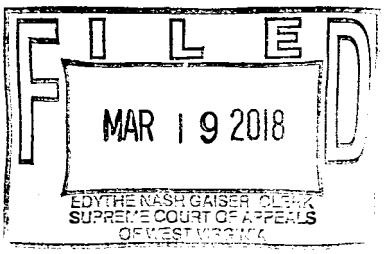
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 17-1106

(Lower Tribunal: Circuit Court of Mineral County, West Virginia)
(Civil Action No.: 14-C-75)



SAMUEL L. AMORUSO, JR.,
d/b/a QUALITY SUPPLIER TRUCKING, INC,
(Defendant below)
Petitioner,

vs.

COMMERCE AND INDUSTRY INSURANCE COMPANY,
(Plaintiff below)

Respondent.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1

Samuel R. Amoruso, Jr., contends that he is entitled to the entry of an Order reversing the Circuit Court of Mineral County's Order entered the 17th day of November, 2017, which denied his Motion to Set Aside the Default Judgment previously entered on the 28th day of January, 2016. Mr. Amoruso unequivocally established before the lower Court that the Respondent failed to sue the proper entity as well as failing to ensure service of process was proper, pursuant to Rule 4(d)(5)(A) of the West Virginia Rules of Civil Procedure. By the use of the Respondent's own documents, contract and the pleadings, Mr. Amoruso plainly exhibited to the lower Court that:

1. Mr. Amoruso was not the entity that contracted for the insurance service provided by the Respondent;

2. Mr. Amoruso does not conduct business "doing business as Quality Supplier Trucking, Inc."; and

3. Mr. Amoruso's substantive and due process rights were violated, depriving him of his property and equal protection under the law.

These salient facts were known to the Respondent and were litigated before the lower Court either negligently or intentionally by misrepresenting these facts, resulting in an improper money judgment against Mr. Amoruso. This Court should review this error and set aside the Judgment against Mr. Amoruso and consider it void and a nullity.

Assignment of Error No. 2

Mr. Amoruso contends that the lower Court abused its discretion, prejudicing Mr. Amoruso in both the incorrect application of the law and the lower Court's errant comments regarding Mr. Amoruso's business practices. The lower Court clearly ignored the failure of the Respondent to sue the correct entity, and the Respondent's obstinate failure to acknowledge its gross error, as evidenced by the contract of insurance and invoice billed to Q.S.I., Inc. The failure of the lower Court to apply the law correctly in reaching its decision must always be considered an abuse of discretion. Koon vs. United States, 518 U.S. 81, [1996]. [1] The failure of the lower Court to exercise his discretion in a reasoned manner, has prejudiced Mr. Amoruso. The lower Court neglected and misapplied West Virginia law in failing to insure Mr. Amoruso's substantive and due process rights would be free from violation as a result of the Respondent's failure to sue the correct entity, as well as failing to consider the prior precedent and rulings of this Honorable Court. The lower Court's ruling is against logic as applied to the facts of this case and its decision was based on irrelevant and impermissible factors and prejudicial statements on the record, which disparaged Mr. Amoruso's character in conducting his business. This Court is duty bound to find an abuse of discretion in order to safeguard Mr. Amoruso's rights and good name.

[1] See also Identifying and Understanding Standards of Review, Georgetown University Law Center, the Writing Center, Daniel Sullivan, 2013.

STATEMENT OF THE CASE

This matter was originally instituted by the Respondent, Commerce Industry Insurance Company, by and through its Attorney Clinton W. Smith, Esquire on the 8th day of June, 2014. The Complaint alleged that the Petitioner, "Samuel R. Amoruso, Jr, d/b/a/ Quality Supplier Trucking, Inc" was indebted to the Respondent as a result of receiving "goods, funds, or services" in the amount of $36,809.00.

The Petitioner received a Summons and Complaint on or about the 16th day of June, 2014, as verified by Jeff Conley, Deputy Sheriff of Mineral County, West Virginia.

On the 7th day of July, 2014 the Petitioner, Samuel R. Amoruso Jr., filed his Answer denying that he was doing business as Quality Supplier Trucking Inc; denied that he received goods, funds, or services from the Respondent; and denied that any amount was due and owing.

