

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

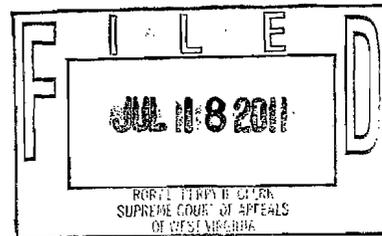
DOCKET NO. 11-0681

**VICTORIA DRUMHELLER,
D. F. BRIARPATCH, LLC,
ENGINEERING CONSTRUCTION
SUPPORT, INC.,
LINDAL CEDAR HOMES**
Petitioners

Appeal from a final order
of the Circuit Court of Jefferson
County (08-C-393)

v.

**James Fillinger and
Diane Fillinger, d/b/a
Fillinger's Contracting**
Respondents



Petitioners' Brief

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John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co., 166 S.E.2d 141, 152 W.Va. 723, (1969)

Plumley v. May, 140 W.Va. 889, 893 87 S.E.2d 282, 285 (1955)

Wood v. Detroit Automobile Inter-Insurance Exchange, 321 N.W.2d 653 (Mich. 1982)

Curbelo v. Ullman, 571 So.2d 443 (Fla.1990)

Shasho v. Euro Motor Sport, Inc., 979 So.2d 343 (Fla 4th DCA 2008)

Rao v. Wma Securities, Inc., 752 N.W.2d 220, 2008 WI 73 (Wis. 2008)

STATUTES

West Virginia Rules of Civil Procedure:

W. Va. R. Civ. P. 15(c)

W. Va. R. Civ. P. 38(a)

W. Va. R. Civ. P. 38(c)

W. Va. R. Civ. P. 39(a)

W. Va. R. Civ. P. 55(b)

W. Va. R. Civ. P. 60(b)

Michigan Court Rules of 1985:

MCR 2.508

MCR 2.509

Florida Rules of Civil Procedure:

Fla. R. Civ. Pro. 1.430

Wisconsin Rules of Civil Procedure:

Wis. Stat § 805.01

Wis. Stat § 806.02

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS A HEARING BEFORE A JURY ON THE MATTER OF DAMAGES.
2. THE CIRCUIT COURT ERRED IN FINDING THAT ALL FOUR NAMED DEFENDANTS WERE PROPERLY SERVED WITH THE COMPLAINT AND SUMMONS INDIVIDUALLY OR THROUGH AN AUTHORIZED AGENT.
3. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER VICTORIA DRUMHELLER IS AN AGENT OF ALL THREE (3) CORPORATE DEFENDANTS.
4. THE CIRCUIT COURT ERRED IN FINDING THAT DEFAULT JUDGMENT WAS PROPER AGAINST ALL DEFENDANTS
5. THE DAMAGE AWARD TO RESPONDENTS OF \$49,400 IS NOT SUPPORTED BY THE EVIDENCE.

STATEMENT OF THE CASE

On October 2, 2008, Respondents filed this general civil action against four named defendants, including three “corporate” defendants, who are the petitioners in this appeal, over a dispute between parties to an agreement. Respondents requested a jury trial. AR 1, AR 5. Respondents alleged in their complaint that respondents performed work for defendants but were not paid the full amount due and suffered harm as a result of petitioners’ breach of contract, unjust enrichment and promissory estoppel. AR 4-5.

Respondents operate a general contracting company. (A.R. 2). Petitioner Victoria Drumheller has employed Respondents to clear building lots and to remove trash on several occasions. The action from which this appeal is taken involved work performed on a property located at the corner of Lake View and Gingerbread (A.R. 104), and on another property involving the tearing down and removing of a trailer home. (A.R. 95). All agreements were between Petitioner Drumheller and Respondent James Fillinger. The three “corporate”

defendants' names do not appear on any of the invoices Respondents claim are unpaid. (A.R. 270-296)

Petitioner "Lindal Cedar Homes" is a non-existent entity. As a non-existent entity, this petitioner could not be properly served and could not have appeared in any proceedings in the circuit court. The non-existent entity appears in this appeal only to the extent that another petitioner was declared by the circuit court to be the authorized agent for the entity (A.R. 298) and so that this Court may rule on the circuit court's jurisdiction over the (non) entity. There is no record of a "Lindal Cedar Homes" authorized to conduct business in the State of West Virginia. Petitioner Drumheller is an authorized distributor of products sold by a Seattle, Washington corporation, Lindal Cedar Homes, Inc., which did submit an application to the West Virginia Secretary of State for a name reservation in 2005, but which expired in 2005. (Supp. A.R. 10).

