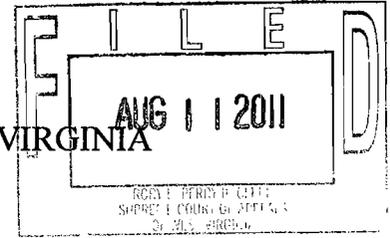


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 11-0543

Tudor's Biscuit World of America, )  
Inc., Defendant Below, Petitioner )  
 )  
vs. )  
 )  
Della M. Critchley, Plaintiff Below, )  
Respondent )  
\_\_\_\_\_ )

**RESPONDENT'S BRIEF**

Della M. Critchley

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## **SUMMARY OF ARGUMENT**

The trial court denied Tudor's Biscuit World's motion to set aside a default judgment for insufficient service of process because it had notice of the judgment in 2004 yet did not seek relief until 2009. App. 68, 71-72, 91, 99-103. In ruling that the motion was thus untimely, the trial court applied settled law to a finding that is not assigned as error. The Court should affirm the denial of relief.

### **Statement that Oral Argument is Unnecessary**

Oral argument is unnecessary in that the dispositive issue is authoritatively decided by the text of Rule 60(b) and the decisions on that rule's reasonable time requirement.

### **Argument**

#### **I. Attacks on service of process have a time limit.**

Biscuit World's petition rises and falls with its argument that it can question service of process "at any time" - no matter how unreasonable the delay. This view is rebuffed by Rule 60(b), West Virginia decisions construing the rule, and this Court's other precedent.

Whether this Court will overrule its precedent and reconstrue Rule 60(b) raises a question of law. Review is *de novo*.

##### **1. Biscuit World slumbered for over five years.**

Biscuit World wants to cut the reasonableness limit out of Rule 60(b)(4) motions because the trial court found that it was on notice of the default judgment on September 30,

2004 but did not seek relief until October 15, 2009. App. 68, 71-72, 91, 99-103. Biscuit World does not assign error to this factual finding. The record explains why.

In September 2004, Critchley's counsel sent two certified letters to Mr. John B. Tudor, Biscuit World's President and Registered Agent. One letter was addressed to his residence and was accepted by Tudor's wife. The other letter was addressed to the corporate address and was accepted by his corporate accountant. Each letter enclosed a copy of the order of default and offered to settle before counsel set a damages trial. App. 68, 89. On October 5, 2004, Critchley's counsel received one of his letters back with a handwritten note on it from Biscuit World's accountant or bookkeeper. This note - written on the letter enclosing the order of default - states that Critchley "is not an employee" of Biscuit World and that "Mr. John Tudor has left a voice mail with your office and the Nitro office." App. 68.

The trial court reviewed this evidence, including Tudor's insistence that Biscuit World did not know about the default until 2009. App. 68. The trial court found that the documents from 2004 were more convincing and that Biscuit World was thus on notice back then. App. 68, 71, 91, 101. Again, Biscuit World does not assign error to this finding.

## **2. Rule 60(b) contains an express time limit.**

Biscuit World wants the Court to edit Rule 60(b) so that it can avoid the consequences of its five-year delay. Rule 60(b) provides that all Rule 60(b) motions - including Rule 60(b)(4) motions challenging void judgments - "shall be made within a reasonable time." "Shall" denotes a mandatory requirement.

Two members of this Court dislike this aspect of the rule and have advocated that, “Rule 60(b) should be amended to eliminate any time limit for setting aside a judgment that is void.” *Leslie Equipment Co. v. Wood Resources Co.*, 224 W.Va. 530, 543, 687 S.E.2d 109, 122 (2009)(Ketchum, Justice, concurring). Biscuit World seizes on this to argue that the Court should carve the time limit out of the rule.

But that is not what the *Leslie* concurrence urged. The concurrence urged the rule’s amendment - not its misconstruction. When the Court proposes an amendment, the chairperson of the judicial council, the president of the State Bar Association, and the judge of every court affected has an opportunity to weigh in before the change occurs. W.Va. Code § 51-1-4. This process offers the Court valuable feedback on any institutional concerns about the proposal. Adversaries litigating a single dispute lack this broader perspective.

Rule 60(b) has not gone through this process. Until it does, the current text is as binding as a statute. And the text requires timeliness.

### **3. Cases construing Rule 60(b)(4) impose a time limit.**

Reading the time limit out of Rule 60(b) also infringes on stare decisis in a way that an amendment does not. This Court normally stands by its precedent to promote certainty, stability, and uniformity in the law. Biscuit World asks the Court to jettison this policy by overruling a line of decisions construing Rule 60(b).

*Leslie* is the most recent case on point. Like this case, *Leslie* involved a default judgment that was void for insufficient service of process. The Court at Syllabus Point 5 held

that a movant must show that a Rule 60(b)(4) motion was filed within a reasonable time. *Leslie*, 224 W.Va. at 530, 687 S.E.2d at 110. The Court went on to describe timeliness as “one other hurdle” to granting relief from the void judgment. *Id.* at 536-537, 687 S.E.2d at 115-116.