The matter proceeded and Counsel for the Respondent apparently served a Discovery request upon the Plaintiff. On the 23rd day of October, 2014 Counsel for the Respondent filed a Motion to Compel the Petitioner to respond to his Discovery requests.

On the 6th day of January, 2015, this Honorable Court granted Counsel for the Respondent's Motion and required the Petitioner to respond by the 5th day of February, 2015.

Thereafter, on the 5th day of February, 2015, Samuel R. Amoruso, Jr. responded to the First Set of Interrogatories, again denying his indebtedness to the Respondent. Petitioner Amoruso also provided certain documents in response to the Respondent's First Request for Documents. Lastly, Petitoner Amoruso responded to the Respondent's Response for Admissions and, again, specifically denied that he had an account with the Respondent, that he received any goods or services from the Respondent or that he was indebted to the Respondent for the amount alleged.

Thereafter, Counsel for the Respondent filed a Motion to Amend its Complaint on the 26th day of June, 2015. Evidently, Counsel for the Respondent averred that additional monies were due and owing and therefore requiring the Complaint to be amended to show an increase in the amount alleged to be due. Thereafter, on the 25th day of July, 2015, this Honorable Court granted the Respondent's Motion to Amend the Complaint. Counsel for the Respondent thereafter filed an amended Complaint alleging that, rather than $36,809.00 being owed, $64,255.00 was alleged to be owed.

The Amended Complaint was served upon Petitioner Amoruso by Deputy Sheriff Conley on the 19th day of August, 2015. Throughout this entire process, Petitioner Amoruso repeatedly communicated with both the Respondent Insurance Company, as well as opposing Counsel Clinton W. Smith, Esq. advising that the dollar amount alleged was calculated incorrectly and that he himself was not the entity to be charged. Mr. Amoruso was of the opinion that this matter would ultimately be settled, upon the Respondent properly reviewing its records and correctly calculating what, if any, amount would have been due and owing.

Subsequent to Counsel for the Respondent securing a Motion to Amend the Complaint, opposing Counsel ceased communicating with Petitoner Amoruso. Evidently, opposing Counsel was more concerned with securing a high-dollar judgment, rather than reaching the truth of all matters he had earlier asserted.

A print-out from the West Virginia Secretary of State Online Data Services Business Organization Detail Form indicates that the entity "Q. S. I., Inc." is the only entity of record with the West Virginia Secretary of State to which Petitioner Amoruso is affiliated regarding the business operations that would have pertained to the Respondent. (Joint Appendix of Record, Pages 75 - 77),

The Workers Compensation Insurance Policy issued by Commerce and Industry Insurance Company clearly reflects that Q. S. I., Inc. is the entity to which goods and services would have been provided to the Petitioner as outlined by Council for the Respondent's Complaint. (Joint Appendix of Record, Pages 78 - 98), Lastly, a Collection Notice from the Respondent billing only Q. S. I., Inc. for the amount in dispute. (Joint Appendix of Record, Page 99).

Notwithstanding all of the above, a Default Judgment was entered against Mr. Amoruso on the 16th day of January , 2016, as a result of Mr. Amoruso's failure to file a responsive pleading to the Amended Complaint. Mr. Amoruso, acting as a *pro se* litigant and was taken advantage of by Counsel for the Respondent thereby resulting in the Default Judgment. Thereafter on the 19th day of May, 2017 the undersigned Counsel for Mr. Amoruso filed a Motion to Set Aside Default Judgment. The issue was then set for a hearing on the 21st day of September, 2017 from which the lower Court denied the Motion to vacate and ruled against Mr. Amoruso.

