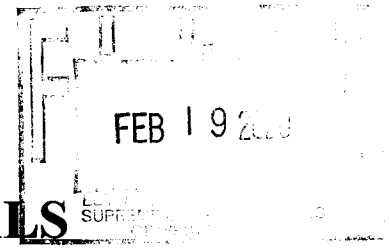

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. MONSTER FRANCHISE, LLC,

Petitioner,

v. **Case No.: 20-0044**

THE HONORABLE JEFFREY D. CRAMER,
Judge of the Circuit Court of Marshall County,
and **DAVID S. DUVALL,**

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 19-C-24

Submitted by:

Michelle Marinacci (#7482) - ***Counsel of Record***
Christopher M. Turak (#8611)
GOLD, KHOUREY & TURAK, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
T: (304) 845-9750
F: (304) 845-1286
E: mlm@gkt.com; cmt@gkt.com

Counsel for Respondent, David S. Duvall

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Federal and Foreign Jurisdiction Cases

Statutes

Rules

QUESTIONS PRESENTED

1. Can Monster Franchise, LLC, an unauthorized foreign entity transacting business in the State of West Virginia, avoid a finding of effective service of process under West Virginia Long-Arm statutes, and, correspondingly, avoid the jurisdiction of West Virginia courts, where the United States Postal Service attempts delivery of certified mail from the West Virginia Secretary of State containing the notification of service, Summons & Amended Complaint at Monster Franchise, LLC's then-current registered business address and was directed to return the certified mail to the sender by handwriting placed on the parcel stating "not at this address" and "return to sender"?

2. Did the Circuit Court of Marshall County clearly err when it refused to set aside its entry of default against Monster Franchise, LLC where Monster Franchise, LLC's Managing Member/CEO had actual notice of the Amended Complaint at least ten (10) days before service was effectively refused at Monster Franchise, LLC's then-current registered business address by directing that certified mail from the West Virginia Secretary of State be returned to sender?

3. Did the Circuit Court abuse its discretion by refusing to set aside its entry of default against Monster Franchise, LLC where it found that Monster Franchise, LLC had acted with significant and extreme intransigence when failing timely respond to the Amended Complaint?

STATEMENT OF THE CASE

Respondent David Duvall set forth the history of this litigation and many of the relevant facts demonstrating the involvement of Monster Franchise, LLC [hereinafter "Monster Franchise"] and Monster Tree Service, Inc. [hereinafter "Monster Tree Service"] in the operations of Monster Tree Service franchises in his Response to Petition for Writ of Prohibition filed

contemporaneously herewith in Case No. 20-0043. Accordingly, Respondent incorporates by reference his Statement of Case set forth therein to the extent applicable herein and attempts to only set forth the additional factual information relevant to the issues presented herein. It is clear from the actions and arguments of Monster Franchise[1] and Monster Tree Service that they act in a unified manner, as a single entity and seek to avoid defending Respondent's claims on the merits.

On February 8, 2019, Respondent filed his initial Complaint against Monster Tree Service of the Upper Ohio Valley, Inc. [hereinafter "Monster UOV"] and Monster Tree Service seeking compensation and other redress for the severe and life-altering injuries he sustained on November 17, 2017. App. 8-30. The injuries occurred when he fell 40-50 feet to the ground after the safety harness provided to him for use by Monster UOV failed when he was struck by a tree limb which broke free while being held under tension by Monster UOV President Kevin Stingle. App. 13-15. Contrary to the representation of Monster Franchise, unlike in *Tudor's Biscuit World of America v. Critchley*, 229 W.Va. 396, 729 S.E.2d 231 (2012) (*per curiam*), Respondent did not seek to hold Monster Tree Service liable under West Virginia's deliberate intent law. Petition, pp. 1-2. Respondent also did not, as represented by Monster Franchise, seek to hold Monster Tree Service responsible for the acts of Monster UOV under a theory of parent/subsidiary liability.[2] Petition, pp. 1-2. Respondent asserted deliberate intent claims solely against Respondent's employer, Monster UOV. App. 16-21.

---

[1] *See, e.g.* Petition, pp. 1-2, 5-6, 15 (Monster Franchising arguing why the default against Monster Tree should be set aside).

[2] Monster Franchise's argument of alleged errors with respect to Monster Tree Service provides evidence that Monster Tree Service and Monster Franchise operate as a single entity and/or that one substantially controls the other, an issue involved in the contemporaneous Petition for Writ of Prohibition filed by Monster Tree Service in Case No. 20-00043.

Respondent asserted separate negligence claims against Monster Tree Service based upon its failure to appropriately train Monster UOV on safety practices, safety equipment and safety laws and industry standards, failing to provide operational support to facilitate Monster UOV's compliance with safety laws and industry consistent with its public representations regarding the extensive training it provides to franchisees and its public assurances that it "does everything possible to ensure our employees safety". App. 10-11, 21-25, 175. Monster Franchise further misconstrues Respondent's allegations as simply failing to make certain Monster UOV provided adequate safety training to Monster UOV employees. Petition, pp. 2-3. Respondent's allegations of negligence also involve Monster Tree Service's failure to appropriately train and equip *Monster UOV* and make certain *Monster UOV* was aware of and complied with all applicable safety laws, regulations and industry standards. App. 21-25, 47-51, 60-64.

