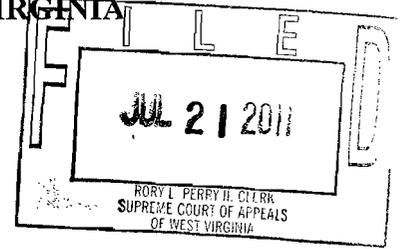


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0543



TUDOR'S BISCUIT WORLD OF AMERICA,

Petitioner/Appellant
(Defendant Below)

vs.

DELLA M. CRITCHLEY,

Respondent/Appellee
(Plaintiff Below)

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0543

3. ASSIGNMENT OF ERRORS

The Circuit Court of Raleigh County, West Virginia, erred as follows:

The circuit court erred in refusing to follow *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010) and its preceding authority holding: “A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment. Syl. Pt. 3, *State ex rel Vance v. Arthur*, 142 W. Va. 737, 98 S.E.2d 418 (1957); Syl. Pt. 3 *State ex rel Lemley v. Roberts*, 164 W. Va. 457, 260 S.E.2d 850 (1979), overruled on other grounds by *Stalnaker v. Roberts*, 164 W. Va. 593, 287 S.E.2d 166 (1981); Syl. Pt. 5, *State ex rel Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003).”

The circuit erred in denying the Petitioner’s Motion to Set Aside the Default Judgment by applying the Rule 60(b) grounds for relief with the factors set out in *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979) for the reason that the judgment here was void *ab initio* because the circuit court lacked personal jurisdiction over the defendant.

The Court incorrectly weighted the four factors set forth in *Parsons v. Consolidated Gas Supply*, *supra*, resulting in the erroneous denial of the defendant’s Motion to set aside the default judgment.

The circuit court erred in granting Respondent default and awarding damages in the net sum of \$264,776.00 when Petitioner had no notice of Respondent's Motion for Default Judgment or the Writ of Inquiry and thus had no opportunity to contest the award of default judgment prior to its entry.

The circuit court erred by abusing its discretion in refusing to set aside the default judgment improperly obtained against the Petitioner by the Respondent.

The circuit court erred by denying Petitioner's Motion to Alter or Amend its prior decision not to set aside the default judgment.

4. STATEMENT OF THE CASE

According to her Complaint filed in the lower court, on September 2, 2002, the Respondent, Della M. Critchley, was employed at a Tudor's Biscuit World restaurant located in Fayetteville, West Virginia. On that date, she fell while walking on steps to the employee entrance to the restaurant and suffered various injuries. (Am. App. P.1)

Thereafter, Critchley filed a claim with the West Virginia Workers' Compensation Division against her employer, KOR, Inc., a West Virginia corporation with principal offices located in Nitro, West Virginia. Her claim was deemed compensable by a decision of the Administrative Law Judge entered on June 4, 2003, and she was paid benefits as a result. (Am. App. P.105)

On June 10, 2003, Critchley filed a complaint stemming from her fall in the Circuit Court of Raleigh County alleging a deliberate intent cause of action against the Petitioner, Tudor's Biscuit World of America, Inc. (Am. App. P.1) Tudor's Biscuit World of

America, Inc., is a West Virginia corporation that is wholly separate and distinct from KOR, Inc. The complaint alleged that the Respondent was employed by the Petitioner and was injured on the Petitioner's premises. (Am. App. P.1)

On June 12, 2003, Critchley's complaint was served on the West Virginia Secretary of State for service upon the Petitioner. The Secretary of State attempted to serve the summons and complaint upon John Tudor, President of the Petitioner, with attempts occurring on June 18, 2003, and June 28, 2003. Neither of the certified letters were received by Mr. Tudor, and consequently the summons and complaint were returned to the Secretary of State's office as "unclaimed". (Am. App. P.6)

Nevertheless, on August 8, 2003, the Respondent, by counsel, filed a motion for default with a supporting affidavit as to service upon the Petitioner. The affidavit stated in paragraph 3 that "the defendant, Tudor's Biscuit World of America, Inc., was duly served with process by a true copies (sic) of plaintiff's Complaint and Summons being served upon the West Virginia Secretary of State on the 12th day of June, 2003." (Am. App. P.8) Based upon the motion and affidavit, an order was entered by the lower court granting a default in favor of Critchley against the Petitioner. (Am. App. P.12)

