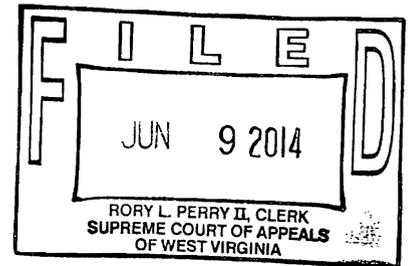


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0215



**LEXON INSURANCE COMPANY,
Defendant Below, Petitioner**

v.

**COUNTY COUNCIL OF BERKELEY COUNTY, WEST VIRGINIA,
and BERKELEY COUNTY PLANNING COMMISSION
Plaintiffs Below, Respondents**

Hon. Gray Silver, III, Judge
Circuit Court of Berkeley County
Civil Action No. 11-C-973

BRIEF OF PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The circuit court erred in ruling that petitioner's motion to set aside the nearly \$3.5 million default judgment was untimely under the circumstances of this case.

2. The circuit court erred in failing to set aside a nearly \$3.5 million default judgment under R. Civ. P. 60(b)(1) where (1) respondents did not suffer significant prejudice from petitioner's delay in answering their complaint; (2) there are material issues of fact and meritorious defenses present; (3) a default judgment of nearly \$3.5 million is significant; and (4) petitioner was not intransigent, but continued to actively engage in settlement negotiations with respondents.

3. The circuit court erred in failing to set aside the default judgment under R. Civ. P. 60(b)(1) where there was no notice of hearing nor was a hearing conducted on damages despite the petitioner's right to elect a method of curing the default of its principal and, accordingly, the amount of the respondents' damages were unliquidated.

4. The circuit court erred in failing to set aside the default judgment under R. Civ. P. 60(b)(4) where respondents did not serve their summons and complaint on petitioner through the Secretary of State; through its registered agent; or through an officer, director, trustee, or authorized agent of petitioner, but simply mailed the summons and complaint to petitioner's director of construction, where its receipt was acknowledged by a receptionist.

II. STATEMENT OF CASE

Petitioner, Lexon Insurance Company ["Lexon"], appeals from a default judgment of nearly \$3.5 million awarded to respondents, the County Council of Berkeley County and Berkeley County Planning Commission ["County"], despite the fact that Lexon had

acknowledged the suit; had reached an agreement with the County extending the time for answering the suit; had engaged in good faith settlement negotiations with the County prior to entry of default judgment; and had not been served with the County's summons and complaint through either the Secretary of State, as its statutory agent for service of process, or its designated agent for service of process.

This case involves Lexon's alleged liability to the County under two subdivision performance bonds, totaling \$3,438,565.20, issued to DLM, LLC ["DLM"]. App. 574. DLM obtained the performance bonds as part of the process of securing the County's approval of a proposed 255-unit subdivision known as Chandler's Glen. App. 574.

On November 17, 2010, over four years after the County approved the final plat submitted by DLM and after both performance bonds had issued – one for \$1,050,000.00 related to completion of the necessary site improvements and infrastructure and one for \$2,388,565.20 related to completion of the infrastructure – the County learned that DLM had filed for bankruptcy protection. App. 574-575.

On December 9, 2010, the County made a demand on Lexon under the first bond of \$1,050,000.00, and on January 25, 2011, the County made a demand on Lexon under the second bond of \$2,388,565.20. App. 575. By letter to the County dated February 24, 2011, Lexon acknowledged receipt of the County's demands and negotiations between the parties ensued. Id.

The County met with Chris Parrish [Mr. Parrish], Lexon's Director of Construction, in April of 2011. Id. Later in the summer of 2011, the County met with Mr. Parrish and Bruce Maas, Counsel for Lexon. Id. The purposes of those meetings were to discuss a potential settlement of the County's claims under the two bonds. Id.

Indeed, the County formally considered but rejected Lexon’s offer to complete the portions of Chandler’s Glen that contained purchased lots in late 2011. *Id.* Instead, by letter dated October 6, 2011, the County counter-offered with a proposal that Lexon either pay the entire proceeds of the two bonds or “complete the project according to the required plans.” *Id.* Importantly, however, the County acknowledged in this counterproposal that all of the proceeds of the two bonds might not be “necessary to the full completion of the project,” *id.*, thereby implicitly conceding that the demand in question was unliquidated and, therefore, notice and a hearing on the motion for default judgment was required.¹

When the parties were unable to come to terms, the County filed suit on November 17, 2011. *App.* 576. Significantly, however, the County’s suit did not seek damages, but prayed only for the following relief:

WHEREFORE, Plaintiffs request this Honorable Court to require specific performance of the Surety’s obligations according to the terms of the subject bonds; that, the Court, in addition, require Defendants to reimburse Plaintiffs their costs and expenses in prosecution of this matter; and, for such other relief as the Court deems appropriate and proper.

App. 10.

Instead of properly serving Lexon through the Secretary of State, however, the County simply had the Circuit Clerk mail a copy of its summons and complaint to Lexon’s office in Woodridge, Illinois, where Linda Martinez, a Lexon receptionist, signed a receipt on November 28, 2011. *App.* 576.

¹ The County’s counsel acknowledged Lexon’s efforts to resolve the matter in this same letter, stating that, “Chris Parrish and Bruce Maas have communicated and met with us in an effort to resolve this matter over the period of the last several months **We very much appreciate their efforts.**” *App.* 13 (Emphasis supplied).

On December 15, 2011, Lexon promptly responded to its receipt of the County's complaint with an email confirming the County's agreement to an "indefinite extension of time to respond to the complaint" with the understanding that the County would "give 15 days' notice of this consent is withdrawn." *Id.*

Thereafter, the parties continued to engage in settlement negotiations, but on April 20, 2012, the County sent an email to Lexon's counsel, Bruce Maas, stating that, "We have decided to go forward and press the litigation" and that it would "appreciate your answer at your earliest convenience." *Id.* Later, by letter dated May 9, 2012, the County reiterated its intention to "move forward and prosecute the civil action against your client." *App.* 577.

On June 14, 2012, the County filed a motion for default judgment, serving its motion not on Lexon, but "upon all counsel of record, including 'Bruce L. Maas, Esq., Harris Beach PLLC, 99 Garnsey Road, Pittsford, New York 14534, Counsel for Lexon Insurance Company.'" *Id.* Apparently, as far as the County was concerned, Mr. Maas was representing Lexon in the litigation it had instituted.²

A mere twenty-two days later, with no notice or hearing, the Court entered not a default, but a default judgment, exceeding the prayer in the complaint as follows:

39. The Complaint demands specific performance of Defendant Lexon's obligation as surety pursuant to the terms of Bond Nos. 1014370 and 1017007.

