IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17-1106

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

Petitioner

v.

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Respondent.

On appeal from the
Circuit Court of Mineral County
Presiding Judge Lynn A. Nelson
Civil Action No. 14-C-75

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

For good reason, the Circuit Court denied Appellant Samuel R. Amoruso, Jr.'s ("Amoruso") Motion under W. Va. R. Civ. P. 60(b) ("Rule 60(b)").

Although Amoruso initially appeared in the case, answered, and aggressively defended, after Respondent, Commerce and Industry Insurance Company ("Commerce and Industry") filed its Amended Complaint, Amoruso failed to answer and vanished from the Circuit Court proceedings. Consequently, the Circuit Court entered a default judgment against Amoruso. After waiting sixteen (16) months from the entry of judgment, Amoruso then filed a Rule 60(b) Motion seeking to set the default judgment aside. In its application of the unambiguous law, the Circuit Court denied the Motion as untimely. Here, Amoruso appeals this denial.

Commerce and Industry's Initial Complaint and Amoruso's Participation in the Case

Commerce and Industry initiated this case in June 2014 by filing a Complaint against Amoruso, in his individual capacity, for breach of contract related to Amoruso's failure to pay premium under a Workers' Compensation Insurance Policy issued by Commerce and Industry ("Complaint"). Appx. 6-7. Within a few days of filing, the Mineral County Sheriff served Amoruso with the Summons and Complaint. Appx. 8. In July 2014, Amoruso duly filed a *pro se* Answer denying the allegations without asserting affirmative defenses ("Answer"). Appx. 9-10.

To prosecute its claim, Commerce and Industry served Amoruso with written discovery requests, including Interrogatories, Requests for Production, and Requests for Admission. Appx. 12. Amoruso failed to respond to these requests, forcing Commerce and Industry to file a Motion to Compel in October 2014. Appx. 13-14. After a hearing that Amoruso failed to attend, the Court granted the Motion to Compel. Appx. 17. Amoruso reappeared in the case in February 2015, serving responses to the written discovery. Appx. 18-22.

Commerce and Industry's Amended Complaint and Amoruso's Failure to Respond

In June 2015, Commerce and Industry moved to amend its Complaint for an expedient reason. Appx. 23-24. Because Amoruso owed premium to Commerce and Industry under a second Workers' Compensation Insurance Policy—not included in the initial Complaint—judicial economy encouraged the inclusion of both policies in a single suit. *Id*. After a hearing, at which Amoruso again did not appear—either in person or by counsel—the Circuit Court granted the Motion. Appx. 30.

Commerce and Industry filed the Amended Complaint ("Amended Complaint"), maintaining the suit against Amoruso in his individual capacity, on August 3, 2015. On August 19, 2015, the Mineral County Sheriff served the Amended Complaint on Amoruso. Appx. 31-36. Along with the Amended Complaint, Amoruso received service of a Summons with the following warning: "If you fail [to serve an answer to the Amended Complaint], judgment by default will be taken against you for the relief demanded in the complaint . . . ." Appx. 31.

Despite Amoruso's participation in the suit from July 2014 to February 2015, and the valid service of the Amended Complaint in August 2015, Amoruso failed to answer or otherwise respond to the Amended Complaint. Amoruso's inaction prompted Commerce and Industry to file a Motion for Default Judgment (the "Motion") against Amoruso in January 2016. Appx. 37-41. Based on Amoruso's failure to answer the Amended Complaint, the Circuit Court granted the Motion, and entered judgment against Amoruso, in his individual capacity, on January 28, 2016 ("Judgment"). Appx. 42-43, 45.