Petitioner "D. F. Briarpatch, LLC" is also a non-existent entity. As a non-existent entity, this petitioner could not be properly served and could not have appeared in any proceedings in the circuit court. The non-existent entity appears in this appeal only to the extent that another petitioner was declared by the circuit court to be the authorized agent for the entity (A.R. 298), and so that this Court may rule on the circuit court's jurisdiction over the (non) entity. There is no record of a "D. F. Briarpatch, LLC" authorized to conduct business in the State of West Virginia. Petitioner Drumheller is identified to receive service for a West Virginia Limited Liability Company, "DF Briarpatch, L.L.C.," (Supp. A.R. 6) however, that entity was not named or was misnamed by the respondent in the circuit court action.

Petitioner Engineering Construction Support, Inc. is a Virginia corporation. From the time Engineering Construction Support, Inc. registered with the State of West Virginia as a

foreign corporation in 2004, it has identified a person other than Defendant Drumheller as its agent designated to receive service. (A.R. 47). At the time the complaint was filed in the circuit court, Defendant Drumheller had been a former officer of this corporation, but was not listed as an officer in the corporation's annual reports since May 2008.

Petitioner Victoria Drumheller, appearing *pro se*, filed an answer on behalf of all four named Defendants, including the 3 "corporate" defendants. (A.R. 37- 41). Respondents served requests for discovery on Petitioners, which Petitioners did not answer. (A.R. 8, A.R. 299). In addition, Petitioners did not appear at a pre-trial conference which appeared on the scheduling order issued by the circuit court. (A.R. 8, A.R. 299). The circuit court granted respondents' motion for default judgment, and because the amount of damages was not an amount sum certain, scheduled a hearing on the issue of damages. (A.R. 43)

A non-jury hearing on the issue of damages was held on January 5, 2010. (A.R. 61). Petitioner Drumheller, with counsel, appeared at the damages hearing and later, through counsel, filed a motion to vacate the default judgment or alternatively to reduce the damage award. (A.R. 7).

The circuit court, on March 22, 2011, entered the Final Judgment Order, finding that service on all four (4) defendants was proper, that petitioner Drumheller was an authorized agent for the three (3) corporate defendants, and awarded respondents \$45,000 plus a ten percent (10%) late fee for a total damages amount of \$49,400.00. (A.R. 297-300).

SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia has not previously decided the issue of whether a defaulted party in civil litigation is entitled to a jury trial on the issue of damages. The rules of civil procedure clearly state when a litigant has a right to a trial by jury, the issues

appropriately decided by a jury, when the right to a jury trial is properly waived and when a request for jury trial may be withdrawn. In applying the West Virginia rules of civil procedure to the facts of this case, it is clear that Petitioners were entitled to, and in fact should have had, a jury hearing on the issue of damages.

Jurisdictions whose civil procedure rules closely align with West Virginia's rules, and who have decided this issue, have held that a defaulted litigant, where a request for jury trial has been made and not withdrawn, is entitled to a jury trial on the issue of damages.

Further, the circuit court awarded damages against "corporate" entities that were not properly before the court due to improper service. Two of the corporate entities are either non-existent entities or were misnamed, and not corrected, by respondents. A third corporate entity, authorized to conduct business in West Virginia, was not properly served according to the corporate documents filed with the West Virginia Secretary of State; instead, the circuit court found that the individual petitioner was an authorized agent for all three (3) "corporate" entities.

The circuit court based its decision to issue a default judgment on petitioners' failure to respond to discovery requests and failure to appear at a pre-trial conference. The three "corporate" entities were not properly served, and could not be expected to respond. The individual petitioner filed a motion to vacate the default judgment and provided an affidavit explaining why she failed to appear at the pre-trial conference. The circuit court found the default judgment proper and stated petitioner's reason for not attending the pre-trial conference was not excusable. (A.R. 299). The circuit court failed to apply the U.S. Supreme Court's *Pioneer* factors in determining "excusable neglect."

Finally, the evidence introduced at the damages hearing does not support the damages award. Respondents introduced two sets of invoices purported to represent amounts owed by

petitioners, including one set that was prepared specifically for the purpose of the damages hearing and which had never been provided to the petitioners. (A.R. 81). None of the invoices which were purported to be unpaid included the names of any of the three (3) “corporate” defendants. The only name on the invoices was that of the individual petitioner. The circuit court acknowledged that respondents’ record keeping was poor and that work was unsatisfactorily performed. (A.R. 213, A.R. 300).

