No. 30109—*Bobby Cales, et al. v. Mark Steven Wills*

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OF WEST VIRGINIA

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McGraw, Justice, concurring in part, and dissenting in part:

While I agree that National's intransigence in this case justifies a finding of default as to liability, I take issue with the majority's action in reversing the resulting award of damages. Specifically, I disagree with the majority's assertion in syllabus point five of the Court's opinion that for purposes of West Virginia Rule of Civil Procedure 55(b)(2), an "appearance" by a party to a litigation may consist of nothing more than an oral or written communication to the opposing party demonstrating an interest in the pending litigation.

As the majority opinion readily admits, our past cases dealing with this issue are in conflict. In *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 374-76, 175 S.E.2d 452, 455 (1970), this Court expressly rejected the notion that mere oral communication between counsel constitutes an appearance under Rule 55(b)(2). More recently, however, in dictum contained in *Farm Family Mutual Ins. Co. v. Thorn Lumber Co.*, 202 W. Va. 69, 501 S.E.2d 786 (1998), we indicated that "[t]he term '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)." *Id*. at 75 n.9, 501 S.E.2d at 792 n.9. I see no valid reason why we should give divergent meanings to this term of art, particularly as there are sound policy

reasons for resolving this conflict by adhering to the stance this Court originally took in *Intercity Realty*.

Even the federal courts, from where we derive Rule 55(b)(2), are not unanimous as to what constitutes an appearance in this context. In *Anderson v. Taylorcraft, Inc*., 197 F. Supp. 872 (W.D. Pa. 1961), an appearance with respect to Rule 55(b)(2) was described as "ordinarily an overt act by which a party comes into a court and submits himself to its jurisdiction." *Id*. at 874 (citation omitted). Following this standard, the Seventh Circuit, in *Zuelzke Tool & Engineering Co., Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226 (7th Cir. 1991), declined to find that "informal settlement negotiations" between parties could amount to making an appearance under Rule 55(b)(2):

> [A] party "has appeared in the action" under Rule 55(b)(2) only where that party has actually made some presentation or submission *to the district court* in the pending action. Such an interpretation is consistent with traditional and accepted legal parlance in which "appearance" is defined as "a coming into court as a party to a suit, either in person or by an attorney, whether as plaintiff or defendant."

Id. at 230 (quoting *Black's Law Dictionary* 89 (5th Ed. 1979)) (emphasis in original).

In *Town and Country Kids, Inc. v. Protected Venture Inv. Trust #1, Inc.*, 178 F.R.D. 453 (E.D. Va. 1998), the district court found that a notarized deposition sent from defendant's to plaintiff's counsel, suggesting the possibility of settlement, was not enough to constitute an appearance under Rule 55(b)(2). That court reasoned that "requiring a party to

make at least some submission to the district court is necessary to apprise the court of . . . whether that party has an interest in defending the suit." *Id*. at 455. Likewise, in *Rogers v. Hartford Life and Accident Insurance Co*., 167 F.3d 933 (5th Cir. 1999), the court would not accept the defendant's claim that its waiver of service of process constituted an appearance under the rule: "We will not interpret the phrase 'appeared in the action' so broadly as to eviscerate the appearance requirement of Rule 55(b)(2)." *Id*. at 937.

These authorities emphasize the importance of keeping a trial court informed of the status of pending litigation. "Efficient court management and reliability of judicial process is enhanced by court records which disclose the critical procedural actions of the parties—such as the entry of an appearance." *Zuelzke,* 925 F.2d at 230. Interpreting Rule 55(b)(2) so broadly as to allow an appearance to be predicated upon "any communication to an opposing party that demonstrates either an interest in the pending litigation, or actual notice of the litigation," as the majority does in the present case, will inevitably lead to confusion and disorganization in the lower courts. A simple acknowledgment by a party of having received notice of pending litigation does not reveal to anyone, most importantly the circuit court, what that party's intentions are with respect to defending the action. *See Rogers*, 167 F.3d at 938 ("Waiver of service of process does not in any way indicate that a defendant intends to defend."). This is nowhere more evident than in the instant case, where National's response to a waiver of subrogation request obviously did not signal its intent to defend the present action.

Although I recognize the importance of giving a defendant an opportunity to defend against an application for default judgment, the Court should not go out of its way to find an appearance based upon communications that may indicate nothing more than *de minimis* attention to the litigation. As the Seventh Circuit emphasized in *Zuelzke*, "it is a disservice to the legal system to distort the meaning of a concrete term such as 'appearance' in order to provide a mechanism to save a party from a default judgment." 925 F.2d at 230. With this admonition in mind, I would adopt the *Zuelzke* court's approach to resolving this issue.

Therefore, I respectfully concur with Part III.B of the majority opinion respecting National's default as to liability, but dissent from Part III.A of the opinion, which reverses the circuit court's award of damages. National was not entitled to notice under Rule 55(b)(2) because it never made a proper appearance in the action prior to the entry of a default judgment.