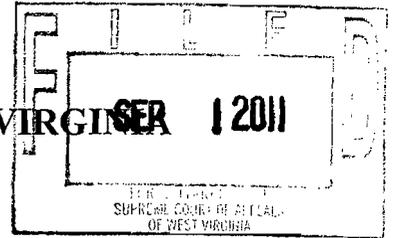


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Docket No. 11-0681



Victoria Drumheller,  
D.F. Briarpatch, LLC,  
Engineering Construction Support, Inc.,  
and Lindal Cedar Homes,

COPY

*Petitioners,*

v.

Appeal from the Circuit Court of  
Jefferson County (08-C-393)  
Judge David H. Sanders

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

*Respondents.*

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**RESPONDENTS' BRIEF**

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### **Summary of Argument**

Petitioner's primary issue on appeal is that she was entitled to a jury trial on damages following a default judgment against her. She asserts that this issue has not yet been addressed by this Court. Petitioner is wrong. This Court, through rule and interpretation, has made it expressly clear that defaulting parties are only entitled to a hearing if their damages are not sum certain.

Petitioner's other issues on appeal relate to the entry of default against her and the other corporate Defendants. The record is clear that Petitioner and the corporate Defendants were properly served, as Petitioner was an agent for all corporate Defendants. The record is further clear that neither Petitioner nor the corporate Defendants participated in the litigation beyond filing an Answer. As they did not appear and defend as required by the Circuit Court, default judgment was proper.

### **Statement of the Case and Relevant Facts**

On October 2, 2008, Plaintiffs (Respondents herein) filed a Complaint against four (4) named Defendants (Petitioners herein). AR 1. The Complaint generally alleged that the Defendants owed Plaintiffs certain compensation for various services performed, including but not limited to hauling and cleaning services. AR 2-5. All four (4) Defendants were properly served with the Complaint and Summons through their authorized agent, Victoria Drumheller as confirmed by the Returns of Service. AR 28-35.

Thereafter, Victoria Drumheller, *pro se*, filed an Answer on behalf of all four (4) Defendants. AR 37-41. It is important to note that a corporation generally may not appear in court *pro se*, but must be represented by counsel. 19 C.J.S. Corporations § 796 (2010).

On October 19, 2009, upon the failure of any Defendant to participate in discovery and the failure of any Defendant to appear at the pre-trial conference, this Court granted default judgment against all Defendants, jointly and severally. AR 43.

Thereafter, a motion to vacate the default judgment against the corporate Defendants was filed only by Defendant Drumheller. *See* AR 7. Michael E. Snyder, Esq., appeared in the underling matter only on behalf of Defendant Drumheller. Accordingly, as the corporate Defendants were unrepresented at this time and *pro se*, the default judgment was confirmed. Mr. Snyder and Defendant Drumheller did not have the representative capacity to vacate the default judgment for the corporate Defendants. AR 7.

Nevertheless, default judgment is proper against all corporate Defendants as Victoria Drumheller is agent for all three (3) corporate Defendants. AR 45-56.

Pursuant to Rule 4 of the West Virginia Rules of Civil Procedure, service is effective upon any domestic corporation by delivering a copy of the complaint and summons “to an officer, director, or trustee thereof; or, if no such officer, director, or trustee be found, by delivering a copy thereof to any agent of the corporation...” W.Va. R. Civ. P. 4(d)(5)(A).

Pursuant to Rule 4 of the West Virginia Rules of Civil Procedure, service is effective upon any foreign corporation qualified to do business by delivering a copy of the complaint and summons in accordance with Rule 4(d)(5) or, if not qualified to do business, by delivering a copy of the complaint and summons “to any officer, director, trustee or agent of such corporation...” W.Va. R. Civ. P. 4(d)(7) & (8).

Victoria Drumheller is an agent of all three (3) corporate Defendants. Regarding Defendant Lindal Ceder Homes, Victoria Drumheller is an authorized distributor. *See* AR 45. Regarding Defendant Engineering Construction Support, Inc., Victoria Drumheller’s personal

address (P.O. Box 40, Harpers Ferry, WV, 25425) is listed as the local business address for the company. AR 45-47. Additionally, Victoria Drumheller signed checks, as an agent for Defendant Engineering Construction Support, Inc., for work performed by Plaintiffs. AR 49-56. Regarding Defendant D. F. Briarpatch, LLC, Victoria Drumheller signed checks as an agent for the company. AR 49-56.

Accordingly, as an authorized agent for all three (3) corporate Defendants, service on all Defendants was proper. The corporate Defendants did not properly respond to the Complaint or discovery requests; therefore, default judgment was proper against these Defendants. AR 43.

Plaintiffs propounded written discovery requests upon Defendant Drumheller on or around April 6, 2009. Defendant Drumheller did not respond. Plaintiffs further requested the deposition of Defendant Drumheller by letter dated August 25, 2009. Defendant Drumheller did not respond. On September 16, 2009, Defendant Drumheller failed to appear for the pre-trial conference in this matter. AR 43.