On April 4, 2019, counsel for Monster Franchise and Monster Tree Service acknowledged the Complaint and demanded its dismissal. App. 354-55. In that letter, counsel also represented that Monster Franchise had a franchise agreement with Monster UOV pertaining to Monster UOV's ability to operate under the name Monster Tree Service. App. 354-55. Based on those representations which indicate that Monster Franchise has the same training duties publicly acknowledged by Monster Tree Service and in light of the fact that no defendant had made an appearance in the litigation, Respondent filed his Amended Complaint on April 16, 2019.[3] In his

[3] Petitioner's editorial commentary on page 3 of the Petition regarding default against Monster UOV is simply gratuitous and has no bearing on the issues before this Court. Monster UOV defaulted as to both the February 8, 2019 Complaint and the April 16, 2019 Amended Complaint, has never appeared and has never sought to set aside the Entry of Default. Petition, p. 3; App. 85, 108. By characterizing the April 24, 2019, Application for Entry of Default as against Monster UOV, and by extension, the April 26, 2019, Entry of Default by Monster UOV as "clearly erroneous", Monster Franchise serves only to demonstrate its interest in protecting the interests of Monster UOV, an entity from which it attempts to distance itself in its arguments relative to the franchise agreement.

Amended Complaint, Respondent asserted identical claims against Monster Franchise as were previously asserted against Monster Tree Service. App. 45-70. A courtesy copy of the Amended Complaint was provided to Monster Franchise's counsel on April 17, 2019. App. 352-53.

Consistent with governing West Virginia law, Respondent served Monster Franchise, a nonresident not authorized to do business in West Virginia by serving the West Virginia Secretary of State [hereinafter "WVSOS"], the nonresident's statutorily appointed agent for service of process. *See*, W. Va. Code §56-3-33(a) (2017); W.Va. Code §31B-1-111(b) (2017); W.Va. Code §31D-15-1510(e) (2008). The WVSOS accepted service of the Amended Complaint on behalf of Monster Franchise and forwarded notification of service, together with the Summons and Amended Complaint, to Monster Franchise at its office address registered with the Pennsylvania Department of State, Bureau of Corporations [hereinafter "Pennsylvania BOC"] in Monster's home state of Pennsylvania, *i.e.*, 320 Norristown Road, Horsham, Pennsylvania, 19044. *See*, App. 339-45. Monster Franchise's Managing Member/CEO, Joshua Skolnick [hereinafter "Mr. Skolnick"] affirmed that the 320 Norristown Road, Horsham, Pennsylvania address was the then "current registered address as on file with the Department of State" in an October 8, 2019 Change of Registered Address filing. App. 291, 345.

On May 9, 2019, the United State Postal Service attempted to deliver the certified mail from the WVSOS to Monster Franchise's registered address. App. 348. Monster Franchise's Managing Member/CEO, Mr. Skolnick, had actual knowledge of the Amended Complaint naming Monster Franchise as a defendant no less than ten (10) days prior to the May 9, 2019 attempted delivery by virtue of the April 26, 2019, signature confirmed delivery of the WVSOS notification of service, Summons and Amended Complaint to his related company, Monster Tree Service

thirteen (13) days prior.[4] App. 302-06. Though Monster Tree Service and Mr. Skolnick have challenged the authority of the person creating the electronic signature confirming delivery on April 26, 2019, neither Monster Tree Service nor Mr. Skolnick have ever denied ***actual receipt*** of the notification of service, Summons and Amended Complaint. *See*, Response to Petition for Writ of Prohibition filed in Case No. 20-0043. The certified mail delivery attempt to Monster Franchise failed when a person at the address handwrote on the envelope "Not at this address" "Return to sender". App. 348.

Mr. Skolnick's subsequently executed an Affidavit on October 11, 2019 claiming that the 320 Norristown Road, Horsham, Pennsylvania address had not been Monster Franchise's address since 2013 or 2014 which was filed in support of Monster Franchise's Motion to Set Aside Default. App. 291-292. The veracity of Mr. Skolnick's disclaimer of the address is questionable in light of his public, governmental filings on behalf of Monster Franchise and his related Monster companies, Monster Tree Service and Monster Landcare, Inc. App. 199, 291, 342-45, 356. Indeed, three (3) days ***before*** signing the Affidavit submitted to the circuit court, Mr. Skolnick confirmed with the Pennsylvania BOC in an October 8, 2019 filing that 320 Norristown Road, Horsham, Pennsylvania was Monster Franchise's then current registered business address. App. 199, 345. That Mr. Skolnick had actual knowledge of his obligation to change an address registered with the Pennsylvania BOC if he moved his business is demonstrated by the Change of Registered Address he filed on behalf of Monster Tree Service in *January 2017*. App. 199. Moreover, Mr. Skolnick's Monster Landcare, Inc. continues to maintain 320 Norristown Road,

---

[4] Mr. Skolnick is the President of Monster Tree Service. App. 132-133, 197. Monster Franchise's Pennsylvania counsel likewise had actual notice of the Amended Complaint more than ten (10) days prior to the attempted delivery as a courtesy copy had been mailed to him on April 17, 2019, twenty-two (22) days prior. App. 352-53.