34. The Plaintiffs demand payment of the full sum guarantied [sic] by Bond Nos. 1014370 and 1017007, plus post-judgment interest:

² Indeed, one need look no further than the County's own complaint, where no fewer than nine of its paragraphs are devoted to the negotiations and communications between the County and its counsel and Lexon and its counsel. *App.* 9-10.

a.	Guaranteed Sum Pursuant to Bond No. 1014370	\$1,050,000.00
b.	Guaranteed Sum Pursuant to Bond No. 1017007	<u>\$2,388,565.20</u>
	TOTAL	\$3,438,565.20

RULING

35. Because Defendant Lexon is otherwise competent to appear and defend but has failed to do so as required under the West Virginia Rules of Civil Procedure, and because the amount sought by the Plaintiffs is a sum certain and all interest, fees, and costs are reasonably susceptible to calculation, it is appropriate for the Clerk to enter Defendant Lexon's default and enter judgment by default in favor of the Plaintiffs for the relief requested herein pursuant to Rule 55 of the West Virginia Rules of Civil Procedure.

IT IS ACCORDINGLY ORDERED that the Plaintiffs' Motion for Default Judgment against the Defendant, LEXON INSURANCE COMPANY, shall be, and hereby is, GRANTED. IT IS FURTHER ORDERED that the Clerk of Court shall default against the Defendant, LEXON INSURANCE COMPANY, and enter judgment by default in favor of the Plaintiffs and against Defendant LEXON INSURANCE COMPANY for the amount of \$3,438,565.20, plus additional post-judgment interest at the daily periodic rate and the Plaintiffs' court costs and any additional costs which Plaintiffs may incur in obtaining satisfaction of the relief granted herein.

* The Clerk shall mail attested copies of this Order to:

. . . Bruce L. Maas, Esq., 99 Garnsey Road, Pittsford, New York
14534

App. 62-63.³

³ In the circuit court's defense, the likely reason that it improperly exceeded the scope of the County's complaint in awarding a monetary judgment against Lexon is that the County's motion for default judgment exceeded the scope of its complaint. App. 54. Nevertheless, it is clear that entering default judgment awarding relief exceeding that pleaded in the complaint is reversible error.

On June 21, 2012, after his receipt of the County's motion for default judgment, Mr. Maas emailed the County's counsel indicating that another settlement offer would be forthcoming. App. 578. On July 6, 2012, before Mr. Maas had received the default judgment, he emailed the settlement offer to the County and asked to "confirm that Lexon's time to respond to the lawsuit continues to be extended while we discuss the terms of a settlement in this matter." Id. When the County's counsel responded to this email, there was no reference to either the default judgment motion or the entry of default judgment. Id.

Upon Mr. Maas' receipt of the default judgment, which had been entered without notice of hearing or hearing, he sent an email to the County's counsel on July 19, 2012, requesting that the County agree to vacate the default judgment and continue with settlement negotiations. Id. A few weeks later, on August 9, 2012, the County's counsel responded by taking the position that Lexon's settlement offer of July 6, 2012, had come too late. Id.

Lexon later retained West Virginia counsel who promptly sought the County's agreement to vacate the default judgment on November 30, 2012. Id. Later, on December 19, 2012, Lexon's West Virginia counsel sent the County's counsel a letter requesting that enforcement proceedings be deferred pending a response to a proposed agreed order setting aside the default judgment. App. 578-579. Finally, on December 26, 2012, Lexon's West Virginia counsel sent the County's counsel another letter requesting execution of the agreed order. App. 579.

After the County's counsel eventually responded to West Virginia counsel by letter dated January 9, 2013, that the County would not agree to set aside the default

judgment, Lexon filed a motion to set aside the default judgment on February 22, 2013. Id. About a year later, on February 6, 2014, the circuit court entered an order denying Lexon's motion to set aside the default judgment. App. 571.

A. THE CIRCUIT COURT RULED THAT LEXON'S RULE 60(B) MOTION WAS UNTIMELY

Even though the circuit court acknowledged that, "[T]he West Virginia Supreme Court has found that a Rule 60(b) motion filed fourteen months after default was timely," it held that because Lexon did not file its motion to set aside the default judgment until February 2013, seven months after its entry in July 2013, "Lexon's Motion is untimely under Rule 60(b). App. 580.

Of course, this ignores the fact that (1) no notice of hearing on the County's motion was ever served; (2) no hearing on the County's motion was ever conducted; (3) Lexon was not required, under the rules, to respond to the County's motion until that motion was scheduled for hearing; (4) Lexon's counsel acknowledged receipt of the motion and responded by making a settlement offer; (5) the money judgment entered on the County's motion exceeded the prayer for relief in the County's complaint; (6) Lexon made another settlement offer before learning of the default judgment; (7) Lexon promptly requested an agreement by the County to vacate the default judgment and continue with settlement negotiations once its counsel learned of the default judgment; (8) the County's counsel failed to promptly respond to repeated requests both by Mr. Maas and Lexon's West Virginia counsel to set aside the default judgment and continue with settlement negotiations; and (9) Lexon filed its motion to set aside the default judgment six weeks after the County finally rejected the repeated requests by Lexon's West Virginia counsel to vacate the default judgment.

Even the circuit court conceded that not all of the seven-month period was chargeable to Lexon when it stated:

[L]exon made efforts to obtain an agreement from the County to have the default judgment set aside voluntarily . . . Even if the approximately three month time period which Lexon's newly-appearing local counsel spent attempting to get the County to agree to set aside the default judgment is forgiven, the four months of inactivity after the default judgment was entered, and the failure of Lexon to make any appearance in this case in opposition to the Motion while it was pending, remain unexplained.

App. 580.

The motion was only "pending" for twenty-two days. During that period, no notice of hearing was served and no hearing was conducted on the motion; rather, it was entered without any hearing. Lexon's counsel, Mr. Maas, did not ignore the motion, but responded with an email to the County's counsel indicating that another offer was forthcoming. Moreover, after receiving notice of entry of default judgment, Mr. Maas promptly communicated with the County's counsel and both he and Lexon's West Virginia counsel repeatedly requested vacation of the default judgment and resumption of settlement negotiations with weeks of unresponsiveness of the County's counsel. Certainly, with the benefit of hindsight, Mr. Maas could have filed a motion to set aside the default judgment instead of negotiating with the County's counsel, but the County had previously deferred Lexon's obligation to answer its complaint for about five months and Mr. Maas reasonably believed that settlement negotiations would continue.

Under the circumstances of this case, Lexon asserts that its motion to set aside the default judgment was timely and that the circuit court erred in its ruling to the contrary.