SUMMARY OF ARGUMENT

1. Mr. Amoruso was entitled to an Order by the lower Court granting his Motion to Set Aside the Default Judgment entered on the 28th day of January, 2016. Prior to Mr. Amoruso retaining the undersigned Counsel, he filed an Answer to the initial Complaint as well as responding to the Respondent's Request for Admissions as well as Answers to Interrogatories and Response to Request to Production of Documents. Throughout the entire proceeding, Mr. Amoruso denied that he incurred the debt and denied that he was a party to the accident. Notwithstanding the Discovery received by Counsel for the Respondent, Counsel for the Respondent filed a Motion to Amend the Complaint, which was subsequently granted by the lower Court, alleging that Sixty Four Thousand Two Hundred and Fifty Five Dollars ($64,255.00) was owed rather than the initial Thirty Six Thousand Eight Hundred and Nine Dollars ($36,809.00). What is most perplexing and equally mystifying is the fact that Counsel for the Respondent knew or should have known that the proper entity billed by his client was Q.S.I., Inc.; not Samuel R. Amoruso, Jr. doing business as Quality Supplier Trucking, Inc. That title, in and of itself, is an impossibility since no one "does business as" a corporation. A corporation is its own legal entity. Nonetheless, Counsel for the Respondent marched on and secured a Default Judgment. Inasmuch as Mr. Amoruso acted *pro se*, he failed to file yet another answer to the Amended Complaint, denying the allegations therein.

The Default Judgment entered upon Mr. Amoruso must be considered a void judgment and a nullity. Since he did not incur the debt alleged; he was not the entity under contract pursuant to the Respondent's own documents; personal jurisdiction was not secured against the Mr. Amoruso as a result of improper service of process. The lower Court's ruling was contrary to West Virginia law, clearly erroneous and plainly in error. A void judgment may be attacked at anytime, being always susceptible to challenge.

2. The lower Court abused its discretion in failing to properly apply West Virginia Rule of Civil Procedure 60(b) in the following manner:

a. That it ignored the fact that the Default Judgment Order was indeed a nullity;

b. That it failed to acknowledge that Mr. Amoruso's substantive procedural due process rights were violated;

c. That it failed to acknowledge the improper service of process utilized by the Counsel of the Respondent; and

d. Further, by the prejudicial comments upon the record, clearly resulted in a persecution of Mr. Amoruso, rather than a reasoned order based upon proper legal precedent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral arguments on this matter pursuant to Rule 19(a)(1), (2), and (3) of the West Virginia Rules of Appellate Procedure, because this case involves assignments of error in the application of settled law; in the unsustainable exercise of discretion by the lower Court where the law governing that discretion is settled; and where the result rendered by the lower Court was against the weight of the evidence.

ARGUMENT

I. STANDARD OF REVIEW

A motion to vacate a default judgment is addressed to the sound discretion of the lower Court and the lower Court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion. Appellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering the Default Judgment. On an appeal to the appellate court, an appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings in judgment in and of the trial court. Hardwood Group v. LaRocco, 219 W.Va. 56, 631 S.E. 2d 614 [2006]. An appellate court is not bound by the labels employed; rather it shall treat matters made pursuant to the most appropriate rule. Beane v. Dailey, 226 W.Va. 445, 701 S.E. 2d 848 [2010]. An appellate court, in the exercise of discretion given it by the remedial provisions of West Virginia Rule of Civil Procedure 60(b), which provides relief from judgment, should recognize that the Rule is to be liberally construed for the purpose of accomplishing justice and that is was designed to facilitate the desirable legal objective that cases are to be decided on the merits. Rose v. Thomas Memorial Hospital Foundation, Inc., 208 W.Va. 406 541 S.E. 2d 1 [2000]. Default judgments are not favored and a liberal construction should be accorded West Virginia Rules of Civil Procedure 60(b). Tudor's Biscuit World of America v. Crichley, 229 W.Va. 396, 729 S.E. 2d 231 [2012]; Hamilton Watch Company v. Atlas Container, Inc., 156 W.Va. 52, 190 S.E. 2d 779 [1972] and McDaniel v. Romano, 155 W.Va. 875, 190 S.E. 2d 8 [1972].

