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Civil Procedure

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CIVIL PROCEDURE

I. PERSONAL JURISDICTION

Hinerman v. Levin, 310 S.E.2d 843 (W.Va. 1983).

The standard for ascertaining whether a state has the power to assert personal jurisdiction over a person was discussed by the West Virginia Supreme Court of Appeals in *Hinerman v. Levin*.¹ *Hinerman*, an attorney, had represented the defendant, *Levin*, in a workers' compensation claim. When *Levin* refused to pay him, *Hinerman* brought an action in state court to compel payment. *Levin*, who subsequently moved to Florida, did not answer the complaint. In response to a default judgment motion, the attorney sent a letter requesting a continuance. The attorney said he was in contact with the defendant, but had not yet agreed to represent him. The court granted the defendant an additional ten days to assert a bona fide defense in response to the request for a continuance. The defendant failed to reply and default judgment as to liability was entered.

Two days after the entry of the default judgment, counsel for the defendant again sent a letter to the court requesting a continuance. Before the court could respond to the defendant's second request, the plaintiff filed a motion for attachment. At the hearing on plaintiff's motion, the defendant submitted a motion to set aside the default judgment. No ruling was made at that time on the motions of either party. Subsequently, the defendant filed a second motion to set aside the default judgment. At a final hearing on the matter, the court conducted an extensive hearing and, in a written opinion, denied the defendant's motion to set aside the default judgment. On appeal, the defendant claimed that the trial court lacked in personam jurisdiction, that default judgment was improperly granted, and that the trial court erred in refusing to set aside the default judgment.

The defendant first argued that since he was a resident of Florida, West Virginia had no basis for asserting personal jurisdiction. *Levin* contended that the default judgment was unenforceable since the due process clause of the fourteenth amendment limits the state's exercise of jurisdiction over a person.² The due process standard has been interpreted to require that a defendant receive adequate notice³ and that he have sufficient "minimum contacts with the state which seeks to exercise personal jurisdiction over him."⁴ The question of what "minimum contacts" were sufficient to sustain a state's exercise of jurisdiction over a person was at issue in *Hinerman*.

In discussing in personam jurisdiction, the court examined the standard for determining when sufficient "minimum contacts" existed. In *S.R. v. City of Fairmont*,⁵ the court reiterated the long standing rule that a state's assertion of

¹ *Hinerman v. Levin*, 310 S.E.2d 843 (W. Va. 1983).

² *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Hanson v. Denckla*, 357 U.S. 235 (1958).

³ *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵ *S.R. v. City of Fairmont*, 280 S.E.2d 712 (W. Va. 1981).

personal jurisdiction should not offend basic and fundamental notions of fair play and substantial justice.⁶ The court, in *Fairmont*, noted that the United States Supreme Court's decisions in this area relied on the following factors in determining whether a state's assertion of personal jurisdiction was reasonable:

(1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining relief; (4) the judicial system's interest in promoting efficient resolution of controversies; and (5) the shared interests of several states in advancing constructive social policy.⁷

Applying these factors, the court in *Hinerman* held that the defendant had adequate minimum contacts with the state to justify the assertion of personal jurisdiction over him by a West Virginia court. The court held that receipt of benefits from the West Virginia Workers' Compensation Fund constituted adequate contacts for the assertion of personal jurisdiction. By receiving the benefits from the state, the defendant had also accepted the reciprocal obligations imposed by its laws.⁸ In *Hinerman*, the court clearly stated that receipt of benefits from a state will satisfy minimum contacts necessary for in personam jurisdiction.

The second argument advanced by the defendant was that the trial court erred in entering a default judgment. The defendant contended that it was excusable for him to neglect to answer plaintiff's pleadings because he was acting *pro se*. In support of his position, the defendant also noted that the letter he sent to the clerk was sufficient to constitute an answer for the purpose of preventing the entry of default judgment. West Virginia courts have adhered to the basic policy that cases should be resolved on their merits and, therefore, default judgments are not favored. The test for determining if a default judgment is proper is, "whether the trial court abused its discretion in entering the default judgment."⁹ To prove that a trial court exceeded its bounds, the defendant must show good cause for overturning the decision.