B. THE CIRCUIT COURT RULED THAT THE COUNTY SUFFERED SUBSTANTIAL PREJUDICE AS A RESULT OF LEXON'S DELAY IN ANSWERING

Although the circuit court ruled that Lexon's motion was untimely, which Lexon asserts colored the rest of its analysis, it engaged in an analysis of whether "good cause" under Rule 60(b) was present.

First, even though DLM filed for bankruptcy protection in November 2010 and the County did not file suit against Lexon until November 2011, a year later; even though the County entered into agreements with Lexon to defer Lexon's obligation to answer the County's complaint until May 2012; and even though the automatic bankruptcy stay prevented any litigation against DLM from proceeding, the circuit court ruled that, "The County has been significantly prejudiced by Lexon's delay in answering" App. 581.

Certainly, Lexon does not dispute the circuit court's findings about the negative impact of DLM's bankruptcy on those who had purchased property in Chandler's Glen, but there is no evidence of record that the County suffered any prejudice or financial damages as a result of the DLM bankruptcy. Even though avoidance of litigation should not be considered in determining whether a plaintiff has suffered "substantial prejudice" as a result of "the delay in answering," F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH at § 55(c)[2][b] (2012) (Footnote omitted), the circuit court concluded its analysis of this issue by stating: "The Court finds that forcing the County to endure lengthy litigation in order to obtain the relief that it is entitled to and has already obtained . . . serves no purpose other than to exacerbate the burdens that the County now faces," App. 582.

Of course, had the County agreed in July 2012, when Lexon promptly requested it, to vacate the improvidently awarded default judgment, the case would likely have been

resolved either through negotiations or on its merits. Had the County agreed in November 2012, when Lexon's West Virginia counsel had promptly requested it, to vacate the default judgment, the case likely would have been resolved. Finally, it was a period of one year between Lexon's motion to set aside the default judgment and entry of an order denying that motion, and Lexon should not have been punished for those delays when the "substantial prejudice" analysis is supposed to be limited to prejudice suffered by the "delay in answering." LITIGATION HANDBOOK, *supra* at § 55(c)[2][b].

C. THE CIRCUIT COURT RULED THAT THERE ARE NO MATERIAL ISSUES OR MERITORIOUS DEFENSES

With respect to the next factor in the "good faith" analysis, the circuit court concluded that "Lexon has identified no meritorious defenses demonstrating that it will not be liable to the County for specific performance of its obligations under the bonds." App. 583. (Emphasis in original and footnote omitted.)

The primary problem with this conclusion is evidenced in the circuit court's own order: "DLM failed to perform its obligations to the County, and Lexon is now obligated to either complete the site improvements and infrastructure itself, or pay the County the full face amount of the bonds." App. 584. Of course, by entering a monetary judgment against Lexon for nearly \$3.5 million, even though the County never asked for that relief in its complaint, Lexon has been deprived of arguing for the alternative.

The circuit court's resolution of this issue, from Lexon's perspective, is problematic on its surface:

To the extent that Lexon is correct in arguing that it held the option of performance (installing the site improvements and infrastructure itself) as opposed to payment, under the bonds, the Court finds that it would be futile and inequitable to treat that "option" as a meritorious defense

App. 585. In other words, even though the circuit court acknowledged that Lexon has the contractual “option” under the bonds to perform rather than pay, which would be less than the penal sum, it simply swept aside this substantial defense by applying equitable considerations inappropriate in ruling on a motion to set aside the default judgment.

Not only did the circuit court essentially convert a motion to set aside a default judgment into an adjudication on the merits of the County’s suit for specific performance, it modified the default judgment without setting it aside as follows:

Even if the County ultimately were to decide to install some portion of, but not the entirety of, the planned and bonded site improvements and infrastructure for Chandler’s Glen (and the Court is not ruling upon the propriety of such a decision, were it to be made), the County’s position that it is only entitled to retain bond proceeds from Lexon in the amount the County expends for site improvements and infrastructure at Chandler’s Glen, means the County will not be the beneficiary of any unjust “windfall” from Lexon.

App. 585, n.6. The circuit court’s discussion of Lexon’s contractual right to exercise an option to perform rather than pay demonstrates that the circuit court erred in ruling that Lexon had no meritorious defense.

The circuit court’s reference to the County’s “representation” that “any amount of the default judgment not so expended will be returned to Lexon,” Order at 15, is cold comfort to Lexon because (1) the only “judgment” in the case is the circuit court’s default judgment for nearly \$3.5 million and (2) the County will obviously not have the same incentive as Lexon to efficiently complete the unfinished site improvements and infrastructure, but the circuit court’s negation of Lexon’s option to complete rather than pay has deprived Lexon of that right.

D. THE CIRCUIT COURT RULED THAT A DEFAULT JUDGMENT OF NEARLY \$3.5 MILLION WHEN LEXON HAD THE CONTRACTUAL OPTION OF PERFORMANCE RATHER THAN PAYMENT IS AN INSUFFICIENT INTEREST TO WARRANT SETTING ASIDE THE DEFAULT JUDGMENT

In holding that nearly \$3.5 million was insufficiently significant to warrant setting aside a default judgment in that amount, the circuit court cited cases where default judgments affirmed on appeal ranged from \$113,734.19 to \$322,415.76. App. 586. Of course, the default judgment in this case is ten times the highest amount referenced in the circuit court's order and, to Lexon's knowledge, is unprecedented in the State of West Virginia.

In an effort to minimize the size of the default judgment, the circuit court references the "nearly \$200,000,000 in liquidity" it found was "reported in financial industry publications" regarding Lexon. Id.

First, the financial information referenced in the circuit court's order involves not Lexon Insurance Company, but its parent, Lexon Surety Group,⁴ which is not a party to this litigation. Second, the date of the article is September 4, 2012, two years prior to the circuit court's order.⁵ Finally, the circuit court referenced no legal authority for the proposition that the wealth of a corporate parent or even a corporate subsidiary who is the actual party to litigation is relevant to determining whether significant interests are at stake arising from entry of a default judgment.

⁴ *President and CEO David Campbell Comments on Rating Action by A.M. Best Company*, PR Newswire (Sept. 4, 2012), <http://pressreleaseheadlines.com/president-ceo-david-campbell-comments-rating-action-company-85472>.

⁵ Id.

E. THE CIRCUIT COURT RULED THAT LEXON HAD BEEN SIGNIFICANTLY INTRANSIGENT IN DEFENDING ITS INTERESTS

The circuit court's analysis of Lexon's alleged intransigence focused almost exclusively on Lexon's delay in answering the County's complaint, which sought nothing more than specific performance the terms of which were being actively negotiated, including a time period within which the County had agreed that Lexon need not file an answer: "The Court finds that Lexon had over six months to answer the County's complaint under its agreement with the County, yet Lexon failed to appear or file anything with the Court." App. 587. Of course, the reason Lexon did not file an answer during this six-month period was because it was negotiating with the County which had agreed that Lexon need not file an answer and, moreover, Lexon obviously had "appeared" as that term is used in the rules as (1) the County served its motion for default on Lexon's counsel, Mr. Maas, and (2) the Court directed that its default judgment order be sent to Mr. Maas.

