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No. 050709

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA, ex rel.,
TERMNET MERCHANT SERVICES,
INC., a foreign corporation, Defendant
below,
Petitioner,

vs.

THE HONORABLE PHILIP B. JORDAN,
Circuit Judge of Tucker County, West Virginia
and Yvonne Marson, Plaintiff below,
Respondents

Action No. 050709

Below:

Civil Action No. 01-C-28
Tucker County Circuit Court

YVONNE MARSON'S SUPPLEMENTAL RESPONSE TO PETITIONERS WRIT FOR PROHIBITION OR MANDAMUS

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POINTS AND AUTHORITIES

Under West Virginia Law, "[w]hether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. pt. 1, *State ex rel. Robinson v. Michael,* 166 W. Va. 660, 276 S.E.2d 812 (1981).

Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

The imposition of discovery sanctions lies within the sound discretion of a trial court. A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law. *Cox,* 194 W. Va. at 218 n.3, 460 S.E.2d at 33 n.3. (Cleckley, J., concurring).

The purpose of Rule 11 and Rule 37 of the West Virginia Rules of Civil Procedure is to allow trial courts to sanction parties who do not meet minimum standards of conduct in a variety of circumstances. *Cox*, 194 W. Va. at 218, 460 S.E.2d at 33. (Cleckley, J., concurring). Nevertheless, it is clear "[b]ecause of their very potency, . . . [sanction] powers must be exercised with restraint and discretion. . . . A primary aspect of . . . [a trial court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2132-33, 115 L.Ed.2d 27, 45 (1991).

The party seeking sanctions under Rule 37(b) has the burden of proving noncompliance with a discovery order. If established, the burden of proof shifts to the noncompliant party to demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. If it is demonstrated that a noncompliant party intentionally or with gross negligence failed to obey a court order, the full range of sanctions under Rule 37(b) is available to the court. *Bartles v. Hinkle*, 196 W.Va. 381, 390, 472 S.E.2d 827, 836 (1996):

In *Bartles,* 196 W.Va. at 389, 472 S.E.2d at 835, this Court set forth several pertinent considerations in the assessment of appropriate sanctions:

Among those commonly mentioned are the public's interest in the expeditious resolution of litigation, the court's need to manage its docket, the severity of the violation, the legitimacy of the party's excuse, the repetition of violations, the deliberateness *vel non* of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of other sanctions. *Bartles v. Hinkle*, 196 W.Va. 381, 390, 472 S.E.2d 827, 836 (1996).

A civil contempt sanction that sets monetary penalties retroactively before the hearing on contempt for failure to comply with a discovery order cannot be enforced. A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. *State Farm Mut. Auto. Ins. Co. v. Stephens,* 188 W. Va. 622, 425 S.E.2d 577 (1992).

Under Rule 37(b)(2)(D) of the West Virginia Rules of Civil Procedure, a court has the power to find a party in contempt for failure to obey a discovery order. Syllabus Pt. 5. *State Farm Mut. Auto, Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)

Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct. Syllabus Pt. 1, *Bartles,* 196 W.Va. at 389, 472 S.E.2d at 835.

Under West Virginia Law, "[w]hether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. pt. 1, *State ex rel. Robinson v. Michael,* 166 W. Va. 660, 276 S.E.2d 812 (1981).

"Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

The imposition of sanctions by a circuit court for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed on appeal unless there has been an abuse of discretion. *Given v. Field,* 199 W. Va. 394, 484 S.E.2d 697 (1997).

(a) A criminal contempt fine is punitive and can be imposed only through criminal proceedings, including the right to jury trial. A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order or compensates the complainant for losses sustained. United States v. United Mine Workers of America, 330 U.S. 258, 303-304. Where a fine is not compensatory, it is civil only if the condemner has an opportunity to purge, such as with *per diem* fines and fixed, suspended fines. Pp. 5-9.

(b) Most contempt sanctions share punitive and coercive characteristics, and the fundamental question underlying the distinction between civil and criminal contempt is what process is due for the imposition of any particular contempt sanction. Direct contempt can be penalized summarily in light of the court's substantial interest in maintaining order and because the need for extensive fact-finding and the likelihood of an erroneous deprivation are reduced. Greater procedural protections are afforded for sanctions of indirect contempt. Certain indirect contempt are particularly appropriate for imposition through civil proceedings, including contempt impeding the court's ability to adjudicate the proceedings before it and those contempt involving discrete, readily ascertainable acts. For contempt of more complex injunctions, however, criminal procedures may be required. Pp. 13-17. International UMWA v. Bagwell, 512 U.S. 821.