The supreme court found that the trial court's continued willingness to allow the defendant time to show bona fide defenses, even after the entry of default judgment, was good reason to affirm the decision.¹⁰ The defendant's failure to assert any defense within the ten-day extension period was characterized as intransigent. In *Parson v. Consolidated Gas Supply Corp.* the court stated that any evidence of intransigence would be weighed heavily against a defaulting party.¹¹ In reviewing all the evidence, the court held that the default judgment was properly granted.

⁶ *Id.* at 715 (citing *Hodge v. Sands Mfg. Co.*, 151 W. Va. 133, 141, 150 S.E.2d 793, 797 (1966)).

⁷ *Hinerman*, 310 S.E.2d at 847.

⁸ *Id.* at 847-48.

⁹ *Parson v. Consolidated Gas Supply Corp.*, 256 S.E.2d 758, 762 (W. Va. 1979); *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1979).

¹⁰ *Hinerman*, 310 S.E.2d at 848.

¹¹ *Parson*, 256 S.E.2d at 763.

Finally, the defendant contended that the trial court erred in refusing to set aside the default judgment. Rule 60(b) of the West Virginia Rules of Civil Procedure (W. Va. R. Civ. P.), sets out those instances when relief from a final judgment is appropriate. The court noted that the review of a denial of a motion for relief from judgment pursuant to rule 60(b) is not concerned with the validity of the underlying judgment, but is concerned with the denial alone.¹²

Several factors have been identified by the court in appellate review of rule 60(b) motions: "1) the degree of prejudice suffered by the plaintiff from the delay in answering; 2) the presence of material issues of fact and meritorious defenses; 3) the significance of the interests at stake; and 4) the degree of intransigence on the part of the defaulting party."¹³ In affirming the refusal to vacate the judgment, the supreme court noted that all these factors had been properly weighed.¹⁴ The failure of the defendant to present any bona fide defenses or material issues strongly supported the decision. No evidence which the defendant presented suggested that a full trial would yield a different result.¹⁵

II. PRETRIAL PROCEDURE

Prager v. Meckling, 310 S.E.2d 852 (W.Va. 1983).

In *Prager v. Meckling*,¹⁶ the West Virginia Supreme Court of Appeals held that evidence which the defendant had failed to produce in response to a discovery request could still be admitted at trial. The plaintiff asserted that the failure of the defendant to produce the document in response to a request for production of documents under rule 34, W. Va. R. Civ. P.¹⁷ barred the introduction of the document into evidence at trial.¹⁸ The court found that the plaintiff had not been prejudiced by the lack of production because the defendant had testified in his pretrial deposition to all the relevant facts contained in the document.¹⁹

Prager had a contract with Meckling for the repair of a roof which guaranteed the work for seven years. On several occasions, Meckling was requested to repair the roof and the requests were honored. However, when the defendant was once again notified that the roof needed repair, he refused and claimed that the damage was due to vandalism and the failure of the plaintiff to remove rotting leaves and other debris. Prager subsequently filed a suit for breach of the contract.

¹² *Toler v. Shelton*, 157 W. Va. 778, 784, 204 S.E.2d 85, 89 (1974).

¹³ *Parson*, 256 S.E.2d at 762.

¹⁴ *Hinerman*, 310 S.E.2d at 849.

¹⁵ *Id.* at 850.

¹⁶ *Prager v. Meckling*, 310 S.E.2d 852 (W. Va. 1983).

¹⁷ W. VA. R. Civ. P. 34 provides in part that a party may serve a request on any other party for production of documents that are within the scope of Rule 26(b), W. VA. R. Civ. P. and are in the possession, custody or control of the party upon whom the request is served.

¹⁸ *Prager*, 310 S.E.2d at 853.

¹⁹ *Id.* at 857.

During discovery, the plaintiff made a request under rule 34, W. Va. R. Civ. P., that the defendant produce eleven specific categories of documents and a twelfth catchall category.²⁰ The existence of the document in dispute, a written estimate of the damage to the roof, was not revealed to the plaintiff during discovery. When the defendant offered the estimate into evidence as proof that the interior of the building was substantially damaged when he examined it for his initial bid on the contract, the plaintiff objected on the grounds that it had not been produced in response to the discovery request.