Horsham, Pennsylvania as its registered address. App. 356.[5] The documentary evidence on record consisting of Pennsylvania official state records indicates that Mr. Skolnick maintained offices for Monster related companies, including Monster Franchise, at 320 Norristown Road, Horsham, Pennsylvania on May 9, 2019 and continues to do so.

As acknowledged by Monster Franchise throughout its Petition, Respondent informed Monster Franchise's counsel that service would be effected in accordance with applicable law. App. 352-53. West Virginia law governing service of process on nonresident, unauthorized businesses transacting business in West Virginia, is clear. Service is made on the statutorily appointed agent, the WVSOS, who then forwards notification of service *via certified mail to the nonresident's principal office*[6] *or address. See*, W. Va. Code §56-3-33(a); W.Va. Code §31B-1-111(b); W.Va. Code §31D-15-1510(e). These statutes are likewise clear that a refusal to accept the certified mail from the WVSOS is deemed effective and sufficient service. *Id.* Thus, all a nonresident entity such as Monster Franchise would need to do to avoid a determination that the notification of service was refused when directed to its registered, principal office is allege "not at this address" "return to sender" when delivery is attempted as occurred herein. Under these circumstances, where Monster Franchise's Managing Member/CEO and its counsel had actual

---

[5] As of February 18, 2020, the date this Response was served, Pennsylvania BOC on-line records available at https://www.corporations.pa.gov/search/corpsearch continued to reflect 320 Norristown Road, Horsham, Pennsylvania as Monster Landcare, Inc.'s registered address.

[6] In Pennsylvania, Monster Franchise's home state, the principal office is referred to as the registered office. *See, e.g.*, App. 197, 199, 342, 345. Pennsylvania law requires Monster Franchise to maintain a registered office with the Pennsylvania BOC and provides that a change in registered address is not effective until filed with the Pennsylvania BOC. 15 Pa. C.S.A. §8825 (2017). Pennsylvania law also provides that service may be deemed effective despite a defendant's claim that the registered address where service was directed was not its then-current address. *See*, *Coleman v. Phoenix Trans, Inc.*, 2014 WL 10803074, *5-6 (Pa. Super. Ct. Aug. 14, 2014) (affirming the denial of an attempt to set aside a default judgment and finding that the "address where Appellee served Appellants continued to be a valid address for service of process" and that appellants could not take advantage of their own failure to update their registered address or other "evasive conduct" to avoid the consequences of timely filing a responsive pleading).

notice of the method of impending service at its principal or registered office, the circuit court was justified in determining that Monster Franchise effectively refused service when the handwritten notations "Not at this address" "Return to sender" were placed on the certified mail envelope from the WVSOS directed to its registered office address. App. 348, 392, 396-98.

With actual knowledge of the Amended Complaint and having effectively refused service on May 9, 2019, Monster Franchise defaulted by failing to file an answer or other responsive pleading on or before May 22, 2019.[7] As a result, Respondent applied for an entry of default against all defendants on May 31, 2019. App. 89-107. Once again, Monster Franchise takes liberties with its representations of Respondent's filings. On page 4 of the Petitioner, Monster Franchise represents that Respondent predicated his request for Entry of Default against Monster Tree Service on a failure to respond to the February 8, 2019 Complaint.[8] A fair reading of Petitioner's Application for Entry of Default demonstrates Monster Tree Service's failure to respond to the February 8, 2019 Complaint was noted solely for the purpose of demonstrating why leave of court was not obtained prior to filing the Amended Complaint.[9] App. 90-92. Once again, Monster Franchise acts as if it and Monster Tree Service are the same entity, despite different

---

[7] Counsel for Respondent takes full responsibility for the typographical error in paragraph 17 of the circuit court's findings of fact which inadvertently refers to May 22, 2019 as March 22, 2019. App. 392. Monster Franchise emphasizes this date in alleging the circuit court faulted it for not responding to the Amended Complaint before it was even filed. Petition, p. 8. If the typographical error was not obvious by the timeline of this litigation itself, it was made more than obvious in the circuit court's subsequent conclusions of law which state May 22, 2019 as the date upon which the responsive pleading was due filed. App. 398-99.

[8] Monster Franchise's continued argument of alleged errors with respect to Monster Tree Service provides further evidence that Monster Tree Service and Monster Franchise operate as a single entity and/or that one substantially controls the other, an issue involved in the contemporaneous Petition for Writ of Prohibition filed by Monster Tree Service in Case No. 20-00043.

