IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0044

STATE ex rel. MONSTER FRANCHISE, LLC,
Petitioner

v.

HON. JEFFREY D. CRAMER, Judge of the Circuit Court of Marshall County, and DAVID S. DUVALL,
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Does the Circuit Court have jurisdiction over the Petitioner where certified mail service was not returned by the United States Postal Service stamped "Delivered" or "Refused," but was returned stamped "Return to Sender" and "Unable to Forward?"

2. Did the Circuit Court err as a matter of law where it refused to set aside default entered before the Petitioner had any obligation to answer and where the Circuit Court considered alleged post-default misconduct.

3. Did the Circuit Court abuse its discretion in not setting aside the entry of default where (a) there has been no prejudice to the Plaintiff as less than forty (40) days passed between when he allegedly served his amended complaint, and when he sought entry of default; (b) there are compelling meritorious defenses where the law provides that a franchisor, like the Petitioner, is not liable for the negligence of its franchisee; (c) there are significant issues at stake where the Petitioner's alleged damages are about $1 million; (d) the Petitioner has not been intransigent, but actively communicated with the Plaintiff's counsel and timely filed a motion to set aside the entry of default; and (e) the reason the Petitioner did not file an answer was that it was advised when provided with a courtesy copy that amended complaint would be formally served and even to this day, the Secretary of State's website still indicates that amended complaint has not been served.

II. STATEMENT OF THE CASE

A. INTRODUCTION.

As in *Tudor's Biscuit World of America v. Critchley*,[1] this case comes before the Court as the result of an effort on the part of the Respondent, David S. Duvall ("Plaintiff"), to avoid the

[1] 229 W. Va. 396, 729 S.E.2d 231 (2012).

limitations of the deliberate intent statute by obtaining first an entry of default, and later a default judgment, against the Petitioner, Monster Franchise, LLC ("Monster Franchise"), the franchisor of the Plaintiff's employer, Monster Tree Service of the Upper Ohio Valley, Inc. ("UOV"), and Monster Tree Service, Inc. ("Monster"), a wholly-unrelated company, by depriving an opportunity for Monster Franchise and Monster to defend the negligence claims asserted against them.

B. FACTS AND PROCEDURAL HISTORY.

On February 8, 2019, the Plaintiff filed suit against UOV and Monster.[2] The Plaintiff was hired in 2017 by UOV to perform tree cutting services.[3] Shortly after he was hired, the Plaintiff fell out of a tree while performing tree cutting services for UOV.[4] As a result of the accident, the Plaintiff filed suit against UOV and Monster.

The Plaintiff's suit against his employer. UOV, is predicated on the deliberate intent statute.[5] The suit against Monster was based on a negligence theory, i.e., as the parent of its alleged subsidiary, it had a duty to make certain that its subsidiary, UOV, provided adequate safety training, but had failed to do so.[6]

On April 16, 2019, the Plaintiff amended his complaint to include the Petitioner, Monster Franchise.[7] The Plaintiff's amended complaint lumped the MTS and Monster Franchise together:

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[2] App. 8.

[3] App. 12.

[4] App. 15.

[5] App. 16.

[6] App. 21.

[7] App. 45.

"Defendants Monster and Monster Franchise were engaged in the business of marketing tree trimming ... training individuals to operate tree trimming ... businesses."[8] Relative to the accident, the amended complaint alleges, "Defendant Monster and/or Defendant Monster Franchise assumed the duty of training and educating Defendant Monster of the UOV on applicable safety statutes, rules and/or regulations."[9] By allegedly not ensuring that his employer provided adequate safety training to the Plaintiff, he alleged that Monster and Monster Franchise breached some common law duty to him and are liable for his injuries."[10]

Because the amended complaint was filed without leave of court after no answer was filed to the original complaint, the Plaintiff had the Clerk issue new summonses on April 17, 2019, and attempted to effectuate service on Monster and Monster Franchise through the Secretary of State.[11] Quizzically, the Plaintiff filed an affidavit on April 24, 2019, in support of default against UOV because it had not answered the first complaint because, as noted, once he filed an amended complaint, the earlier complaint had been rendered a nullity. Two days later, on April 24, 2019, an affidavit for entry of default against UOV was filed.[12] This was clearly erroneous because, as noted, the process against UOV started over again once the Plaintiff filed the amended complaint.

Then, on May 31, 2019, the Plaintiff filed an affidavit for entry of default against all the defendants.[13] As to the employer, UOV, the affidavit noted that it had not answered the original

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[8] App. 47.

[9] App. 49.

[10] App. 60. The amended complaint asserted the same deliberate intent action against the Plaintiff's employer. App. 55.

[11] App. 1.

[12] App. 74.

[13] App. 89.

complaint after being served,[14] even though that complaint had been superseded by the amended complaint. As to Monster, the affidavit predicated its request for entry of default on its failure to answer the original complaint,[15] which again is erroneous because the amended complaint rendered the original complaint a nullity. As to the new defendant in the amended complaint, the Petitioner, Monster Franchise, the affidavit predicated its request for entry of default on its failure to answer the amended complaint after having been allegedly served through the Secretary of State thirty-nine (39) days earlier, on April 22, 2019.[16]

Critically, however, the Plaintiff's affidavit conceded that his attempted service on Monster Franchise had been unsuccessful:

> After learning that the certified mail containing the Summons and Amended Complaint had been returned as undeliverable ... counsel confirmed with the Pennsylvania Secretary of State that the address set forth in Exhibit F ... is the correct address for Defendant Monster Franchise ...
>
> Upon information and belief, Defendant Monster Franchise ... has actual notice of the Amended Complaint by virtue of service upon Monster ...[17]

Of course, in both *White v. Berryman*[18] and *State ex rel. Farber v. Mazzone*,[19] the defendants had actual notice of the summonses and complaints that were left with their secretaries but, in both cases, this Court held that because service of process was inadequate, the trial court had not

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[14] App. 90. The affidavit also alleged that UOV had not answered the amended complaint within the requisite thirty-day period, having been served through its registered agent for service of process on April 25, 2019. App. 91.

[15] App. 90. The affidavit also alleged that Monster had not answered the amended complaint within the requisite thirty-day period, having been served through the Secretary of State on April 22, 2019. App. 91-92.

[16] App. 92-93.

[17] App. 93.

[18] 187 W. Va. 323, 418 S.E.2d 917 (1992).

[19] 213 W. Va. 661, 584 S.E.2d 517 (2003).

obtained personal jurisdiction over them and, in the latter case, issued a writ of prohibition, the relief being requested by Monster Franchise in this case.

Significantly, the "Application for Entry of Default" filed on May 31, 2019, was not served on any of the defendants.[20] Consequently and not surprisingly, the trial court entered default against the employer, UOV, Monster, and Monster Franchise on June 5, 2019.[21]

Nineteen days later, on June 24, 2019, Monster filed its motion to set aside the entry of default, arguing that service of process was defective, less than twenty days had passed since the entry of default, and that it had meritorious defenses to the negligence complaint.[22] Monster noted that it did not engage in business in the State of West Virginia for purposes of the long-arm statute.[23] Specifically, it stated, "Monster Tree is not affiliated in any way with Monster UO(V. Instead, Monster Tree is a Pennsylvania tree-cutting company that operates solely in Pennsylvania and simply uses the Monster Tree trademark pursuant to a licensing agreement ... Monster Tree has never conducted business in West Virginia ..."[24] As in *White* and *Farber*, Monster also argued that service was defective because the summons had not been accepted "by a duly authorized agent of Monster Tree" and that the signature on the return receipt card was not "that of anyone authorized to receipt or receipt mail at Monster Tree."[25] Finally, Monster argued that the trial

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[20] App. 89.