Over two and one half years later, on February 23, 2006, a writ of inquiry was conducted without notice to the Petitioner, and based upon the representations of counsel and the testimony of the Respondent, the Circuit Court of Raleigh County granted a default judgment against the Petitioner in favor of the Respondent in the amount of \$264,776.00, together with costs of the action and statutory attorney's fees, all with interest at the legal rate. (Am. App. P.14)

Over three and one half years later, on September 30, 2009, a summons was issued in aid of execution of the judgment and served upon John Tudor on October 2, 2009. (Am. App. P.18 & 19) Within days of its receipt, the Petitioner filed its motion to set aside the default judgment pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. (Am. App. P.21) The motion was supported by the affidavit of John B. Tudor. (Am. App. P.23) In his affidavit, Mr. Tudor stated that the first notice he received of the judgment against the Petitioner entered by the Circuit Court of Raleigh County was the receipt of the summons in aid of execution received by him on October 2, 2009. He stated that this was the first notice he had received of any lawsuit filed by Critchley. Mr. Tudor stated he had been a shareholder and President of Tudor's Biscuit of America, Inc., for the preceding 20 years. He attested that Critchley had never been an employee of Tudor's Biscuit World of America, Inc., nor had she ever filed a Workers' Compensation claim against the Petitioner. Mr. Tudor further stated that Tudor's Biscuit World of America, Inc., had never owned, leased or otherwise had any interest in real estate in the State of West Virginia, nor owned nor operated any restaurants in West Virginia. The Petitioner's sole business is to license and franchise others for the operation of Tudor's Biscuit World restaurants. The Petitioner's motion to set aside the default judgment was further supported by copy of the certified letter sent by the Secretary of State's office for service of process showing the letter was returned as "unclaimed". (Am. App. P.39)

Nevertheless, by order entered December 4, 2009, the lower court denied the Petitioner's motion to set aside default judgment. (Am. App. P.67) The lower court relied upon evidence produced at a hearing held on November 10, 2009, upon the Petitioner's motion. On September 29, 2004, Critchley's counsel mailed a certified letter to John B. Tudor at his

Kensington Lane residence in Huntington, West Virginia. This letter apprised Mr. Tudor of the default entered against the Petitioner and enclosed a copy of the order. Mr. Tudor's wife, Lydia Tudor, signed for the certified mailing at their residence. On September 30, 2004, Respondent's counsel sent the letter and order by certified mail to Mr. Tudor at the corporation's address in Huntington. This certified mail was accepted and signed for by James Heighton, the defendant's outside corporate accountant.

At the hearing, Mr. Tudor testified that he was not notified of the default judgment via either copy of the letters sent by certified mail. He claimed Tudor's Biscuit World of America, Inc., had no knowledge whatsoever of either the plaintiff's suit or the order of default until October 2, 2009.

The court in its order denying the motion found that the issue of sufficiency of process in the case "did not turn on issues of equity or negligence, but on statutory interpretation," and on the basis of interpretation of statutes, the court made a specific finding that service of process was legally insufficient. The court correctly concluded that the default judgment defendant sought to vacate was void. (Am. App. P.70) Nevertheless, by the Order entered December 4, 2009, the lower court denied the Petitioner's motion to set aside the default judgment by applying and analyzing the four factors set out in *Parsons v. Consolidated Gas Supply*, 163 W. Va. 464, 471, 256 S.E.2d, 758, 762 (1979), giving particular weight to the factor of intransigence.