The amount of the sanction to be levied for failure to answer discovery is an amount that the Court deems sufficient to compel the respondent to answer. *State Farm Mutual Auto Ins. Co., v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

According to *Stephens*, at syllabus pt. 5, Under Rule 37(b)(2)(D) of the West Virginia Rules of Civil Procedure, a court has the power to find a party in contempt for failure to obey a discovery order, except an order to submit to a physical or mental examination. State Farm Mutual Auto Ins. Co., v. *Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

A civil contempt sanction that sets monetary penalties retroactively before the hearing on contempt for failure to comply with a discovery order cannot be enforced. A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. Syllabus pt. 6.State Farm Mutual Auto Ins. Co., v. *Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

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STATE OF WEST VIRGINIA, ex rel.,
TermNet MERCHANT SERVICES,
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RESPONDENT, YVONNE MARSON'S SUPPLEMENTAL RESPONSE TO PETITIONERS WRIT FOR PROHIBITION OR MANDAMUS

Comes now, the Respondent, Yvonne Marson, by and through her attorney, Frank P. Bush, Jr. and for her Supplemental Response to Petitioner's Writ For Prohibition or Mandamus submits the following:

ADDITIONAL FACTS

Default Judgement was awarded Yvonne Marson (Marson) against TermNet Merchant Services, Inc., (TermNet) on November 9, 2001 after TermNet failed to answer Marson's Complaint. On December 17, 2001 a hearing was held on TermNet's motion to set aside the default judgment and denied by Order entered January 3, 2002. On January 11, 2002, TermNet filed a motion to reconsider which was also denied. A hearing was held on TermNet's Motion to Reconsider and also to assess the unliquidated damages in the

case. TermNet's President Charles Thompson appeared at the hearing and was represented by counsel. By Order entered February 4, 2002, Marson was awarded $20,760.00 in addition to the $8,146.00 previously awarded. TermNet filed a second motion to reconsider and motion for new trial on February 13, 2002, which were again denied by Order entered March 4, 2002. After the Motion to set aside the default judgment was denied, TermNet appealed to the West Virginia Supreme Court of Appeals.

In the motion to set aside default judgment, TermNet raised two issues. TermNet's first argument was excusable neglect under Rule 60(b)2. In support of that claim TermNet offered that the president of TermNet telephoned the undersigned counsel and that it thus made an appearance and was therefore entitled to three days notice of the hearing on the Plaintiff's motion for default judgment.. The second issue raised in the Motion to set aside the default judgment was that venue was inappropriate in Tucker County, West Virginia because of a venue provision in the contract between the parties.. See Motion to set aside Default Judgment. A full hearing was held on December 17, 2001 wherein the Court denied TermNet's Motion to set aside default judgment. Both Parties were represented at that hearing. A hearing to assess unliquidated damages was heard on January 28, 2002. At the hearing the Court heard TermNet's first Motion to Reconsider the entry of default judgment. TermNet reargued only one issue, that it raised in the Motion to set aside the default judgment; that the telephone conversation between TermNet's president, Charles Thompson, and the undersigned counsel constituted an entry of appearance, which entitled

TermNet to three days notice of the hearing on the Motion for Default Judgment. At the hearing. TermNet appeared by counsel. Mr. Thompson also appeared. TermNet proffered an affidavit by Mr. Thompson regarding the contents of the conversation. Thompson falsely reported in his affidavit that he asked for documentation of the credit card charges in question and wanted to work things out with Ms. Marson. He further falsely reported that he left the conversation thinking the undersigned counsel would provide him with copies of sales vouchers. The undersigned freely admitted that he had a telephone conversation with Mr. Thompson, however the true content of the conversation was proffered as follows:

> MR. BUSH: Your honor. We have addressed this issue before and you denied this Motion to Reconsider. Telephone conversation, as I indicated to you earlier, ended when I hung up on Mr. Thompson who was extremely rude. There was no discussion about providing him with any documentation. He was insistent that the suit could not be brought here. As I indicated before, he said, "We're in litigation now. We're going to litigate this to the max," or "with all diligence" or whatever, and I hung up on him.
>
> I had previously sent documentation of every transaction in question, with a total amount, with a Margaret Mulligan, who is with their company. I got no. response. Jan. 28 2002 Hearing Transcript

Pg. 136 lines 15-26 attached as Exhibit 1.

Mr. Thompson, who was present, did not offer any contradictory testimony at the hearing. There was no discussion about any documents. The only fraud being perpetrated is that by Charles Thompson who is simply lying about the telephone conversation. TermNet never claimed that a fraud was perpetrated on the court until it filed suit in Georgia in March, 2004. TermNet filed a frivolous suit in Georgia alleging fraud in a desperate attempt to have a Georgia Court rule that the judgments, which had then accrued to over $250,000.00, could not be recognized in Georgia. By order entered February 4, 2002 Plaintiff was awarded additional damages in the amount of $20,670.00 and TermNet's Motion to reconsider was denied.