Amoruso's Rule 60(b) Motion

After Commerce and Industry made various attempts to execute on the Judgment (*see* Appx. 48-63), Amoruso hired counsel and moved to set aside the Judgment on May 19, 2017 (the "Motion to Set Aside"). Appx. 67-71. In the Motion to Set Aside, Amoruso merely contended

that he was not indebted, in his individual capacity, to Commerce and Industry under the Workers' Compensation Insurance Policy, and therefore not the proper party to the suit. Appx. 69-71. Instead, through counsel, he argued, Quality Supplier Trucking, Inc. ("QST") was the sole proper party to the suit. As the legal basis for his Motion, Amoruso, through counsel, cited "fraud" and "excusable neglect," implicitly invoking Rule 60(b)(1) & (3). *Id.* Never once did he argue, or even intimate, that the Circuit Court should set aside the Judgment as void—under Rule 60(b)(4). Appx. 67-71.

The Circuit Court heard Amoruo's Motion to Set Aside in September 2017. Appx. 109-115. At the hearing, Amoruso's counsel again implicitly argued that the Judgment should be set aside under Rule 60(b)(1) & (3) because Commerce and Industry supposedly made "a mistake" or was negligent in suing Amoruso, instead of QST. Appx. 109-115. Amoruso's counsel never raised even the slightest hint or argument that the Judgment was void and should be set aside under Rule 60(b)(4). *Id*. The Court denied Amoruso's Motion to Set Aside as untimely—because it fell outside the one-year deadline under Rule 60(b)(1) and (3). Appx. 116.

SUMMARY OF ARGUMENT

In this appeal, Amoruso does not articulate any valid reason for reversing the Circuit Court's denial of his Motion to Set Aside.

His principal argument on appeal—that the Judgment was void and thus should be vacated under Rule 60(b)(4)—was never raised in the Circuit Court, and he thus cannot raise it for the first time here. Besides, the Judgment is not void, in that there was no defect in the Circuit Court's exercise of personal jurisdiction over Amoruso—the only defendant in the suit. Contrary to Amoruso's contention that Commerce and Industry sued the wrong party, Amoruso was properly

served (twice) and subjected to the Circuit Court's jurisdiction. Stripped down, Amoruso contends that the Judgment is void because it is wrong—an unsupported and erroneous proposition.

The Circuit Court properly denied Amoruso's Motion to Set Aside because it was not timely filed. Motions brought under Rule 60(b)(1) or (3)—the *only* subsections relied on by Amoruso in his Motion to Set Aside in the Circuit Court—must be filed within a reasonable time, but not to exceed a period of one year after the judgment. Amoruso waited 16 months to file his Motion to Set Aside. Because Amoruso failed to timely file his Motion to Set Aside in the Circuit Court, and because he fails to show how the Circuit Court abused its discretion, the Court should affirm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Commerce and Industry does not believe that oral argument is necessary in this case because, under W. Va. R. App. P. 18(4), the facts and legal arguments are adequately presented in the brief and record on appeal, and therefore the decisional process would not be significantly aided by oral argument before the Court.

ARGUMENT

I. STANDARD OF REVIEW

A motion to vacate a judgment made pursuant to *Rule* 60(b), W. Va. R.C. P., " is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion. Syl. Pt. 5, *Toler v. Shelton,* 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. pt. 4, *Rose v. Thomas Mem'l Hosp. Found., Inc.,* 208 W.Va. 406, 541 S.E.2d 1 (2000) (per curiam). *See also* Syl. pt. 2, *Rose,* 208 W.Va. 406, 541 S.E.2d 1 (" 'An appeal of the denial of a *Rule* 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.' Syl. Pt. 3, *Toler v. Shelton,* 157 W.Va. 778, 204 S.E.2d 85 (1974)."). " '[U]nder

the abuse of discretion standard, [this Court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.' " *Graham v. Wallace*, 214 W.Va. 178, 182, 588 S.E.2d 167, 171 (2003) (internal citations omitted). This Court also has noted that "[o]nly where we are left with a firm conviction that an error has been committed may we legitimately overturn a lower court's discretionary ruling. 'Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.' " *Covington v. Smith*, 213 W.Va. 309, 322-23, 582 S.E.2d 756, 769-70 (2003) (internal citations omitted).