The proper address for Defendant Drumheller was and remains P.O. Box 40, Harpers Ferry, WV, 25425. Defendant Drumheller has not alleged that she did not receive copies of the discovery requests and letters from counsel. Further, her reasons for not attending the pre-trial conference are not excusable. Accordingly, the default judgment against Defendant Drumheller should be confirmed. AR 43.

A hearing on damages was held where Defendants were permitted to cross-examine witnesses and present mitigating evidence. Based upon the evidence adduced at the damages hearing, the Circuit Court recognized Plaintiffs have been damaged in the total principal amount of at least \$60,871.60, plus a ten percent (10%) late fee according to the contract, for total damages of \$66,958.76. AR 299; 61-296.

However, Plaintiffs conceded that some of the charges for work performed did not comply with the applicable contract, and therefore recalculated their principal damages. During cross-examination, it became clear that the record-keeping of Plaintiffs was poor and that some of the work had been unsatisfactorily performed. Therefore, the Circuit Court was not persuaded to award damages in the full amount. The Circuit Court believed Plaintiffs were entitled to damages in the amount of \$45,000.00. This amount, plus a ten percent (10%) late fee according to the contract, or \$4,500.00, confirms a total damages amount of \$49,500.00.<sup>1</sup> AR 300; 61-296.

### **Statement Regarding Oral Argument**

Respondents agree that the briefs and record adequately represent the positions of the parties; therefore, oral argument is not requested unless otherwise deemed necessary by the Court.

### **Argument**

“Motion to vacate default judgment is addressed to sound discretion of court and court’s ruling on such motion will not be disturbed on appeal unless there is showing of abuse of such discretion.” W.Va. Rule Civ. Proc. 55(c) (2011); *County Com’n of Wood County v. Hanson*, 187 W.Va. 61, 415 S.E.2d 607, 1992.

#### **I. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS A HEARING BEFORE A JURY ON THE MATTER OF DAMAGES.**

Petitioner asserts that this Court 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. Petitioner is wrong.

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<sup>1</sup> The Court awarded damages in the total amount of \$49,400.00, yet identified principal damages in the amount of \$45,000.00 plus a ten percent (10%) late fee of \$4,500.00. Counsel believes the Court erred in its calculation and that the total award should have been \$49,500.00.

Pursuant to Rule 55(b)(2) of the West Virginia Rules of Civil Procedure, "...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 (emphasis added).

This Rule does not guarantee the defaulting party a right to a damages hearing by jury; it expressly states that the *court* may conduct hearings as necessary.

Moreover, this Court has confirmed this rule by interpretation – that the defaulting party is entitled to a hearing, and not a jury trial, on the issues of damages. "Where a default has been obtained, 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 Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E.2d 786 (1998). *See also Coury v. Tsapis*, 172 W.Va. 103, 304 S.E.2d 7 (1983). Further, *Farm Family* expressly specifies that the defaulting party is entitled to cross-examine witnesses and present mitigating evidence. *Id.* However, *Farm Family* does not indicate that the defaulting party is entitled to a jury trial on the damages issue. *Id.*

Indeed, the prevailing rules regarding default judgments and their interpretation confirm that a defaulting party is not entitled to a jury trial on the damages issue. Accordingly, the Circuit Court did not err in this matter.

**II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT ALL FOUR NAMED DEFENDANTS WERE PROPERLY SERVED WITH THE COMPLAINT AND SUMMONS INDIVIDUALLY OR THROUGH AN AUTHORIZED AGENT.**

The Circuit Court did not err in finding that all four named Defendants were properly served with the complaint and summons individually or through an authorized agent.

All four (4) Defendants were properly served with the Complaint and Summons

through their authorized agent, Victoria Drumheller as confirmed by the Returns of Service. AR 28-35.

Pursuant to Rule 4 of the West Virginia Rules of Civil Procedure, service is effective upon any domestic corporation by delivering a copy of the complaint and summons “to an officer, director, or trustee thereof; or, if no such officer, director, or trustee be found, by delivering a copy thereof to *any agent of the corporation...*” W.Va. R. Civ. P. 4(d)(5)(A) (emphasis added).

Pursuant to Rule 4 of the West Virginia Rules of Civil Procedure, service is effective upon any foreign corporation qualified to do business by delivering a copy of the complaint and summons in accordance *with Rule 4(d)(5)* or, if not qualified to do business, by delivering a copy of the complaint and summons “*to any officer, director, trustee or agent of such corporation...*” W.Va. R. Civ. P. 4(d)(7) & (8) (emphasis added).

Victoria Drumheller is an agent of all three (3) corporate Defendants. Regarding Defendant Lindal Ceder Homes, Victoria Drumheller is an authorized distributor. *See* AR 45. Regarding Defendant Engineering Construction Support, Inc., Victoria Drumheller’s personal address (P.O. Box 40, Harpers Ferry, WV, 25425) is listed as the local business address for the company. *See* AR 45-47. Additionally, Victoria Drumheller signed checks, as an agent for Defendant Engineering Construction Support, Inc., for work performed by Plaintiffs. *See* AR 49-56. Regarding Defendant D. F. Briarpatch, LLC, Victoria Drumheller signed checks as an agent for the company. *See* AR 49-56.