A party is not "significantly intransigent" as that term is used relative to default judgments when it responds promptly to receipt of a lawsuit by engaging in settlement negotiations and securing an open-ended extension of time to file an answer; continues to engage in negotiations and make settlement offers both before, during, and after the filing of a motion for and entry of default judgment; and continues to elicit vacation of a default judgment order for the purposes of continuing settlement negotiations.

F. THE CIRCUIT COURT RULES THAT THE BALANCE OF FACTORS WEIGHED IN FAVOR OF UPHOLDING THE DEFAULT JUDGMENT

With respect to the required weighing of the foregoing factors, the circuit court concluded that, "[O]nly one of the above factors somewhat weighs in favor of Lexon: the

interests are significant.” App. 588. But because a default judgment of nearly \$3.5 million would not “threaten Lexon’s financial stability,” based upon the finances of its corporate parent, and because the risk of being sued “Lexon voluntarily accepted by issuing the performance bond,” the circuit court denied Lexon’s motion to set aside the default judgment. App. 588-589. Again, under the circumstances of this case, Lexon submits that the balance of factors weighed in favor of setting aside the default judgment and the circuit court erred in ruling to the contrary.

G. THE CIRCUIT COURT RULED THAT RECEIPT OF THE COUNTY’S SUMMONS AND COMPLAINT BY A RECEPTIONIST NOT AUTHORIZED TO ACCEPT SERVICE WAS SUFFICIENT SERVICE OF PROCESS

In addition to moving to set aside the default judgment, Lexon also challenged the validity of the judgment for insufficiency of service of process, but the circuit court ruled that acceptance of service of process by a receptionist was adequate.

Even though, on the one hand, the circuit court criticized Lexon for not “appearing” in the matter in response to the County’s complaint, it nevertheless relied, on the other hand, on the interaction between one of Lexon’s employees and the County’s counsel in ruling that mailing a copy of the summons and complaint to the address of Lexon’s employee was adequate service of process:

The Court finds that, on February 24, 2011, Lexon gave the County the contact information for Chris Parrish, Lexon’s Director of Construction, and told it that Mr. Parrish would be “handling this matter for response.” In doing so, Lexon held Mr. Parrish out as its agent for service

The Court finds that the fact that the County’s summons and complaint were signed for by one “L. Mart.,” the signature of Linda Martinez, a Lexon receptionist at the Woodridge, Illinois office, does not create a defect in service.

App. 591.

The circuit court acknowledged that in *White v. Berryman*, 187 W. Va. 323, 418 S.E.2d 917 (1992), this Court held that service upon a corporate secretary not specifically designated to accept service of process was insufficient, App. 592, and that in *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 584 S.E.2d 517 (2003), the Court held that service upon a private secretary was insufficient when the secretary was not authorized by her employer to accept service of process, App. 593, but without identifying any case authority, the circuit court nevertheless held that service on Lexon's receptionist was sufficient even though Lexon could have been served through its statutory agent for service of process, the Secretary of State, or its registered agent for service of process, Corporation Service Company, which is a matter of public record.⁶ Indeed, the address used by the County is not listed by either the Secretary of State or the Office of the Insurance Commissioner as an address for Lexon.⁷

III. SUMMARY OF ARGUMENT

Service of a summons and complaint on any name and address provided by a foreign corporation to a plaintiff is insufficient. The County could easily have served Lexon through the Secretary of State as its statutory agent for service of process. The County could easily have served Lexon through its designated agent for service of process, which is identified on the Secretary of State's website. The circumstances of this case present no reason for this Court to depart from its previous precedent and it should again hold that service on a corporate secretary, receptionist, or other person not specifically designated to accept service of process is inadequate.

⁶ <http://apps.sos.wv.gov/business/corporations/organization.aspx?org=177073>.

⁷ App. 105-106.

Additionally, where a plaintiff consents to an indefinite extension of time for a defendant to answer a complaint where settlement negotiations are ongoing and where a plaintiff's complaint does not expressly seek a monetary judgment, but specific performance of a contract which affords the defendant the right to elect between remedies in the event of a breach, a default judgment should not be entered merely by the serving of a motion for default judgment, twenty-two days prior to entry of default judgment, without notice of hearing or any hearing being conducted.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The circuit court's default judgment of \$3.5 million is unprecedented in the State of West Virginia in several ways. First, to Lexon's knowledge, it is the largest default judgment in the history of the State of West Virginia. Second, no default judgment, at least with respect to its relative size, has ever been affirmed when the summons and complaint were never served on a corporate defendant's statutory or designated agents for service of process. Third, no default judgment, at least with respect to its relative size, has ever been affirmed when the complaint upon which it is based did not seek a monetary judgment, but specific performance. Fourth, no default judgment, at least with respect to its relative size, has ever been affirmed without the time for responding to the motion having expired; without any notice of hearing on the motion for default judgment; or without a hearing on the motion for default judgment. Fifth, no default judgment, at least with respect to its relative size, has been affirmed in an order essentially modifying the default judgment order in the process of denying a motion to set the default judgment aside. Finally, no default judgment, at least with respect to its relative size, has been affirmed when the motion to set aside the default judgment was

filed well within one year of its entry. Because so many of this Court's rules and precedents have been cast aside in affirming the default judgment entered in this case, Lexon submits a Rule 20 oral argument is warranted.

V. ARGUMENT

A. STANDARD OF REVIEW

With respect to the entry of a default judgment, this Court has held, "We review a decision by a trial court to award a default judgment pursuant to an abuse of discretion standard. . . . Where, however, 'the issue on appeal from the circuit court is clearly a question of law . . . we apply a de novo standard of review.'" *Leslie Equipment Co. v. Wood Resources Co., L.L.C.*, 224 W. Va. 530, 532-533, 687 S.E.2d 109, 111-112 (2009)(Citations omitted). Here, particularly where the circuit court entered a default judgment of nearly \$3.5 million without a hearing and then attempted to cure the procedural defect by modifying that judgment to provide for a refund of any unused portion of the default judgment to Lexon, this case presents issues of law and not the exercise of discretion.

With respect to the sufficiency of service of process, it has been noted, "Appellate review of a Rule 12(b)(5) dismissal is de novo." LITIGATION HANDBOOK, supra § 12(b)(5)[2] (Footnote omitted). Here, the circuit court's ruling that service upon a receptionist at an address of an employee who had been dealing with the County was sufficient even though neither had been designated by statute or Lexon as an agent for service of process is wrong as a matter of law.