[21] App. 108-109.

[22] App. 110.

[23] App. 119-120.

[24] App. 120.

[25] App. 121.

court lacked both general and specific jurisdiction over it, and that by not setting aside the default, its constitutional rights would be violated.[26]

On October 15, 2019, the Petitioner, Monster Franchise, filed its motion to set aside the default, arguing that it had not been properly served, that it had meritorious defenses, and that good cause existed for setting aside the entry of default.[27] In its memorandum supporting its motion, Monster Franchise noted that, "the certified mail from the West Virginia Secretary of State ... was returned ... marked" something other than "Delivered" or "Refused."[28] Because the summons and complaint could not be actually served, "The returned correspondence was processed through the U.S. Postal Service for return to the Secretary of State on or about May 13, 2019."[29]

Monster Franchise explained through an affidavit that, "the address where service was attempted ... is not the address of Monster Franchise; that address has not been the address of Monster Franchise for a number of years; and, Monster Franchise did not receive service ..."[30] In addition, Monster Franchise argued that, under the circumstances, there was good cause to set aside the entry of default, particularly where, under West Virginia law, "A franchisor will not be held liable for the acts of the franchisee unless the franchisor is actively involved in the day-to-day operations of the franchisee's business"[31] and where "pursuant to the applicable franchise

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[26] App. 122-127.

[27] App. 267.

[28] App. 272.

[29] Id.

[30] Id.

[31] App. 280.

agreement, Plaintiff's employer ... UOV ... was an independent contractor ... solely responsible for safety and security, and warranted it would adhere to applicable safety standards."[32] Monster Franchise also noted that although the Plaintiff's attorney had provided a courtesy copy of the amended complaint, the cover letter stated, "**Service of the same is being made in accordance with the applicable law,**"[33] which was not done.

The Plaintiff's response to Monster Franchise's motion to set aside the default was predicated on the argument that because service of the amended complaint on Monster was allegedly effective, service on Monster Franchise was effective because it is a "related company" to Monster.[34] Relative to the fact that under the applicable franchise agreement, the responsibility for safety and security is allocated solely to the franchisee, the Plaintiff argued, "whatever contractual relationship exists between it and Monster UOV, the contractual terms do not negate Plaintiff's claims against Monster Franchise,"[35] but this is contrary to West Virginia law. The Plaintiff also argued that even if Monster Franchise had not been properly served, it had "actual notice" because a copy had been forwarded to Monster's counsel.[36] Finally, the Plaintiff made the factually-unsupported allegation that someone at Monster Franchise wrote "not at this address" and "return to sender," while acknowledging, "the identity of the individual at 320 Norristown

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[32] App. 281.

[33] App. 283 (emphasis in original).

[34] App. 325.

[35] App. 326.

[36] App. 327.

Road who wrote 'not at this address' and 'return to sender' on the envelope from the WVSOS when avoiding delivery is not specifically known."[37]

On December 18, 2019, the trial court entered orders denying Monster's and Monster Franchise's motions to set aside the entry of default. The order relative to Monster Franchise reasoned that because Monster was allegedly served with its copy of the summons and complaint; a courtesy copy of the summons and complaint had been sent to Monster's counsel; and service of the summons and complaint on Monster Franchise "was effectively refused by someone ... handwriting 'not at this address' 'return to sender' on the envelope, Monster Franchise "failed to Answer or otherwise respond to Plaintiff's Amended Complaint on or before **March 22, 2019**," which is before the amended complaint was filed, let alone service had been attempted on anyone, the entry of default was proper.[38]

Relative to the failure to effectuate service, the order states, "Delivery of the certified mail parcel to Monster Franchise ... was effectively refused ..."[39] Regarding the wrong address being used, the order states, "320 Norristown Road ... remains the registered address of Monster Lawncare, Inc.," yet another non-party defendant, "a related company also owned by Mr. Skolnick and which is the owner of the Monster Tree Service trademark."[40]

Apparently as a way of forgiving the failure to properly effectuate service, the order also states, "Monster Franchise's effective refusal of service was done with actual knowledge ... that

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[37] App. 330, n.7.

[38] App. 390-393 (emphasis supplied).

[39] App. 392.

[40] App. 394.

the Summons and Complaint was forthcoming,"[41] ignoring the fact that the cover letter indicated that proper service of process was being effectuated.

Concerning the legal issues presented, the trial court held that, "Acceptance of the Summons and Amended Complaint by the West Virginia Secretary of State was the equivalent of personally serving Monster Service,"[42] ignoring the rule that service is not perfected if process is returned undelivered. Alternatively, the trial court held, "The critical inquiry in determining sufficiency of process where there is an allegation that service was attempted at an incorrect address or accepted by an unauthorized person is whether the defendant had actual notice of the lawsuit and an opportunity to be heard."[43] Of course, the latter is absent because the cover letter conveying the courtesy copy of the amended complaint indicated that service of process would be properly effectuated, and the time to "be heard" was when that occurred.

Relative to the five-part test for ruling on a motion to set aside the entry of default, the trial court's order is lacking.

First, relative to the "degree of prejudice" factor, the trial court held, "Any prejudice to Monster Franchise ... was created by Monster Franchise itself."[44] Of course, were that the standard, which it is not, no default would be set aside because, by definition, the default was a product of the defendant's act or omission. Relative to prejudice to the Plaintiff, the order states, "Plaintiff has been prejudiced by Monster Franchise's refusal to acknowledge his claims, including

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[41] Id.

[42] App. 395.

[43] App. 397.

[44] App. 400.

the delay in prosecuting his claims."[45] Again, by definition, a defendant which has not answered can be said not to have "acknowledged" the plaintiff's claims and, here, less than forty (40) days lapsed between the alleged service and the Plaintiff's application for default, and most of any "delay" at this point is the product of the Plaintiff's chosen to have his case decided by default rather than on its merits.

Second, relative to "material issues of fact and meritorious defenses," the order completely ignores the franchisor/franchisee relationship between Monster Franchise and the Plaintiff's employer. Instead, it first states, "Monster Franchise argued meritorious defenses of ineffective service of process and lack of jurisdiction,"[46] but those are procedural defenses to the entry of default and are entirely irrelevant to a motion to set aside an entry of default. The order next states, "Any additional defenses arising from Monster Franchise's claimed contractual agreement with Monster UOV are matters between the parties which ... are not currently before this Court,"[47] but it is precisely the undisputed franchisor/franchisee issue that was squarely before the trial court presenting a compelling substantive legal defense to the Plaintiff's negligence claims against Monster Franchise.

Third, relative to the "significance of interests at stake," the trial court's analysis is limited to a fifteen-word, single sentence: "Significant issues are at stake in this litigation given the alleged severity of Plaintiff's injuries and damages,"[48] which (1) completely ignores the significance at

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[45] App. 401.

[46] Id.

[47] Id.

[48] Id.

stake for Monster Franchise were the Plaintiff's damages are allegedly around $1 million[49] and (2) the "significant issue" factor, whether applicable to a plaintiff or defendant, militates in favor of setting aside an entry of default as it should be reserved for relatively insignificant disputes.