[9] The June 5, 2019 Entry of Default By Monster Tree Service confirms that the circuit court only considered Monster Tree Service's failure to respond to the Amended Complaint when entering default. App. 109.

corporate names, by devoting nearly a page of its Petition to arguing why the default against Monster Tree Service should be set aside notwithstanding the attempt by Monster Tree Service to argue that they are unrelated entities in Case No. 20-0043. Petition, pp. 5-6.

The Circuit Court of Marshall County entered default against Monster Franchise on June 5, 2019.[10] R.App. 1. Though criticizing Respondent for not providing it or Monster Tree Service with notice of Respondent's Application for Entry of Default on pages 5 and 30[11] of the Petition, Monster Franchise concedes on page 22 that notice was not required.

Monster Franchise was aware of the Entry of Default no later than June 18, 2019. App. 363-64. More than two months passed from the time Monster Franchise became aware of the Entry of Default before it made an official appearance in this underlying litigation by the filing of a notice of appearance of counsel on August 29, 2019. App. 145. An additional seven (7) weeks passed before it filed its Motion to Set Aside Default and accompanying memorandum of law in support on October 15, 2019. App. 267-313. In its Memorandum, Monster Franchise argued, in part, that its contractual relationship with Monster UOV, the terms of which have never been disclosed, operated as a defense to Respondent's claims. App. 281. Monster Franchise also attempted to justify its delay in timely responding to the Amended Complaint by stating it was awaiting a coverage decision after tendering its defense to Monster UOV's insurer pursuant to the terms of the same, as yet undisclosed, franchise agreement. App. 284. Following the filing of

---

[10] A copy of the June 5, 2019 Entry of Default was not included in the Appendix submitted by Petitioner. Accordingly, Respondent is submitting Respondent's Appendix which consists solely of the June 5, 2019 Entry of Default.

[11] On page 30 of the Petition, Monster Franchise also misrepresents that Respondent sought an entry of judgment. A default is distinct from a default judgment, with default relating to liability and default judgment occurring only after damages have be ascertained. Syl. pt. 2, *Cales v. Wills*, 212 W.Va. 232, 569 S.E.2d 479 (2002).

Respondent's Response in Opposition[12], the circuit court denied Monster Franchise's motion by order entered December 17, 2019 and filed in the circuit clerk's office on December 18, 2019. App. 324-66, 389-403. Monster Franchise filed the instant Petition on January 17, 2020. For the reasons set forth herein, the Petition should be denied.

SUMMARY OF ARGUMENT

A nonresident, foreign business who is not registered or authorized to do business in the State of West Virginia but who is transacting business in the State of West Virginia should not be permitted to avoid a finding of effective service of process and, thus, the jurisdiction of West Virginia courts in actions seeking redress for harm caused in West Virginia, by representing the address is incorrect and returning the certified mail containing notification of service to the WVSOS. The notification of suit was directed to Monster Franchise's registered address, the only address where notification of service may be directed under applicable West Virginia law. *See* W.Va. Code §56-3-33(c); W.Va. §31B-1-111(b); 15 Pa. C.S.A. §8825; *Coleman v. Phoenix Trans, Inc.*, 3158 EDA 2013, 2014 WL 10803074 (Pa. Super. Ct. Aug. 14, 2014) (registered address remains valid address for service of process despite entity's disclaimer of same).

At the time notification of service was returned to the WVSOS, Monster Franchise had actual knowledge of the Amended Complaint. Actual knowledge and an opportunity to be heard are the critical considerations when ascertaining the effectiveness of service as a defense to entry of default or default judgment. *See, Federal Deposit Ins. Corp. v. Spartan Mining Co., Inc.*,

---

[12] Once again, Monster mischaracterizes Respondent's argument to the circuit court. Respondent ***did not*** argue service was effective on Monster Franchise because service was effective on Monster Tree Service in its response brief. Petition, p. 7. Respondent argued that Monster Franchise had actual notice of the Amended Complaint by virtue of the fact that its Managing Member/CEO, Mr. Skolnick, had actual notice of the Amended Complaint in his role as president of Monster Tree Service. App. 331-33.

96 F.R.D. 677, 681 (S.D.W.Va. 1983), *aff'd Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134 (4th Cir.1984). The circuit court has authority to look beyond a strict "delivered"/"refused" analysis when ascertaining the effectiveness of service and is permitted to consider whether there was an attempt to evade service through gamesmanship. *Burkes v. Fas-Chek Food Mart Inc,* 217 W.Va. 291, 298, 617 S.E.2d 838, 845 (2005); *Crowley v. Krylon Diversified Brands*, 216 W.Va. 408, 412, n.3, 607 S.E.2d 514, 518, n. 3 (2004). In light of the totality of the circumstances, the circuit court correctly found that Monster Franchise had effectively refused service. As such, service of process was effective and the circuit court had jurisdiction to enter default on June 5, 2019, consistent with W.Va. Code §56-3-33(c), inasmuch as Monster Franchise failed to file a responsive pleading within thirty (30) days of service upon the WVSOS.