On December 17, 2009, the Petitioner filed its Motion to Alter or Amend the Order entered December 4, 2009, Denying the Defendant's Motion to Set Aside Default Judgment. (Am. App. P.76) The basis for the motion was to point out factual information to the

court that may have been overlooked and led to the erroneous decision on the initial motion. The motion pointed out that the Respondent suffered her injuries on September 2, 2002. That was more than two years prior to the mailing on September 29, 2004, of the certified letter to John Tudor at his residence, and the mailing of the same certified letter on September 30, 2004, to Mr. Tudor at the Petitioner's corporate office in Huntington, West Virginia. The lower court in its order denying the motion to set aside the default had noted that, under West Virginia Code 55-2-12, personal injury actions must be brought within two years after the right to bring the same. The court in its order cited evidence presented by Mr. Tudor that the corporation that operated the Tudor's Biscuit World where the Respondent fell was a franchise operating separately as a privately owned company. The court then concluded "if this is true, the prejudice to the plaintiff in now setting aside the default judgment would be extreme, inasmuch as the applicable statute of limitations would operate to bar the plaintiff from filing suit against a different party defendant." (Am. App. P.73)

The implication from this statement is that, if Tudor's Biscuit World of America, Inc., had acted to set aside the default judgment at the time the lower court charged it with notice of the judgment on September 29, 2004, then Critchley would have had an opportunity to file suit against the correct defendant, *i.e.*, the franchisee, and that Critchley was severely prejudiced by the defendant's delay in taking action to set aside the default. However, this reasoning was flawed. The Respondent fell on September 2, 2002, and the lower court found that the defendant was charged with knowledge of the default judgment on September 30, 2004. Even if the Petitioner had taken immediate action on that date to set aside the default judgment, it would have already been too late for the plaintiff to file an action against a different defendant because

of the two year statute of limitations. Therefore, if there is any prejudice to the Respondent from the Petitioner's delay, it was not the prejudice identified by the Circuit Court in its order, and the order should be amended.

Prior to the court's ruling on Petitioner's Motion to Alter or Amend, on September 8, 2010, a settlement conference was held before the court following mediation attempts between the parties. At the settlement conference Petitioner's counsel asserted that the recent decision of *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010) which was decided on April 1, 2010, was applicable to the instant action. The court afforded counsel time to submit memoranda on the Petitioner's original Motion to Alter or Amend Order filed December 4, 2009, denying Defendant's Motion to Set Aside Default Judgment, in light of the newly issued *Beane* decision. Both counsel for the Petitioner and Respondent submitted memoranda in view of the recent decision.

On March 1, 2011, the court entered its Order Denying the Petitioner's Motion to Alter or Amend Order filed on December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment. (Am. App. P.87) From this order, the Petitioner has perfected its appeal with this Court.

5. SUMMARY OF ARGUMENT

A default judgment obtained without legally sufficient service of process and without jurisdiction over the defendant is void as a matter of law. A void judgment, deemed a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment.

Where a Court does not have personal jurisdiction over a defendant, any default judgment rendered is void and there is no need to perform a *Parsons*' analysis on whether to set aside the judgment.

6. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument in this appeal is not necessary pursuant to the criteria in Rule 18(a) for the reasons the dispositive issue has been authoritatively decided and the facts and legal arguments are adequately presented in this brief and record on appeal, and the decisional process would not be significantly aided by oral argument.

7. ARGUMENT

Standard of Review

Appellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering default judgment. Syl. Pt. 3, *Heinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983), Syl. Pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974). Where, however “the issue on appeal from the circuit court is clearly a question of law . . . a de novo standard of review is applied.” Syl. Pt. 1, in part, *Chrystal R. M. v. Charles A. L.* 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. Pt. 1, in part, *Toler, supra*.

A default judgment obtained without legally sufficient service of process and without jurisdiction over the defendant is void as a matter of law. A void judgment, deemed a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment.

The lower court in its Order Denying Defendant’s Motion to Set Aside Default

Judgment entered December 4, 2009, correctly found that the service of process upon the Petitioner through the Secretary of State was legally insufficient for the reason that the certified mailing of the process or notice was returned as unclaimed.

The court properly determined that the default judgment entered against the defendant was therefore void for insufficiency of process. However, the lower court erred by further finding that before the judgment could be set aside, the Petitioner had to additionally establish that it sought to vacate the default judgment within a reasonable length of time, relying upon *Leslie Equipment v. Wood Resources*, ___ W. Va. ___, 687 S.E.2d 109 (2009).

