

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**SEP 21 2011**

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

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**Reply Brief**

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*Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)

*County Com'n of Wood County v. Hanson*, 187 W.Va. 61, 415 S.E.2d 607 (1992)

*Coury v. Tsapis*, 172 W.Va. 103, 304 S.E.2d 7 (1983)

*Farley v. Economy Garage*, 170 W.Va. 425, 294 S.E.2d 279 (1982)

*Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E.2d 786 (1998)

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

*Johnson v. Huntington Moving and Storage, Inc.*, 160 W.Va. 796, 239 S.E.2d 128 (1977)

*State Harper Adams v. Murray*, \_\_\_ W.Va. \_\_\_, 680 S.E.2d 101 (2009)

### STATUTES

West Virginia Rules of Civil Procedure:

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)

West Virginia Revised Rules of Appellate Procedure:

W. Va. Rev. R. App. P. 10(d)

## ARGUMENT

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

In their Brief, Respondents claim that Petitioners are wrong in asserting that 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 have a jury decide the issue of damages. Respondents failed to cite any cases, however, in support of their claim. Respondents cited two cases and Rule 55(b)(2) of the West Virginia Rules of Civil Procedure in support of their argument that the Circuit Court did not err in denying Petitioners a hearing before a jury on the matter of damages. Neither *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va 69, 501 S.E.2d 786 (1998), nor *Coury v. Tsapis*, 172 W.Va. 103, 304 S.E. 7 (1983), address jury hearings on the issue of damages.

The issue in *Farm Family* was whether damages were a “sum certain” and in turn, whether the Circuit Court should have held an evidentiary hearing to determine damages due to the Appellee. The appellant, Farmer Boy AG, Inc., after being served with a complaint and summons, failed to answer or otherwise plead or appear. Appellee, Farm Family Mutual, filed a motion for default judgment on all issues. The Circuit Court, without holding an evidentiary hearing on the issue of damages, entered an order granting a default judgment in the amount Appellee claimed it was owed.

In *Farm Family*, this Court distinguished between a “default” and a “default judgment” under Rule 55, stating, “a default relates to the issue of liability and a default judgment occurs after damages have been ascertained. *Farm Family*, 202 W.Va. at 73, 501 S.E.2 at 790., citing *Coury*, 172 W.Va. at 106, 304 S.E.2d at 10. A default under Rule 55(b)(2) “applies to cases

where the amount sued for is not a sum certain. In this situation, after a default is entered, a further hearing is required in order to ascertain the damages. *Farm Family*, 202 W.Va. at 73. 501 S.E.2 at 790 citing *Coury*, 172 W.Va. at 105, 304 S.E.2d at 9. Regarding the obligation of the Circuit Court, this Court previously held, “[w]here a default judgment has been obtained under Rule 55(b)(2) of the West Virginia Rules of Civil Procedure, a trial court is required to hold a hearing in order to ascertain the amount of damages if the plaintiff’s claim involves unliquidated damages. *Farm Family*, 202 W.Va. at 73. 501 S.E.2d at 790, citing *Farley v. Economy Garage*, 170 W.Va. 425, 294 S.E.2d 279 (1982).

If damages sought by the party moving for a default judgment are for a sum certain, no evidentiary hearing is necessary and the Circuit Court may enter a default judgment on all issues in the case. *Farm Family*, 202 W.Va. at 73, 501 S.E.2d at 790. This court has held that Rule 55(b)(1) of the West Virginia Rules of Civil Procedure relates to cases where the amount sued for is a sum certain or which can be rendered certain by computation. Upon a default in this category of cases, the court can enter a judgment not only as to liability but also to the amount due. Syllabus Point 1, *Couri v. Tsapis*, 172 W.Va. 103, 304 S.E.2d 7.

In the current matter, damages were not sum certain. Respondents did not specify an amount in which they were allegedly damaged. In fact, Respondents stated in their complaint that they were damaged “in an amount to be determined at trial.” A.R. 2-4. Respondents are correct in arguing that Rule 55(b)(2) applies. “If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary.” W.Va. Rule Civ. Proc. 55.

Respondents claim that Rule 55 does not guarantee the defaulting party a right to a damages hearing by jury. Rule 55, in fact, does not expressly address jury hearings. Rule 55 does not exist in a vacuum and must be read in context with other rules. When a trial court conducts “such hearings...as it deems necessary,” it cannot ignore Rules 38 and 39. Rule 38(a) states 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).

Respondents claim that “prevailing rules” on default judgments confirm that a defaulting party is not entitled to a jury hearing, yet do not offer support for this statement other than the two cases previously cited. Those cases confirm only that Rule 55 requires a hearing be held when damages are not a sum certain. Where the parties have secured their right to a trial by jury on all triable issues and neither party has expressly waived that right, the trial court, in following Rule 55 and “conducting such hearings ... as it deems necessary,” must also follow Rules 38 and 39. If the criteria for holding a jury hearing set forth in Rules 38 and 39 are met, it becomes

“necessary” to hold a jury hearing on the issue of damages if those damages are not a sum certain.

The Circuit Court did err in holding a non-jury hearing on the issue of damages. Rule 55, read in conjunction with Rules 38 and 39, requires that the Circuit Court conduct a jury hearing on the matter of damages if the parties have secured, and not expressly waived, that right.