II. THE CIRCUIT COURT PROPERLY DENIED AMORUSO'S RULE 60(b) MOTION BECAUSE THE JUDGMENT IS NOT VOID AND AMORUSO'S MOTION WAS NOT TIMELY MADE.

A. Amoruso Waived any Argument that the Judgment Is Void, as He Failed to Raise this Issue in the Circuit Court.

As this Court has held, a party does not preserve, for appeal, issues that the party fails to raise in the Circuit Court. In the Circuit Court, Amoruso never argued that the Judgment was void and, therefore, should be set aside under Rule 60(b)(4). Because he raises this issue for the first time on appeal, the issue was not properly preserved, and the Court should not address it.

"To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *Hanlon v. Logan Cnty. Bd. of Educ.*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997). "The rule in West Virginia is that parties must speak clearly in the circuit court on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *Id.* (internal alterations omitted). "It must be emphasized

that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely." *Id*.

In his Motion to Set Aside, Amoruso never raised the prospect that the Judgment was void. Appx. 67-71, 109-115. Indeed, as the face of his Motion to Set Aside and hearing transcript demonstrate, Amoruso grounded his arguments in the concepts of "fraud" and "excusable neglect," thereby exclusively invoking Rule 60(b)(1) & (3) as the legal justification to vacate the Judgment.[1] *Id*. At the Circuit Court, Amoruso did not expressly invoke Rule 60(b)(4). Nor did he make any substantive arguments suggesting that the Judgment was void. *Id*. Indeed, the Circuit Court, in denying the Motion, understood Amoruso's arguments to exclusively relate to Rule 60(b)(1) & (3). Appx. 116.

Now, for the first time, Amoruso raises the specter of a void Judgment on appeal. But his failure to raise this argument at the Circuit Court precludes its consideration on appeal. *C.D. v. Grant Cnty. Bd. of Educ*., No. 16-1035, 2017 W. Va. LEXIS 784, at *7 (W. Va. Sup. Ct. Oct. 20, 2017) (memorandum decision) ("Petitioner fails to provide a citation to the record where, either in writing or in oral presentation, she raised the issue . . . with the circuit court. Therefore, she has waived her right to raise this argument for the first time on appeal."). As a result, the Court can affirm the Circuit Court's decision on this basis alone.

B. The Circuit Court's Judgment Is Not Void Thereby Rendering Rule 60(b)(4) Inapplicable.

1. There is No Issue of Personal Jurisdiction.

Even assuming Amoruso can raise his void judgment argument on appeal, it collapses under the weight of its own illogic. Instead of focusing on the Circuit Court's jurisdiction over

[1] In his brief, Amoruso even acknowledges that the grounds he advanced in the Circuit Court in support of his Rule 60(b) motion were based on grounds other than a void judgment. Petitioner's Brief at 11.

himself, Amoruso challenges the efficacy of the Judgment based on the Circuit Court's lack of jurisdiction over QST, a non-party. Because Commerce and Industry properly served Amoruso, and the Circuit Court properly exercised jurisdiction over Amoruso—the only Defendant below—the Judgment is not void. Thus, the Circuit Court did not err in refusing to vacate the Judgment under Rule 60(b)(4).

The fundamental flaw in Amoruso's new-fangled theory is that it conflates jurisdictional principles with a defense he never raised. In short, Amoruso argues that because Commerce and Industry allegedly should have sued another party—*i.e.*, QST—for the unpaid premium, Commerce and Industry's failure to properly serve QST somehow thwarted the Circuit Court's "jurisdiction"[2] to enter the Judgment. Petitioner's Brief at 11-13.

This theory completely disregards the reality confronted by the Circuit Court. Commerce and Industry did not sue QST—it sued Amoruso. Because Commerce and Industry decided to pursue Amoruso for the unpaid premium, it only needed to serve Amoruso. W. Va. R. Civ. P. 4. And the parties do not dispute that Commerce and Industry properly served its Complaint and Amended Complaint on Amoruso. Appx. 8, 31; Petitioner's Brief, 3-4. Because Commerce and Industry properly served Amoruso—and the Amoruso raises no other arguments with respect to personal jurisdiction—the Circuit Court properly exercised personal jurisdiction over him. To the extent Amoruso asserts that QST was also required to be served to confer personal jurisdiction over him, he cites no authority for that facially illogical and incorrect proposition.