Also like this case, *Evans v. Holt*, 193 W.Va. 578, 457 S.E.2d 515 (1995), involved a default judgment that was void for insufficient service of process. After finding that the judgment was void, the Court held that “the only other requirement the Appellant had to met under Rule 60(b) was that the motion for relief had to be filed ‘within a reasonable time.’” *Id.*, 193 W.Va. at 587 n. 13, 457 S.E.2d at 524 n. 13, citing Syllabus Point 2 of *Jenkins v. Johnson*, 181 W.Va. 281, 382 S.E.2d 334 (1989).

Other decisions apply the Rule 60(b) time limit to more general Rule 60(b)(4) motions. Rule 60(b)(4) motions, for example, must also be filed within a reasonable time under Syllabus Point 2 of *Corathers v. Facemire*, 185 W.Va. 78, 404 S.E.2d 769 (1991). Reversing the trial court, the Court held there that a motion to set aside a judgment - made 28 years after the judgment’s entry - was untimely regardless of the basis for relief. Under Biscuit World’s view, this motion would be timely if the challenge was to service of process.

In *Coolfront Mountainside Assoc. v. Ashelman*, 180 W.Va. 638, 640 n. 3, 378 S.E.2d 847, 849 n. 3 (1989), this Court yet again noted that “a motion made pursuant to Rule 60(b)(4) must nonetheless be made within a reasonable time.” It concluded that the trial court did not abuse its discretion in denying the motion as untimely. In contrast, Biscuit World

believes that imposing any time restriction on Rule 60(b)(4) motions is always an abuse of discretion.

Still other decisions impose laches on a party's ability to challenge service of process or personal jurisdiction. This Court has, for example, held that insufficient service of process rendered a divorce decree a "mere nullity" - yet that laches may be a defense to the attempt to vacate the void decree. *Dierkes v. Dierkes*, 165 W.Va. 425, 268 S.E.2d 142 (1980), Syllabus Point 2. Generations before Rule 60(b)'s adoption, the Court in *Mullan's Adm'r v. Carper*, 37 W.Va. 215, 16 S.E. 527 (1892), likewise applied laches to bar an attempt to vacate a void decree. The Court held that the decree for the sale of land was void for lack of personal jurisdiction - yet applied laches to bar the attempt to set it aside.

These decisions show that parties may not sit back in perpetuity. To accept Biscuit World's contrary view, the Court must overrule Syllabus Point 5 in *Leslie*, Syllabus Point 2 in *Corathers*, and the other decisions imposing a reasonable time limit.

#### **4. The *Beane* decision is distinguishable.**

Biscuit World wrongly argues that *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010), has already overruled these decisions. It held at Syllabus Point 2: "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." Biscuit World zeros in on the "any time" language to edit reasonableness out of Rule 60(b).

This focus is much too narrow. It ignores the case's context and the syllabus point as a whole.

The judgment debtor in *Beane* took a direct appeal on April 25, 2008 from a default judgment entered on January 8, 2008. *Id.* at 447, 701 S.E.2d at 850. Because it was a direct appeal, Rule 60(b) and its timeliness requirement were not at issue. There is also nothing unreasonable about a delay from January 2008 to April 2008. A delay of less than four months differs from one exceeding five years.

Reading the *Beane* Syllabus Point 2 as a whole - and reviewing the cases cited within it - further distinguishes it. The syllabus point as a whole suggests that "any time" refers to a party's ability to seek writs of prohibition, mandamus, habeas corpus, and the like. In this context, "any time" means that judgment debtors may promptly initiate collateral proceedings after learning about a judgment entered years before.

But that is not this case. Biscuit World did not act promptly after receiving notice of the judgment in 2004. It did nothing for over five years. App. 71-74, 99-101.

Biscuit World also fails to explain why the law should excuse such an unreasonable delay. After all, a party who has notice of a lawsuit and promptly appears must timely raise the insufficiency of service of process. Rule 12(h)(1), W. Va.R.Civ.P. Why should a different rule apply to a party who has notice of the lawsuit but then slumbers on its rights?

## II. The *Parsons* analysis is not reversible error.

Biscuit World also argues that the trial court erred by applying the *Parsons* factors. *See Parsons v. Consolidated Gas Supply Co.*, 163 W.Va. 464, 256 S.E.2d 758 (1979). The trial court, however, ultimately held that Biscuit World's motion was untimely regardless of these factors. The court's earlier *Parsons* analysis was also taken at Biscuit World's invitation and under this Court's prior instruction.