The Court should (1) reverse the circuit court’s Order as to the three corporate defendants for lack of service and insufficient evidence, (2) find that the circuit court erred in holding a non-jury hearing on damages and (3) remand with instructions to the circuit court to vacate the default judgment against all defendants, dismiss the complaint as to the corporate defendants, and convene appropriate proceedings before a jury.

STATEMENT REGARDING ORAL ARGUMENT

The principle issue in this case is one of first impression, however, the facts and legal arguments are adequately presented in the Petitioners’ brief and record on appeal, *infra*, therefore oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 20 argument on the principle issue. The remaining issues have been authoritatively decided by the Court as presented in this brief and record on appeal, *infra*, therefore oral argument is not necessary unless the Court determines that other issues arising upon the record should be addressed, in which case those issues are appropriate for a Rule 19 argument.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS A HEARING BEFORE A JURY ON THE MATTER OF DAMAGES.

The Supreme Court of Appeals of West Virginia has not previously decided the issue of whether a defaulted party in civil litigation is entitled to a jury trial on the issue of damages. The Court has decided other related issues regarding, for example, default judgments and required notice (*Cales v. Wills*, 212 W.Va. 232, 569 S.E.2d 479 (2002)), a party's right to trial by jury (*Moon v. Michael Koslow Construction, Inc.*, 193 W.Va. 673, 458 S.E.2d 610 (1995)), and affording a party voir dire examination of the prospective jurors (*Barker v. Benefit Trust Life Ins. Co.*, 174 W.Va. 187, 324 S.E.2d 148, (1984)), but not whether a defaulted party is entitled to have a jury decide the issue of damages.

The issue of a defaulted party's right to jury trial on the issue of damages has been decided in other jurisdictions. The Supreme Court of Michigan has held that a defendant, against whom a default was entered, has a right to a jury trial to determine the amount of damages. In *Wood v. Detroit Automobile Inter-Insurance Exchange*, 321 N.W.2d 653 (Mich. 1982), the Plaintiff was injured in a motorcycle accident. The Defendant paid some of Plaintiff's medical expenses and other benefits before terminating payments. Plaintiff filed suit and demanded a jury trial. Defendant answered and also demanded a jury trial. Defendant later failed to answer requests for and orders compelling responses to discovery. Default was entered and a hearing on plaintiff's motion for default judgment was set. Default judgment was granted in favor of the Defendant and the Defendant's motion to set aside the default judgment was denied.

The Michigan Court noted that under Michigan law, a default settles the question of liability, and that a defaulting party has a right to participate if further proceedings are necessary to determine the amount of damages. *Wood* was a case of first impression in Michigan on the

issue of whether a defaulting party has a right to a jury trial in such further proceedings necessary to determine the amount of damages.

The Defendant in *Wood* argued that it did not sacrifice its right to a jury determination of damages as demanded in its answer to plaintiff's complaint. Plaintiff asserted that defendant's jury demand did not survive the default. Michigan rules regarding jury trials state that "[a]ny party may demand a trial by jury of any issue so triable of right by filing a demand therefor in writing at any time after the commencement of the action...[i]f a party does not designate which issues are to be tried to a jury, Rule 508 provides that the demand is deemed to cover all issues so triable." *Wood*, 658. Since neither the plaintiff nor the defendant in *Wood* specified jury issues, their demands were construed to include all issues, e.g., the question of liability and the amount of recovery. The Supreme Court of Michigan held in *Wood* that a defaulting party who has properly invoked his right to jury trial retains that right if a hearing is held to determine the amount of recovery. *Id.*, 659.

Michigan's relevant rules of procedure include:

Rule 2.508 Jury Trial of Right

(A) Right Preserved. The right of trial by jury as declared by the constitution must be preserved to the parties inviolate.

(C) Specification of Issues.

(1) In a demand for jury trial, a party may specify the issues the party wishes so tried; otherwise, the party is deemed to have demanded trial by jury of all the issues so triable.

(D) Waiver; Withdrawal.

- (3) A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys.

MCR 2.508.