In support of their positions on admissibility of the document, both parties cited various cases discussing rule 37, W. Va. R. Civ. P.²¹ The court disregarded these cases, holding that they were not relevant to resolving this dispute. Justice Miller pointed out that the reason for excluding the case from a rule 37 context²² was that the plaintiff had no way of determining whether the defendant's initial response was true when he answered that no documents existed.²³ Therefore, the plaintiff had no basis for seeking sanctions under rule 37.

The proper inquiry and the central issue in *Prager* was whether the defendant had breached his continuing obligation to supplement responses to discovery requests as required by rule 26(e)(2), W. Va. R. Civ. P.²⁴ Affirming the lower court's ruling, the supreme court relied on the fact that the surprise and prejudice to the plaintiff in admitting the evidence were minimal.²⁵ The court pointed out that the defendant had testified to all the material facts contained in the document during his pretrial deposition.

The rule articulated in *Prager*, that to exclude the evidence which a party fails to produce in response to a discovery request the opposing party must show surprise or prejudice, is in accord with the decisions of the majority of federal courts which have discussed similar issues. In *DeMarines v. KLM Royal Dutch Airlines*,²⁶ the Third Circuit Court of Appeals was faced with the issue of prohibiting a witness from testifying when a party had failed to supplement the witness list. The court set out the applicable standard of review to determine whether the district court abused its discretion in excluding testimony for failure to comply with pretrial notice requirements. The four factors to be considered included:

²⁰ *Id.* at 854.

²¹ W. VA. R. Civ. P. 37(a) states in part: "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery. . . ."

²² *Prager*, 310 S.E.2d at 855 (citing *McGraw v. West Virginia Judicial Review Bd.*, 271 S.E.2d 344, 347 (W. Va. 1980)).

²³ *Id.*

²⁴ A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. W. VA. R. Civ. P. 26(e)(2).

²⁵ *Prager*, 310 S.E.2d at 857.

²⁶ *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978).

1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; 2) the ability of that party to cure the prejudice; 3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; 4) bad faith or willfulness in failing to comply with the court's order.²⁷

The court also pointed out the practical importance of the exclusion of evidence.²⁸

With the decision in *Prager*, the court limited those instances in which sanctions are appropriate for alleged failure to supplement responses, as mandated by rule 26(e)(2), W. Va. R. Civ. P. In order for sanctions to be implemented, the failure to supplement the responses must result in surprise or prejudice to the opposing party. Such limitations are designed to allow the most relevant evidence to be introduced and to aide the factfinder in deciding the dispute.

III. INVOLUNTARY DISMISSAL

Brent v. Board of Trustees of Davis and Elkins College, 311 S.E.2d 153 (W.Va. 1983).

In *Brent v. Board of Trustees of Davis and Elkins College*²⁹ the plaintiff appealed from an order denying reinstatement of a cause of action which had been dismissed pursuant to rule 41(b), W. Va. R. Civ. P. West Virginia's highest court held that all named parties in a suit shall be notified of the entry of an order involuntarily dismissing an action for failure to prosecute. The lack of such notice to a named party may provide grounds for reinstatement of an action even after expiration of the statutory period for reinstatement.

The plaintiff was injured when a glass test tube exploded during a chemistry lab experiment at Davis and Elkins College. Plaintiff filed suit in the Circuit Court of Hancock County in May, 1975, seeking three million dollars in damages. Named as defendants were the college, the lab supervisor, and the manufacturer of the test tube. In response to the defendant's motion to dismiss for improper venue in Hancock County, plaintiff filed an identical suit in the Circuit Court of Wood County on February 3, 1976. The defendant's motion to dismiss the Hancock County action for lack of venue was later granted in 1977. The plaintiff appealed the dismissal, and the West Virginia Supreme Court remanded the case to the Circuit Court of Hancock County with guidelines for determining if venue was proper.³⁰

In an effort to determine if venue was proper, based on the criteria established

²⁷ *Id.* at 1201-02 (citing *Meyers v. Pennypack Woods*, 559 F.2d 894 (3d Cir. 1977)).

²⁸ *Id.*

²⁹ *Brent v. Board of Trustees of Davis and Elkins College*, 311 S.E.2d 153 (W. Va. 1983).