Similarly, the circuit court did not abuse its discretion in finding that Monster Tree Service had failed to demonstrate good cause to set aside the June 5, 2019 upon analysis of the factors set forth in syllabus point 4 of *Hardwood Group v. LaRocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006). The circuit court's findings of extreme and significant intransigence is well supported by the documentary evidence. App. 400-03. The extreme and significant intransigence, coupled with Monster Franchise's unjustifiable reason for failing to timely answer or otherwise respond are sufficient in and of themselves to support the circuit court's decision, notwithstanding Monster Franchise's arguments relative to the remaining *Hardwood Group* factors.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the circuit court did not clearly err nor abuse its discretion under the facts and circumstances of this case, a memorandum decision without oral argument is appropriate as the circuit court simply applied established West Virginia law to the facts presented herein. To the

extent this Court deems oral argument appropriate or necessary, placement on the Rule 19 docket would be appropriate.

ARGUMENT

I. APPLICABLE STANDARDS OF REVIEW

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977); syl. pt. 1, *State ex rel. West Virginia Regional Jail Authority v. Webster*, -- W.Va. --, 836 S.E.2d 510 (2019) (same). Rather, prohibition is a discretionary form of relief which should be used solely 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.

Syl. Pt. 1, *in part*, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014); syl. pt. 3, *State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 794 S.E.2d 10 (2016); syl. pt. 2, *SER West Virginia Regional Jail Authority*, -- W.Va. --, 836 S.E.2d 510. Relief in prohibition is inappropriate where the circuit court's "jurisdiction turns on contested issues of fact." *State ex rel. Ford Motor Co. v. McGraw*, 237 W.Va. 573, 580, 788 S.E.2d 319, 326 (2016).

Where a writ of prohibition is sought on the basis the circuit court exceeded its legitimate powers, the high standard set forth in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), controls:

> 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.

In determining the third factor, the existence of clear error as a matter of law, the Court employs the same *de novo* standard of review that is applied in all purely legal questions. *See*, *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002); *SER West Virginia Regional Jail Authority*, -- W.Va. --, 836 S.E.2d at 515-16.

This Court generally reviews findings of fact for clear error and conclusions of law *de novo*. *SER Ford Motor Co.*, 237 W.Va. at 580, 788 S.E.2d at 326. Findings of fact which entail application of law or legal judgments transcending ordinary factual findings may be subjected to a *de novo* review. *Id.* A circuit court's decision on whether or not to set aside a default under Rule 55(c) of the *West Virginia Rules of Civil Procedure* is subject to review for an abuse of discretion. Syl. pts. 1 and 2, *Hardwood Group*, 219 W.Va. 56, 631 S.E.2d 614.

This Court has previously refused to issue a writ of prohibition where the circuit court has refused to set aside a default and/or default judgment or upheld a circuit court's order refusing to set aside a default judgment on claims of ineffective service of process where the defaulting party, as here, had actual notice of the suit yet failed to file a responsive pleading challenging the

effectiveness of service of process or other jurisdictional defenses.[13] *See, e.g., Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W.Va. 247, 250-51, 624 S.E2d 594, 597-98 (2005) (*per curiam*) (upholding default judgment where WVSOS accepted service of complaint on behalf of defendant and there was no evidence in the record to suggest defendant did not have actual notice of suit); *Lee v. Gentlemen's Club, Inc.*, 208 W.Va. 564, 566, 569, 542 S.E.2d 78, 80, 82 (2000) (*per curiam*) (upholding denial of motion to set aside default where certified mail containing summons and complaint were returned as "unclaimed" and defendant had or reasonably should have had notice of action); *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 71, 75, 501 S.E.2d 786, 788, 792 (1998) (upholding entry of default where defendant had actual notice of action and challenged service on basis that certified mail containing summons and complaint disappeared after being signed for by an employee); *Coury v. Tsapis*, 172 W.Va. 103, 111, 304 S.E.2d 7, 15 (1983) (reinstating default order set aside by circuit court where defendant had actual notice of suit and failed to timely file a responsive pleading while waiting on an insurer's coverage opinion and remanding for hearing on damages). Petitioner has failed to meet the exacting standards necessary for extraordinary relief and, as a result, the Petition should be denied consistent with this Court's precedent refusing to grant relief to a party who, despite actual notice of a suit, fails to timely respond to assert any jurisdictional defenses it may have and, instead, allows a default to be entered.

---

[13] The cases set forth in footnotes 61 and 62 of Petitioner's brief as providing examples of the relief sought by Petitioner herein all involve entirely distinct factual predicates and legal analyses and, therefore, are of no moment when addressing the issues currently before this Court.