Rule 2.509 Trial by Jury or by Court

(A) By Jury. If a jury has been demanded as provided in MCR 2.508, the action or appeal must be designated in the court records as a jury action. The trial of all issues so demanded must be by jury unless

- (1) the parties agree otherwise by stipulation in writing or on the record, or

- (2) the court on motion or on its own initiative finds that there is no right to trial by jury of some or all of those issues.

(B) By Court. Issues for which a trial by jury has not been demanded as provided in MCR 2.508 will be tried by the court. In the absence of a demand for a jury trial of an issue as to which a jury demand might have been made of right, the court in its discretion may order a trial by jury of any or all issues.

MCR 2.509.

The Florida Supreme Court has also held in *Curbelo v. Ullman*, 571 So.2d 443 (Fla.1990), that "[w]hen a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on the issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead."

In *Curbelo*, respondent Ullman brought a medical malpractice wrongful death action against Curbelo. Ullman's complaint included a demand for trial by jury pursuant to Florida rules of civil procedure. Curbelo did not answer and a default judgment was entered. After

notice was given, Curbelo appeared pro se at a non-jury trial on the issue of damages. A final judgment was entered in favor of Ullman.

Ullman's argument that Curbelo waived his right to a jury trial on the issue of damages by failing to answer was rejected by the Florida Supreme Court, which stated, "[w]hen a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on the issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead. *Curbelo*, 444. The Florida Court also acknowledged that Florida's rules of civil procedure require that a demand for trial by jury may not be withdrawn "without the consent of the parties." Fla.R.Civ.P. 1.430(d). In Florida, the parties' consent to waiver must be manifested by affirmative action such as "a specific waiver in writing or by announcement in open court." Because there was no affirmative manifestation, the Florida Supreme Court found that Curbelo did not waive his right to jury trial. *Id.*, 445.

In 2008, in the case of *Shasho v. Euro Motor Sport, Inc.*, 979 So.2d 343 (Fla 4th DCA 2008), the appellant, Shasho, failed to file a responsive pleading and default was entered against appellant. The trial court ordered the case referred for a non-jury trial on the issue of unliquidated damages. A general magistrate awarded total damages of \$1,200,000. Appellees had made a jury trial demand in their original complaint. In Florida, regardless of who makes a jury demand, once made it cannot be withdrawn without the consent of all parties. When a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead. *Shasho*, 345, citing *Cubelo*.

In *Shasho*, the appellant never consented to withdrawal of the jury trial demand. The failure to participate in the proceedings cannot be construed as an affirmative waiver of the right

to jury trial. "To constitute a waiver of the existing demand for jury trial the Supreme Court of Florida held there must be affirmative action on the part of a party." *Shasho*, 346 citing *Barge v. Simeton*, 460 So.2d 939, 940 (Fla. 4th DCA 1984). Florida's rules of civil procedure, like those in West Virginia, provide that in a jury demand, a party may specify the issues that the party wishes so tried; otherwise, the party is deemed to demand trial by jury for all issues so triable. Fla. R. Civ. Pro. 1.430(c). For those reasons, the *Shasho* court reversed the final judgment and remanded for a jury trial on the issues of damages.

Florida's relevant rules of procedure include:

RULE 1.430 DEMAND FOR JURY TRIAL; WAIVER

- (a) Right Preserved. The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.
- (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. The demand may be indorsed upon a pleading of the party.
- (c) Specification of Issues. In the demand a party may specify the issues that the party wishes so tried; otherwise, the party is deemed to demand trial by jury for all issues so triable. If a party has demanded trial by jury for only some of the issues, any other party may serve a demand for trial by jury of any other or all of the issues triable by jury 10 days after service of the demand or such lesser time as the court may order.
- (d) Waiver. A party who fails to serve a demand as required by this rule waives trial by jury. If waived, a jury trial may not be granted without the consent of the parties, but

the court may allow an amendment in the proceedings to demand a trial by jury or order a trial by jury on its own motion. A demand for trial by jury may not be withdrawn without the consent of the parties.

Fla. R. Civ. Pro. 1.430.