B. THE CIRCUIT COURT ERRED IN RULING THAT PETITIONER’S MOTION TO SET ASIDE THE NEARLY \$3.5 MILLION DEFAULT JUDGMENT WAS UNTIMELY UNDER THE CIRCUMSTANCES OF THIS CASE.

In this case, the circuit court determined that Lexon’s motion was untimely because it learned of the default judgment in July 2012 and even though it immediately contacted the County requesting vacation of the default judgment; continued settlement negotiations; and was advised by the County’s counsel that no efforts would be made to enforce the judgment in light of ongoing settlement negotiations, it did not file a formal motion to set aside the default judgment until February 2013. The circuit court, however, clearly erred as a matter of law in so ruling.

With respect to the timeliness of a motion to set aside the default, R. Civ. P. 55(c) provides, “For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” Accordingly, with respect to a motion to set aside an entry of default, there is no timeliness requirement, but only a good cause requirement, and with respect to a motion to set aside a default judgment, the only timeliness requirement is derived from R. Civ. P. 60(b) which provides, “The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.”

In this regard, it has been noted that a one-year limitation would apply to the extent defendant’s motion to set aside is made under R. Civ. P. 60(b)(1) and its motion was obviously made well within this time period. See LITIGATION HANDBOOK, *supra* at § 60(b)(1)[3] (2012)(Rule 60(b)(1) governs motions to set aside default judgments).

Moreover, to the extent defendant's motion to set aside is made under R. Civ. P. 60(b)(4), there is no limit limitation applicable. *Id.* at § 60(b)(4)[2] (“A motion under Rule 60(b)(4) is . . . not constrained by the one year period provided for in the other provisions of Rule 60(b). . . . A void judgment is from its inception a legal nullity.”)(Footnotes omitted).

Finally, R. Civ. P. 55(b)(2) provides: “In all other cases the party entitled to a judgment by default shall apply to the court therefor. . . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. . . .”

The reason Rule 55(b)(2) requires service of a motion for default on a party “at least 3 days prior to the hearing on such application” is that R. Civ. P. 6(d)(2) provides, “Unless a different period is set by these rules or by the court, any response to a written motion, including any supporting brief or affidavits, shall be served as follows . . . at least 4 days before the time set for the hearing, if served by mail”

Here, not only was the County's motion filed a mere twenty-two days prior to entry of default judgment, as no hearing was noticed on the County's motion, Lexon was not required under the rules to respond to the County's motion.

With respect to failure to notice the motion for hearing as required by R. Civ. P. 55(b)(2) and afford Lexon an opportunity to respond to the motion prior to its entry, it has been noted:

The purpose of this rule is to provide a party defendant with a timely opportunity to urge reasons against entry of default judgment. As a general rule, the Supreme Court has held that “[a] party should not be deprived of his opportunity to be

heard on the merits when he failed to appear for lack of notice.”

Failure to provide the 3 days notice when it is required is considered a serious procedural error that should permit, but not require, reversal or the setting aside of a default judgment. . . . Appellate “review of the sufficiency of service of notice of a motion for default judgment is de novo.”

LITIGATION HANDBOOK, supra at § 55(b)(2)[a] (Footnotes omitted).

Here, the County’s argument that Lexon’s motion to set aside the default judgment was untimely must be tempered by the County’s failure to schedule the motion for hearing and provide the required three days’ notice under R. Civ. P. 55(b)(2) which may have allowed Lexon to interpose its arguments in opposition to the motion prior to entry of default judgment.

Accordingly, because Lexon’s motion to set aside the default judgment was filed well within the one-year period provided in R. Civ. P. 60(b)(1) and the one-year time period does not apply under R. Civ. P. 60(b)(4), the circuit court erred in ruling that Lexon’s motion was untimely under the circumstances presented.

C. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE A NEARLY \$3.5 MILLION DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE (1) RESPONDENTS DID NOT SUFFER SIGNIFICANT PREJUDICE FROM PETITIONER’S DELAY IN ANSWERING THEIR COMPLAINT; (2) THERE ARE MATERIAL ISSUES OF FACT AND MERITORIOUS DEFENSES PRESENT; (3) A DEFAULT JUDGMENT OF NEARLY \$3.5 MILLION IS SIGNIFICANT; AND (4) PETITIONER WAS NOT INTRANSIGENT, BUT CONTINUED TO ACTIVELY ENGAGE IN SETTLEMENT NEGOTIATIONS WITH RESPONDENTS.

“Public policy favors litigation results,” it has been noted, “that are based on the merits of a particular case and not on technicalities.” LITIGATION HANDBOOK, supra at § 55(c)[2] (Footnote omitted). Accordingly, “If any doubt exists as to whether relief from a default or a default judgment should be granted, such doubt should be resolved in favor of setting aside the default or default judgment in order that the case may be heard

on the merits.” Id. (Emphasis supplied and footnote omitted). Finally, ““The policy of the law . . . looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of mistake, surprise, inadvertence, or neglect of his adversary.”” Id. (Footnote omitted).

With respect to whether, independently of the service of process issue, Lexon established good cause, it has been noted, “In determining whether a default judgment should be vacated upon a Rule 60(b) motion, the trial court should consider: (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.” LITIGATION HANDBOOK, *supra* at § 55(c)[2][b] (Footnote omitted).

1. The County Suffered No Substantial Prejudice As a Result of Any Delay Between When It Made an Open-Ended Request that Lexon Answer the Complaint and When Lexon Filed Its Answer

With respect to the first factor, the degree of prejudice suffered by the plaintiff from the delay in answer, the County successfully argued below that, “DLM declared default and stopped work on Chandler’s Glen nearly three years ago, and since that time, the little work that was completed in the subdivision has been left to rot” App. 380. This is not the relevant time period, however, as the cases require focus on “the delay in answering.”

Here, the County does not dispute on April 20, 2012, they asked only that Lexon “answer at your earliest convenience.” App. 380. Thereafter, by letter dated May 9, 2012, the County only asked, “when I might expect your answer [?]” App. 380 and App. 425. On June 14, 2012, the County filed its motion for default, but conceded below that

Lexon contacted them a week later indicating that a settlement proposal was imminent. App. 380.

Although Lexon could have acted with greater alacrity, the County does not appear to have suffered any prejudice over the relevant period.

