STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Daryoush Hooshyar and Farzaneh Hassani, M.D.,
Defendants Below, Petitioners

vs) No. 12-0578 (Monongalia County 10-C-19)

Dr. Afiakbar Afshari and Dr. Amir Mohammadi,
Plaintiffs Below, Respondents

FILED
June 7, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Daryoush Hooshyar and Farzaneh Hassani, M.D., by counsel William T. Holmes, appeal the order of the Circuit Court of Monongalia County, entered December 6, 2011, granting in part and denying in part respondents' motion for summary judgment. Respondents Dr. Afiakbar Afshari and Amir Mohammadi[1] appear by counsel Allan N. Karlin.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

I.

Respondents filed a complaint in the Circuit Court of Monongalia County on January 8, 2010, alleging breach of contract and fraud related to a hand-written document executed on April 21, 2005. Respondents assert that the instrument memorialized the parties' agreement that petitioners, husband and wife, would transfer to the respondents their ownership interest in specified parcels of land in exchange for $8,954.00.[2] The document, titled "Transfer of Ownership of 17 Parcells (*sic*) of Land [and] Oil and Gas" and signed by all parties, stated, in part:

> This document will serve as a written agreement of a settlement of 17 parcells of land and oil and gas . . .

[1] According to respondents' brief, earlier pleadings mistakenly refer to Respondent Mohammadi by the title "doctor[.]"

[2] The parties already were joint owners of the oil and gas or some surface rights of those parcels.

> The agreed upon price for the (50%) Fifty Percent legal interest is Eight Thousand Nine Hundred Fifty Four dollars payable to Mr. Daryoush Hooshyar and Mrs. Farzaneh Hassani.
>
> The sellers mention above agree to come to court or (their legal designe) to legally transfer their joint 50% ownerships of the above mention parcells to Mr. Amir Mohammadi and Mr. Ali AFSHARI. The date will be set at a mutual agreed upon date.
>
> Moreover, all parties agree to Pay the proportion of their taxes to be paid to the court for their share of ownership as of April 21st, 2005. With this agreement the undersigned agree to switch the original . . . copies of the mentioned deeds in exchange for a copy to Mr. Hooshyar for their records.

(Typographical and spelling errors in original.)

At its end, the document contained the following acknowledgment, signed by Petitioner Hooshyar:

> I, Daryoush Hooshyar, received two checks each for $4,477 . . . [for] a total of Eight Thousand Nine hundred Fifty Four dollars 8,954.00 from Mr. Amir Mohammadi [and] Mr. Ali AFSHARI for the settlement of the transfer of the ownership of the 17 parcells mentioned in page 1.

(Typographical and spelling errors in original.)

The notation on one of the checks received by petitioners read, "transfer of 17 parcels" and the other notation was, "[f]or the purchase of Mr. Mahmood[3] and Farzaneh's share[.]" Those checks were cashed by petitioners.

Respondents complained that petitioners then refused to transfer the land rights. Petitioners asserted counterclaims for fraud, breach of contract, breach of fiduciary duty, and subsequent alteration. They state that Petitioner Hooshyar did not read the 2005 document when it was presented, believing it to be a receipt for money that respondents gave him for expenses he incurred in a joint business venture of the parties.

The parties had formed a partnership in January of 2004, under which Petitioner Hooshyar would research and purchase properties, and respondents would reimburse his research expenses in return for a 25% ownership interest, per respondent, for each property. Petitioner Hooshyar asserted in his counterclaim below that respondents failed to reimburse $30,000 in costs and expenses, and that he believed the money given to him when he signed the document on April 21, 2005, was given as partial reimbursement for those expenses. Petitioner Hooshyar testified that he believed he was signing a document acknowledging receipt. At a deposition taken on January 17, 2011, he described the exchange:

[3] Use of the name "Mahmood" is not explained in the briefs.

Q: . . .Was it Dr. Mohammadi or Dr. Afshari that told you that this was just a paper where they were giving you the costs, and you didn't need to do anything? This was just a—here's the costs?

A: This is what I supposed to get from them.

Q: Did you—Mr. Mohammadi tell you that or Dr. Afshari?

A: I can't remember.

Q: Or both?

A: This was a long time. I really don't remember exactly.

Q: And here—you are under oath, and you are testifying that they told you that this was just for your cost—

A: No, I'm not saying they say anything. I—if I sign—if—they present me this paper. I've signed here. It was like I'm receiving, because I had talked to them before, that you have to pay the—my expense. . . .

Petitioner Hooshyar repeatedly testified that he did not carefully read the agreement or the checks because respondents were his friends and he trusted them. Initially, petitioners alleged that the 2005 document had been modified after it was signed by Mr. Hooshyar. In response to discovery requests certified served on April 25, 2011, petitioners admitted that the document had not been altered.