On February 13, 2002 TermNet filed a Motion to Reconsider the Verdict and Motion for New Trial, both of which were denied by Order dated March 4, 2002. TermNet appealed to the West Virginia Supreme Court of Appeals alleging that Judge abuse his discretion by failing to set aside the default judgment because of the telephone conversation described above. In its appeal, TermNet never argued that a fraud was perpetrated upon the Court. As noted above the allegation was first raised in the suit filed by TermNet in Georgia.

The second issue raised on appeal was that the Court below abused its discretion when it awarded the amount of damages because the evidence was insufficient. The third issue raised on appeal was cumulative error.

The Petition for Appeal was refused by order dated July 29, 2002.

After the Appeal was refused, TermNet refused to pay the judgment. Marson then served TermNet with interrogatories in aid of execution. See interrogatories are attached as Exhibit 2. TermNet filed incomplete answers, Respondents Exhibit 3. A motion to compel was filed and heard by the Hon., Judge Jordan in the Circuit Court of Tucker County, West Virginia. TermNet argued that assets located outside the state are not discoverable. The court ruled that out of state assets were discoverable because judgments may freely be transferred from state to state. Judge Jordan ordered TermNet to answer the discovery by April 25, 2002.

Marson filed her first Petition for Contempt after TermNet refused to comply with the Court's Order and refused to pay the judgment. In his order entered June 24, 2003, Judge Jordan made specific findings that TermNet failed to answer the discovery and failed to offer any reason why it should not be held in contempt. Judge Jordan held TermNet in Contempt and ordered that if TermNet failed to answer the discovery as ordered by July 1, 2002.. Judge Jordan also ordered that TermNet would pay a *per diem* sanction of $250.00 until the discovery was answered or the judgment paid. Thus, TermNet was availed an opportunity to avoid the sanctions by either answering the discovery or paying the judgment. TermNet intentionally and without justification refused to do either.

TermNet was represented by local counsel and by an Atlanta Law Firm throughout

these proceedings and was presumably being advised not to answer the discovery or else refused against the advice of counsel. TermNet refused to answer the discovery as ordered.

After three more months of frustration Marson filed her Second Petition for Contempt. Marson asked that TermNet be compelled to answer or for an increase in the *per diem* sanction in an amount sufficient to compel TermNet to answer. The Second Petition for Contempt was served on both TermNet and on Gary S. Freed, Esq., its Atlanta counsel. TermNet intentionally refused to answer and chose not to reply to the Second Petition or appear at the hearing. After notice and hearing held October 27, 2003, the *per diem* sanction was increased prospectively to $1,000.00 for every day after October 27, 2003 that TermNet refused to comply with the Court's Order. In that order Judge Jordan made specific findings that TermNet refused to answer the discovery requests which consisted of identification of assets and that the previous sanction of $250.00 per day proved to be inadequate to create an incentive for TermNet to answer the discovery. See Order at Paragraph 7

After Marson filed a Third Petition for Contempt, seeking answers to her discovery requests. Judge Jordan raised the *per diem* sanction prospectively to $2,500.00. Judge Jordan granted Marson final judgment for the accrued sanctions at that time. TermNet received notice of the hearing and was served with the Third Petition for Contempt. Its Atlanta attorney was also served with both. TermNet chose not to file a responsive

pleading, did not appear at the hearing and refused to answer the discovery request. In the resulting order Judge Jordan made specific findings that TermNet flagrantly, knowingly and intentionally refused to provide answers to the Plaintiff's discovery and found that the previous sanction of $1,000.00 per day proved inadequate to provide an incentive for TermNet to answer the discovery and therefore increased the sanction prospectively in the amount of $2,500.00 per day for every day that TermNet refused to answer. See Order.

TermNet did not appeal Judge Jordan's ruling on the Third Petition for contempt. Rather than comply with the Court's order, TermNet, apparently in desperation, chose instead to file a civil suit in Cobb County, Georgia on March 12, 2004 against Marson claiming that Marson perpetrated a fraud upon the Circuit Court Tucker County by claiming that Marson's counsel perpetrated a fraud on the Tucker County Court by not reporting the telephone conversation with Mr. Thompson as an entry of TermNet's appearance. TermNet sought compensatory damages, attorney fees and $250,000.00 in punitive damages in the Georgia suit. The fraud was apparently a desperate attempt by Gary Freed, TermNet's attorney, to trump up the facts to create grounds to prevent the Tucker County Judgment from being transferable and also, to try and color a claim for punitive damages.. Respondent's Exhibit 4.

The Georgia case was removed to Federal Court. In a comprehensive opinion attached as Respondent's Exhibit 5, Judge Duffey, the federal district judge, granted Marson summary judgement and dismissed TermNet's Complaint. Judge Duffey analyzed

the applicable West Virginia Law and upheld the decision of Judge Jordan. Judge Duffey also found no basis for TermNet's claims of fraud. See Duffey Order. TermNet is misleading this Court by claiming actions are pending in Georgia and Florida. In actuality all efforts in Florida and Georgia have failed. TermNet is trying to appeal the Georgia and Florida decisions.