2. There Are Obviously Material Issues of Fact and Material Defenses When the County Concedes that Alternative Cure Remedies Are Available to Lexon under the Two Bonds

With respect to the second factor, the presence of material issues of fact and material defenses, the County argued below that, “Lexon wrote, priced, and guaranteed the bonds, promising that should DLM fail to complete the work, it would either complete it or pay the bonds.” App. 386. (Emphasis supplied). Thus, even assuming the County will ultimately prevail on the issue of liability, it concedes that the subject bonds provide two alternative remedies for Lexon, i.e., to complete the project or pay the face value of the bonds. Accordingly, if the cost of completion is less than the face value of the bonds, Lexon’s liability will be less than the face value.

It has also been noted that, “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. . . . The failure to conduct a hearing on the damage issue when the plaintiff’s claim is unliquidated is reversible error.” LITIGATION HANDBOOK, *supra* at § 55(b)(2)[b] (Footnotes omitted).

Here, by definition, the County’s claims were “unliquidated” in the sense that it may cost less than the face value of the bonds to cure DLM’s default. Moreover, the County’s own complaint did not specifically pray for monetary damages in the amount of the face value of the bonds. Rather, it prayed for “specific performance” of the bonds,

which alternatively includes completing the project. Under those circumstances, it is clear that, at most, the circuit court was authorized to enter a default awarding the County the relief prayed for, i.e., specific performance, and not a monetary judgment:

As a result of a default, a defendant is deemed to admit the plaintiff's well-pleaded allegations of fact and is barred from contesting on appeal the facts thus established. A default is unassailable on the merits, but only so far as it is supported by well-pleaded allegations, assumed to be true. The corollary of this rule, however, is that a defendant's default does not in itself warrant the court in entering default judgment. . . . A default judgment may lawfully be entered only according to what is proper to be decreed upon the statements of the complaint, assumed to be true, and not as of course according to the prayer for relief. The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short, a default judgment is not treated as an absolute confession by the defendant of his/her liability and of the plaintiff's right to recover. On appeal, the defendant, although he/she may not challenge the sufficiency of the evidence, is entitled to contest the sufficiency of the complaint and its allegations to support the judgment.

LITIGATION HANDBOOK, supra at § 55(c)[2][d] (Emphasis supplied and footnotes omitted).

This case is a perfect example of the violation of these fundamental principles. The County's complaint was not a suit for damages, but for specific performance. Yet, a default judgment was entered awarding it relief it never requested. Consequently, the circuit court erred in casting aside material issues of fact and material defenses.

3. It is Difficult to Think of a More "Significant" Default Judgment Than One Involving Almost \$3.5 Million

With respect to the third factor, the significance of the interests at stake, the County conceded below that, "the Court's default judgment award is significant." Response at 10. Although the County compared the amount of \$3.4 million default

judgment with the financial condition of Lexon's corporation parent, it cited no authority in support of this argument and the authority it did reference involved default judgments not exceeding percent of the amount in this case. App. 386. Plainly, the circuit court erred in minimizing the significance of the interests at stake for Lexon.

4. Where Lexon Actively Engaged in Settlement Negotiations Before the Motion for Default Judgment Was Filed and After the Default Judgment Was Entered, It was Not "Intransigent"

With respect to the final factor, the County argued below that "Lexon has been willfully intransigent in defending itself in this case." App. 387. In their response to Lexon's motion to set aside the default judgment, however, the County conceded that "Lexon responded to communications about settlement but ignored the County's demands that Lexon appear and defend itself in this action." Id.

Although as previously noted, Lexon could have acted with more alacrity in filing its answer to the County's complaint, nevertheless, there had been many months of negotiations; the County initially agreed to an indefinite extension of Lexon's time to answer; the County made equivocal demands of Lexon as to filing an answer; the County failed to notice its motion for default judgment for hearing;⁸ Lexon extended a settlement offer before it learned of entry of the default judgment; and Lexon engaged in negotiations with the County regarding withdrawal of the default judgment and a potential settlement of the case.

⁸ This Court has recently considered a party's failure to provide notice of a hearing on a motion for default judgment in determining whether the non-moving party has been intransigent for purposes of a motion to set aside default judgment. See *Tudor's Biscuit World of America v. Critchley*, 229 W. Va. 396, 407, 729 S.E.2d 231, 242 (2012). The same analysis applied in Tudor's applies with equal force in this case.

It is also important to note that the negotiations that occurred between the County and Lexon were very substantive. For example, Lexon's counsel provided multiple legal authorities to the County's counsel supporting Lexon's position that it was not obligated to complete or pay for improvements for those portions of a residential subdivision that would never be developed. App. 108.

Moreover, the County's counsel represented to Lexon's counsel on July 9, 2012, that even though the County had filed a motion for default judgment, it would not actively prosecute the motion because settlement negotiations were still ongoing:

Bruce: First, you were to get back to me with your proposal early in the week of June 25. Second, my advice was that I would do nothing to encourage the Court to rule on our motion for default . . . I have been advised, although have not received an order yet, that the case has been reassigned from the initial judge to another of our circuit judges. This may delay the Court's ruling but I do not know that.

I will forward your proposal to my clients for their consideration. . . .

App. 111 (Emphasis supplied). The County's counsel also cautioned that Lexon should do whatever was necessary to protect its interests, App. 111, but it is easy to see why Lexon's counsel believed the parties were still actively engaged in settlement negotiations and the County was not actively prosecuting its motion for default judgment.

Later, on July 19, 2012, after default judgment was entered, the County's counsel indicated to Lexon's counsel that settlement negotiations were continuing as follows:

Bruce:

Monday night's Planning Commission meeting was cancelled . . . The next meeting is scheduled for August 6, at 6 pm.

I have no intention of taking any action to enforce the judgment until I have given you notice that the County wishes me to do so.

App. 433 (Emphasis supplied). This was reasonably interpreted to mean that at least until August 6, 2012, Lexon need not act to set aside the default judgment as settlement negotiations might resolve the matter, particularly when this was in response to an email from Lexon's counsel which stated as follows:

Norwood . . . Obviously, I don't have a problem with the County taking as much time as it needs to respond to our settlement offer. I am going on vacation for 10 days starting next Thursday and **I just want to make sure our agreement is in place that you will not be taking any action to enforce the judgment until you give me some notice to provide time to hire local counsel and move to vacate the default.**

App. 434 (Emphasis supplied).

Eventually, after the County rejected Lexon's settlement offer, Lexon retained West Virginia counsel who promptly communicated with the County's counsel about setting aside the default judgment, including submission of a proposed order. App. 436-439. This was consistent with the dealings between the County's counsel and Lexon's counsel, which supports Lexon's argument that rather than being intransigent, it was operating based upon the representations of the County's counsel.

Finally, after West Virginia counsel was retained and made multiple attempts to engage the County's counsel regarding resolution of the matter, including clarification of a notation in the minutes of a planning commission meeting in which it appeared that the County had accepted Lexon's settlement offer, the County's response was delayed because it retained substitute counsel. App. 507-528.