The circuit court entered its order on December 6, 2011, granting respondents' motion for summary judgment on: (1) petitioners' counterclaim for fraud, because respondents "failed to present evidence of a particular fraudulent act"; (2) petitioners' counterclaim for breach of fiduciary duty, finding it unnecessary to determine whether a fiduciary relationship existed because petitioners produced no affirmative evidence that respondents misrepresented the nature and purpose of the 2005 agreement; and (3) respondents' claim for breach of contract because the terms of the agreement were unambiguous and there was no reason for the court to look outside the four corners of the document. The circuit court denied respondents' motion for summary judgment on petitioners' counterclaim for breach of the 2004 partnership agreement, which is not a subject of this appeal. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, however, the court certified that its order was immediately appealable.

Petitioners filed, on December 22, 2011, a motion to alter or amend judgment, alleging in part that on December 7, 2011, the day after the entry of the court's summary judgment order, petitioners' counsel reviewed documents in respondents' counsel's possession and found a previously undisclosed version of the second page of the 2005 agreement. They asserted that discrepancies in the signatures on the second page of the document created a factual issue. The court denied the motion to alter or amend judgment by order entered April 3, 2012.

Petitioners filed their appeal with this Court on May 2, 2012. They argue that: (1) there was no "meeting of the minds" necessary for formation of the contract; (2) the record before the circuit court contained evidence which created genuine issues of material fact about whether respondents had engaged in fraud; (3) questions remained about the fiduciary duty owed by respondents to petitioners; and (4) the circuit court failed to grant petitioners' motion to alter or amend judgment upon the presentation of newly discovered evidence.

II.

We have previously held that "[t]he 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. Am. Travellers Life Ins. Co*., 204 W.Va. 430, 513 S.E.2d 657 (1998). A *de novo* review is employed in an appeal of a partial summary judgment order. Syl. pt. 1, *West Virginia Department of Transportation v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005). However, 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." We have held that "[a] motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled . . ." Syl. Pt. 3, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992), *overruled on other grounds by Walker v. Doe*, 210 W.Va. 490, 558 S.E. 2d 290 (2001). The circuit court entered its summary judgment order on December 6, 2011, and petitioners did not file their motion to alter or amend judgment until twelve business days later, on December 22, 2011.[4]

If we treat the motion to alter or amend judgment as one filed pursuant to Rule 60(b), our review on appeal is limited to the circuit court's denial of the Rule 60(b) motion. We have traditionally held that "[a] motion made pursuant to Rule 60 does not toll the running of the appeal time." *Toler v. Shelton*, 157 W.Va. 778, 783, 204 S.E.2d 85, 88 (1974). Rule 60(b) provides a remedy which exists concurrently with and independently of the remedy of appeal. *Parkway Fuel Serv. v. Pauley*, 159 W.Va. 216, 219, 220 S.E.2d 439, 441 (1975). Syllabus Point 3 of *Toler* explains that "[A]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." *Toler*, 157 W.Va. at 778, 204 S.E.2d at 86. If our review is limited to the issues presented in the Rule 60(b) motion, the substance of the lower court's summary judgment ruling is not before us because the notice of appeal was filed nearly five months after entry of the summary judgment order, and thus was not timely. Moreover, if we consider the motion filed pursuant to Rule 60(b), the issues remaining are evaluated as follows: "'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.' Syllabus point 5, *Toler v.*

[4] The parties have not briefed the issue of the timeliness of the Rule 59(e) motion. Respondents' memorandum in opposition to the motion to alter or amend judgment filed below reflects respondents' belief that petitioners' motion was filed on December 16, 2011. The record on appeal does not include a file-stamped copy of the motion, but the certified docket sheet contained in the parties' appendix shows a filing date of December 22, 2011.

Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl., *Ross v. Ross*, 187 W.Va. 68, 415 S.E.2d 614 (1992).

This Court has acknowledged the possibility that an order granting partial summary judgment rather than summary judgment on all issues, even when properly certified under Rule 54(b), may remain reviewable in the fashion of an interlocutory order. *Hubbard v. State Farm Insurance Company, et al.*, 213 W.Va. 542, 551, n. 18, 584 S.E.2d 176, 185, n. 18 (2003). However, we need not consider that possibility in this instance. Under any scenario, petitioners would not prevail on their challenge.

III.

First, we observe that no facts contained in the record on appeal could support a determination that petitioners' entry into the contract was induced by fraud. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981). We perceive evidence of no act interpretable as fraudulent on the part of respondents. The unambiguous written agreement executed by the parties clearly provides for the transfer of property in exchange for a monetary amount certain. Petitioners received that amount in two checks from respondents, and the checks, cashed by petitioners, included evident notations explaining their purpose.

In the absence of fraud, Petitioner Hooshyar's unilateral, mistaken belief that he was receiving payment for a prior debt is insufficient to create a genuine issue of material fact contrary to the unambiguous contract. "A party cannot avoid the legal consequences of his actions on the ground of mistake, even a mistake of fact, where such mistake is the result of negligence on the part of the complaining party." Syl. Pt. 4, *Webb v. Webb*, 171 W.Va. 614, 301 S.E.2d 570 (1983). Because there is no evidence that either respondent made inaccurate statements about the document that petitioners signed, any mistake on petitioners' part is entirely the result of petitioners' failure to read the document.