Marson filed her fourth Petition for Contempt on September 8, 2004. TermNet appeared by counsel and asked the Court to stay further proceedings pending the outcome of the case in Federal Court in Georgia. TermNet still refused to answer and was held in contempt and the daily sanction was increased to $3,500.00 because the previous sanctions proved inadequate to cause TermNet to answer. TermNet continued to knowingly and intentionally refuse to answer Marson's discovery. TermNet freely admits taht it won't answer the discovery.

As noted above TermNet refused or appear in the second and third Motions for Contempt. After their suit in Georigia was dismissed and after the Florida Court ruled against it, TermNet rehired Attoreny Nichols in Tucker County and decided to respond to Marson's fourht petition for contempt. In the fourth contempt proceeding TermNet argued that it was denied due process in the Tucker County Court and further alleged that the West Virginia Supreme Court of Appeals "rubber stamped" Judge Jordan's original decision without addressing the issues. See TermNet Motion for Stay Petitioner's Appendix 10. By Order entered October 25, 2004 the Fourth Petition for Contempt was

granted and the accrued *per diem* sanctions were reduced to a final judgment See Order Petitioner's Appendix 9. TermNet did not appeal the judgment within the four month time limit and never raised the issue it raises now regarding the criminal/civil sanction argument.

Marson filed a Fifth Petition for contempt, seeking an order compelling answers, which was granted along with a final judgment for the additional accrued sanctions and attorney fees. Again, Judge Jordan found that TermNet flagrantly and intentionally refused to answer the discovery.

All of the discovery sanctions ordered by Judge Jordan were prospective and designed to compel TermNet to answer the discovery after finding that TermNet's actions were flagrant, knowingly made and intentional. TermNet had the ability to terminate the sanctions by answering the discovery. Initially TermNet could have avoided all sanctions by paying the judgment. Ms. Marson filed this case in July of 2001 for losses occurring over the year and a half prior to that filing. See Complaint. To date TermNet has paid nothing and continues to refuse to answer the discovery requests..

Marson filed an action in Florida to record two of the five Tucker County Judgments on February 17, 2005. TermNet objected but the Florida Court ruled that the Judgment was valid and enforceable as if rendered in the State of Florida. See Order Respondent's Exhibit 6. TermNet was served with discovery requests in the Florida action. TermNet once against refused to answer any discovery. A Motion to Compel was filed

against TermNet in Florida also. See Motion for Contempt Respondent's Exhibit 7.

Under Rule 3 of the West Virginia Rules of Appellate Procedure the deadline to appeal a final order is four months. Any applicable appeal deadline has expired on the first four final judgments rendered by Judge Jordan in Tucker County. The Deadline to file a motion under Rule60(b) to set aside the original judgment based on allegations of fraud, although there was no fraud, expired in December of 2002. No new arguments or new evidence has been offered in support of TermNet's 60(b) motion. TermNet merely re-alleges the allegations it made in its Motion to set aside the Default Judgment that it filed in December of 2001.

The deadline to appeal the decision on the Fifth Petition to Compel has not expired. TermNet has a pending appeal in the 11th Circuit Court of Appeals and in the Bay County Circuit Court in Florida. Thus TermNet has remedies besides the writ of prohibition.

After being compelled to do so and held in contempt and sanctioned on five separate occasions, TermNet refuses to answer Plaintiff's interrogatories as ordered. TermNet has not advanced any valid legal arguments as to why it should not be compelled to answer, rather, it has let the sanctions accrue for nearly two years. TermNet tried filing suit in Georgia seeking $250,000.00 in compensatory damages. The suit was dismissed. The Federal Court analyzed the Tucker County Judgment under West Virginia Law and ruled that Judge Jordan made the right decision. See opinion of Hon. Judge Duffey of the Federal District Court in the Northern District of Georgia, Respondent's Exhibit 5.

TermNet tried to challenge the transfer of the previous judgments in Florida. Those efforts have also failed. The Circuit Court of Bay County Florida rejected TermNet's argument and ruled that the Tucker County judgments were valid and enforceable as if they had been entered in Florida. Thus far TermNet has lost at every turn in three jurisdictions. TermNet has not succeeded in any court, state or federal in having the judgment of the Circuit Court of Tucker County rendered invalid and rightly so. TermNet refused to answer interrogatories requesting identification of assets. TermNet has not asserted any legally valid argument as to why it should not answer. In fact at the hearing held March 24, 2005, TermNet's counsel stated that he did not know why TermNet refuses to answer the interrogatories, but knew that they haven't and "they won't". See March. 24, 2005 Transcript at page 26.

One appeal has been refused. The time to appeal the first, second, third and fourth Motions for contempt expired. Summary Judgment was granted in the Federal Court in Georgia and judgment was entered in Florida. Any reasonable time to collaterally attack the underlying judgment under Rule 60(b) has expired...