Accordingly, as an authorized agent for all three (3) corporate Defendants, service on said Defendants was proper.

Based on the documents produced by the Defendants, Plaintiffs joined the proper parties to this civil action. AR 45-56. As Defendant Drumheller was an authorized agent for the corporate Defendants, these entities had proper notice of the civil action against them. In turn, each could have filed motions to dismiss regarding any alleged misnomers. They did not. Instead, Defendant Drumheller filed an Answer, presumably on behalf of all Defendants as their agent, denying the allegations but not raising a defense regarding the alleged misnomers. Unfortunately, filing an Answer was the only action taken by Drumheller and the other corporate Defendants. Therefore, default judgment was proper as all Defendants had been served, failed to raise proper defenses or objections and simply did not respond.

**III. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT PETITIONER VICTORIA DRUMHELLER IS AN AGENT OF ALL THREE (3) CORPORATE DEFENDANTS.**

For the reasons set forth Section II, supra, Petitioner Drumheller is an agent of all three corporate Defendants.

**IV. THE CIRCUIT COURT DID NOT ERR IN FINDING DEFAULT JUDGMENT WAS PROPER AGAINST ALL DEFENDANTS.**

The Circuit Court did not err in finding that default judgment was proper against all Defendants.

Plaintiffs propounded written discovery requests upon Defendant Drumheller on or around April 6, 2009. Defendant Drumheller did not respond. Plaintiffs further requested the deposition of Defendant Drumheller by letter dated August 25, 2009. Defendant Drumheller did not respond. On September 16, 2009, Defendant Drumheller failed to appear for the pre-trial conference in this matter. AR 43.

The proper address for Defendant Drumheller was and remains P.O. Box 40, Harpers Ferry, WV, 25425. Defendant Drumheller has not alleged that she did not receive copies of the

discovery requests and letters from counsel. Further, her reasons for not attending the pre-trial conference are not excusable. Accordingly, the default judgment against Defendant Drumheller should be confirmed. AR 43.

As set forth above herein, all three corporate Defendants were properly served with the Complaint and Summons through their authorized agent, Victoria Drumheller as confirmed by the Returns of Service. AR 28-35.

Victoria Drumheller, *pro se*, filed an Answer on behalf of all four (4) Defendants. AR 37-41. A corporation generally may not appear in court *pro se*, but must be represented by counsel. 19 C.J.S. Corporations § 796 (2010).

On October 19, 2009, upon the failure of any Defendant to participate in discovery and the failure of any Defendant to appear at the pre-trial conference, this Court granted default judgment against all Defendants, jointly and severally. AR 43.

The motion to vacate the default judgment against the corporate Defendants was filed only by Defendant Drumheller. *See* AR 7. Michael E. Snyder, Esq., has only appeared in this matter on behalf of Defendant Drumheller. Accordingly, as the corporate Defendants remain unrepresented by legal counsel at this time and *pro se*, the default judgment must be confirmed. Mr. Snyder and Defendant Drumheller do not have the representative capacity to vacate the default judgment for the corporate Defendants. AR 7.

Accordingly, default judgment was proper against all Defendants.

**V. THE DAMAGE AWARD TO RESPONDENTS OF \$49,400.00 WAS PROPER.**

The damage award to Respondents of \$49,400.00 was proper and supported by the evidence presented to the Circuit Court.

Based upon the evidenced adduced at the damages hearing, Plaintiffs were damaged in the total principal amount of at least \$60,871.60, plus a ten percent (10%) late fee according to the contract, for total damages of \$66,958.76. AR 299; 61-296.

However, the Court did take into consideration issues with Plaintiffs' record-keeping and accordingly reduced the damages. Plaintiffs conceded that some of the charges for work performed did not comply with the applicable contract, and therefore recalculated their principal damages. During cross-examination, it became clear that the record-keeping of Plaintiffs was poor and that some of the work had been unsatisfactorily performed. Therefore, the Circuit Court was not persuaded to award damages in the full amount. The Circuit Court believed Plaintiffs were entitled to damages in the amount of \$45,000.00. This amount, plus a ten percent (10%) late fee according to the contract, or \$4,500.00, confirms a total damages amount of \$49,500.00. AR 300; 61-296.

### **Conclusion and Request for Relief**

For the reasons set forth herein, Respondents request that this Court affirm the Final Judgment Order of the Circuit Court.



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**RESPONDENTS**  
**By Counsel**

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*Respondents.*

**CERTIFICATE OF SERVICE**

I, Christopher P. Stroech, Esq., counsel for Respondents, do hereby certify that I have served a true copy of the foregoing RESPONDENTS' BRIEF upon the following counsel via regular mail this 30<sup>th</sup> day of August, 2011:

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\_\_\_\_\_  
Christopher P. Stroech, Esq.