Fourth, relative to the "degree of intransigence of the defaulting party," the trial court did not focus on Monster Franchise as a separate defendant but lumped the defendants together: "Monster Franchise, through both its CEO and counsel, had actual notice of the Amended Complaint yet chose to ignore the same,"[50] which is inaccurate because (1) the order states elsewhere that, in response to the Amended Complaint, counsel requested the amended complaint be withdrawn[51] and (2) the cover letter which accompanied a courtesy copy of the amended complaint stated, "Service of the same is being made in accordance with the applicable law,"[52] which was not done. A defendant has the right to wait to answer until he, she, or it has been properly served. It is not "intransigent" to wait until service is properly effectuated, particularly where, as here, the plaintiff's attorney indicates that service is being properly effectuated.

Finally, relative to the "reason for the failure to respond/excusable neglect," the order states, "Monster Franchise's attempt to justify its failure to respond on the basis that it did not believe service had been effective such that this Court would have jurisdiction to enter default does not constitute excusable neglect,"[53] but in addition to the misapplication of the rules governing effective service of process discussed elsewhere, this ignores the chronology set forth in the trial

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[49] App. at 170. ("Mr. Duvall's medical bills alone approach $1 Million and he has not yet been released to return to work").

[50] App. 401.

[51] App. 393.

[52] App. 283.

[53] App. 402.

court's order. The trial court's order states, "The West Virginia Secretary of State accepted service of the Complaint [sic] on April 22, 2019..."[54] Even assuming this service was effective, which it was not, that meant any responsive pleading, including a Rule 12(b) motion was due on May 22, 2019, thirty days later. Thereafter, "On May 31, 2019," only nine days later, "Plaintiff filed an Application for Entry of Default,"[55] and with absolutely no notice whatsoever to any Defendant, including Monster Franchise, "This Court ordered an Entry of Default by Monster Franchise on June 5, 2019,"[56] only fourteen days after a Rule 12(b) motion would have been due if the summons and complaint had been properly served. Plainly, these circumstances presented good cause for setting aside the entry of judgment, and the trial court should have granted Monster Franchise's motion and proceeded to have this case decided on the merits.

Under the circumstances, the issuance of a writ of prohibition and the remanding of this case for a trial on the merits is appropriate.

III. SUMMARY OF ARGUMENT

Where certified mail service was returned by the United States Postal Service not stamped "Delivered" or "Refused, but returned stamped "Return to Sender" and "Unable to Forward," and evidence was presented that the address was no longer used by Monster Franchise, the trial court lacks personal jurisdiction and this case should be remanded to proceed on its merits.

Where default was entered before Monster Franchise had an obligation to answer, having not been properly served with process, and where the trial court impermissibly considered alleged

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[54] App. 391.

[55] App. 392.

[56] App. 393.

post-default misconduct, it erred as a matter of law by refusing to set aside the entry of default, and this case should be remanded with directions to set aside the entry of default without prejudice.

Where (1) there has been no prejudice to the Plaintiff as less than forty (40) days passed between when he allegedly served his amended complaint, and when he sought entry of default; (2) there are meritorious defenses where the law provides that a franchisor, like the Petitioner, is not liable for the negligence of its franchisee; (3) there are significant issues at stake where the Petitioner's alleged damages are around $1 million; (4) the Petitioner has not been intransigent, but actively communicated with the Plaintiff's counsel and timely filed a motion to set aside the entry of default; and (5) the reason the Petitioner did not file an answer was that it was advised when provided with a courtesy copy that amended complaint would be formally served and even to this day, the Secretary of State's website still indicates that amended complaint has not been served.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves errors in the application of settled law, an unsustainable exercise of discretion where the law governing that discretion is settled, and narrow issues of law, oral argument under R. App. P. 19 is appropriate in this case.

V. ARGUMENT

A. THE AWARD OF A WRIT OF PROHIBITION IS APPROPRIATE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

1. The Standards for a Writ of Prohibition

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having

such jurisdiction, exceeds its legitimate powers."[57] Both provinces of the writ are present here because (1) the trial court has no jurisdiction over Monster Franchise as it was not properly served and (2) the trial court clearly erred in its application of this Court's standards for the review of a motion to set aside the entry of default. Regarding the second aspect of the writ, this Court has held that prohibition is appropriate to correct "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."[58]

Moreover, in Syllabus Point 4 of *State ex rel. Hoover v. Berger*,[59] this Court held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

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[57] W. Va. Code § 53-1-1; see also syl. pt. 1, in part, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (purpose of writ of prohibition is "to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers").

[58] Syl. pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), superseded on other grounds as stated in *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)

[59] 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, where Monster Franchise has no other means, such as a direct appeal, to obtain the requested relief; where it is being deprived of a right to defend itself, as a franchisor, on the merits; the trial court's order is clearly erroneous as a matter of law; the trial court's errors extend not only to Monster Franchise, but also to Monster; and the theory that actual notice of litigation cures insufficient service presents an issue of first impression, a writ of prohibition is appropriate.

2. This Court's Application of the Prohibition Standards in Similar Cases

In addition to *State ex rel. Farber v. Mazzone*,[60] previously discussed, where a summons and complaint was left with an attorney's secretary, this Court has issued writs of prohibition in other cases involving issues of lack of jurisdiction,[61] including service of process.[62]

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[60] Supra note 19.

[61] See, e.g., *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 835 S.E.2d 579 (W. Va. 2019) (granting writ of prohibition for lack of subject matter jurisdiction); *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 788 S.E.2d 319 (2016) (granting writ of prohibition where record was insufficient to support exercise of personal jurisdiction); *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 588 S.E.2d 217 (2003) (granting writ of prohibition for lack of subject matter jurisdiction); *Pries v. Watt*, 186 W. Va. 49, 410 S.E.2d 285 (1991) (granting writ of prohibition for lack of personal jurisdiction); see also E.H. Schopler, *Prohibition as Appropriate Remedy to Restrain Civil Action for Lack of Jurisdiction of the Person*, 92 A.L.R.2d 247 (1963).

[62] See also *Norfolk Southern Ry. Co. v. Maynard*, 190 W. Va. 113, 437 S.E.2d 277 (1993) (granting writ of prohibition to determine whether employee of parent corporation was its agent for purposes of service of process); *State ex rel. West Virginia Truck Stop, Inc. v. Belcher*, 156 W. Va. 183, 192 S.E.2d 229 (1972) (granting writ of prohibition where company's full-time employee who served original process was acting as plaintiff's agent and, therefore, trial court had no jurisdiction over defendant under rule prohibiting service of process by a party); *State ex rel. Garner v. Garvin*, 145 W. Va. 820, 117 S.E.2d 521 (1960) (granting writ of prohibition and holding that where a nonresident of the state voluntarily submitted himself to jurisdiction of a court in the state in answer to a legal process, such nonresident was entitled to immunity from service of civil process while answering the civil process under which he was appearing, and for a reasonable time before and after such legal proceeding in going to and returning from the state); *State ex rel. Staley v. Hereford*, 131 W.Va. 844, 5 S.E.2d 738 (1947) (granting writ of prohibition where service of process was improper); *Morris v. Calhoun*, 19 W. Va. 603, 195 S.E. 341 (1938) (granting writ of prohibition where service of process was improper); (granting writ of prohibition where service of process was improper).