[2] Although Amoruso is imprecise in his use of the term "jurisdiction," Amoruso's arguments are necessarily grounded in personal jurisdiction, not subject matter jurisdiction. While service of process does not confer personal jurisdiction, it is a prerequisite. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 666, 584 S.E.2d 517, 522 (2003) (citing *Bowers v. Wurzburg*, 205 W. Va. 450, 519 S.E.2d 148 (1999) for the proposition that "'service of process brings the defendant before the court, and personal jurisdiction contemplates whether the defendant is properly before the court so as to permit the tribunal to exercise jurisdiction over his/her person.'").

2. Amoruso Waived Any Conceivable Issue of Personal Jurisdiction.

In addition, even if Amoruso theorizes that the Circuit Court lacked personal jurisdiction over him, in his personal capacity, he waived that defense. The West Virginia Rules of Civil Procedure are clear on this point:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

W. Va. R. Civ. P. 12(h)(1). Amoruso did not contest either the sufficiency of process or personal jurisdiction by motion. And he failed to include either defense in his Answer to the Complaint. Appx. 9-10. Amoruso thus waived any defense relating to service of process or personal jurisdiction. *In re Appointment of Trustees for Woodlawn Cemetery*, 222 W. Va. 351, 354, 664 S.E.2d 692, 695 (2008) ("Clearly, because the appellants failed to make a motion or file any pleading challenging the sufficiency of the appellees' service of process . . . and instead appeared to defend against the appellee's petition on the merits, the appellants have waived their objections.").

Amoruso essentially asserts that the Judgment is void because it is allegedly wrong. But, even if this fiction were true, it would not transform it into a void judgment—a point on which the courts are in unanimous agreement. *See e.g., Pittman v. Pittman*, No. 01-A-01-9301-CH-00014, 1994 Tenn. App. LEXIS 481, at *10 (Tenn. Ct. App. Aug. 24, 1994) ("A judgment is not void simply because it is wrong. To be found void, a judgment must have been rendered by a court lacking jurisdiction over the subject matter or the parties or acting in some other manner inconsistent with the requirements of due process."); *Riggins v. Hill*, 461 S.W.3d 577, 582 (Tex. App.—Houston [14th Dist.] 2015) ("Any error by the trial court in adjudicating the merits in the

Judgment did not deprive the trial court of jurisdiction to render the Judgment, nor did it make the Judgment void."); *Njos v. United States*, No. 3:12-CV-1251, 2015 U.S. Dist. LEXIS 152497, at *8 (M.D. Pa. Nov. 9, 2015) ("[A] judgment is not void simply because one party regards that judgment as wrong.").

Contrary to Amoruso's contention, the Judgment is not void due to some defect in service of process or personal jurisdiction. Commerce and Industry sued and properly served Amoruso. Neither QST's existence nor Amoruso's unasserted defense change the analysis. As a result, Rule 60(b)(4) is not a basis to set aside the Judgment, and the Court should affirm the Circuit Court's actions.

C. The Circuit Court Correctly Denied Amoruso's Rule 60(b) Motion Because It Was Untimely.

1. It is Untimely Under Rule 60(b)(1) and (3).

To bring a motion under Rule 60(b), it must be timely. Under Rule 60(b)(1) & (3), the subsections implicated by Amoruso, the motion must be brought within a reasonable time—but no longer than a year after judgment. Because Amoruso filed his Motion to Set Aside nearly 16 months after entry of the Judgment, it fell outside the strict deadline imposed by Rule 60(b).