II. THE LOWER COURT ERRED IN FAILING TO RECOGNIZE THE VOID NATURE OF THE JANUARY 28, 2016 ORDER OF DEFAULT.

Rule 60(b) of the West Virginia Rules of Civil Procedures provided in pertinent part:

> Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud etc. - On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for anew trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgement. The motion shall be made within a reasonable time, and for reasons (1) (2) (3) not more that one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petition for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

This Honorable Court in Tudor's Biscuit World of America v. Crichley, (supra) established the standard that while a void judgment is a nullity and may be attached, collaterally or directly at any time and in any court whenever any claim or right is asserted, consequently there should be no time limit to set a void judgment. This Honorable Court further espoused that a motion filed pursuant to West Virginia Rules of Civil Procedure Rule 60(b)(4) must be made within a reasonable time.

Counsel for the Respondent relied on Rule 60(b) of the West Virginia Rules of Civil Procedure in an attempt to request the lower Court to set aside the prior Default Judgment. The Motion to Set Aside the Default Judgment clearly identified the legal inconsistencies between the Respondent's own Contract and Billing which listed the proper party to be charged as "Q.S.I., Inc." rather that Mr. Amoruso doing business as Quality Supplier Trucking, Inc.

The undersigned Counsel through both the written Motion and Oral Argument attempted to show the lower Court that as a result of the Contract of the Respondent being in the name of another entity, (Q.S.I, Inc.), a mistake, inexcusable neglect, fraud, misrepresentation or misconduct had to be afoot by Counsel for the Respondent or the Respondent to justify processing this cause of action at the onset. Specifically during the hearing upon the Motion conducted on the 21st day of September, 2017, the undersigned Counsel informed the Court that whenever the undersigned sues someone he has to sue the right person. (Transcript Page 4, Joint Appendix of Record Page 112).

Q.S.I., Inc. was the proper entity to be charged and litigated against, rather than Mr. Amoruso. Service of Process was not made correctly pursuant to Rule 60(b)(4) of the West Virginia Rules of Civil Procedure since the proper entity was not made a party, Mr. Amoruso's substantive due process rights were violated. This Honorable Court in Tudor's Biscuit World of America v. Crichley, (*supra*) recognized that:

> It is a fundamental tenet of United States jurisprudence that to enable a court to hear and determine 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. To Make a corporation amendable to the jurisdiction of a state's courts, service of process must be made in accordance with West Virginia Rules of Civil Procedure 4(d) and with exacting compliance with any statute so governing. As such, a determination that the trial court lacked in personam jurisdiction will render the default judgment at issue void and unenforceable.

This is the exact result that has befallen Mr. Amoruso. Mr. Amoruso did not make the debt averred and was not the proper party. The affect of this Default Judgment renders another person liable for another entity's debt. The default judgment is necessarily void as a result. Inasmuch as the default judgment is void, the lower Court's Order of the 17th day of November, 2017, denying to set aside default judgment is also void. A judgment is void on its face if the trial court exceeded its jurisdiction by granting a relief that it had no power to grant. A court must vacate any judgment entered in excess of its jurisdiction. Lubben v. Selective Service System Local Bd. No 27, 453 F. 2d 645 [1st Cir. 1972]. A judgment is a void judgment if a Court that rendered judgment lacked jurisdiction of the subject matter or the parties, or acted in a manner inconsistent with due process. United States Constitution Amendment Five Klugh v. United States, 620 F. Supp. 892 [D.S.C. 1985] "Where due process is denied, the case is void" Johnson v. Zerbst, 304 U.S. 458, S. Ct. 1019 [1938]

In order to render service of process upon a corporation, the requirements under Rule 4(d)(5)(A) of the West Virginia Rule of Civil Procedure provides in pertinent part:

> Upon a domestic private corporation, (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

Counsel for the Respondent prepared a Complaint styled "Commerce and Industry Insurance v. Samuel R. Amoruso, Jr. dba Quality Supplier Trucking, Inc." (Joint Appendix of Record Page 6). Counsel for the Respondent prepared the Summons in the name of "Samuel R. Amoruso, Jr. dba Quality Supplier Trucking, Inc." (Joint Appendix of Record Page 5). A designee of the Sheriff of Mineral County, West Virginia then proceed to serve Mr. Amoruso individually. The proper method of securing service of process upon a corporation would have been to serve an officer of Q.S. I., Inc. rather Counsel for the Respondent sued Mr. Amoruso as an individual "doing business as" a corporation.