B. WHERE THE POSTAL SERVICE RETURNED THE ATTEMPTED CERTIFIED MAIL ON THE PETITIONER MARKED "UNABLE TO FORWARD" AND "RETURN TO SENDER," INSTEAD OF "DELIVERED" OR "REFUSED," SERVICE OF PROCESS WAS INADEQUATE AND THE TRIAL COURT LACKS PERSONAL JURISDICTION OVER THE PETITIONER.

"Jurisdiction is made up of two elements—jurisdiction of the subject matter and jurisdiction of the person."[63] In *State ex rel. West Virginia Truck Stop, Inc. v. Belcher*,[64] this Court noted, "To hear and determine an action the court must have jurisdiction of the parties."

"There is a distinction between the defenses of insufficient service of process and lack of personal jurisdiction; however, '[a] consequence that flows from insufficient service of process is that a trial court's presumptive personal jurisdiction is lacking when it is properly established that process was not served correctly.'"[65]

Accordingly, "a determination that the circuit court lacked personal jurisdiction" due to improper service "would render the default judgment issued against petitioner void and unenforceable."[66]

This Court has also held that personal jurisdiction does not "arise by operation of law when a nonresident defendant is constructively served with process pursuant to the provisions of Rule 4 of the West Virginia Rules of Civil Procedure."[67]

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[63] *Sidney C. Smith Corp. v. Dailey*, 136 W. Va. 380, 386, 67 S.E.2d 523, 526 (1951).

[64] Supra note 62; see also Syl. pt. 3, *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010) (holding that jurisdiction does not exist where service of process is defective).

[65] *Leslie Equip. Co. v. Wood Res. Co.*, 224 W. Va. 530, 541 n.9, 687 S.E.2d 109, 120 n.9 (2009) (Davis, J., dissenting).

[66] *Rife v. Shields*, 2016 WL 6819045 at *4 (W. Va.) (memorandum) (citation omitted); see also Syl. pt. 3, *Beane v. Dailey*, supra note 64 ("A default decree rendered upon a defective substituted service of process is void for want of jurisdiction.") (Internal quotations and citations omitted.).

[67] *Leslie Equip.*, 224 W. Va. at 536, 687 S.E.2d at 115.

Moreover, "Absent personal jurisdiction, 'the court is powerless to do anything beyond dismissing without prejudice.'"[68]

Our long-arm statute, W. Va. Code § 56-3-33(c) provides:

> Service shall be made by leaving the original and two copies of both the summons and the complaint, and the fee required by section two, article one, chapter fifty-nine of this code with the Secretary of State, or in his or her office, and such service shall be sufficient upon such nonresident: Provided, That notice of such service and a copy of the summons and complaint shall forthwith be sent by registered or certified mail, return receipt requested ... by the Secretary of State to the defendant at his or her nonresident address **and the defendant's return receipt signed by himself or herself or his or her duly authorized agent or the registered or certified mail so sent by the Secretary of State which is refused by the addressee and which registered or certified mail is returned to the Secretary of State, or to his or her office, showing thereon the stamp of the post-office department that delivery has been refused** ... If the process, notice or demand **was refused or undeliverable** by the United States Postal Service the Secretary of State shall create a preservation duplicate from which a reproduction of the stored record may be retrieved which truly and accurately depicts the image of the original record ... If any defendant served with summons and complaint fails to appear and defend within thirty days of service, judgment by default may be rendered against him or her at any time thereafter. **The court may order such continuances as may be reasonable to afford the defendant opportunity to defend the action or proceeding.**[69]

Strict compliance with these statutory provisions is necessary for a court to obtain personal jurisdiction over a non-resident: "Code, 56-3-31, As amended, is in derogation of common law in

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[68] *Midkiff v. Shepherd University*, 2016 WL 3092807 at *5 (W. Va.) (memorandum) (citing *Western Life Trust v. State*, 536 N.W.2d 709, 712 (N.D. 1995)); see also *Coleman v. Gillespie*, 424 Fed. Appx. 267, 270 (5th Cir. 2011) (finding that where service of process was not effectuated, dismissal must be without prejudice "[b]ecause these defendants were never before the court"); *Colston v. First Guarantee Commercial Mortgage Corp.*, 665 F. Supp. 2d 5, 9 (D.D.C. 2009) ("Because Aurora Bank has not been served properly, the Court lacks personal jurisdiction over it and is powerless to adjudicate the merits of Ms. Colston's allegations against it."); *Fries v. Carpenter*, 567 A.2d 437, 439 (Me. 1989) ("[B]ecause the plaintiffs failed to make a timely service of process on the defendants personal jurisdiction of the defendants was never secured. ... Accordingly, the dismissal of the plaintiffs' complaint did not operate as an adjudication upon the merits of this case." (citations omitted))

[69] (Emphasis supplied).

allowing a summons to be served upon the Auditor in an action against a non-resident defendant and therefore must be strictly adhered to in accordance with its clear and unambiguous terms"[70] and arguments such as the non-resident's attorney was provided a copy of the summons and complaint; the non-resident's affiliate was served with a separate summons and complaint, the non-resident's CEO had access to the summons and complaint, etc., are simply inadequate.

For example, in the single Syllabus of *Crowley v. Krylon Diversified Brands*,[71] this Court held, "Under the provisions of W. Va. Code, 31-1-15 [1997] and 31D-15-1510 [2002], service of process on a corporation is insufficient when notice or process is mailed using registered or certified mail to an authorized corporation's listed agent by the Secretary of State, is neither accepted or refused by the agent, and the mail is returned to the Secretary of State because the notice or process is undeliverable."

Here, the Secretary of State's website still lists the summons and complaint as not having been delivered to Monster Franchise.[72] Moreover, the Secretary of State's website reflects that the "stamp of the post-office department" does not indicate "refused" in accordance with W. Va. Code § 56-3-33(c), but indicates as follows:

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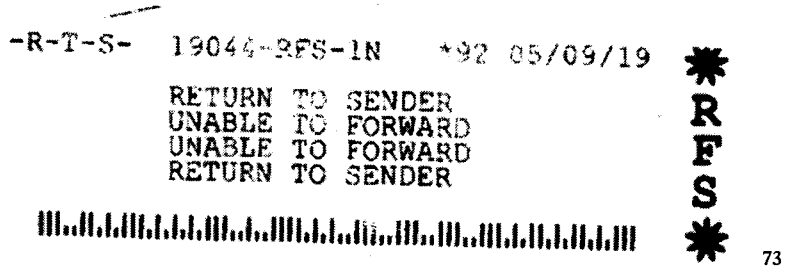
[70] Syl. pt. 2, *Stevens v. Saunders*, 159 W. Va. 179, 220 S.E.2d 887 (1975), superseded by statute on other grounds as recognized in *Lanick v. Amtower Auto Supply, Inc.*, 2013 WL 2149864 (W. Va.) (memorandum); see also *Leslie Equip.*, supra at note ___ (service of process under the constructive service provisions of the Rules of Civil Procedure was insufficient to establish personal jurisdiction because such provisions do not comply with the service of process provisions of the long-arm statute).

[71] 216 W. Va. 408, 607 S.E.2d 514 (2004).