The Supreme Court of Wisconsin, on the other hand, has found that a defaulting party does not retain the right to have a jury decide the issue of damages. *Rao v. Wma Securities, Inc.*, 752 N.W.2d 220, 2008 WI 73 (Wis. 2008). The Court in Wisconsin determined that, unlike the rules of procedure that apply in Michigan that led to the result in *Wood*, Wisconsin's Rules of Civil Procedure do not require the circuit court to recognize a defaulting defendant's state constitutional right of trial by jury when the court determines that an evidentiary hearing will be held to determine the amount of damages to be awarded. Instead, the law in Wisconsin is clear that it lies within the circuit court's discretion to determine the appropriate procedure for deciding factual issues in default judgment cases and that the defaulting party therefore has no right of trial by jury. The distinction between Michigan and Wisconsin law, pertaining not to the scope of the state constitutional right to jury trials in civil cases but rather to matters of procedural law governing waiver of that right, explains the different holdings in *Wood* and in *Rao*.

Wisconsin's relevant rules of procedure include:

805.01 Jury trial of right

(1) Right preserved. The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

- (2) Demand. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.
- (3) Waiver. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Wis. Stat § 805.01.

806.02 Default Judgment

- (5) A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

Wis. Stat § 806.02

West Virginia's rules of civil procedure related to default judgments and trials by jury are more closely aligned with those of Michigan and Florida, states whose highest courts have held that a defaulting party is entitled to a jury trial on the issue of damages, and less closely aligned with Wisconsin, where the highest court found a defaulting party had no right of trial by jury on damages.

Rule 55(b) of the West Virginia Rules of Civil Procedure contains procedural requirements for default judgments when awarding either sum certain damages or damages that are not sum certain. Sum certain damages, addressed in Rule 55(b)(1), are those involving a sum that is certain or which can be rendered certain by computation. If damages are a sum certain, there is no need for an evidentiary hearing. *Cales v. Wills*, 212 W.Va 232, 569 S.E.2d 479 (2002).

Where a default judgment has been obtained under Rule 55(b)(2) a trial court is required to hold a hearing to ascertain the amount of damages when the damage amount is not a sum certain. *Cales*, S.E.2d 478, 485, *Daniels v. Hall's Motor Transit Co.*, 157 W.Va. 863, 865, 205 S.E.2d 412, 413 (1974).

Rule 38(a) of the West Virginia Rules of Civil Procedure state that “the right of trial by jury as declared by the Constitution or statutes of the State of West Virginia [is] preserved to the parties inviolate.” W. Va. R. Civ. P. 38(a). Rule 38(c) states “a party may specify the issues which the party wishes so tried [by a jury]; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable.” W. Va. R. Civ. P. 38(c).

Rule 39(a) of the West Virginia Rules of Civil Procedure requires trial of all issues so demanded or requested be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State. W. Va. R. Civ. P. 39(a).

The Supreme Court of Appeals of West Virginia has held in favor of a party’s right to trial by jury when that party has not waived that right. *Moon*, 193 W.Va. 673, 676. In *Moon*,

plaintiffs filed a complaint in the Circuit Court of Cabell County alleging negligence related to a construction contract. Defendant made a demand for a jury trial in its answer to the complaint and at no time waived its right to a jury trial. The circuit court referred the matter to a special commissioner over defendant's objections. On appeal, the Court discussed the requirement of rule 38(a) of the Rules of Civil Procedure, which provides that "the right of trial by a jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate."

Id.

The Court noted, "[w]here a trial by jury has been secured by a party to litigation under W.Va.R.Civ.P. 38 or 39(b), a party to such litigation has a right to an impartial and unbiased jury; and in order to insure that right, the party is entitled, in the absence of a waiver upon the record, to meaningful voir dire examination and peremptory challenges of the prospective jurors. *Moon*, 676. The Court found the circuit court's decision to refer the matter to a special commissioner violated defendant's right to have the case tried before a jury and reversed the judgment and remanded for a trial upon the merits.

In the current matter, respondents, when filing their complaint, made a general jury demand by noting such in bold capital letters immediately following their request for relief (A.R. 5) and by noting such demand on the civil case information statement (A.R. 1). Respondents did not specify any specific issues respondents wished to be tried by a jury.

On October 16, 2009, the circuit court entered an order granting plaintiff's (respondents on appeal) motion for default judgment. As the amount of damages was not sum certain, the court scheduled a hearing on the issue of damages. (A.R. 43). The damages hearing was held on January 5, 2010 (A.R. 61), without a jury present. (A.R. 88).

No stipulation was made by the parties or their attorneys, either in writing filed with the court or orally in open court, consenting to a hearing on damages by the court sitting without a jury. Additionally, the circuit court made no finding that a right of trial by jury on the issue of damages did not exist.