In addition, the court found that it was compelled to consider, and analyze under the facts of the case, the four factors set forth in *Parsons v. Consolidated Gas Supply*, 163 W. Va. 464, 471, 256 S.E.2d 758, 762 (1979), to determine whether or not a default judgment should be set aside. The four factors are: (1) the degree of prejudice suffered by the plaintiff in the delay of filing, (2) the presence of material fact and meritorious defenses, (3) the significance of the interest at stake, and (4) the degree of intransigence on the party of the defaulting party. The court proceeded to discuss the weight to be assigned each of the four factors in its order.

The court found that the prejudice to the plaintiff would be extreme in setting aside the default judgment inasmuch as the applicable statute of limitations would bar the plaintiff from filing suit against a different party defendant. The defendant had contended all along that the plaintiff was never employed by Tudor's Biscuit World of America, Inc. The court also opined that there had been extreme degree of intransigence on the part of the defaulting party, the Petitioner in the case at bar. The court found that the letter received by the Petitioner's outside accountant on September 30, 2004, was sufficient to constitute constructive notice of the

judgment to the Petitioner and that the Petitioner should have acted to set aside the judgment expeditiously after that date.

In response to the Court's refusal to set aside the default judgment, the Petitioner filed its Motion to Alter or Amend the Order filed December 4, 2009, Denying Defendant's Motion to Set Aside Default Judgment. In its motion the defendant argued that the plaintiff would not have been prejudiced had the defendant successfully filed a motion to set aside the judgment after the receipt by the accountant of the letter on September 30, 2004, because the two year statute of limitations applicable to the plaintiff's cause of action would have expired in any event. The plaintiff simply delayed in providing any type of notice to the defendant within the two year period arising on the date of injuries suffered by the plaintiff.

The Petitioner supplemented its Motion to Alter or Deny the Prior Order providing to the court the recent decision of *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010). In *Beane*, the plaintiff brought suit for personal injuries suffered in an automobile accident that occurred in 2000. The summons for the suit was served at the defendant's mother's home on April 10, 2003, in Dunbar, West Virginia. The defendant's mother accepted service for her son, the alleged driver. No answer was filed. The circuit court granted order of default to plaintiff on June 22, 2003, and on January 8, 2008, awarded damages to the plaintiff in the amount of \$2,449.86. On April 25, 2008, nearly five years after the entry of default, the defendant appealed to the West Virginia Supreme Court of Appeals maintaining he was not aware of the lawsuit. He asserted his lack of knowledge was due to the fact he was not a resident of West Virginia at any time during the proceedings.

This Court found that the attempted substituted service of process upon his

mother was inadequate the judgment was therefore void. The lower court was found to have abused its discretion in entering its order of default and awarding damages in its judgment order. This Court in *Beane* did not impose any time limitation upon any attack upon a void judgment.

“A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment. Syl. Pt. 2 of *Beane, supra*, quoting Syl. Pt. 3, *State ex rel. Vance v. Arthur*, 142 W. Va. 737, 98 S.E.2d 418 (1957). Syl. Pt. 3, *State ex rel. Lemley v. Roberts*, 164 W. Va. 457, 260 S.E.2d 850 (1979), overruled on other grounds by *Stalnaker v. Roberts*, 168 W. Va. 593, 287 S.E.2d 166 (1981). Syl. Pt. 5, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d. 517 (2003). “To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the party; both are necessary and the absence of either is fatal to its jurisdiction.” Syl. Pt. 4, *Beane, supra*, quoting Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d, 610 (1960). Syl. Pt. 1, *Leslie Equipment v. Wood Resource, LLC*, ___ W. Va. ___, 687 S.E.2d. 109 (2009).

The lower court believed that the syllabus points in *Beane* applied to the defendant in that case, but do not provide new law that would affect the case at bar. In its order the court relied upon its analysis of *Evans v. Holt*, 193 W. Va. 578, 457 S.E.2d. 515 (1985), in refusing to grant Petitioner’s motion. Even after finding that the judgment rendered against the Petitioner was void, the “reasonable time” requirement of Rule 60(b) prohibited the court from granting the Petitioner’s motion. The delay between when the Circuit Court deemed the Petitioner to have any knowledge of entry of default on September 30, 2004, and the filing of its

motion to set aside the judgment in October, 2009, was outside the “reasonable time” requirement of Rule 60(b) and therefore barred the Petitioner from relief from a void judgment. In effect, the lower court found that a void judgment could become a valid judgment based upon the expiration of time.