[72] http://apps.sos.wv.gov/business/service-of-process/Home/Details/237515



[73]

There is no basis anywhere in the law for the trial court's reasoning that the certified mail was "effectively refused" [74] when the United States Postal Service did not affix "the stamp of the post-office department that delivery has been refused," which is the statutory requirement.

What is even more absurd is that despite the trial court's ruling that service was effectuated on Monster Franchise when the summons and complaint were received by the Secretary of State April 22, 2019,[75] the Secretary of State's website accurately reflects that the United States Postal Service was never able to deliver them to Monster Franchise, departing its Charleston, West Virginia, USPS facility on April 24, 2019, processed for return from its Philadelphia, Pennsylvania, facility on May 9, 2019, for return to the Secretary of State not having been delivered but classified as "Return to Sender Processed" and "Moved Left No Address" by its Ambler, Pennsylvania, facility, and eventually classified as "Waiting Delivery Scan" from its South Charleston, West Virginia, facility on May 13, 2019.[76]

In Syllabus Point 2 of *Burkes v. Fas-Chek Food Mart Inc.*,[77] this Court held, "Under W. Va. Code, 31D-5-504(c) [2002], service of process or notice upon a domestic corporation through the

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[73] http://apps.sos.wv.gov/business/service-of-process/Home/ReturnReceipt/987330b5-3c82-e911-a991-00155df3a145

[74] App. 392.

[75] App. 393.

[76] http://apps.sos.wv.gov/business/service-of-process/Home/USPSStatusDetails/237515

[77] 217 W. Va. 291, 617 S.E.2d 838 (2005).

Secretary of State is insufficient when a registered or certified mailing of the process or notice is neither accepted nor refused by an agent or employee of the corporation," and there is no logical reason, particularly in light of the clear language of our long-arm statute and its similarity to the domestic corporation service of process statute, that the same rule does not apply to foreign corporations.

Indeed, in Syllabus Points 1, 2, and 3 of *Evans v. Holt*,[78] this Court held:

1. "[I]n an action against a non-resident motorist[,] service of process may be had upon the ... [Secretary of State] provided that notice of such service and a copy of the process shall forthwith be forwarded by the ... [Secretary of State] to the defendant by registered mail, return receipt requested, and the return receipt, signed by the defendant or his duly authorized agent, or the registered mail, showing thereon the stamp of the post office department that delivery has been refused by the addressee, is appended to the original process and filed therewith in the clerk's office, the return of the registered mail showing the stamp of the post office department that addressee is "Unknown" is not sufficient compliance with the statute to sustain a default judgment rendered against a nonresident defendant." Syl. Pt. 4, in part, *Mollohan v. North Side Cheese Co.*, 144 W. Va. 215, 107 S.E.2d 372 (1959).

2. Where a plaintiff seeks to obtain service of process on a nonresident defendant in accordance with the procedures outlined in West Virginia Code § 56-3-31(e) (Supp.1994), and where the registered or certified mail containing service of process is returned to the Secretary of State's Office showing thereon the stamp of the post office department that delivery was unable to be made due to the "Insufficient Address" of the addressee, then the plaintiff, provided no other action has been taken under said statutory provisions, has failed to serve the nonresident defendant with process in compliance with the statute.

3. Under the provisions of West Virginia Code § 56-3-31 (Supp.1994), in order for a duly authorized agent to accept service of process on behalf of a nonresident defendant, there must be clear, unambiguous and express terms on the notice of service of process sent by the Secretary of State to the nonresident defendant's duly authorized agent that the copy of the summons and complaint are not being served on the duly authorized agent

[78] 193 W. Va. 578, 457 S.E.2d 515 (1995).

> in his individual capacity, but on the nonresident defendant. Further, the nonresident defendant's duly authorized agent must acknowledge on the return receipt signed by said individual that service of process has been accepted on behalf of the nonresident defendant.

In *Crowley*, this Court ruled that service of process was insufficient where the United States Postal Service stamped it "Forwarding Order Expired."[79] In *Evans v. Holt*, this Court ruled that service of process was insufficient where the United States Postal Service stamped it "Returned for Better Address, INSUFFICIENT ADDRESS."[80] In *Burkes*, this Court ruled that service of process was insufficient holding as follows:

> The record in the instant case indicates that the Secretary of State mailed a copy of the appellant's summons and complaint by certified mail, return receipt requested, to the appellee's registered agent for service of process, Mr. Tate. The certified mail was returned to the Secretary of State marked "Attempted—Not Known." Because the mailing was not returned as "refused," we find the circuit court did not err in presuming that the appellee had not been properly served.[81]

Likewise, in this case, where the certified mail to Monster Franchise was not stamped "Delivered" or "Refused," but was stamped, "Return to Sender" and "Unable to Forward,"[82] service of process was insufficient as in *Crowley*, *Evans*, and *Burkes*; the fact that Monster Franchise may have had imputed knowledge of the complaint as in *White* and *Farber* is irrelevant; the trial court has no jurisdiction over Monster Franchise; and a writ of prohibition should be granted.

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[79] *Crowley*, supra at 409, 607 S.E.2d at 515 ("The certified mail was returned to the Secretary of State with a notice indicating that it was not delivered for the stated reason of 'Forwarding Order Expired.'").

[80] *Evans*, supra at 582, S.E.2d at 519.

[81] *Burkes*, supra at 296, S.E.2d at 843.

[82] http://apps.sos.wv.gov/business/service-of-process/Home/ReturnReceipt/987330b5-3c82-e911-a991-00155df3a145

C. THE TRIAL ERRED, AS A MATTER OF LAW, BY REFUSING TO SET ASIDE DEFAULT WHERE IT WAS ENTERED BEFORE THE PETITIONER HAD ANY OBLIGATION TO ANSWER AND WHERE IT CONSIDERED "POST-DEFAULT" MISCONDUCT.

It is not insignificant that Monster Franchise moved to set aside not a default judgment, but only the entry of default.

R. Civ. P. 55(a) governs the entry of default and provides, "When a party ... has failed to plead or otherwise defend ... the clerk shall enter the party's default." R. Civ. P. 55(b)(2), on the other hand, governs the entry of default judgment by a trial court and provides, "In all other cases the party entitled to a judgment by default shall apply to the court therefor" and where, as here, "If the party against whom judgment by default is sought has appeared ... the party ... shall be served with written notice of the application for judgment at least 3 days prior to the hearing." Here, because the Plaintiff was seeking the entry of default, as opposed to entry of default judgment, no written notice was provided to any of the Defendants when he applied for entry of default.

Relative to the entry of default under Rule 55(a), "an entry of default against [a defendant] before it had any obligation to file an answer, [is] incorrect as a matter of law."[83] Here, as noted, default was entered before Monster Franchise had any obligation to file an answer as it had not been properly served and the trial court was incorrect as a matter of law by refusing to set it aside.

Additionally, the trial court's order violated the admonition that the "'otherwise defend' language **should not be interpreted to allow pleading stage default to extend and apply to post-pleading misconduct**."[84] Here, of course, in order to bootstrap denial of Monster Franchise's

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[83] L. Palmer & R. Davis, LITIGATION HANDBOOK ON THE WEST VIRGINIA RULES OF CIVIL PROCEDURE 5TH at § 55(a)[2] (2017) (footnote omitted).

[84] Id.at § 55(a)[2][a] (emphasis supplied, and footnote omitted).

motion to set aside, the trial court considered all sorts of alleged post-pleading misconduct[85] and, by doing so, clearly erred as a matter of law warranting issuance of a writ of prohibition.

D. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS LIMITED DISCRETION WHEN IT DENIED THE PETITIONER'S RULE 55(C) MOTION.

After a Rule 55(a) entry of default has been entered, R. Civ. P. 55(c) provides, "For good cause shown the court may set aside an entry of default ..."

1. The Trial Court Erred as a Matter of Law in Failing to Set Aside the Entry of Default Where it Was Void for Want of Jurisdiction.

Where, as in this case, "judgment [is] rendered upon a defective substituted service of process," it is "void for want of jurisdiction,"[86] and to proceed from the entry of default to the entry of default judgment, which is the course the case is currently on, would be legally erroneous. Thus, the trial court erred as a matter of law in denying Monster Franchise's Rule 55(c) motion.

2. The Trial Court Erred as a Matter of Law in Resolving Every Doubt Against Setting Aside the Entry of Default.

"Public policy favors litigation results," under West Virginia law, that are based on the merits of a particular case and not on technicalities."[87] Accordingly, "If any doubt exists as to whether relief from a default ... should be granted, such doubt should be resolved in favor of setting aside the default ... in order that the case be heard on the merits."[88] This is because "'The policy

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[85] App. 371 ("During a June 18, 2019 telephone call ... Monster Franchise's ... counsel ... acknowledged the Amended Complaint, demanded Plaintiff dismiss all claims and reiterated his prior threat to seek sanctions ..."); App. 379 ("Monster Franchise ... threatened to seek Rule 11 sanctions if Plaintiff pursued his claims against it."); App. 380 ("Had Monster Franchise not been represented by counsel, an excusable neglect argument ... may have had some credibility. However, Monster Franchise, through counsel ... chose to ignore the same ...").

[86] LITIGATION HANDBOOK, supra at § 55(c)[2] (footnote omitted).

[87] Id. (footnote omitted).

[88] Id. (footnote omitted).

of the law is to have every litigated case tried on its merits, and it 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.'"[89] Here, instead of resolving any "doubt ... in favor of setting aside the default," the trial judge resolved all doubts in favor sustaining the default.

For example, in the face of an affidavit to the contrary[90] and based on no contradictory evidence, the trial court held, "Delivery of the certified mail parcel to Monster Franchise ... was effectively refused by someone at the address."[91] This was clearly erroneous as any doubt regarding who affixed the handwriting to the certified mail should have been resolved in favor of Monster Franchise, based on an affidavit, rather than against it based on nothing but speculation.

The trial court also held, in the face of an affidavit to the contrary,[92] that "Monster Franchise's good cause argument is primarily based on the terms and conditions of its purported franchise agreement with Monster UOV."[93] This was clearly erroneous because, instead of resolving any doubt about the contents of that agreement in favor of Monster Franchise, based on an affidavit, the trial court resolved it against it based on nothing but speculation.

Finally, the trial court resolved an affidavit "averring that Monster Franchise left the 320 Norristown Road ... address in 2013 or 2014"[94] not in favor of Monster Franchise, but in favor of

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[89] Id. (footnote omitted).

[90] App. 291.

[91] App. 392.

[92] App. 291.

[93] App. 393; see also App. 401 ("Any other additional defenses arising from Monster Franchise's claimed contractual agreement with Monster UOV are matters between those parties which do not involve Plaintiff and are not currently before this Court.").

[94] App. 393; see also App. 400 ("Monster Franchise ... disingenuously claim[ed] it to be an incorrect address ...").

the Plaintiff by noting that the other Monster Defendant's address is the same as well as Monster Landcare, Inc., which is not a party to this litigation.[95]

Because it resolved every doubt against setting aside default, the trial court committed clear legal error, warranting a writ of prohibition.

3. The Trial Court Abused its Circumscribed Discretion by Denying the Rule 55(c) Motion.

A trial court's discretion on a Rule 55(c) motion is "circumscribed ... in the context of a default" as "a reflection of our oft-stated preference for resolving disputes on the merits."[96]

Regarding the relevant Rule 55(c) factors, it has been noted:

> In the case of *The Hardwood Group v. LaRocco* the Supreme Court adopted the factors used by federal courts to determine good cause for setting aside a default. It was said in LaRocco that in analyzing good cause, for purposes of a motion to set aside a default, a 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; (4) the degree of intransigence on the part of the defaulting party; and (5) the reason for the defaulting party's failure to timely file an answer.[97]

Moreover, "In reviewing the standards to set aside a default, a trial court should apply **a more lenient and less stringent standard, than would otherwise be used in reviewing a motion to**

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[95] App. 393-394. Additionally, the trial court's finding that "Monster Franchise" had "the ability to track the anticipated delivery date of the same on the West Virginia Secretary of State and United States Postal Service websites," App. 394 is ironic when the Secretary of State's website still indicates that the certified mail has not been delivered. See http://apps.sos.wv.gov/business/service-of-process/Home/USPSStatusDetails/237515

[96] LITIGATION HANDBOOK, supra at § 55(c)[2][a] (footnote omitted).

[97] Id. (footnote omitted).

set aside a default judgment."[98] "Thus, when doubt exists as to whether a default should be granted or vacated, **the doubt should be resolved in favor of the defaulting party**."[99]

Plainly, as already discussed, the trial court resolved every doubt in favor of sustaining the entry of default and denying the motion to set it aside. In doing so, it applied a more stringent standard, and not a lesser and more lenient one, to each of the five factors.

This Court's decision in *Tudor's Biscuit World of America v. Critchley*[100] amply demonstrates the clear error committed by the trial court in this case.

In *Tudor's*, as in this case, the plaintiff was injured at work, but sued not her employer, the franchisee, but against the franchisor.[101] The summons and complaint, as in this case, was not returned "delivered" or "refused," but was returned "unclaimed."[102] A few weeks later, as in this case, a motion for entry of default was filed claiming that Tudor's, the franchisor, had been served.[103] About a month later, as in this case, default was entered but, unlike in this case, the plaintiff's counsel provided a copy of the default order to the president of Tudor's with a request that the parties engage in settlement negotiations.[104] As in this case, Tudor's responded noting that it was not the plaintiff's employer and had no liability to the plaintiff under West Virginia law.[105] About fourteen months later, with no notice to Tudor's, a hearing was conducted and the

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[98] Id. (emphasis supplied, and footnote omitted).

[99] Id. (emphasis supplied, and footnote omitted).

[100] 229 W.Va. 396, 729 S.E.2d 231 (2012).

[101] Id. at 399, 729 S.E.2d at 234.

[102] Id. at 400, 729 S.E.2d at 235.

[103] Id.

[104] Id.

[105] Id.

trial court entered default judgment against Tudor's in the amount of $264,776.00,[106] but the order was not entered until about thirty-one months later.[107] At that point, three and a half years after the judgment was awarded and five years after Tudor's was notified of the entry of default, the plaintiff served a summons on Tudor's to appear and answer an action in aid of execution.[108] At that point, under circumstances much more extreme than in the present case relative to the plaintiff's efforts to obtain damages, Tudor's filed its motion to set aside default judgment.[109]

First, as in this case, this Court noted that the default and default judgment was entered against Tudor's, the franchisor, arising from a workplace accident, despite the presence of obviously meritorious defenses.[110]

Second, as in this case, this Court noted, "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. ... As such, 'a determination that the trial court lacked *in personam* jurisdiction will render the default judgment at issue void and unenforceable.' ... 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."[111]

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[106] Id.