Despite the demand for a jury trial, and Rule 38(c), which deems a general demand for a jury trial to apply to all issues triable, the circuit court heard evidence at the non-jury hearing on damages, made findings of fact and conclusions of law, and issued a final judgment order in favor of the respondents. (A.R. 297-300).

For the reasons set forth herein, the Court should hold that in the State of West Virginia, a defaulted party who has secured the right to a trial by jury is entitled to have a jury decide the issue of damages, and remand the present case for proceedings consistent with this holding.

II. THE CIRCUIT COURT ERRED IN FINDING THAT ALL FOUR NAMED DEFENDANTS WERE PROPERLY SERVED WITH THE COMPLAINT AND SUMMONS INDIVIDUALLY OR THROUGH AN AUTHORIZED AGENT.

The circuit court made the following findings of fact in its Final Judgment Order issued on March 22, 2011:

- a. "All four (4) Defendants were properly served with the Complaint and Summons individually or presumably through an authorized agent, Victoria Drumheller as confirmed by the Returns of Service."
- b. "Victoria Drumheller, *pro se*, filed an Answer on behalf of all four (4) Defendants."

- c. "...default judgment is proper against all Defendants as Victoria Drumheller is an authorized agent for all three (3) corporate defendants."
- d. "Victoria Drumheller is an agent of all three (3) corporate Defendants..."

(A.R. 297-300).

Two of the named defendants, "Lindal Cedar Homes" and "D. F. Briarpatch, LLC" are non-existent entities, or are misnamed by the respondents. The third corporate entity, Engineering Construction Support, Inc., was not served in accordance with its filings with the West Virginia Secretary of State.

Respondents named "Lindal Cedar Homes" as a Defendant in the circuit court action. (A.R. 1-5). "Lindal Cedar Homes" does not appear in the business database of the West Virginia Secretary of State as an entity registered to do business in the State of West Virginia. The only similarly named entity found in that database is "Lindal Cedar Homes, Inc.," a Seattle, Washington corporation which is not registered to do business, but filed an application for name reservation in West Virginia in 2005. (Supp.A.R. 10) Petitioner Drumheller, through another corporation, Cedar Images, Inc., is a distributor for the Seattle, Washington Corporation. (A.R. 45). Even assuming Plaintiff had named "Lindal Cedar Homes, Inc." as a Defendant, Defendant Drumheller, as a distributor, is not an authorized agent for service.

Respondents also named "D. F. Briarpatch, LLC" as a defendant in the circuit court action. (A.R. 1-5). "D. F. Briarpatch, LLC" does not appear in the business database of the West Virginia Secretary of State as an entity registered to do business in the State of West Virginia. Petitioner Drumheller is the designated agent to receive service for a similarly named limited

liability company, DF Briarpatch, L.L.C. (Supp.A.R. 6). If respondents intended to name DF Briarpatch, L.L.C. as a defendant, they failed to correctly name the company and did not at any time attempt to correct the name.

The West Virginia Rules of Civil Procedure provide a means to correct a misnomer, if in fact respondents' complaint against "Lindal Cedar Homes" was a misnomer. Rule 15(c) states, "(c) Relation back of amendments. — An amendment of a pleading relates back to the date of the original pleading when: ... (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against the party."

Respondents named "Engineering Construction Support, Inc." as a defendant in this matter. (A.R. 1-5). From the time Engineering Construction Support, Inc. registered with the State of West Virginia as a foreign corporation in 2004, it has identified a person other than Petitioner Drumheller as the person designated to receive service. (A.R. 47). Defendant Drumheller is a former officer of this corporation, but had not been listed as an officer in the corporation's annual reports since May 2008, before respondents filed their initial complaint in this matter.

Since it is not possible to serve an entity that does not exist, and because the respondents had means and opportunity to correct any misnomer in the original complaint but failed to do so, the Court must find that the (non) entities, "Lindal Cedar Homes" and "D. F. Briarpatch, LLC"

were not properly before the circuit court and reverse that court's Final Judgment Order and damages award against those (non) entities, and remand with instructions to dismiss the complaint against "Lindal Cedar Homes" and "D. F. Briarpatch, LLC."

Because the copies of the summons and complaint against Engineering Construction Support, Inc., were served on an individual other than the person designated to receive service in filings maintained by the West Virginia Secretary of State, the Court must find that Engineering Construction Support, Inc. was not properly before the circuit court and reverse that court's Final Judgment Order and damages award against that petitioner, and remand with instructions to dismiss the complaint against Engineering Construction Support, Inc.

III. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER VICTORIA DRUMHELLER IS AN AGENT OF ALL THREE (3) CORPORATE DEFENDANTS.

For the reasons set forth in section II, *supra*, petitioner Drumheller is not an agent of the corporate defendants/petitioners. If the Court should find that respondents did in fact mean to name Lindal Cedar Homes, Inc. in their complaint and that naming "Lindal Cedar Homes" is sufficient, service was still not proper on petitioner Drumheller.

The circuit court found that petitioner Drumheller was an agent of "Lindal Cedar Homes" because she is an authorized distributor. A distributor and an agent are not the same. An agent represents a principal and has authority to act on the principal's behalf. A distributor sells a manufacturer's product. The law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person; and the burden of proving an agency rests upon him who alleges the existence of the agency. *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141, 152 W.Va. 723, (1969).

Respondents offered no evidence that petitioner Drumheller acted as an agent of Lindal Cedar Homes, Inc., only that she is a distributor of that corporation's products through another company, Cedar Images, Inc. (A.R. 45)

IV. THE CIRCUIT COURT ERRED IN FINDING THAT DEFAULT JUDGMENT WAS PROPER AGAINST ALL DEFENDANTS

On October 16, 2009, the circuit court entered an Order granting plaintiffs' motion for default judgment against the four named defendants, who are the petitioners in this appeal. The circuit court noted that the defendants did not appear for a pre-trial conference scheduled for September 16, 2009, and failed to respond to previous written discovery requests. (A.R. 43) Petitioner Victoria Drumheller filed a motion to vacate the default judgment against all named defendants. (A.R. 7). The circuit court found, in its March 22, 2011, Final Judgment Order that default judgment was proper against all defendants. (A.R. 297-300).

Petitioners' reiterate that not all of the four named defendants were properly served in the underlying action. For the reasons discussed in detail *supra*, two of the named "corporate" defendants do not exist and service on the third "corporate" defendant was not made on the proper person.

In addition, in the March 22, 2011 Final Judgment Order, the circuit court stated, "[f]urther her reasons for not attending the pre-trial conference are not excusable. Accordingly, the default judgment against Defendant Drumheller should be and hereby is confirmed." (A.R. 299). The circuit court failed to elaborate and provide sufficient reasoning for its determination that Petitioner Drumheller's reasons for not attending the pre-trial conference are not excusable.

Petitioners do not deny that the circuit court has authority to order a default judgment. A default judgment is a sanction that may be imposed against a party for his or her failure to

comply with certain procedural requirements associated with a lawsuit. See 11A Michie's Jurisprudence Judgments and Decrees § 186, at 281 (explaining that a default judgment is based "upon an omission to take a necessary step in [an] action within the proper time." *Stillwell v. City of Wheeling*, 210 W.Va. 599, 558 S.E.2d 598 (2001). Default judgments, however, are not favored in the law. The law strongly favors an opportunity to a defendant to make defense to an action against him. *Stillwell*, 210 W.Va. at 606, *Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 376 175 S.E.2d 452, 456 (1970), *Plumley v. May*, 140 W.Va. 889, 893 87 S.E.2d 282, 285 (1955). Rendering default judgment against a party for failure to provide discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just. *Bell v. Inland Mutual Insurance Co.*, 175 W.Va. 165, 332 S.E.2d 127, (1985) cert. denied sub nom.

The party seeking sanctions under W. Va. R. Civ. P. 37(b) has the burden of establishing noncompliance with the circuit court's order to provide discovery. Once established the burden is upon the party not providing discovery to avoid sanctions, such as a default judgment, by showing that the inability to comply or special circumstances render the particular sanctions unjust. *Bell*, syl. pt. 3. Petitioner Drumheller filed a motion to vacate the default judgment (A.R. 7) and included an affidavit explaining her reason for not attending the pre-trial conference. (A.R. 18-21). Around the time of the pre-trial conference, Petitioner Drumheller was involved in two different and unrelated legal actions, one involving property she owned and another involving the custody of her grandchild. These distractions led to her miss the pre-trial conference. (A.R. 21).