³⁰ The court remanded the case and ordered the trial court to determine if the manufacturer: 1) had entered into any contracts to be performed in the county 2) had committed a tort in the county or 3) had manufactured, sold, offered for sale or supplied any defective products in the county which caused injury to any person or property in the county. *Brent v. Board of Trustees of Davis & Elkins College*, 163 W. Va. 390, 395-96, 256 S.E.2d 432, 435 (1979).

by the court, further discovery was conducted. The inquiry revealed that venue was not proper and the Circuit Court of Hancock County again dismissed the action on December 13, 1979.

Counsel for the plaintiff contended that on December 15, 1979, following the second dismissal for lack of venue by the Circuit Court of Hancock County, a fire broke out in his office destroying all his files pertaining to the incident in dispute. On December 28, 1979, the parallel complaint filed in Wood County was dismissed pursuant to rule 41(b) for failure to prosecute. Exactly two years after dismissal of the parallel complaint in Wood County, counsel for the plaintiff filed a motion for reinstatement of the case.

Plaintiff alleged that he received no notice of the dismissal order and that the order was therefore void for failure to satisfy the minimum requirements of due process.³¹ In response to the plaintiff's motion, the Circuit Court of Wood County held that it lacked jurisdiction to reinstate the case after the expiration of three terms of court from entry of judgment and denied counsel's motion for reinstatement. The plaintiff then petitioned the West Virginia Supreme Court of Appeals seeking reversal of the trial court's order denying reinstatement.

Rule 41(b), W. Va. R. Civ. P.³² provides that a trial court strike from the docket any action where there has been no proceeding or order for two years. Rule 41(b) also provides that the action may be reinstated within three terms of court after entry of the dismissal order. No explicit notice requirement is found in the rule, but the rule does permit notice by publication if ordered by the court.³³

The court had previously discussed rule 41(b) in *Arlan's Department Store of Huntington, Inc. v. Conaty*.³⁴ The issue of failure to provide notice to counsel of entry of a dismissal order was not asserted as a grounds for reinstatement in the *Arlan's* case.³⁵ Although this specific issue was not raised in *Arlan's*, the court stated that "where proper grounds are alleged and proven a circuit court has the power and authority to set aside a final order in a case discontinued after the time prescribed for filing reinstatement motions under W. Va. R. Civ. P. 41(b) has expired."³⁶

³¹ *Brent*, 311 S.E.2d at 157.

³² W. VA. R. Civ. P. 41(b) provides in pertinent part:

Any court in which is pending an action wherein for more than two years there has been no order or proceeding but to continue it, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. The court may direct that such order be published in such newspaper as the court may name. The court may, on motion, reinstate on its trial docket any action dismissed under this rule, and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff, within three terms after entry of the order of dismissal or nonsuit; but an order of reinstatement shall not be entered until the accrued costs are paid.

³³ *Brent*, 311 S.E.2d at 155.

³⁴ *Arlan's Dep't Store v. Conaty*, 253 S.E.2d 522 (W. Va. 1979).

³⁵ *Brent*, 311 S.E.2d at 157.

³⁶ *Arlan's*, 253 S.E.2d at 527.

The trial court in *Brent* relied on *Link v. Wabash Railroad Co.*³⁷ in determining that the absence of advance notice did not violate due process. In *Link*, the United States Supreme Court affirmed the lower court's sua sponte dismissal of the appellant's claim for failure to appear for a scheduled pretrial conference. Justice Harlan reasoned that the adequacy of notice and hearing hinged on the knowledge of the respective parties as to the consequences of their conduct. The court also reasoned that rule 60(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) neutralized any prejudice by authorizing the reopening of cases in which final orders have been inadvisedly entered.³⁸

Justice McGraw, writing for the majority in *Brent*, pointed out that, even if advance notice is not required under *Link*, rule 77(d), W. Va. R. Civ. P. provides for notice of orders or judgments to all named parties.³⁹ The court stated that anytime an order dismissing a claim pursuant to rule 41(b) is entered, notice of the entry of the order must be provided pursuant to rule 77(d).⁴⁰ The court remanded the case for a determination of whether notice of the 1979 dismissal was provided.