[107] Id.

[108] Id.

[109] Id.

[110] Id. at 405, 729 S.E.2d at 241.

[111] Id. at 406, 729 S.E.2d at 241 (citations omitted).

Third, as in this case, this Court noted, "despite having made representations to the court in an affidavit to the contrary, Critchley's counsel did not obtain proper service of process -- a fact which a simple review of the court file and familiarity with our well-established caselaw would have revealed. As such, the entire basis for the default was defective, at a minimum, and, at worst, had been misrepresented."[112] As in this case, where Monster Franchise had the right to wait until it had been properly served as it had been promised before filing its answer, the Court also noted:

> We note ... that Tudor's failure to take action within the confines of this civil action upon notice of the default is not necessarily an "intransigent" failure. The United States Supreme Court has held that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 72 L.Ed.2d 492 (1982).[113]

Finally, as in this case, this Court concluded, "we are not constrained in our analysis of this factor for purposes of reviewing the circuit court's use of its discretion in balancing the equities of this matter. This failure, along with the affidavit averring proper service of process where none existed, we believe mitigates the perceived intransigence of Tudor's in responding to the default by suggesting a commensurate balance of gamesmanship on the part of Critchley in seeking to capitalize on her defective default judgment."[114]

The trial court in this case had a similar opportunity, under similar circumstances, to balance the equities where the Plaintiff is similarly attempting to impose liability on a franchisor for a workplace accident and is more intent on capitalizing on the entry of default, instead of

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[112] Id. at 407, 729 S.E.2d at 242 (footnote omitted).

[113] Id. at 407 n.16, 729 S.E.2d at 242 n.16.

[114] Id. (footnote omitted).

litigating his claim on the merits, but it did not do so as demonstrated by a fair application of the circumstances of this case to the five factors in *LaRocco*.

a. The Degree of Prejudice to the Plaintiff was Relatively Minor Where He Sought Default Less than Forty Days After Allegedly Serving the Amended Complaint on Monster Franchise and is Actively Pursuing His Deliberate Intent Claims Against His Employer.

With respect to the "degree of prejudice" factor, this Court has observed, "prejudice occurs when circumstances have changed since the entry of default which impairs the plaintiff's ability to prosecute its claim" and "'the fact that the plaintiff would have to try the case on the merits if relief is granted is not the kind of prejudice that should preclude relief. Similarly, the fact that reopening the judgment would delay plaintiff's possible recovery has not, in itself, been deemed to bar relief.'"[115] "Also, the fact that a party may be required to undergo the expense of preparing and conducting a trial on the merits is an insufficient basis for denying relief from default."[116] Accordingly, where this Court has concluded there is "nothing in the record to indicate that circumstances have changed since the entry of the default judgment which would impair the plaintiffs' ability to prosecute its claim on the merits,"[117] it has reversed the denial of motions to set aside defaults.

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[115] *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W. Va. 309, 315-316, 664 S.E.2d 531, 537-538 (2008) (citing 10A FED. PRAC. & PROC. § 2699 (Civ.3d.1998)).

[116] Id. at 316, 664 S.E.2d at 538.

[117] Id.; see also *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W.Va. 1, 14, 614 S.E.2d 1, 14 (2005) ("There is nothing in the record indicating any impediment to Cattrell taking the depositions in the future, for example there is no allegation that any deponent has died or otherwise become unavailable. Likewise, there has been no indication that the delay in obtaining the desired depositions will cause Cattrell to be adversely affected at trial."); *Cales v. Wills*, 212 W. Va. 232, 242, 569 S.E.2d 479, 489 (2002) ("All that Mr. Cales has shown is that setting aside the judgment of default as to liability would mean further delay in obtaining full compensation for his injuries. There has been no suggestion by Mr. Cales that evidence or witness testimony would be lost.").

In this case, as noted, less than forty (40) days passed between when the Plaintiff alleges that he served his amended complaint on Monster Franchise,[118] and when he sought the entry of judgment against Monster Franchise,[119] without notice. Then, after orders entering default were filed on June 5, 2019,[120] Monster filed its motion to set aside the default on June 24, 2019,[121] only nineteen (19) days later, and Monster Franchise filed its motion on October 15, 2019 [122]

As in *Groves*, there is nothing in the record indicating the changing of any circumstances between June 5, 2019, and June 24, 2019, or October 15, 2019, which has prejudiced the Plaintiff's ability to prosecute his claims against Monster and Monster Franchise on their merits. There is nothing in the record about any loss of evidence or unavailability of witnesses because of any change in circumstances following the entry of default. Moreover, the Plaintiff has pending and is prosecuting his deliberate intent claim against Monster UOV. As in *Tudor's*, the Plaintiff knew at the time he filed his amended complaint, that Monster Franchise, was not his employer, but was only the franchisor of his employer. Finally, as the law favors an adjudication on the merits, the "degree of prejudice" factor favors setting aside the entry of default.

b. Monster Franchise's Defenses Are Not Only Meritorious, They Are Compelling.

As in *Tudor's*, the Plaintiff is seeking to hold a franchisor who is not his employer liable for a workplace accident, but as this Court has noted, a "franchisor's authority [for] no more than authority to require uniformity in standardization of products and services" is insufficient to

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[118] App. 91.

[119] App. 89.

[120] App. 108 and 109.

[121] App. 110.

[122] App. 267.

impose liability on a franchisor.[123] Consequently, the presence of meritorious defenses, as in *Tudor's*, to the Plaintiff's claims that Monster Franchise is liable for issues of workplace safety favors setting aside the entry of default.

c. Alleged Damages of About $1 Million Imposed on a Franchisor with No Connection to the Plaintiff Are Significant.

As previously noted, the trial court flipped the "significance of the interests at stake" on its head, viewing those not from Monster Franchise's perspective, but from the Plaintiff's.[124]

Here, the Plaintiff's damages are alleged to be around $1 million,[125] and this Court has found cases involving $704,000,[126] $265,000,[127] $70,000,[128] $65,000,[129] $51,423.95,[130] $35,000,[131]

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[123] *Shafer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 342, 524 S.E.2d 688, 697 (1999) (citing *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813-15 (Iowa 1994); see also *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 212, 670 N.E.2d 632, 633 (1996); *Oliveria-Brooks v. Re/Max Int'l, Inc.*, 372 Ill. App. 3rd 127, 128, 865 N.E.2d 252, 253 (2007); *Salisbury v. Chapman Realty*, 124 Ill. App. 3rd 1057, 1061, 465 N.E.2d 127 (1984); *Simpkins v. 7-Eleven*, 2008 WL 918482 (N.J. Super.); *Myszkowski v. Penn Stroud Hotel, Inc.*, 430 Pa. Super. 315, 634 A.2d 622 (1993); *Cislaw v. Southland Corporation*, 4 Cal. App. 4th 1284, 6 Cal. Rptr. 2d 386 (1992); *Murphy v. Holiday Inns*, 216 Va. 490, 219 S.E.2d 874 (1975); *Frey v. PepsiCo. Inc.*, 191 Ga. App. 585, 82 S.E.2d 648 (1989); *Howell v. Chick-Fil-A, Inc.*, 1993 WL 60396 (N.D. Fla. 1993); *Little v. Howard Johnson Co.*, 183 Mich. App. 675, 455 N.W. 2d 390 (1990); *Baldino's Giant Jersey Subs, Inc. v. Taylor*, 216 Ga. App. 467, 454 S.E.2d 599 (1995).