Mr. Amoruso, acting *pro se*, filed an Answer (Joint Appendix of Record Page 9) as well as providing Responses to the Respondent's First Set of Interrogatories, First Request for Documents and a Response to Admissions. (Joint Appendix of Record Pages 18-22). Mr. Amoruso's responses consistently denied both liability of the underlying debt averred, as well as being the entity to be charged. The Record reflects that notwithstanding the Discovery received by Counsel for the Respondent, on the 26th day of June, 2015, the Respondent filed a Motion to Amend its Complaint increasing the dollar amount of the Judgment from Thirty Six Thousand Eight Hundred and Nine Dollars ($36,809.00) to Sixty Four Thousand Two Hundred and Fifty

Five Dollars ($64,255.00). The lower Court granted the Motion to Amend; however Mr. Amoruso did not file a separate answer due to being an insufficient *pro se* litigant. As a result of Mr. Amoruso's failure to file an answer to the Amended Complaint, a Order of Default Judgment was entered by the lower Court on the 28th day of January, 2016. Counsel for the Respondent prepared a Writ and a Suggestion on the 24th day of April, 2017 to be mailed by certified mail to the Mr. Amoruso. (Joint Appendix of Record Pages 48-55). Moreover, Counsel for the Respondent requested that a Designee of the Mineral County Sheriff serve the Suggestion upon the Mr. Amoruso. Interestingly enough, that Writ was returned not satisfied and not served by the Designee of the Sheriff of Mineral County, West Virginia. (Joint Appendix of Record Page 56). Thereafter, a Suggestion was mailed to Mr. Amoruso and PNC Bank by Certified Mail the 11th day of May, 2017. Mr. Amoruso did accept that Certified Mailing and sign for it on the 17th day of May, 2017. (Joint Appendix of Record Pages 57-63). Two days later, on the 19th day of May, 2017, the undersigned Counsel noted his appearance and properly filed a Motion to Set Aside the Default Judgment. (Joint Appendix of Record Pages 64-74).

Since it is clear that the Default Judgment Order entered by the lower Court on th 20th day of January, 2016 is void and a nullity, this Honorable Court must review the reasonable time element of Rule 60(b). Counsel for the Respondent has sought to pigeon hole and ignore the void affect of the Default Judgment Order and boot strap the one year time frame to the discussion of the undersigned Counsel regarding excusable neglect, mistake and fraud. The undersigned Counsel had attempted to logically ascertain why opposing Counsel would litigate the matter in the name of the wrong Defendant. Not once has Counsel for the Respondent acknowledged that inconsistency. Since the Default Judgment Order is void and a nullity, the one year time limit is not imposed, but rather a reasonable period of time should be the standard and as this Honorable

Court as held in Tudor's Biscuit World of America v. Crichley, (*supra*) a void judgment may be attacked at anytime.

Upon establishing the grounds set forth in Rule 60(b) for the relief for judgment as a judgment being void, Mr. Amoruso is further entitled to relief as outlined by this Honorable Court in Parsons v. Consolidated Gas Supply Corporation, 163 W.Va. 464,256 S.E. 2d 758 [1979] which requires the showing of good cause in addition to The Parsons test is defined as follows:

> 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, 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 interest at state; and (4) the degree of intransigence on the part of the defaulting party.

The following represent the Parson test as applied to Mr. Amoruso:

1. Degree of prejudice suffered:

Clearly, Mr. Amoruso is prejudiced by the entry of Sixty Four Thousand Two Hundred and Fifty Five Dollars ($64,255.00) Judgment against him. He was not the proper party and for him to be liable for a corporation's debt is untenable;

2. The presence of material issue:

Mr. Amoruso presented the defense of a void judgment and the improper parties and the dubious nature of the case being filed by the Counsel of Respondent all which unfortunately fell on deaf ears of the lower Court; and

3. The significance of the interest at stake:

Mr Amoruso's substantive and procedural due process rights were trampled as well as a money judgment being imposed which no reasonable person would think that judgment was nominal in dollar amount.