The court emphasized that failure to provide notice would not automatically result in the reinstatement of the case. A showing of good cause must still be established to justify the delay leading to the dismissal. Thus, to reinstate the case after the expiration of three court terms, a court would have to find that the failure to give notice of the entry of the dismissal order was a substantial factor which prevented a party from seeking reinstatement.

Finally, the court noted that the record in *Brent* compelled it to comment on the duty of attorneys to keep informed on the status of their cases. In cases like *Brent*, counsel must not only show good cause for reinstatement of the case, but must also give some explanation of the obvious neglect in prosecuting the case. The court also cited the Code of Professional Responsibility DR6-101(A)(3) and emphasized that all lawyers have a duty to work diligently to protect a client's interest.

IV. LIMITATION OF ACTIONS

Charlton v. M.P. Industries, Inc., 314 S.E.2d 416 (W. Va. 1984).

In *Charlton v. M.P. Industries, Inc.*,⁴¹ the plaintiff petitioned the West Virginia Supreme Court of Appeals to reverse the trial court's order which dismissed one of the parties to the complaint. The trial court had determined that the plaintiff improperly amended its complaint to add Benjamin Shaw Co. as a defendant and

³⁷ *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962).

³⁸ *Id.*

³⁹ W. VA. R. CIV. P. 77(d) provides in pertinent part: "Immediately upon the entry of an order or judgment the clerk . . . shall serve by mail a notice of the entry. . . ."

⁴⁰ *Brent*, 311 S.E.2d at 159.

⁴¹ *Charlton v. M.P. Ind.*, 314 S.E.2d 416 (W. Va. 1984).

that the statute of limitations had subsequently expired, precluding any further action against the company. In reversing and remanding the case, Justice McHugh stated that a complaint amended to add a party which is properly filed under rule 5(e), W. Va. R. Civ. P.,⁴² tolls the statute of limitations⁴³ regardless of whether the complaint is amended in conformity with rule 15(a) or the party is added in conformity with rule 21.⁴⁴

The plaintiff was injured at an industrial plant which was owned and operated by DuPont. The plaintiff was employed by M.P. Industries, who had contracted with DuPont to perform various painting jobs in the building where the accident occurred. Defendant's answers to interrogatories filed by the plaintiff revealed that ten years earlier some renovation work had been done by the Benjamin Shaw Company in the area of the plant where plaintiff was injured. Based on this information, the plaintiff moved the court to amend the complaint to add Shaw as a defendant. A substituted judge, presiding in the absence of the judge to whom the case was originally assigned, refused to enter the order because of a request by the absent judge that no orders be entered prior to his return. Subsequently, DuPont and M.P. Industries filed stipulations agreeing to the addition of Shaw, and on July 12, 1982 the judge to whom the case was originally assigned entered an agreed order allowing the amended complaint to be filed as of July 8, 1982. The statute of limitations expired on July 10, 1982. The defendant, Shaw, moved the court to set aside the order, because the plaintiff had improperly amended the complaint. The trial court agreed and dismissed Shaw.

On appeal, the defendant argued that a party could only be added consistent with rule 21 which requires leave of the court, and that it was improper to add a defendant by amending the complaint under rule 15(a). However, the supreme court found it unnecessary to resolve that question. Instead, the court stated that the issue was whether the statute of limitations was tolled when the appellants filed their amended complaint with the circuit clerk on July 8, 1982.⁴⁵ The court held that the statute of limitations was tolled when the amended complaint was filed. This holding is in accord with federal court decisions which have held that the filing of an amended complaint under rule 5(e), Fed. R. Civ. P., tolls the statute

⁴² The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court.

W. VA. R. CIV. P. 5(e).

⁴³ "[E]very personal action for which no limitation is otherwise prescribed shall be brought . . . [w]ithin two years next after the right to bring the same shall have accrued if it be for damages for personal injuries. . . ." W. VA. CODE § 55-2-12 (1977).

⁴⁴ *Charlton*, 314 S.E.2d at 420.

⁴⁵ *Id.* at 419.

of limitations, regardless of other technical requirements prescribed by the rules.⁴⁶

The gist of the holdings in *Charlton* was that the purpose of the statute of limitations was not offended by adding Shaw as a defendant. Statutes of limitations are designed to bar stale claims⁴⁷ and to give litigants notice that suit has been filed.⁴⁸ In this case, the court found that these policies were satisfied by filing the amended complaint pursuant to rule 5(e) and that the filing of the amended complaint was an independent act sufficient to toll the statute of limitations.