A party must bring a motion under Rule 60(b) within the period established by the rule. *State ex rel. Bess v. Berger*, 203 W. Va. 662, 666, 510 S.E.2d 496, 500 (1998) ("Critical to the issue of seeking Rule 60(b) relief is a timely filing requesting such relief."). The time limitation for bringing a Rule 60(b) motion under subsections (1)—"Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause"—or (3)—". . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party"—is "**not more than one year after the judgment, order, or proceeding was entered or taken**." W. Va. R. Civ. P. 60(b) (emphasis added).

For motions brought under these subsections, the one-year mark is a categorical outer limit, after which the motion may not be brought. *Savas v. Savas*, 181 W. Va. 316, 319, 382 S.E.2d 510, 513 (1989) (holding, under the previous version of the rule that provided for an eight month outer limit, that "[o]bviously, where the eight-month period has not been met, there is no need to make the reasonable time inquiry, as it is barred by the outer-limit term."). Here, Amoruso grounded his motion in subsections (1) and (3). Appx. 67-71, 109-115. Indisputably, Amoruso filed his motion nearly 16 months after the Circuit Court entered Judgment. Appx. 43-45, 67. Thus, his Rule 60(b) motion was time-barred. *Savas*, 181 W. Va. at 319, 382 S.E.2d at 513.

2. Although Waived by Amoruso, Amoruso's Motion is Likewise Untimely Under Rule 60(b)(4).

Recognizing the fixed nature of this time limit, Amoruso argues that his Motion to Set Aside is timely under subsection (4). Petitioner's Brief at 10-12. This argument is academic, because he waived it by failing to raise it at the trial-court level (*see* § I.A (above)). Even if he had done so, waiting 16 months to file his Motion to Set Aside was unreasonable, and therefore untimely. *White v. Berryman*, 187 W. Va. 323, 331-332, 418 S.E.2d 917, 925-926 (1992) ("There is no question that [appellant] filed his 60(b) motion within eight months [applicable under the previous version of the rule] of the entry of the default judgment orders. However, given the circumstances present in this case, we do not find that this motion was filed within a reasonable time.").

It is certainly not the case that motions under subsection (4) are subject to no time limit. Amoruso misreads *Tudor's Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 403, 729 S.E.2d 231, 238 (2012), as holding that a putatively void judgment under Rule 60(b) can be attacked at any time—even if the movant waits an unreasonable period of time. Petitioner's Brief at 14-15. While this case notes a minority concurring opinion advocating for that proposition, the Court did

not adopt this position, instead choosing to leave "for another day" the question of whether a void judgment is subject to the Rule 60(b) timeliness requirement. *Id.* at n.10. Accordingly, Amoruso's Motion to Set Aside is untimely even under a theory that Amoruso waived at the trial-court level.

3. Amoruso's Initial Participation Manifests an Understanding of the Consequences of Disengaging from the Litigation.

Amoruso, though litigating *pro se*, filed an answer to Commerce and Industry's Complaint. Appx. 9-10. Thereafter, when the Circuit Court ordered Amoruso to provide responses to Commerce and Industry's written discovery requests, he complied. Appx. 17-22. And it is undisputed that Commerce and Industry served him with the Amended Complaint. Appx. 31; Petitioner's Brief at 4. At the time Commerce and Industry's served the Amended Complaint, it likewise served the summons, which expressly warned Amoruso that "[i]f you fail [to serve an answer to the Amended Complaint], judgment by default will be taken against you for the relief demanded in the complaint. . . ." Appx. 31.

Despite the Amoruso's months-long participation in the case, and the clear warnings noted on the Summons attached to the Amended Complaint, Amoruso deliberately disengaged from the Circuit Court proceedings. In his brief, Amoruso offers no reason for his purposeful withdrawal from the case, except that he "did not file a separate answer due to being an insufficient pro se litigant." Petitioner's Brief at 14. But that status did not preclude his prior participation. And that prior participation manifests an understanding of the grave consequences of disengaging from active litigation.