TermNet claims that answering discovery impacts it ability to exercise its rights to challenge the validity of the Tucker County judgments. There is no legal basis for that statement. In fact TermNet has tried to get three different courts to set aside the underlying judgment each effort has failed. Until now, TermNet has never appealed the sanctions or raised the issue in other jurisdictions. TermNet is shielding its assets to

prevent Ms. Marson from collecting her judgment.

Ms. Marson seeks only to collect her judgment. She has not done anything to adversely affect TermNet's efforts to collaterally attack the judgment. TermNet has lost at every turn thus far, having let deadlines go, made unfounded legal arguments and filed a frivolous suit in Cobb County, Georgia.

ISSUE I

DID THE COURT BELOW VIOLATE TERMNET'S DUE PROCESS RIGHTS BY ORDERING DISCOVERY SANCTIONS WITHOUT A JURY TRIAL

TermNet claims the contempt sanctions for discovery violations are criminal and not civil and thus may only be rendered after a jury trial. There is no question, that TermNet blatantly and intentionally refused to fully answer the seven interrogatories propounded by Marson. At the hearing held on Marson's fifth motion for contempt counsel fro TermNet stated that "they haven't answered and they won't. Transcript at page 26. TermNet was first ordered to answer the interrogatories or pay a *per diem* sanction of $250.00. The *per diem* sanction was levied in an amount calculated to create an adequate incentive for TermNet to answer the interrogatories. TermNet was given seven days within which to answer before the sanction began. See Order dated June 24, 2003. TermNet, was represented by both local and Atlanta counsel decided not to answer and defy the Court's order. Over the next several months, Judge Jordan increased the *per diem* sanction because the previous sanction proved inadequate to compel TermNet to answer.

STANDARD OF REVIEW

The imposition of discovery sanctions lies within the sound discretion of a trial court. A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law. *Cox,* 194 W. Va. at 218 n.3, 460 S.E.2d at 33 n.3. (Cleckley, J., concurring).

The purpose of Rule 11 and Rule 37 of the West Virginia Rules of Civil Procedure is to allow trial courts to sanction parties who do not meet minimum standards of conduct in a variety of circumstances. *Cox,* 194 W. Va. at 218, 460 S.E.2d at 33. (Cleckley, J., concurring). Nevertheless, it is clear "[b]ecause of their very potency, . . . [sanction] powers must be exercised with restraint and discretion. . . . A primary aspect of . . . [a trial court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44-45, 111 S. Ct. 2123, 2132-33, 115 L.Ed.2d 27, 45 (1991).

DISCUSSION

Under *Bartles v. Hinkle*, 196 W.Va. 381, 390, 472 S.E.2d 827, 836 (1996):

> The party seeking sanctions under Rule 37(b) has the burden of proving noncompliance with a discovery order. If established, the burden of proof shifts to the noncompliant party to demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. If it is demonstrated that a noncompliant party intentionally or with gross negligence failed to obey a court order, the full range of sanctions under Rule 37(b) is available to the court.

Applying this rule to the instant facts, it is uncontested that TermNet refused to

fully answer Marson's discovery. TermNet failed to comply with the circuit court's six orders to answer Marson's discovery. The burden then shifted to TermNet to demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. TermNet first argued that out of state assets should not be discoverable. The Circuit Court ruled that out of state assets are discoverable because judgments are freely transferable from state to state.

In *Bartles,* 196 W.Va. at 389, 472 S.E.2d at 835, this Court set forth several pertinent considerations in the assessment of appropriate sanctions:

> Among those commonly mentioned are the public's interest in the expeditious resolution of litigation, the court's need to manage its docket, the severity of the violation, the legitimacy of the party's excuse, the repetition of violations, the deliberateness *vel non* of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of other sanctions. *Id.*

The facts indicate that TermNet is an Atlanta based company with no assets in West Virginia.. TermNet deliberately failed to identify financial assets and their location; information that Marson needs to collect her judgment. Further, because judgment had already been rendered against TermNet, default judgment was not an option as a sanction. TermNet could not justify its refusal to answer, in fact it chose not to appear or answer two of the contempt petitions. The Court gave TermNet an opportunity to avoid all sanctions by answering the discovery or paying the judgment. The amount of the sanction was designed to compel TermNet to answer. It was only increased after a hearing and after findings that TermNet willfully refused to answer the discovery and that the previous

amount of the sanction proved inadequate to compel TermNet to answer. TermNet has repeatedly refused to answer the discovery both in West Virginia and in Florida. A Motion to compel was filed agaisnt TermNet in Florida as well. Motion to Compel Appendix.....

A civil contempt sanction that sets monetary penalties retroactively before the hearing on contempt for failure to comply with a discovery order cannot be enforced. A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. *State Farm Mut. Auto. Ins. Co. v. Stephens,* 188 W. Va. 622, 425 S.E.2d 577 (1992).

Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct. Syllabus Pt. 1, *Bartles,* 196 W.Va. at 389, 472 S.E.2d at 835. Under Rule 37(b)(2)(D) of the West Virginia Rules of Civil Procedure, a court has the power to find a party in contempt for failure to obey a discovery order. Syllabus Pt. 5. *State Farm Mut. Auto, Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)

In formulating the appropriate sanction, a court shall be guided by equitable

principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction . The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction , the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. Syllabus Pt. 2., 196 W.Va. at 389, 472 S.E.2d at 835.

Under *Bartles, supra,* the Constitutional protection of TermNet's due process rights are satisfied when the court conducts a hearing, makes appropriate findings and fashions an appropriate sanction for non-compliance with a discovery order. Judge Jordan conducted a hearing after notice for each Contempt Petition and made findings that the discovery had not been answered and also found that TermNet, without just cause, willfully and intentionally refuses to answer and then fashioned a sanction prospectively, designed and intended to compel . To answer. Judge Jordan afforded TermNet all of its due process rights it was due under the law. TermNet argues that it was entitled to a jury trial prior to the imposition of the discovery sanctions in this case because TermNet's contempt is criminal vs. civil.

Under West Virginia Law, "[w]hether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or

criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. pt. 1, State ex rel. *Robinson v. Michael*, 166 W. Va. 660, 276 S.E.2d 812 (1981).

"Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, State ex rel. *Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

TermNet cites *International UMWA v. Bagwell*, a U.S. Supreme Court case in its motion below. If that case is applied to the case at bar, the sanctions imposed by Judge Jordan are civil and not criminal. Bagwell involved sanctions against protesting mine workers who engaged in unlawful labor activities. The union was sanctioned $64, 000,000.00. In that case the Supreme explained the distinction between criminal contempt and civil contempt at syllabus points (a) and (b) as follows:

> (a) A criminal contempt fine is punitive and can be imposed only through criminal proceedings, including the right to jury trial. A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order or compensates the complainant for losses sustained. United States v. United Mine Workers of America, 330 U.S. 258, 303-304. Where a fine is not compensatory, it is civil only if the condemner has an opportunity to purge, such as with *per diem* fines and fixed, suspended fines. Pp. 5-9.
>
> (b) Most contempt sanctions share punitive and coercive characteristics, and the fundamental question underlying the distinction between civil and criminal contempt is what process is due for the imposition of any particular contempt sanction. Direct contempt can be penalized summarily in light of the court's

> substantial interest in maintaining order and because the need for extensive fact-finding and the likelihood of an erroneous deprivation are reduced. Greater procedural protections are afforded for sanctions of indirect contempt. Certain indirect contempt are particularly appropriate for imposition through civil proceedings, including contempt impeding the court's ability to adjudicate the proceedings before it and those contempt involving discrete, readily ascertainable acts. For contempt of more complex injunctions, however, criminal procedures may be required. Pp. 13-17. International UMWA v. Bagwell, 512 U.S. 821

(1994).

Stephens and *Bartles* are both in accord with the U.S. Supreme Court's analysis in *Bagwell*. When this analysis is applied to the case at bar, the penalties in this case are *per diem* with an opportunity for TermNet to purge itself of contempt by answering the interrogatories or paying the judgment. Thus under syllabus point (a) the sanctions are civil, not criminal.

There is no question that TermNet has not answered the discovery requests. The Court need not make an extensive factual inquiry into that issue. Certainly a jury trial is not required. TermNet has admitted it hasn't answered and from day one has maintained that it has no intention to answer and no intention to pay the judgment rendered against it. See Hearing transcript at page 26. When asked by the Court why TermNet won't answer the discovery Mr. Ridge stated, " I don't know the answer to that question and I don't want to speculate on it, frankly, Your honor. I just know they haven't and they won't. Hearing Transcript at page 26, lines 5-9.

TermNet admits it received notice of all of the Motions for Contempt and actually appeared by counsel in the first, fourth and fifth Motions for contempt. In each order the

Court gave TermNet the opportunity to purge itself of contempt by answering the discovery requests, In fact, in the First order, TermNet could have avoided every penny of the sanctions leveled against it by answering the Plaintiff's discovery request within 10 days. TermNet never appealed that order and never answered either.

TermNet argues that the accumulated sanctions are excessive and not reflective of any damages suffered by the Plaintiff. This analysis is flawed as well. The amount of the sanction to be levied for failure to answer discovery is an amount that the Court deems sufficient to compel the respondent to answer. *State Farm Mutual Auto Ins. Co., v. Stephens,* 188 W. Va. 622, 425 S.E.2d 577 (1992). According to *Stephens*, at syllabus pt. 5, Under Rule 37(b)(2)(D) of the West Virginia Rules of Civil Procedure, a court has the power to find a party in contempt for failure to obey a discovery order, except an order to submit to a physical or mental examination. A civil contempt sanction that sets monetary penalties retroactively before the hearing on contempt for failure to comply with a discovery order cannot be enforced. A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. *Id.* at Syllabus pt. 6.