II. THE CIRCUIT COURT HAD JURISDICTION TO ENTER DEFAULT AGAINST MONSTER TREE SERVICE AND DID NOT CLEARLY ERR BY FINDING EFFECTIVE SERVICE OF PROCESS WHERE MONSTER FRANCHISE EFFECTIVELY REFUSED SERVICE AT ITS CURRENT, REGISTERED ADDRESS WHEN THE WVSOS'S CERTIFIED MAIL CONTAINING NOTIFICATOIN OF SERVICE WAS RETURNED TO SENDER

Monster Franchise has not challenged that it is subject to jurisdiction under West Virginia's Long Arm statute, W.Va. Code §56-3-33.[14] By transacting business in West Virginia without having obtained a certificate of authority from the WVSOS to do so Monster Franchise is statutorily deemed to have appointed the WVSOS as its agent for service of process in any proceeding arising from jurisdiction conferring acts or transactions. W.Va. Code §56-3-33(c); W.Va. §31B-1-111(b); W.Va. Code §31B-10-1008 (1996). The WVSOS's acceptance of the Summons and Amended Complaint was the legal equivalent of personally serving Monster Franchise within West Virginia on April 22, 2019.[15] Syl. pt. 3, *Leslie Equipment Co. v. Wood Resources Co., LLC*, 224 W.Va. 530, 687 S.E.2d 109 (2009); App. 339. Consistent with the provisions of W.Va. Code §56-3-33(c), the WVSOS thereafter promptly forwarded the notification of service, Summons and Amended Complaint by certified mail to Monster Franchise at its address registered with the Pennsylvania BOC. App. 339-41; *see also*, W.Va. Code §31B-1-111(c). Thus,

---

[14] West Virginia Code §56-3-33(a) confers jurisdiction where a nonresident engages in activities such as:

> (1) Transacting any business in this state;
> (2) Contracting to supply services or things in this state;
> (3) Causing tortious injury by an act or omission in this state; [and]
> (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state[.]

W.Va. Code §56-3-33 (a)(1)-(4).

[15] The WVSOS's acceptance of service on behalf of Monster Franchise likewise satisfied the service requirements of Rule 4(d)(7)(B) of the *West Virginia Rules of Civil Procedure.*

the only question is whether Monster Franchise had sufficient notice of the Amended Complaint such that service may be deemed effective upon the date of acceptance by the WVSOS. If so, the circuit court had jurisdiction to enter default on June 5, 2019 and the June 5, 2019 Entry of Default was not void from inception as argued by Monster Franchise.

A. Address for Service of Process Purposes

West Virginia Code §56-3-33(c) provides, in relevant part:

> (c) . . .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 a means which may include electronic issuance and acceptance of electronic return receipts, 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. . . . 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***. . . .

W.Va. Code §56-3-33(c); *see also*, W. Va. Code §31B-1-111(c) (notification of service may be provided to nonregistered limited liability company who has not notified the WVSOS of an agent for service of process "to the principal office of the limited liability company at the address last given to the Secretary of State's office and if no address is available on record with the Secretary of State then to the address provided on the original process or demand"). Monster Franchise did not obtain authorization from the WVSOS to transact business in West Virginia and does not have a registered agent or address on record with the WVSOS. Accordingly, one must look to Monster Franchise's business registration information in its home state of Pennsylvania to determine its disclosed agent for service of process, if any, and registered address or principal office of record.

Monster Franchise's registered address in Pennsylvania from the time of its creation in October 2011 until October 9, 2019, nearly six (6) months ***after*** notification of service was sent by the WVSOS and rejected, was 320 Norristown Road, Horsham, Pennsylvania. App. 342-45. Pennsylvania law requires entities such as Monster Franchise to continuously maintain record of its registered office with the Pennsylvania BOC. 15 Pa. C.S.A. §8825. Pennsylvania law further provides that a change in registered address is not effective until a notice of change is filed and recorded with the Pennsylvania BOC. *Id.* Pennsylvania BOC records and the record before the circuit court are clear – Monster Franchise's registered address with the Pennsylvania BOC at the time the Amended Complaint was filed on April 16, 2019 was 320 Norristown Road, Horsham, Pennsylvania – the address where the WVSOS directed its notification of service on April 22, 2019 and from where the certified mail from the WVSOS was directed to be returned to sender on May 9, 2019. App. 339-48. Though briefed before the circuit court and relied upon by the circuit court when issuing the order at issue herein, Monster Franchise does not acknowledge these statutory obligations in its Petition or even address the fact that the certified mail was directed to its registered address, relying simply, instead, on Mr. Skolnick's Affidavit claiming Monster Franchise left that address in 2013 or 2014. App. 291, 324-25, 330, 396.

In a case where, like here, a Pennsylvania corporate defendant sought to strike a default judgment arguing service was not effective because service had been directed to an old business address which remained the registered address with the Pennsylvania BOC, a Pennsylvania appellate court affirmed the trial court's decision denying the motion. *Coleman v. Phoenix Trans, Inc.*, 3158 EDA 2013, 2014 WL 10803074 (Pa. Super. Ct. Aug. 14, 2014). The appellate court agreed with the trial court's holding that the "address where Appellee served Appellants continued

to be a valid address for service of process". *Coleman*, 2014 WL 10803074, *5. The appellate court quoted with approval the trial court's recognition of decisions finding that where a domestic corporate entity fails to officially change its registered address with the Pennsylvania BOC "it cannot take advantage of its own default or evasive conduct to avoid time limitations for filing a responsive pleading to service of process". *Id.* (citations omitted in original); *see also*, *Id.* at *6.