Under the foregoing circumstances, the circuit court erred in ruling Lexon's intransigence militated against setting aside the default judgment.

5. The Circuit Court Improperly Balanced the "Good Cause" Factors Against Lexon

With respect to the balancing of the good cause on a motion to set aside default judgment, it has been observed:

Notwithstanding the deference due to this discretionary decision, a reviewing tribunal should not stay its hand if the trial court errs by reading Rule 55(c)'s good cause too grudgingly. Nor does an abuse of discretion need to be glaring to justify reversal. The circumscribed scope of the trial court's discretion in the context of a default is a reflection of the preference for resolving disputes on the merits. Thus, when doubt exists as to whether a default should be granted or vacation, the doubt should be resolved in favor of the defaulting party.

LITIGATION HANDBOOK, *supra* at § 55(c)[2][d] (Footnotes omitted).

In this case, the circuit court respectfully read Rule 55(c) good cause standard too grudgingly and this Court should set its ruling aside.

D. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE THERE WAS NO NOTICE OF HEARING NOR WAS A HEARING CONDUCTED ON DAMAGES DESPITE THE PETITIONER'S RIGHT TO ELECT A METHOD OF CURING THE DEFAULT OF ITS PRINCIPAL AND, ACCORDINGLY, THE AMOUNT OF THE RESPONDENTS' DAMAGES WERE UNLIQUIDATED.

It has been noted:

Rule 55(a) represents the first procedural step, in a two-step process, for obtaining a default judgment. . . . As a general rule, a default establishes, as a matter of law, that the defendant is liable to the plaintiff for each cause of action alleged in the complaint. In this situation, after default is entered, a further hearing is required in order to ascertain the damages. Ascertaining damages is the second step in the process of obtaining a default judgment.

LITIGATION HANDBOOK, supra at § 55(a)[2] (Footnotes omitted). Accordingly, when obtaining a default under R. Civ. P. 55(a) by the clerk, a default is first entered and then a “further hearing is required in order to ascertain damages.” Here, default judgment was obtained under R. Civ. P. 55(b)(2) not R. Civ. P. 55(a), but a hearing is also required under that rule.

Specifically, R. Civ. P. 55(b)(2) provides:

If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party’s representative) **shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.** 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.**

(Emphasis supplied).

Here, it cannot be seriously argued that Lexon had not “appeared” for purposes of R. Civ. P. 55(b)(2) when both the County and the circuit court rely upon Lexon’s “appearance” for purposes of arguing and holding that service upon a Lexon receptionist at an address for a person who was negotiating with the County was sufficient and when the County served its motion for default judgment on Lexon’s counsel.

With respect to “appearance” under R. Civ. P. 55(b)(2), it has been noted:

Under this rule if the party against whom judgment by default has “appeared in the action,” the party must be served with written notice of the application for judgment. The phrase “appeared in the action” for purposes of Rule 55(b)(2) is quite different from an appearance for other purposes, such as establishing personal jurisdiction. An appearance for purposes of Rule 55(b)(2) may consist only of letters or conversations between the parties. . . . This liberal

construction of the phrase allows for the resolution of litigation on its merits, not technical pleading rules.

LITIGATION HANDBOOK, *supra* at § 55(b)(2)[a] (Footnotes omitted).

Consequently, it has been observed:

When a party has appeared in the action, he/she must be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. The purpose of this rule is to provide a party defendant with a timely opportunity to urge reasons against entry of default judgment. As a general rule, the Supreme Court has held that “[a] party should not be deprived of his opportunity to be heard on the merits when he failed to appear for lack of notice.”

Failure to provide the 3 days notice when it is required is considered a serious procedural error that should permit, but not require, reversal or the setting aside of a default judgment. Courts should examine the circumstances on a case-by-case basis to determine whether the failure to give notice requires that a default judgment be set aside. Appellate “review of the sufficiency of service of notice of a motion for a default judgment is *de novo*.”

Id. (Footnotes omitted).

Certainly, the County served a **motion** for default judgment on Lexon’s counsel, but no notice of hearing was served or hearing conducted. And, indeed, under the Rules of Civil Procedure, **Lexon had no obligation to file a response to the motion for default judgment until a hearing on the motion was scheduled**, which is another reason it is essential that both a notice of hearing be served and a hearing on a motion for default judgment be conducted.

Specifically, R. Civ. P. 6(d)(1)(A) provides, “Unless a different period is set by these rules or by the court, any response to a written motion, including any supporting brief or affidavits, shall be served as follows . . . at least 4 days before the time set for

the hearing, if served by mail” Where, as here, no hearing was ever set on the County’s motion for default judgment, Lexon had no obligation under the rules to file a response; but rather, Lexon’s obligation to file a response would have been triggered by a notice of hearing on the motion, which never came.

As previously noted, “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. . . . The failure to conduct a hearing on the damage issue when the plaintiff’s claim is unliquidated is reversible error.” LITIGATION HANDBOOK, *supra* at § 55(b)(2)[b] (Footnotes omitted).

Because notice and hearing are essential elements of due process, it has been observed with respect to Rule 55(b)(2) that, “The failure of the trial court to conduct a hearing on the damage issue when the plaintiff’s claim is unliquidated is reversible error.” *Id.* (Footnote omitted). Here, by definition, the County’s claim is unliquidated as the circuit court’s judgment order acknowledges that Lexon may ultimately be obligated to the County for a sum less than the amount of the default judgment. Accordingly, it was reversible error for the circuit court to fail to conduct a hearing.

E. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(4) WHERE RESPONDENTS DID NOT SERVE THEIR SUMMONS AND COMPLAINT ON PETITIONER THROUGH THE SECRETARY OF STATE; THROUGH ITS REGISTERED AGENT; OR THROUGH AN OFFICER, DIRECTOR, TRUSTEE, OR AUTHORIZED AGENT OF PETITIONER, BUT SIMPLY MAILED THE SUMMONS AND COMPLAINT TO PETITIONER’S DIRECTOR OF CONSTRUCTION, WHERE ITS RECEIPT WAS ACKNOWLEDGED BY A RECEPTIONIST.

With respect to service of the summons and complaint, it has been noted:

To enable a court to hear and determine an action it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction. A default judgment rendered without

personal jurisdiction is void. Notice and an opportunity to be heard are essential to the jurisdiction of all courts, and such notice must be given by the issuance and service of process in the manner prescribed by law, unless waived. **A default judgment rendered upon a defective substituted service of process is void for want of jurisdiction.**

LITIGATION HANDBOOK, supra at § 55(c)[2] (Emphasis supplied and footnotes omitted).

R. Civ. P. 4(d)(7) provides for service upon foreign corporations licensed to do business in West Virginia as follows: “by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint as provided in Rule 4(d)(5).”