This 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.**

Respondents’ argument that the Circuit Court did not err in finding that all four named defendants were properly served restates, in part, the findings of fact and conclusions of law contained in the Circuit Court’s Final Judgment Order. A.R. 297-299. Respondents further claim that the documents produced by Defendants support the notion that Plaintiffs joined the proper parties in this action, and cite to pages 45 through 56 of the Appendix Record.

Page 45 of the Appendix Record is a printed page from a website, <https://lindal.com/cedarimages/contactus.cfm>, which promotes Cedar Images, Inc. and Petitioner Drumheller as a “Local Independent Distributor” of Lindal Cedar Homes, Inc. products. The page clearly shows the name of the entity responsible for providing the website information is “Lindal Cedar Homes, Inc.” This page from the Appendix Record does not indicate any relationship between Petitioner Drumheller, Lindal Cedar Homes, Inc. or Cedar Images, Inc. and

the Respondents. Further, the page illustrates Petitioner Drumheller's capacity as a distributor and not an agent of Lindal Cedar Homes, Inc. Respondents did not name Cedar Images, Inc. as a defendant in their complaint.

Respondents advise that Petitioners could have filed motions to dismiss regarding any alleged misnomers. This Court has held that an objection to a misnomer cannot be raised by a motion to dismiss, but rather must be raised by answer or by affidavit. *Johnson v. Huntington Moving and Storage, Inc.*, 160 W.Va. 796, 239 S.E.2d 128 (1977).

Respondents acknowledge that Petitioner Drumheller filed an Answer in this action, stating the Answer was "presumably" on behalf of all defendants. It is in that answer that Respondents would have the corporate entities raise the misnomer defense, yet Respondents also point out that corporations generally may not appear in court *pro se*, but must be represented by counsel.

Since the three "corporate" entities were not properly served with copies of the complaint and summons in this action, and since corporations generally may not appear in court *pro se*, but must be represented by counsel, it is not reasonable to expect the corporate entities to answer or raise objections to misnomers.

Even if the Court finds Petitioners D.F. Briarpatch, LLC and Engineering Construction Support, Inc., had knowledge of the complaint against them, as well as the misnomer in the case of D.F. Briarpatch, LLC, such knowledge cannot be imparted on Lindal Cedar Homes, Inc. Lindal Cedar Homes, Inc. is a Washington corporation with its main offices in Washington. It is not registered to do business in the State of West Virginia. Petitioner Drumheller and Cedar Images, Inc. together are a distributor of Lindal Cedar Homes, Inc. products and not agents of the corporation.

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

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)

Respondents direct the Court to the business listing for Engineering Construction Support, Inc. on the website of the West Virginia Secretary of State to prove agency status for Petitioner Drumheller. Petitioner Drumheller's name is not on that page, however, another name, Ralph R. Fitzwater, is listed with the address for process.

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

If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue. W. Va. Rev. R. App. P. 10(d). In support of their argument that the Circuit Court did not err in finding default judgment was proper against all defendants, Respondents restated seven paragraphs from the Circuit Court's Final Judgment Order.

Rule 60 of the West Virginia Rules of Civil Procedure permits a circuit court to provide relief from judgment for, among other things, excusable neglect. W. Va. R. Civ. P. 60(b). The United States Supreme Court defined excusable neglect and identified factors a court should consider when making a determination that neglect is excusable in its decision in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). Those factors include (1) the

danger of prejudice to the debtor, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.

Respondents' Brief did not address the absence of a *Pioneer* analysis in the Circuit Court's Final Judgment Order. Further, in the opening paragraph of their argument, Respondents cite to *County Com'n of Wood County v. Hanson*, 187 W.Va. 61, 415 S.E.2d 607 (1992). In that case, this Court discussed the four factors it considers in determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion. Those factors are: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.

The Circuit Court's Final Judgment Order likewise provided no analysis of these factors and Respondents failed to address that omission. Orders of circuit courts necessarily must contain requisite findings of fact and conclusions of law in entering default judgment orders so that meaningful and adequate appellate review is possible. *State Harper Adams v. Murray*, \_\_\_ W.Va. \_\_\_, 680 S.E.2d 101 (2009).

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.**

In support of their argument that the damage award to Respondents of \$49,400 was proper, Respondents restate two paragraphs from the Circuit Court's Final Judgment Order.

Respondents do not address the several disconcerting facts underlying this evidence including specifically that (1) Respondents appeared with two sets of invoices at the damages hearing: the second set being the "refigured" set that Respondents claim represent the full amount owed, yet never provided to Petitioners; and (2) none of the invoices, records or other documents entered as evidence in either the original set of invoices or the "refigured" set of invoices include the names of any of the three corporate defendants. Petitioner Drumheller's name is the only name appearing on any of the invoices.

This is a case in which the Circuit Court's findings of fact are clearly erroneous. The Court should remand for proper proceedings.

### **CONCLUSION**

For the reasons set forth in Petitioners' Brief and herein, this matter should be reversed in part and remanded to the Circuit Court. 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 20<sup>th</sup> day of September, 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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