Pursuant to W.Va. Code §56-3-33(c), the notification of service was required to be sent to Monster Franchise's principal office. *See also*, W. Va. Code §31B-1-111(c). A principal office is that office registered with the appropriate governmental licensing authority. As Monster Franchise did not register to do business in West Virginia with the WVSOS, Respondent justifiably looked to see what principal office was registered with Monster Franchise's home state and directed that the notification of service be sent to that registered address. If Monster Franchise is bound by its registered office for service purposes in its home state, it should likewise be bound by its registered address for purposes of effective service under W.Va. Code §56-3-33(c). *See*, 15 Pa. C.S.A. §8825; *Coleman*, 2014 WL 10803074, *5.

B. Impact of Actual Notice of Lawsuit on Service at Registered Address

Where there is facial compliance with W.Va. Code §56-3-33(c) by acceptance of service by the WVSOS and forwarding of notification of service to Monster Franchise at its registered address, the circuit court possessed jurisdiction to enter default unless there was some defect in the notification. *Federal Deposit Ins. Corp.*, 96 F.R.D. 677 at 681. In determining sufficiency of the notification, the focus is on whether Monster Franchise had actual notice of the proceedings and an opportunity to be heard. *Federal Deposit Ins. Corp.*, 96 F.R.D at 681. "West Virginia does not require actual notice for service of process to be valid where the statutory requirements for

notification have been met." *Id.* at 682. Directing notification to the last known address is sufficient to give a court jurisdiction to render default judgment notwithstanding a defaulting party's contention that it was not the correct address. *Id.* Therein, the district court noted:

> actions taken by the defendants in ignoring that of which they were well aware may have amounted to refusal of service. In any event, it is clear that Schaffer contacted his attorney shortly after service was made on the other defendants and that Malin signed a return receipt card for co-defendant LMC Enterprises, Inc. Under these circumstances, the court concludes that delivery of the summons and complaint to the respective addresses of each Schaffer and Malin, coupled with their actual notice of the pendency of these very proceedings against them from the outset, was sufficient notification even though they may not, as claimed, have personally received in their individual capacities the papers served. Moreover, as further developed below, since they had actual notice of the pendency of this litigation from the beginning, they cannot claim "excusable neglect" as grounds for setting aside the default.

Id. at 682-3.

In affirming the district court in *Federal Deposit Inc. Co.*, the United States Court of Appeals for the Fourth Circuit likewise focused on the defendant's actual notice of the lawsuit when the effectiveness of service under W.Va. Code §56-3-33(c) was challenged on the basis of an alleged error in the notification address. *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134 (4th Cir. 1984). Therein, the Fourth Circuit held that a good faith effort to comply with W. Va. Code §56-3-33(c) by directing the notification of service to a proper address was sufficient to effect service and confer jurisdiction notwithstanding an argument that the notification of service was not actually received where the defaulting party had actual notice of the lawsuit. *Federal Deposit Ins. Corp.*, 731 F.2d at 1137.

Similarly, decisions from this Court have focused on whether a defaulting defendant had actual notice of a lawsuit when determining whether a default or default judgment should be set

aside in the face of a claim of ineffective service of process.[16] *See, e.g., Realco Ltd. Liability Co.*, 218 W.Va. at 250, 624 S.E2d at 597; *Lee*, 208 W.Va. at 566, 568-69, 542 S.E.2d at 80, 82-83; *Farm Family Mut. Ins. Co.* 202 W.Va. at 71, 75, 501 S.E.2d at 788, 792. While not directly discussing how notification of service was attempted, this Court in *Realco Ltd. Liability Co.* noted that the WVSOS had accepted service on behalf of the defendant corporation and that there was "nothing in the record to suggest [its incorporator] did not have actual notice of the filing of the original suit." *Realco Ltd. Liability Co.*, 218 W.Va. at 250, 624 S.E2d at 597. This Court refused to set aside the default judgment even though, as noted by the dissent, the lease upon which the default judgment was based was executed by a related company not named in the complaint having the same principal officer as the defendant against whom default was entered and which was not incorporated at the time the lease was executed. *Id.* at 251-52, 624 S.E.2d at 598-99 (Albright, J., dissenting).

In *Farm Family Mut. Ins. Co.*, the complaint was signed for and received by an employee of the defendant and subsequently disappeared. *Farm Family Mut. Ins. Co.* 202 W.Va. at 71, 501 S.E.2d at 788. Although the defendant did not respond to the lawsuit, at least one representative of the defendant contacted the plaintiff to inquire about it. *Id.* Setting aside the default judgment, this Court upheld the entry of default and remanded for a hearing on damages. *Id.* at 75, 501 S.E.2d at 792.