> This Court has clearly stated that "in the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms." *Reddy v. Community Health Found. of Man*, 171 W.Va. 368, 373, 298 S.E.2d 906, 910 (1982). The record in *Reddy* did not suggest that the doctor was anything but an intelligent adult who entered the contract freely. Given these facts we said in *Reddy* that "[c]ontracts are reduced to writing so that there can be no subsequent argument concerning the terms of an agreement. A person who fails to read a document to which he places his signature does so at his peril." *Id*. In the earlier-decided case of *Southern v. Sine*, 95 W.Va. 634, 123 S.E. 436 (1924), language of certain deeds was at issue. The Court in *Sine* noted that the documents had been submitted to the complaining party for his inspection and the approval of his attorney, and that the facts did not demonstrate any effort to withhold or disguise the information contained in the documents. Thereafter, it was stated: "It was his duty to know [what was

> contained in the deeds]. The law says that he shall know. If he did not read the deeds at any time before acceptance it was clearly his fault and negligence." *Id*. at 643, 123 S.E. at 439.

Sedlock v. Moyle, 222 W.Va. 547, 551, 668 S.E.2d 176, 180 (2008).

Petitioner Hooshyar acknowledged his failure to carefully read the document that he signed, and admitted that respondents made no misrepresentations about the contents of the agreement when he testified, "I'm not saying that they say anything." The facts fail to support the contention that the parties did not achieve a "meeting of the minds" and fail to support the allegation of fraud.[5] Summary judgment was appropriately granted. Thus, even if petitioners' motion was properly filed under Rule 59(e) resulting in a non-time-barred appeal of the partial summary judgment order, petitioners' appeal would nonetheless fail.

IV.

We turn then to petitioners' sole remaining argument: that newly discovered evidence required the circuit court to set aside the grant of summary judgment.[6] Again, petitioners presented their motion for relief as if filed pursuant to Rule 59(e). Under this rule, petitioners' burden is great:

> While Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts and commentators have set forth the grounds for amending earlier judgments. For instance, the *Litigation Handbook on West Virginia Rules of Civil Procedure* states that a Rule 59(e) motion should be granted where: "(1) there is an intervening change in the 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." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 59(e) at 1178–1179 (3d. Ed.2008). Under Rule 59(e), a party who relies on newly discovered evidence "must produce a legitimate justification for not presenting the evidence during the earlier proceeding." *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir.1996). Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy

[5] Petitioners offer scant explanation for their assertion that the circuit court improperly declined to consider the existence of a fiduciary duty owed to petitioners by respondents. In any event, because we discern no act which could constitute a breach of duty, it is unnecessary that we determine whether a fiduciary relationship existed.

[6] Though petitioners presented this argument in a pleading purporting to be a Rule 59(e) motion to alter or amend judgment, "newly discovered evidence" is a ground specifically permitted by Rule 60(b). We note that appeal on this issue is not time-barred regardless whether considered under Rule 59(e) or Rule 60(b) because it is not predicated on the substance of the summary judgment order.

> 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).

Mey v. Pep Boys-Manny, Moe & Jack, 228 W.Va. 48, 56-57, 717 S.E.2d 235, 243 -244 (2011).

As noted above, however, if the motion is converted to a Rule 60(b) motion, we apply an abuse of discretion standard. Syl., *Ross v. Ross*, 187 W.Va. 68, 415 S.E.2d 614 (1992).

In either event, we do not find that the circuit court improperly declined to revisit its summary judgment order. The "new evidence" put forth by petitioners is nothing more than a photocopy of the signature page of the parties' agreement, apparently made before Petitioner Hassani signed the document. The relevant content of the document otherwise appears unchanged, and is cumulative to the evidence already reviewed by the circuit court.

Petitioners emphasize that Respondent Mohammadi created two to four handwritten copies of the agreement, and they argue that the existence of multiple documents taken together with the discovery of the second photocopied page evidences respondents' misdeeds. Mr. Mohammadi testified that each copy he wrote contained the same language. The "newly discovered" iteration of the document contains the same language as the first, as well as the signatures as described above. Petitioner Hooshyar's signature appears on the document reviewed by the court prior to its grant of summary judgment and on the "newly discovered" document. It is apparent, then, that Petitioner Hooshyar had an opportunity to read the language contained on each copy. Petitioners argue that Petitioner Hooshyar "accepted the representation that he was signing only a receipt[,]" however, the photocopied page presented with the motion to alter or amend judgment contains no language to support that assertion. There is now, as there was at the time the circuit court entered its summary judgment order, no evidence of misrepresentation on the part of respondents.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 7, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II