4. Degree of intransigence:

Upon Counsel for the Respondent attempting to suggest monies held by Mr. Amoruso with PNC Bank, Mr. Amoruso within six (6) days, retained the undersigned to set aside the judgment. That time span is only one (1) year and four (4) months beyond the date of the Default Judgment action. Clearly a reasonable time had passed between the time of the illegal Judgment and especially the time the Suggestion was filed to satisfy the illegal Judgment.

Mr. Amoruso has clearly met his burden of proof in establishing that the Default Judgment Order was void *ab initio*. The lower court was clearly and plainly wrong in both its legal analysis and failing to recognize how the void judgment came about as well as failing to acknowledge the order as a nullity.

III. THE LOWER COURT ABUSED ITS DISCRETION INASMUCH AS IT COMPLETELY MISCONSTRUED THE LETTER AND SPIRIT OF THE LAW PERTAINING TO VOID JUDGMENTS AS WELL AS BASING ITS DECISION UPON PREJUDICIAL STATEMENTS MADE BY THE LOWER COURT ON THE RECORD.

"The term judicial discretion is one of the most general expressions in the law."

Bouevier's Law Dictionary [First Edition, Published in 1839] gave the following definition:

> The discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst; it is every vice, folly, and passion, to which human nature is liable. [2]

Justice Benjamin Cardozo recognized that a matter committed to a trial judge's discretion is not unlimited and that discretion must be exercised in a disciplined and rational manner.

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuant of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by an analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains.

Benjamin N. Cardozo The Nature of the Judicial Process [1921][3]

Examples of an abuse of discretion can be generally defined as follows:

> 1. The Court misunderstood the facts where there was insufficient evidence to support the facts they relied on.

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[2]For an excellent discussion see Judicial Discretion In Common Law Courts, Richard B. Spindle, 4 Washington and Lee Law Review Issue 2, Article 3 [1947].

[3] Another excellent article for this Court's review is Abuse of Discretion: What Should it Mean under Ohio Law, 29 Ohnulr 209 [Mark B. Painter: Paula L. Welker]

> 2. The Court misunderstood the law such as the trial court's actions transgressing the confines of the applicable principles of law based upon other impermissible factors or an incorrect legal standard.
>
> The Court failed to follow the proper procedure for exercising its discretion and the record affirmatively shows the Court was unaware of its discretion. [4]

The undersigned Counsel attempted to argue and set out before the lower Court not the grounds for the Motion to Set Aside the Default Judgment, by arguing that not only was the Judgment void inasmuch as the proper party wasn't sued but somehow Counsel for the Respondent either knew or should have known of this error or the Respondent itself knew or should have known of this error. Evidently Commerce and Industry Insurance Company was only interested in securing a Judgment against anyone, no matter whether it sued the proper party, and then collect on ill-gotten gains. The undersigned Counsel argued the following during the September 21, 2017 hearing:

> MR. JAMES SMITH: Your Honor, if it please the Court, as I set out in the motion, fora brief timeline, the matter was initially instituted by filing of a complaint, June 8 of 2014, alleging that $36,809 was due and owing as a result of , quote, goods, funds, or service provided. That summons was served thereafter June 16th of '14. The Defendants were listed at that time, Samuel R. Amoruso, dba Quality Supplier Trucking, Inc.
>
> On the 7th, the Defendant Amoruso, pro se, filed an answer denying the complaint, denying that he owed anything and denying that he was doing business as Quality Supplier Trucking.
>
> Thereafter, looks like there was some discovery. A motion to compel was filed by opposing counsel. That motion was granted.

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[4] The abuse of discretion standard: How to Argue it If You must and Avoid it If You Can, 6th District Appellate Program, Nonprofit Corporation Serving Indigent Appellate Filings, 95 South Market Street, Suite 570, San Jose, California 95113

Mr. Amoruso responded to the discovery; again denying that he was the party so alleged and averred to owe any money. Even after that information and fact was presented and proffered to opposing counsel, there was a motion to amend the complaint.

THE COURT: Right, I granted that.

MR. JAMES SMITH: Right.

THE COURT: Served them on the 19th of August.