Consequently, his unexplained and indefensible failure to answer the Amended Complaint and 16-month delay in seeking relief from the Judgment was unreasonable. *Savas*, 181 W. Va. at 319, 382 S.E.2d at 514 (affirming denial of Rule 60(b) motion because appellant could "offer no

viable reason as to why she delayed filing the motion until approximately thirteen months after the final decree").

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AMORUSO'S RULE 60(b) MOTION.

As discussed above, Amoruso's Motion to Set Aside did not comply with applicable time limits. Nor did he ever articulate a legitimate reason for failing to answer and waiting over 16 months to file his Motion to Set Aside. He likewise waived any argument related to an assertion of a void judgment. So, there is really no reason to assess whether the Circuit Court abused its discretion in denying Amoruso's Motion to Set Aside.

Amoruso nonetheless quotes from an ancient legal dictionary and Benjamin Cardozo to divine an abuse of discretion in the denial of his Motion to Set Aside. But this case involves a narrow interpretation of a clearly-defined rule of civil procedure. Specifically, "an appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of a denial itself and not the substance supporting the underlying judgment nor the final judgment order." *Kenner v. Affordable Living, Inc.*, 212 W. Va. 312, 314, 570 S.E.2d 571, 573 (2002) (quoting *Toler*, *supra*, Syl. Pt. 3).

An appellate court's review of "an order denying a motion under Rule 60(b), . . . the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner." *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 411, 541 S.E.2d 1, 6 (2000) (quoting *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974) Syl. Pt. 4). "Indeed, 'a motion to vacate a judgment pursuant to Rule 60(b), W. Va.R.C.P., is addressed to the sound discretion of the court and the court's ruling on such a motion will not be disturbed on appeal unless there is a

showing of an abuse of discretion." *Kenner*, 212 W. Va. at 314, 570 S.E.2d at 573 (quoting *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974) Syl. Pt. 5).

To support a finding of an abuse of discretion, Amoruso seizes on a single comment made by the Circuit Court at the hearing on his Rule 60(b) Motion that Amoruso contends disparaged his character. Appx. 112, 15-17. Amoruso asserts that this lone remark displays the Circuit Court's blind illogic and purposeful flaunting of the law in rendering its decision. Petitioner's Brief at 20. But the Court was merely responding to the following comment of Amoruso's counsel: "So I mean, either it's mistake on the part of the Plaintiff or, you know, negligence or whatever; or maybe, you know, Mr. Smith goes around the State trying to ram judgments wherever he wants." Appx. 112, 7-10. It was not some kind of unprompted attack on Amoruso.

More importantly, the statement in question is wholly unrelated to the merits of Amoruso's Motion to Set Aside. The Circuit Court's ruling on that Motion resulted from a straightforward application of a rule of civil procedure. Appx. 116 ("[I]t is the Judgment and Order of the Court that the motion by the Defendant to set aside the Default Judgment is hereby denied on the grounds that the motion was not timely filed."). A separate colloquy between the Circuit Court and counsel would have no bearing on a reading of that rule.

This sort of comment cannot warrant overruling the Circuit Court: "Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Builders' Serv. & Supply Co. v. Dempsey*, 224 W. Va. 80, 83 680 S.E.2d 95, 98 (2009) (quoting *Intercity Realty Co. v. Gibson*, 152 W. Va. 369, 377, 175 S.E.2d 452, 457 (1970)).

CONCLUSION

Amoruso filed his Motion to Set Aside under Rule 60(b)(1) & (3) well after the one-year time limit. Amoruso waived any argument related to subsection (4) and, in any event, any challenge under this subsection is likewise untimely. Because the denial of the Motion to Set Aside is based on a straightforward application of a rule of civil procedure, there could not have been any abuse of discretion. Accordingly, this Court should affirm the Order denying Amoruso's Motion to Set Aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Clinton W. Smith, counsel for Respondent, do hereby certify that on the 2nd day of May, 2018, I served copies of the foregoing RESPONDENTS' BRIEF upon the following counsel of record by depositing true copies thereof via U.S. Mail, postage prepaid:

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