V. RELIEF FROM JUDGMENT

N.C. v. W.R.C., 317 S.E.2d 793 (W. Va. 1984).

W.R.C., the ex-husband of N.C., petitioned the West Virginia Supreme Court of Appeals seeking reversal of the McDowell County Circuit Court's order denying him various postjudgment relief from his second divorce from N.C. The husband claimed the divorce was obtained by fraud and deceit. The wife, N.C., made a motion under rule 18 of the West Virginia Rules of Appellate Procedure to dismiss the appeal.⁴⁹ The wife contended that the husband's petition was, in substance, a motion for relief from a final judgment under rule 60(b) of the W. Va. R. Civ. P.⁵⁰ The motion was not filed within the eight month time limitations prescribed by rule 60(b) and the court therefore would not have jurisdiction. The husband, on the other hand, characterized the petition as an independent action seeking relief from a prior judgment.

Rule 60(b) is recognized as the initial means of obtaining relief from a judgment or order.⁵¹ The grounds for which relief may be granted by a court are clearly defined by the rule. The rule specifically provides that an independent action may be instituted to obtain relief from a final judgment as an alternative to a rule 60(b) motion. In discussing the type of independent action provided for in rule 60(b),

⁴⁶ *Id.* at 419-20 (citing *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978); *Krajci v. Provident Consumer Discount Co.*, 525 F. Supp. 145 (E.D. Pa. 1981), *aff'd*, 688 F.2d 822 (3d Cir. 1982); *Leathers v. Serrell*, 376 F. Supp. 983 (W.D. Va. 1974); *Derdiarian v. Futterman Corp.*, 36 F.R.D. 192 (S.D.N.Y. 1964); *Gloster v. Pennsylvania R.R. Co.*, 214 F.Supp. 207 (W.D.Pa. 1963); *Robinson v. Waterman S.S. Co.*, 7 F.R.D. 51 (D.N.J. 1947)).

⁴⁷ *Gray v. Johnson*, 267 S.E.2d 615, 617 (W. Va. 1980).

⁴⁸ *Prashar v. Volkswagen of America*, 480 F.2d 947, 952 (8th Cir. 1973).

⁴⁹ Rule 18(a) of the West Virginia Rules of Appellate Procedure for the Supreme Court of Appeals provides in pertinent part:

At any time after the granting of an appeal, any party to the action appealed from may move the Supreme Court to dismiss the appeal on any of the following grounds: (1) failure to properly perfect the appeal; (2) failure to obey an order of the Court; (3) failure to comply with these rules; (4) lack of an appealable order, ruling, or judgment; or (5) lack of jurisdiction.

⁵⁰ W. VA. R. CIV. P. 60(b) sets out those instances in which a court may relieve a party from a final judgment, order or proceeding.

⁵¹ *NC. v. W.R.C.*, 317 S.E.2d 793, 795 (W. Va. 1984) (citing *Parsons v. Consolidated Gas and Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979)).

Justice McHugh characterized it as an action which does not relitigate the matter but allows for relief due to extraordinary circumstances.⁵²

The court described those elements essential to an independent action as contemplated by Rule 60(b):

(1) the final judgment, order or proceeding from which relief is sought must be one that in equity and good conscience, should not be enforced; (2) the party seeking relief should have a good defense to the cause of action upon which the final judgment, order or proceeding is based; (3) there must have been fraud, accident, or mistake that prevented the party seeking relief from obtaining the benefit of his defense; (4) there must be absence of fault or negligence on the part of the party seeking relief; and (5) there must be no adequate legal remedy.⁵³

Applying the above criteria, the court held that the husband's petition was not sufficient to obtain relief from judgment through an independent action.⁵⁴ The number of cases capable of satisfying the criteria for maintaining a relief from judgment by an independent action is further limited by the holding in this case, which reflects how extraordinary the situation must be in order for such relief to be appropriate.

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⁵² *N.C.* at 796 (citing *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972)).

⁵³ *N.C.* at 797 (citing *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir. 1981); *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

⁵⁴ *N.C.* at 797.