In this case, a *per diem* sanction of $250.00 proved an inadequate amount to compel TermNet to respond. $1,000.00 per day was inadequate, as was, $2,500.00 per day. It was not until the sanction was raised to $3,500.00 that TermNet filed a partial response. The Court's approached was incremental, in accord with the applicable law within the

Court's discretion.

It is no argument that a pending motion stays discovery. Discovery is not stayed because of a pending motion. As paltry as the pending Motions, a stay should not be granted. By Order dated February 18, 2005, the Circuit Court of Bay County, Florida recognized the judgments West Virginia as if it had been rendered in the State of Florida. See Order Attached as Respondent's Exhibit 6.

TermNet represents to this Court that it is making good faith efforts in Florida and Georgia's Federal Court when in fact they have lost in each venue, and have a pending Motion for Contempt for failure to answer discovery in Florida, See Respondent's Exhibit 7. TermNet has willfully and intentionally disobeyed Judge Jordan's Orders.

A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. *State Farm Mut. Auto Ins., Co., v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). The imposition of sanctions by a circuit court for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed on appeal unless there has been an abuse of discretion. *Given v. Field,* 199 W. Va. 394, 484 S.E.2d 697 (1997).

Each sanction imposed by Judge Jordan increased incrementally until TermNet finally answered five of the seven interrogatories. Although TermNet failed to answer the key request, which was the location of bank accounts, the amount that accumulated created

a sufficient incentive to get at least some response. Judge Jordan did not abuse his discretion because each sanction proved insufficient to ensure compliance with the court's order.

As Judge Jordan clearly states in each order in which he held TermNet in contempt, the purpose of the *per diem* penalty was to "compel" TermNet to answer Marson's interrogatories as previously ordered. Thus under *Robinson*, and *Bagwell,* the sanctions are civil and not criminal.

ISSUE II

IS TERMNET ENTITLED TO A WRIT OF PROHIBITION

TermNet argues that a writ is warranted because Judge Jordan denied TermNet's Rule 60(b) Motion for rendering judgments for the accrued sanctions. TermNet admits that an appeal is available. As noted above, *per diem* sanctions for failure to answer discovery are within the sound discretion of the judge and appropriate when gauged to ensure compliance. TermNet has still not been sanctioned in an amount to ensure compliance.

> 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. Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Under the West Virginia Rules of Civil Procedure, the judge has jurisdiction and it is in his or her discretion to impose *per diem* sanctions. Therefore it cannot be said that Judge Jordan made a flagrant violation of TermNet's rights to a clear cut legal error plainly in contravention of a clear statutory, constitutional, or common law mandate when both the rules and the case law permit a *per diem* penalty.

TermNet can cite no legal authority to support its refusal to identify its assets. Obviously TermNet does not want to pay the judgments. TermNet refuses to pay or to tell Marson where the assets are. Judge Jordan has taken appropriate legal action to compel TermNet to answer.

TermNet sat on its appeal rights with respect to four of the five orders, choosing not to appear or file pleadings in the second and third. TermNet sat on its rights, choosing to attempt a civil suit in Georgia which has failed miserably and choosing to attempt to have the Florida court determine that the judgments rendered by Judge Jordan are null and void, which failed miserably as well. The actions in Florida and in Georgia do not involve the sanctions imposed by Judge Jordan. TermNet only attempted to challenge the underlying judgments. This Petition for writ is the first action taken by TermNet to challenge the sanctions.

A writ of Prohibition is an equitable and extraordinary remedy. TermNet should no be rewarded for its recalcitrance and disrespect for the West Virginia Courts. TermNet had every opportunities to appeal Judge Jordan's decisions regarding the first five rulings concerning the discovery issues, but choose not to. Under Rule 3 of the West Virginia Rues of Appellate Procedure, TermNet was required to appeal the decisions rendered by the Circuit Court within four months of the dates of the final orders. Only the most recent decision regarding the Fifth Motion for Contempt has been timely appealed. The final order resulting from the Marson's Fourth Petition for Contempt was entered October 25, 2004. The time to appeal that order expired on February 25, 2005. The time to appeal all previous orders expired. Additionally, TermNet did not respond or appear at the hearings in Marson's Second and Third Petitions for Contempt and thus preserved no error or issue for appeal.

TermNet claims Judge Jordan was punishing TermNet for pursuing remedies in State and Federal Courts. This allegation is contrary to the evidence. Judge Jordan was trying to get TermNet to answer the discovery. TermNet decided not to answer or appear in two of the hearings and decided not to appeal five of the orders. What State remedies were they pursuing? TermNet's efforts in Georgia and Florida failed. The claim defies logic. There is simply no relationship between TermNet's frivolous lawsuit it filed in Georgia and Judge Jordan's decision discovery sanction. TermNet seems to be arguing that it should have to answer discovery in West Virginia if it files a law suit in Georgia.