Ironically, the lower court in its order cited and discussed with approval the case of *Crowley v. Krylon Diversified Brands*, 216 W. Va. 408, 607 S.E.2d 514 (2004). The court on page 16 of its order stated “now, in addition, the court couples its ruling with dicta in the *Crowley* opinion provided in footnote 3: Although service on a defendant may be found insufficient, a plaintiff who has acted in good faith to provide proper service on a defendant has standing to assert that the defendant corporation that has failed to follow statutory requirements should be estopped from asserting insufficiency of process, the statute of limitations, or other defense arising from insufficient process.” The court proceeded to note that it finds this sentiment applicable to the circumstances of the case at bar.

What the lower court failed to find was the utter lack of good faith in this case that is shown by the plaintiff in the instant action. The complaint filed in this action affirmatively states that Critchley was employed by the defendant, Tudor’s Biscuit World of America, Inc. The complaint further states that the steps upon which the plaintiff allegedly fell were owned and maintained by the defendant, Tudor’s Biscuit World of America, Inc. Both of these allegations are patently false. Tudor’s Biscuit World of America, Inc., never employed the Respondent nor owned any steps in Fayette, Raleigh or any other county in West Virginia. Incredibly, the allegations were made after Critchley had previously filed a Workers’ Compensation claim against her actual employer, KOR, Inc., one year prior to the filing of the complaint. The

plaintiff filed two separate claims for damages related to her fall in June, 2002, but with allegations as to different employers, one being KOR, Inc., the other being Tudor's Biscuit World of America, Inc.

The lower court noted that it must give weight to the actions of the defendant in purportedly failing to file a timely motion to set aside the default judgment if the court completely ignored and gave no weight to the fact that the plaintiff had filed two separate claims against different employers arising from the same event. The sentiment expressed in *Crowley*, and adopted by the lower court, have no place in the instant action for it is apparent the plaintiff has not acted in good faith by the filing of claim against two different employers relating to the same event.

The lower court's ruling is in direct contrast to this Court's holding in the recent case of *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010). Syl. Pt. 2 of *Beane* states "A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right as asserted under such judgment", quoting Syl. Pt. 3, *State ex rel. Vance v. Arthur*, 142 W. Va. 737, 98 S.E.2d 418 (1957). Syl. Pt. 3, *State ex rel. Lemley v. Roberts*, 164 W. Va. 457, 260 S.E.2d 850 (1979), overruled on other grounds by *Stalnaker v. Roberts*, 168 W. Va. 593, 287 S.E.2d 166 (1981). Syllabus Point 5, *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003).

Beane goes on to state in Syl. Pt. 4: "To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction." quoting Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610 (1960). Syllabus Point 1,

Leslie Equipment Co. v. Wood Resource Co., L.L.C., ___ W. Va. ___, 687 S.E.2d 109 (2009).

In this action, there is no question, and the lower court properly found, that the default judgment rendered against the Petitioner was void for insufficient service of process and lack of jurisdiction. Nevertheless, the court refused to set the judgment aside, despite the insufficient service and the existence of two critical facts which were never disputed throughout the long and drawn-out history of this case, (1) the Respondent was never employed by the Petitioner, or (2) that the Petitioner did not own, use, possess or maintain the premises upon which the Respondent fell on September 2, 2002.