R. Civ. P. 4(d)(5) provides for the following alternative methods for service:

(A) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint 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 including, in the case of a railroad company, a depot or station agent in the actual employment of the company; but excluding, in the case of an insurance company, a local or soliciting agent; or

(B) by delivering or mailing in accordance with paragraph (1) above a copy thereof to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

With respect to direct service on a corporate official, it has been noted, “The critical aspect of direct service here is that it must, in fact, be made **directly** on an officer, director or trustee” LITIGATION HANDBOOK, supra at § 4(d)(5)(A)[2][a] (Emphasis supplied and footnote omitted).

Here, the County argued that because Lexon referred it to one of Lexon’s employees for purposes of settlement negotiations, it effectively appointed that employee as its agent for service of process, but because of the language in R. Civ. P. 4(d)(5) referencing “**authorized by appointment** or statute **to receive or accept service in its**

behalf,” (Emphasis supplied), which modifies both “any agent or attorney in fact,” only individuals formally appointed by a foreign corporation to accept service of process.⁹

Accordingly, “[i]f an appointed agent or attorney-in-fact was not authorized by such appointment to receive service of process on behalf of a foreign corporation,” it has been observed, “service on such an agent or attorney-in-fact is insufficient under Rule 4(d)(7).” LITIGATION HANDBOOK, *supra* at § 4(d)(7)[2] (Footnote omitted).

Here, the County did not argue that the person with whom it was negotiating was authorized to accept service of process on behalf of Lexon, but that he was “appointed as its agent for handling this matter,” Response at 13, but the law is clear that unless a person is appointed as the agent for service of process, merely dealing with an employee of a foreign corporation is insufficient.

Moreover, the County concedes that it did not serve the employee with whom they were negotiating with the summons and complaint, but rather mailed it to Lexon where it was signed for by a receptionist, App. 390, not the entity designated by Lexon with the Secretary of State for service of process.

So, even assuming Lexon had told the County that Mr. Parrish would accept any service of process, which never happened, the County never served Mr. Parrish but a corporate receptionist, which is clearly contrary to this Court’s rules and precedent.

⁹ *Id.*, citing *Ayers v. Jacobs, P.A.*, 99 F.3d 565 (3d Cir. 1996)(office manager not authorized by law to receive process for business); *Woodbury v. Sears, Roebuck & Co.*, 152 F.R.D. 229 (D. Fla. 1993)(corporation file maintenance person not authorized by law to receive process for business); *Technology Consulting Corp. v. Infotrons, Inc.*, 141 F.R.D. 104 (D. Wis. 1991)(corporate accountant not authorized by law to receive process for business); see also LITIGATION HANDBOOK, *supra* at § 4(d)(5)(A)[2][b] (“service of process may be made on an appointed or statutory, attorney-in-fact or agent”); *id.* at § 4(d)(7)[2] (“Under Rule 4(d)(7) delivery and service of process on an attorney-in-fact or agent (statutory or appointed) of a foreign corporation . . . may occur if not officer, director or trustee can be found”)(Footnote omitted).

In Syllabus Point 3 of *White*, supra, this Court held, “Service of process on a secretarial employee in a public corporation or agency is insufficient to constitute service on the public corporation or agency absent a clear showing that such individual had been delegated by the corporation or agency to accept process.” Consequently, service of process on one of Lexon’s clerical employees not authorized to accept service of process on its behalf was insufficient rendering the default judgment void.

The County argued that Lexon somehow waived service of process or is estopped from raising the defense of insufficient service by asking for an extension of time to file its answer, App. 391, but cited no case in which any court has held that requesting an extension constitutes waiver of the defense of insufficient service of process, particularly in the context of a motion to set aside a subsequent default judgment.

Likewise, the County’s argument that this Court “has not addressed a situation where although service was questionable, the defendant had actual knowledge of the action against it and made plans with the plaintiff to file an answer,” App. 392, is flawed because in *White*, this Court found that Secretary Gleason had actual knowledge of the service of process but nevertheless held that service on his secretary was defective and a default judgment was void.

Finally, the circuit court attempted to distinguish *White* by noting that the defendant in that case was a “public corporation” as opposed to a “private corporation,” App. 592, but (1) the defendant in the *Farber* case was a private attorney, not a public corporation, and this Court nevertheless held that service of a summons and complaint upon the attorney’s personal secretary, who was not authorized to accept service, was insufficient, and (2) differentiating between a public and private corporation with respect

to the legal effect of failure to proper service process would implicate obvious equal protection concerns.

As this Court held in Syllabus Point 5 of *Farber*, “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.” (Citations and internal quotation marks omitted). The argument that a default judgment is void if a public corporation’s secretary is served with a summons and complaint unless the public corporation officially designated the secretary as its agent for service of process, but a default judgment is not void if a private corporation is served under the identical circumstances speaks for itself.

In *Tudor's Biscuit World of America v. Critchley*, supra at 406, 729 S.E.2d at 241, this Court reversed a circuit court’s refusal to set aside a default judgment as follows:

It is a fundamental tenet of our jurisprudence that

“[t]o enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610 (1960).

Syl. Pt. 1, *Leslie Equipment Co.*, supra. To make a corporation “amenable to the jurisdiction of our State's courts,” service of process must be made in accordance with W.V.R.C.P. 4(d) **and with “exacting” compliance with any statute so governing.** *McClay v. Mid-Atlantic Country Magazine*, 190 W. Va. 42, 47–8, 435 S.E.2d 180, 185–6 (1993). As such, “a determination that the trial court lacked in personam jurisdiction **will render the default judgment at issue void and unenforceable.**” *Leslie Equipment*, 224 W. Va. at 533, 687 S.E.2d at 112. Given the nature of these two meritorious defenses—one of which renders any ostensible judgment void—we find the circuit court's failure to heavily weight this factor erroneous.

[Emphasis supplied].

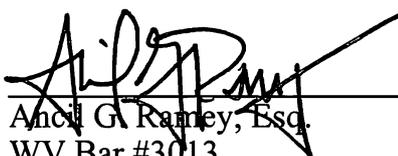
Accordingly, in this case, as Lexon never designated its corporate receptionist as its agent for service of process, the summons and complaint were not served “with ‘exacting’ compliance” with the statutes and rules governing service on a foreign corporation, the default judgment is void and should have been set aside, and the circuit court erred in ruling to the contrary.

V. CONCLUSION

The petitioner, Lexon Insurance Company, respectfully requests that this Court set aside the default judgment entered by the Circuit Court of Berkeley County in this case and remand so that the case can proceed upon its merits.

LEXON INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2014, I served the foregoing **BRIEF OF PETITIONER** upon all counsel of record via email and by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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