The fourth and fifth Orders from Tucker County came after TermNet's Georgia suit was dismissed on its face and after the Florida Court determined that the judgments rendered by Judge Jordan were proper and valid as if rendered in the State of Florida.

A writ should not lie under the circumstances.

ISSUE III

DID THE COURT ABUSE ITS DISCRETION BY FAILING TO GRANT TERMNET'S RULE 60(b) MOTION

Under Rule 60(b) of the West Virginia Rules of Civil Procedure any reasonable time to collaterally attack the underlying judgment entered in November 2001 and January 2002 have expired.

Judge Jordan correctly denied TermNet's Rule 60(b) Motion to set aside the underlying judgment. TermNet claims that when Charles Thompson, TermNet's president, telephoned Marson's counsel, that constituted an appearance entitling TermNet to three days notice of the Motion for Default Judgment. TermNet made the same argument to Judge Jordan in December of 2001 and January 2002 in its motion to vacate the default judgment and motion to reconsider. TermNet made the same argument on appeal in July of 2002.

When a court undertakes to analyze a subdivision (b) motion based on grounds 1,2,3, or 6 of subdivision (b) the court must decide if the Motion was timely. *Savas v. Savas,* 181 W. Va. 316, 382 S.E.2d 510 (1989).In the case at bar the filing of the Rule 60

(b) motion three yeas after the judgment was rendered should be deemed untimely. TermNet has not offered any new evidence to support its 60(b) motion. To collaterally attack a judgment under Rule 60(b) the movant cannot merely rest on previous facts and arguments. The Movant must allege new evidence or other new grounds beyond merely stating previous facts and arguments in order to prevail in a motion under Rule 60(b). *Powderidge Unit Owners Assoc., v. Highland Properties, Ltd.,* 196 W.Va. 692, 474 S.E.2d 872 (1996). TermNet has made the same arguments raised previously, with nothing new added.

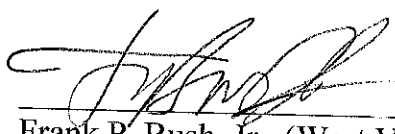
There was no fraud perpetrated by anyone except the fraud Charles Thompson has attempted by giving false testimony regarding the telephone conversations he had with the undersigned. At the hearing on TermNet's motion to set aside the Default Judgment Mr. Thompson appeared in person and TermNet had counsel. TermNet was given a full opportunity to be heard and to show cause why the Default Judgment should be set aside. Ms. Marson, by counsel, freely admitted that there was a telephone conversation between himself and Mr. Thompson. That issue was fully addressed in January of 2002. There was no denial of due process and no fraud by Ms. Marson.

CONCLUSION

The underlying judgments in this case have been fully adjudicated in three forums.. Each forum has rejected TermNet's arguments. TermNet cannot support its refusal to answer Marson's interrogatories. There was no fraud in this case by Ms. Marson.

TermNet offers nothing new in support of its rule 60(b) argument. No analysis under Rule 60(b) or the relevant case law is offered by TermNet. Even if there were fraud, under Rule 60(b) of the West Virginia Rules of Civil Procedure the time limit to challenge a judgment because of fraud is one year if fraud is alleged. Judge Jordan sanctioned TermNet incrementally and prospectively in an amount determined to provide an incentive to cause TermNet to comply with the Court's Order, rendering the sanctions civil and not criminal. Thus TermNet is not entitled to a jury trial on the Contempt Sanctions. The standard of review for the default judgment and the discovery sanctions is an abuse of discretion standard. No amount yet sanctioned has provided adequate incentive for TermNet to comply with the Court's order. TermNet is avoiding payment of the judgment by hiding information about bank accounts and assets. TermNet has adequate appeal rights to challenge the ruling rendered by Judge Jordan on April 6, 2005. The sanctions imposed by Judge Jordan have proved inadequate to compel TermNet to comply with the Court's order and thus cannot be said to be an abuse of discretion Accordingly, the writ should be denied.

Respectfully submitted,



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(304) 636-1111
Counsel for Yvonne Marson

WHEREFORE, the Plaintiff requests the Court enter an Order:

A. Finding the Defendant in contempt for failure to provide the required discovery;

B. Setting a date certain for the Defendant to answer the required Interrogatories; and

C. Establishing a monetary fine for each day after the date certain until the answered Interrogatories are supplied.

Respectfully submitted,
Chase, Quinnell, McIver & Jackson, P.A.

By: _____
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CERTIFICATE OF SERVICE

I certify that a copy of this document was mailed to the person listed below on March 4th, 2005.

Gary Freed, Esquire
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_____
Keith A. McIver
Attorney for Plaintiff

cc: Frank Bush, Jr., Esquire