MR. JAMES SMITH: year, amended it, and it almost - - well, doubled the amount that he was praying for.

Now, again, Defendant Amoruso repeatedly communicated, thinking that this thing would be cleared up. It wasn't. Of course, he's not an attorney.

Thereafter, the motion to - - for default judgement was pushed through. And only thereafter, you know, Mr. Amoruso is - - unfortunately understood that he had to do something to get this off his name.

I mean, I think the crux of the issue is the Plaintiff is the only one who would know who owes money to it, who contracted the insurance, or whatever this arrangement was. I mean, they had the information.

Within my motion, I show the contract, this Workers Comp. insurance, that was in QSI's name. That's the proper entity. Exhibit B shows that under this Chartis Company. There was also a bill that was posted. It was pas due in QSI on West Virginia Secretary of State's data services. I mean, it shows QSI and only the Amorusos as officers.

So, I mean, either it's a mistake on the part of the Plaintiff or, you know, negligence of whatever; or maybe, you know, Mr. Smith goes around the State trying to ram judgments wherever he wants. I mean - -

MR. CLINTON SMITH: Your Honor.

THE COURT: That's out of line, man.

MR. JAMES SMITH: Well, I mean, I think it's out of line when you don't know - -

THE COURT: What's out of line is your client has spent his whole entire career creating these damn companies so he can hide behind money that he owes people.

MR. SMITH: I'll hear you.

Mr. JAMES SMITH: Well, Judge, whenever I sue anyone, Judge, I got to get the right person.

THE COURT: I'm not saying you did anything wrong.

MR. JAMES SMITH: No, no, no. I'm saying for - -

THE COURT: I understand. I understand your argument. They sued the right - - the wrong entity.

MR. JAMES SMITH: No one else is responsible for anyone else's - -

(Joint Appendix of Record Pages 110 - 113; Transcript Pages 2 - 5)(Emphasis added).

The above indicates that the Court knew or should have known that the wrong party was sued but relied on its prejudicial statement that Mr. Amoruso has been "out of line spending his whole entire career creating these damn companies so he can hide behind money that he owes people". This statement and opinion blinded the lower Court in properly understanding that the Default Judgment was void ab initio. The lower Court's personal opinion eviscerated Mr. Amoruso's substantive procedural due process right. The lower Court's actions mirror Justice Cardozo's fears. The lower Court innovated at its own pleasure. The lower Court did not draw inspiration from consecrated principles or prior precedent. The lower Court did yield to spasmodic sentiment. The lower Court did not choose to decide the matter by a traditional methodized logical analogy, disciplined by rule of law. The lower Court allowed its temper and passion to obliterate the rights of Mr. Amoruso.

CONCLUSION AND RELIEF REQUESTED

"Defendants who have been treated with unfairness, bias and the appearance of prejudice by this Court, and the opposing Counsel, leaves open the question of how an uninterested, lay person, would question the partiality and neutrality of this Court... our system of law has always endeavored to prevent even the probability of unfairness". [In Re: Murchinson, 349 U.S. 133 (1955)]. The Default Judgment entered by the lower Court on the 20th day of January, 2016 was an a nullity; a void order, inasmuch as both improper service of process occurred pursuant to Rule 4(d)(5)(A) of the West Virginia Rules of Civil Procedure, and as the wrong entity was included as a party in this cause of action. The Respondent's own Billing Invoice and Contract of Insurance was billed in the name of Q.S.I., Inc. These documents have never been contradicted by the Respondent. Either the Respondent or Counsel for the Respondent knew or should have known of the proper party to sue in this cause of action; however, for either intentional or negligent reasons, chose to sue an officer of Q.S.I., Inc., the Petitioner herein, as an individual "doing business as" another corporation. That phrase in and of itself is an incongruently and patently false. This Honorable Court has held that a void order can always be attacked collaterally or directly at any time. The one year 60(b) limitation requirement does not apply in the instant case. Furthermore, the good cause requirement as defined and relied upon in the Parsons clearly indicates that Mr. Amoruso would be forever harmed by the impact of this Judgment, both by the dollar amount of the Judgment as well as what the Judgment represents; a wholesale destruction of Mr. Amoruso's substantive and procedural due process rights. The lower Court abused its discretion and chose not to apply the proper law to the facts; but rather relied upon its personal opinion regarding Mr. Amoruso (which failure in and of itself indicates