[124] App. 385.

[125] App. at 170 ("Mr. Duvall's medical bills alone approach $1 Million and he has not yet been released to return to work").

[126] *Groves*, supra at 311, 664 S.E.2d at 533.

[127] *Tudor's*, supra at 400, 729 S.E.2d at 235.

[128] *County Com'n of Wood County v. Hanson*, 187 W. Va. 61, 64, 415 S.E.2d 607, 610 (1992).

[129] *Cook v. Channel One, Inc.*, 209 W. Va. 432, 436, 549 S.E.2d 306, 310 (2001).

[130] *Arbuckle v. Smith*, 2018 WL 1444288 at * 4 (W. Va.) (memorandum).

[131] *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 473, 256 S.E.2d 758, 763 (1979).

$22,459.70,[132] $15,435.98,[133] $14,000,[134] and $4,550[135] to have interests at stake sufficiently significant to the defaulting parties to warrant setting it aside. Clearly, the prospect of a default judgment of $1 million in this case favors setting aside the entry of default.

d. Monster Franchise Was Not Intransigent, But Communicated with Plaintiff's Counsel, Disputed the Viability of Plaintiff's Claims, Tendered its Defense to its Insurer, and Relied on the Representation of the Plaintiff's Counsel that Process Would be Properly Served.

There are at least three reasons in the record that Monster Franchise was not intransigent. First, as noted, although the Plaintiff's attorney had provided a courtesy copy of the amended complaint, the cover letter stated, "**Service of the same is being made in accordance with the applicable law,**"[136] which Monster Franchise compelling argued to the trial court and in this petition was not done. Second, as noted in the trial court's order, Monster Franchise had tendered defense of the matter to the Plaintiff's employer.[137] Finally, again turning the standard on its head, the trial court held that Monster Franchise's assertion of its meritorious defenses was intransigent,[138] when asserting one's defenses is just the opposite.

Indeed, the April 4, 2019, letter from Monster Franchise's counsel was detailed, setting forth that the Plaintiff was not employed by Monster Franchise, that the Plaintiff had no contract

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[132] *Leslie Equipment*, supra at 532, 687 S.E.2d at 111.

[133] *Hardwood Group v. Larocco*, 219 W. Va. 56, 65, 631 S.E.2d 614, 623 (2006).

[134] *James Wilson Douglas, L.C. v. Morton*, 2018 WL 317314 at *2 (W. Va.) (memorandum).

[135] *Black's Auto Repair and Towing, Inc. v. Monongalia County Magistrate Court*, 211 W. Va. 661, 663, 567 S.E.2d 671, 673 (2002).

[136] App. 283 (emphasis in original).

[137] App. 377.

[138] App. 379.

with Monster Franchise, that Monster Franchise owed no duty of care to the Plaintiff.[139] The letter referenced the franchise agreement between Monster Franchise and Monster UOV, the Plaintiff's employer, which specifically provides that Monster UOV is not Monster Franchise's agent, employer, partner, or joint venture.[140] The letter also contained extensive legal authority, including decisions of this Court, why Monster Franchise could not be held liable for a workplace accident involving the Plaintiff.[141]

This is not a case, like *Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*,[142] where the defaulting party ignored the summons and complaint for eleven months prior to the entry of default judgment, then ignored the default judgment for eleven more months before moving to set it aside.

Instead, Monster Franchise relied on the representation of the Plaintiff's counsel that the amended complaint would be served in accordance with law and actively engaged the Plaintiff's counsel regarding the viability of the Plaintiff's claims against it as a franchisor.

Under these circumstances, and where Monster Franchise acted with alacrity in moving to set aside the entry of default, the element of intransigence favors setting it aside.

e. Waiting Until Process is Properly Served Until Filing an Answer is a Good Reason to Set Aside the Entry of Default.

As noted, the cover letter with a courtesy copy of the amended complaint indicated that it would be properly served.[143] Monster Franchise was entitled to rely on that representation and its

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[139] App. 189.

[140] Id.

[141] App. 190.

[142] 218 W. Va. 247, 250, 624 S.E.2d 594, 597 (2005); see also *Cook,* supra at 436, 549 S.E,2d at 436 (eleven months before responding to summons and complaint by filing a motion to set aside default judgment).

[143] App. 283.

failure to file an answer until it was properly served was reasonable. The trial court faulted Monster Franchise for not filing a Rule 12 motion to dismiss for improper service,[144] but that is irrational because (1) had Monster Franchise been properly served, there would have been no reason to file a Rule 12 motion and (2) Monster Franchise timely moved to set aside the default based on defective service one it was provided notice of the default.

This Court was presented with similar circumstances *in Lexon Ins. Co. v. County Council of Berkeley County*,[145] where the defaulting party had relied on representations regarding an extension of time to serve an answer:

> In ruling on the propriety of the default under the unique circumstances herein presented, we are mindful that, "'[a]lthough courts should not set aside default judgments or dismissals without good cause, *it is the policy of the law to favor the trial of all cases on their merits.*' Syl. Pt. 2, McDaniel v. Romano, 155 W. Va. 875, 190 S.E.2d 8 (1972)." Syl. pt. 6, *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005) (emphasis added). Based upon the language in Berkeley County's communications quoted above, and the policy favoring trial of all cases on their merits, we agree with Lexon that Berkeley County failed to provide clear notice that it was withdrawing its consent to give Lexon an indefinite time within which to answer Berkeley County's complaint. Berkeley County merely stated that it would "appreciate [Lexon's] answer at your earliest convenience," and asked to be informed of when it "might expect [Lexon's] answer." These ambiguous communications fail to clearly articulate an intent on the part of Berkeley County to seek default in the event that Lexon's answer was not forthcoming. Accordingly, Berkeley County's motion was improperly filed and should not have been granted.

Similarly, in the present case, where the cover letter with a courtesy copy of the amended complaint stated, "**Service of the same is being made in accordance with the applicable law,**"[146] it was reasonable for Monster Franchise to rely on that representation and it was

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[144] App. 398.

[145] 235 W. Va. 47, 55-56, 770 S.E.2d 547, 555-556 (2015) (emphasis in original).

[146] App. 398 (emphasis in original).

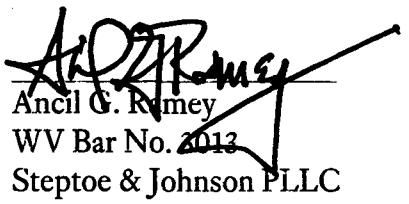
fundamentally unfair, just as it was in the *Lexon* case, for the Plaintiff to seek entry of default less than forty (40) days after he allegedly served the amended complaint, without any notice to Monster Franchise or its counsel. Accordingly, as in *Lexon*, this Court should set aside the entry of default in this case.

VI. CONCLUSION

WHEREFORE, the Petitioner, Monster Franchise, LLC, respectfully requests that this Court issue a writ of prohibition directing the Circuit Court of Marshall County to set aside the entry of default against the Petitioner and allow it to defend itself on the merits.

MONSTER FRANCHISE, LLC

By Counsel



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