Rule 60 of the West Virginia Rules of Civil Procedure permit a circuit court to provide relief from judgment for mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. W. Va. R. Civ. P. 60(b). The United States Supreme Court has defined excusable neglect in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). "Neglect" means "to give little attention or respect to a matter... 'to leave undone or unattended to es[pecially] through carelessness'" *Id.* at 388. "The word therefore encompasses both simple, faultless, omissions to act, and more commonly, omissions caused by carelessness." *Id.* Making the determination that neglect is excusable "is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission." *Id.* at 395. Factors that a court should consider include: "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* Although excusable neglect is an elastic concept, it does not usually constitute inadvertence, ignorance of the rules, or mistakes construing the rules. *Id.* at 392.

The circuit court in deeming Petitioner Drumheller's reasons for not attending the pre-trial conference "not excusable," failed to provide analysis of its application of the *Pioneer* factors to Petitioner Drumheller's reasons. Since default judgments are disfavored in the law and because the circuit court failed to fully consider Petitioner's reasons for failing to attend the pre-trial conference, the default judgment must be vacated.

V. THE DAMAGE AWARD TO RESPONDENTS OF \$49,400 IS NOT SUPPORTED BY THE EVIDENCE.

The circuit court heard testimony and reviewed evidence submitted by respondents at the January 5, 2010, damages hearing. After which, the circuit court issued findings of fact and

conclusions of law in a Final Judgment Order. (A.R. 297-300). Findings of fact, whether based on oral or documentary evidence, are not to be set aside unless clearly erroneous, and due regard is to be given to the opportunity of the trial court to judge the credibility of the witnesses. Wv. R. Civ. P. 52(a).

This is a case in which the circuit court's findings of fact are clearly erroneous. At the damages hearing, respondents entered two sets of documents into evidence purported to be the unpaid invoices that brought rise to their complaint against the four petitioners. Respondents' Exhibit A (A.R. 214-250) includes various documents including the agreement between Respondent James Fillinger and Petitioner Victoria Drumheller, several invoices addressed to Petitioner Drumheller, and various receipts from the Jefferson County Solid Waste Authority, the Home Depot, and others. None of the agreements or invoices include the names of any of the three corporate defendants. Further, none of the testimony established that any agreement was ever made between the respondents and the three corporate defendants.

Respondent Diane Fillinger testified that the invoices contained in Respondents' Exhibit A, did not conform to the terms of the agreement between Respondent James Fillinger and Petitioner Drumheller. Respondent Diane Fillinger "refigured them" for purposes of the damages hearing. (A.R. 79). Those refigured invoices were included in Respondents' Exhibit C. (A.R. 80). The refigured invoices introduced for the purpose of proving the amount owed by petitioners, were never sent to any of the petitioners (A.R. 80).

In its Final Judgment Order, the circuit court notes that respondents' record keeping was poor. (A.R. 299) and at the close of the damages hearing, the court noted its "need to look more closely at this somewhat messy bunch of invoices." (A.R. 213). The circuit court awarded damages in the amount of \$45,000. It further stated, "[t]his amount, plus a ten percent (10%)

late fee according to the contract, or \$4,500, confirms a total damages amount of \$49,400.00.” (A.R. 300).

In addition to the obvious miscalculation in adding the base award amount to the late fee amount to reach a total damages amount of \$49,400.00, the circuit court failed to explain how it calculated \$45,000 to be the appropriate measure of damages, and failed to explain how damages were appropriate against the defendants whose names did not appear on any of the agreements or invoices.

The Court should find that the circuit court’s damage award was clearly erroneous and remand for proper proceedings.

CONCLUSION

This matter should be reversed in part and remanded to the circuit court for several reasons. On the matter of first impression before the Court, the Court should find that in West Virginia, consistent with other jurisdictions, a defaulted litigant who has preserved her right to a trial by jury is entitled to have the issue of damages heard by a jury.

The Court should (1) reverse the circuit court’s Order as to the three corporate defendants for lack of service and insufficient evidence, (2) find that the circuit court erred in holding a non-jury hearing on damages and (3) remand with instructions to the circuit court to vacate the default judgment against all defendants, dismiss the complaint as to the corporate defendants, and convene appropriate proceedings before a jury.

Signed: 
Brett Offutt (WV Bar# 11271)
Counsel of Record for Petitioners

CERTIFICATE OF SERVICE

I certify that on the 15th day of July, 2011, I served the foregoing Petitioner's Brief upon the Plaintiffs, James Fillinger and Diane Fillinger, dba Fillinger's Contracting, through counsel of record, Christopher P. Stroeck, Esquire, by mailing a true copy thereof with the United States Postal Service addressed as follows:

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