abuse of discretion). The Court's personal animosity of Mr. Amoruso would allow a blind man to see the affect of the lower Court's abuse of discretion. Without this Honorable Court's intervention, a grave injustice shall stand and a dangerous precedent will be established. This Honorable Court can not let such a precedent stand. Such a precedent would result in an embarrassment upon not only to West Virginia jurisprudence but will invite National ridicule.

For the forgoing reasons, and any others that may be apparent to this Honorable Court, your Petitioner, Mr. Amoruso, respectfully prays for the following:

1.That the relief requested herein be granted;

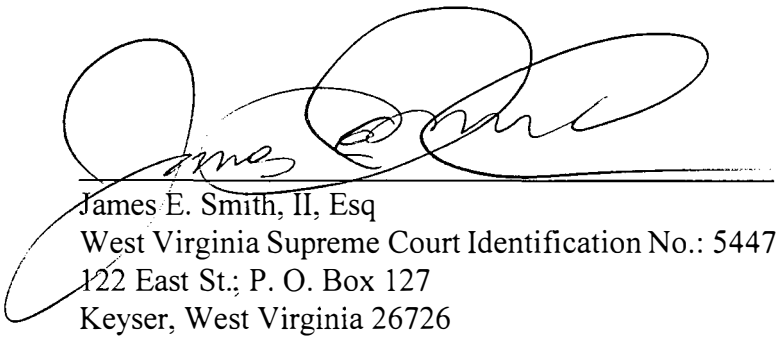
2. That the Petitioner be admitted to the Rule 19 the argument docket;

3. That this Honorable Court reverse the lower Court's Order of the 17th day of November, 2017, which denied the Petitioner's Motion to Set Aside Default Judgment;

4. That this Honorable Court would set aside the Default Judgment entered on the 28th day of January, 2016; and

5. For such other relief that this Honorable Court deeds equitable and just.

SAMUEL L. AMORUSO, JR.,
d/b/a QUALITY SUPPLIER TRUCKING, INC,
PETITIONER, BY COUNSEL



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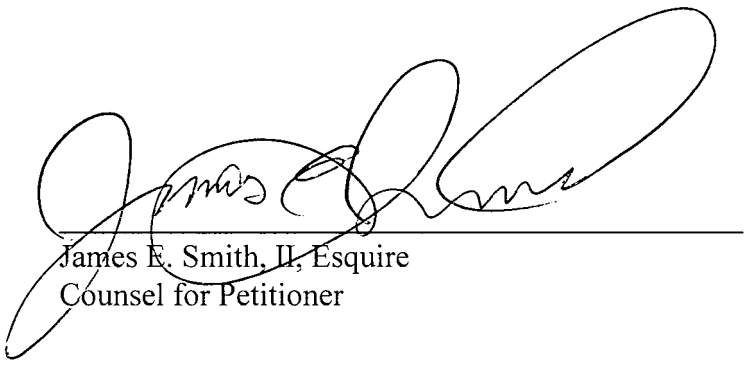
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, James E. Smith, II, Esquire, a practicing West Virginia attorney, pursuant to Rule 37 of the West Virginia Rules of Appellate Procedure, do hereby certify that, a true copy of the foregoing Petitioner's Brief was duly served upon the following:

1. Clinton W. Smith, Esq., by United States Mail, First Class, postage pre-paid to 405 Capitol Street, Mezzanine Suite 4, Charleston, West Virginia 25301; and

2. That the original and ten (10) copies of the same was duly served by United States Mail, First Class, postage pre-paid to the Office of the Clerk, Attn. Claudia, Supreme Court of Appeals of West Virginia, State Capitol Building, Room E-317, 1900 Kanawha Blvd. East, Charleston, West Virginia 25305, for filing on the 15th day of March, 2018.



James E. Smith, II, Esquire
Counsel for Petitioner