For background, Biscuit World asked the Court to apply *Parsons* and submitted its views on all four factors. App. 34-37. The trial court first denied the motion as untimely. App. 71-72. It then applied *Parsons* - as asked - and concluded that Biscuit World's intransigence was "extreme" in that Biscuit World refused to acknowledge the judgment's existence after Tudor's wife and his corporate accountant received actual notice of it in 2004. App. 73-74. The trial court also noted that Tudor continued to insist that Biscuit World first received notice of the default in 2009 despite the controverting documents from 2004. App. 68, 73-74.

After this order's entry, Biscuit World made a motion to amend which again asked the Court to apply the *Parsons* factors. App. 79-84. But prior to ruling on this motion, the trial court reviewed the *Beane* decision and noted that a *Parsons* analysis is no longer necessary once a court determines that service of process is insufficient. It then reaffirmed its earlier ruling on untimeliness. App. 91-92, 94-95, 99-103.

**1. The trial court denied relief for untimeliness.**

The trial court ultimately denied relief because Biscuit World was on notice of the default in 2004 and failed to act until 2009. App. 99-103. Whether *Parsons* applies or was applied properly is thus immaterial. Biscuit World's motion remains untimely.

**2. Biscuit World asked the court to apply the law then in effect.**

Any error was also invited. Biscuit World twice asked the trial court to apply the *Parsons* factors. App. 34-37, 79-84. At the time, this Court further held that *Parsons* applies in determining whether to set a default judgment aside. *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006)(Syllabus Point 5). The trial court thus initially felt "compelled" to analyze these factors. App. 72.

The trial court did not abuse its discretion by applying factors that Biscuit World twice asked it to apply and which this Court earlier instructed it to apply.

**3. The trial court properly weighed Biscuit World's delay.**

Biscuit World's assignment of errors also claims that the trial court misweighed these factors. This claimed error was not argued in the argument section. And because the purported misweighing does not raise a question of law, review is limited to whether the trial court abused its discretion. *Beane*, 226 W.Va. at 447-448, 701 S.E.2d 850-851. It did not.

The trial court, for example, fully considered Biscuit World's attack on Critchley's good faith. Biscuit World argues that Critchley sued it in bad faith because she knew that it was not her employer and because it does not own or maintain the property where she was

injured. The trial court, however, saw and heard Critchley testify that Biscuit World was her employer. App. 49 ll.20-23. The court later ruled that “it does not find that [she] was unreasonable” in suing Biscuit World because of the perception that Biscuit World created by allowing franchisees to use the Biscuit World name and operations. App. 91 n. 4. Having saw and heard Critchley testify live, the trial court is in the best position to weigh her credibility and good faith.

Biscuit World similarly suggests that Critchley’s counsel mislead the court when he averred that the lawsuit was duly served after the process was returned “unclaimed.” App. 6, 8-9. But the return did not indicate that the address was insufficient or unknown, or that the mail was undeliverable. App. 6. Counsel thus took “unclaimed” to mean that Tudor refused to claim it after its proper delivery. Tudor was in fact later served with a summons at that same address. App. 6, 19.

Biscuit World next argues that the trial court got it wrong when it evaluated the possible prejudice to Critchley from the statute of limitations bar. The trial court, however, reconsidered its earlier evaluation and ruled that the statute of limitations would not impair the case from moving forward. App. 91 n. 4. Having won this narrow point, Biscuit World is no longer aggrieved by it.

This still leaves Biscuit World’s five-year delay. App. 68, 71-72, 91, 99-103. Whether a Rule 60(b) motion is timely turns in large part on whether the moving party “had some good reason for his failure to take appropriate action sooner.” *Savas v. Savas*, 181 W.Va. 316, 319 n. 2, 382 S.E.2d 510, 513 n. 2 (1989). Again, Biscuit World does not assign as error

the trial court's finding that it delayed for five years. It also offers no reason for its tardiness. The trial court thus acted well within its discretion in giving this five-year delay the weight it deserves.

#### **IV. Critchley gave notice before the damages hearing.**

Biscuit World lastly claims that it lacked of an opportunity to contest the default judgment prior to its entry. The record differs.

The trial court found that Critchley put Biscuit World on notice of the default judgment - and offered to settle before a damages hearing was set - on September 30, 2004. App. 68, 71, 89, 91, 101. The damages hearing did not occur until February 23, 2006. App. 42. Biscuit World thus had well over a year to appear and contest damages. It missed the damages hearing slumbering - not for lack of notice.

### **Conclusion**

Biscuit World lacked unlimited time to attack service of process for being returned unclaimed rather than refused. Those who live by such rules die by such rules. And the rules require that Rule 60(b)(4) motions be made within a reasonable time. The trial court did not abuse its discretion in holding Biscuit World to this standard or in finding that five years crosses the line. The Court should affirm the denial of relief.

## Certificate of Service

I, Ralph Young, certify that I am counsel for the Respondent and that I on August 10, 2011 served the Respondent's Brief upon the Petitioner by mailing a true copy postage prepaid to J. Nicholas Barth, Barth & Thompson, P.O. Box 129, Charleston, WV 25321.

Respectfully submitted,

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