The reasoning of the *Beane* decision that a void judgment could be attacked at any time was a continuation of the line of thinking set out in the concurring opinions of Justices Ketchum and Workman in *Leslie Equipment Company v. Wood Resources Company, L.L.C.*, *supra*. Justices Ketchum wrote the concurring opinion to express his concern with the reasonable time requirement of Rule 60(b)(4). The Justices wrote:

“What is a reasonable period of time? If a defendant learns 10 years later that a void judgment has been entered against him or her, is it too late to set aside the void judgment under Rule 60(b)(4)? What constitutes a “reasonable time” is not subject to precise definition. *Savas vs. Savas*, 181 W. Va. 316, 319 n.2, 382 S.E.2d 510, 513 n.2 (1989) (The term “reasonable time” is not susceptible of a precise definition). Different circuit judges will apply different definitions to the term ‘reasonable time.’

There should be no time limit to set aside a void judgment. Once void, always void. Although Rule 60(b) indicates that relief from a judgment may also be sought through an independent action, Rule 60(b) should be amended to eliminate any time limit for setting aside a

judgment that is void.” *Leslie*, supra, p. 122.

Where a Court does not have personal jurisdiction over a defendant, any default judgment rendered is void and there is no need to perform a *Parsons*’ analysis on whether to set aside the judgment.

In its Order denying defendant’s Motion to Set Aside Default Judgment the lower court properly determined the plaintiff’s service of process was insufficient and as a result the default judgment it entered was void. However, the Court felt compelled to consider and analysis the facts of this case under the four factors set forth in *Parsons*, supra, to determine whether or not the default judgment should be set aside. This conclusion was erroneous. In *Beane*, supra, the court made clear that once a default judgment has been determined to be void, there is no need to perform a *Parsons* analysis.

“This Court has held that: ‘[a]ppellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering the default judgment’ Syllabus Point 3, *Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983). In the discussion that follows, however, it is clear that the default judgment in this case is void because the trial court did not have personal jurisdiction over the defendant, therefore we need not perform a *Parsons*’ analysis. See Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 55(b)(2) (3rd ed. Cum. Supp. 2010) (‘A default judgment rendered without personal jurisdiction is void and, therefore, is a per se abuse of discretion if the trial court that entered the judgment lacked jurisdiction.’)” *Beane*, supra, p. 850.

A default judgment rendered without personal jurisdiction is void and, therefore, is as a per se abuse of discretion if the trial court that entered the judgment lacked jurisdiction: e360

Insight v. The Spamhour Project, 500 F.3d. 594 (7th Cir. 2007).

To entitle a court to hear and determine an action it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction. *Beane*, supra. The lower court did not have jurisdiction of Tudor's Biscuit World of America because of insufficient service of process at the time of entry of both the orders of default and default judgment. Therefore, the default judgment is void. See Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 55(b) (2) (3rd ed. Cum. Supp. 2011)

Further, there was never an appearance in the case by the Petitioner until years after the entry of judgment. The lower court erred by not determining that it did have jurisdiction over the Petitioner before entering the default judgment. e360 *Insight*, supra. Notice and an opportunity to be heard are essential to the jurisdiction of all courts, and such notice must be given by the issuance and service of process in the manner prescribed by law, unless waived. *Beane*, supra.

In the instant action, notice was admittedly not given in the manner prescribed by law, nor was it waived. Hence, the judgment rendered against the Petitioner was void and there was no need for the lower court to engage in a *Parsons* analysis in considering the petitioner's motion to set aside the judgment.

8. CONCLUSION

For the foregoing reasons the Petitioner, Tudor's Biscuit World of America, Inc., prays that this Court enter an order that reverses the Raleigh Court Circuit Court Order Denying Defendant's Motion to Set Aside Default Judgment and the Raleigh County Circuit Court Order

Denying Defendant's Motion to Alter or Amend Order entered on December 4, 2009, denying Defendant's Motion to Set Aside Default Judgment.

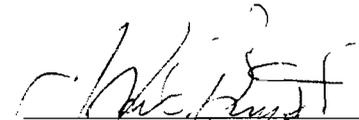
9. CERTIFICATE OF SERVICE

I, J. Nicholas Barth, one of counsel for Petitioner, do hereby certify that the foregoing Petitioner's Brief was served upon Respondent by mailing, postage prepaid, a true copy of the same this 21st day of July, 2011, addressed as follows:

Ralph C. Young, Esquire
P. O. Box 959
Fayetteville, WV 25840

Respectfully submitted,

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