Lee is especially relevant to the matter currently before this Court as it too involved a situation where notification from the WVSOS directed to the defendant's registered address was

---

[16] While not involving a claim of ineffective service, this Court has also refused to set aside a default where the defendant had actual notice of the suit but failed to timely respond after tendering its defense to its insurer and assuming the insurer would handle the defense. *Coury*, 172 W.Va. at 108, 111, 304 S.E.2d at 12-13, 15.

returned as opposed to expressly refused and evidence existed of the defendant's awareness of the claim. Therein, default judgment entered against a club where service was effected on the WVSOS, the WVSOS forwarded the notification of service to the club's registered address and the certified mail was returned to the WVSOS marked "unclaimed". *Lee*, 208 W.Va. at 566, 542 S.E.2d at 80. Rejecting an affidavit submitted by the club owner indicating that he was unaware of the suit until he received notification of the default, the Court found the club had "intentionally avoided" communication concerning the incident, including certified mail. *Id.* at 568, 542 S.E.2d at 82. Affirming the circuit court's refusal to set aside the default judgment, this Court concluded by stating that "to rule otherwise" under these circumstances "encourages business entities to ignore [claims] in the hopes that the matter will vanish." *Id.* at 569, 542 S.E.2d at 83.

Each of the cases relied upon by Monster Franchise in support of its argument that notification was not expressly refused and, thus, failed either actually support Respondent's position herein or is readily distinguishable as not involving the actual notice and limited notification of service options[17] at issue herein. Of particular significance is *Crowley v. Krylon Diversified Brands*, 216 W.Va. 408, 607 S.E.2d 514 (2004), which actually provides support for the very argument advanced by Respondent herein.

In *Crowley*, the defendant had actually registered with the WVSOS and was authorized to do business in the State of West Virginia, with a registered agent on file with the WVSOS. *Crowley*, 216 W.Va. at 409, 607 S.E.2d at 515. However, at the time notification of service was sent to the registered agent, he had either died or moved and the certified mail from the WVSOS

---

[17] As discussed *supra*, notification is to be made at the foreign entity's principal or registered office which in this matter is disclaimed by Monster Franchise despite the fact that it was the registered address on file with the Pennsylvania BOC at all times material and relevant herein.

was returned as undeliverable. *Id.* The defendant had no apparent notice of the suit as it was undisputed that a letter sent an entire year after entry of default judgment and four (4) years after the notification of service was returned as undeliverable "was the first actual notice to [the defendant] of the claim or the proceedings against it." *Id.*

While the Court, understandably, set aside a default judgment where the defendant had no actual notice of the dispute, it qualified its holding in footnote 3 wherein it stated:

> In light of our discussion of the responsibility of the appellants for the underlying problem that led to the failure of the mailed service of process to be properly served upon them in a timely manner, ***we qualify our holding*** by stating that we are inclined to the position that a plaintiff that has acted in good faith in seeking service of notice or process through the Secretary of State's office has standing to assert ***that an authorized corporation that has failed to follow the statutory requirement of maintaining a listed agent for service of notice or process by mail through the Secretary of State's office should be estopped from asserting insufficiency of process, the statute of limitations, or other defense arising from insufficient process; and that a court considering such a matter should balance all of the equities in deciding the estoppel question***.

Id. at 412, n.3, 607 S.E.2d at 518, n. 3 (emphasis added). Thus, the Court in *Crawley*, anticipated a situation similar to that with which it is faced herein and *left the door open* to the precise arguments advanced by Respondent and adopted by the circuit court – that a defendant with actual notice of a lawsuit may not avoid a finding of effective service of process at its registered address where the WVSOS's certified mail notification is returned as undeliverable due to an alleged incorrect address, an allegation refuted by factual evidence.

Similarly, in *Burkes v. Fas-Chek Food Mart Inc.*, 217 W.Va. 291, 617 S.E.2d 838 (2005), this Court reversed a circuit court's denial of a motion to reinstate a complaint finding the circuit court erred by refusing to extend the time for service under Rule 4(k) of the *West Virginia Rules of Civil Procedure* for good cause. *Burkes*, 217 W.Va. at 298, 617 S.E.2d at 845. In *Burkes*,

notification of service was returned as "unclaimed" when delivery was attempted at the address provided by the defendant's president. *Id.* at 294, 617 S.E.2d at 841. As the defendant's president had provided the address, he obviously had notice, as did Monster Franchise, that certified mail with notification of service was forthcoming from the WVSOS. Therein, this Court cautioned against gamesmanship by defendants seeking to avoid a finding of effective service:

> In the instant case, appellant made several attempts to serve the appellee—going so far as contacting the appellee's president and designated agent—in her attempt to perfect service on the appellee. The appellant and the appellee's president had even engaged in settlement discussions several times. While "[t]he plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted," Syllabus Point 4, *Stevens v. Saunders*, 159 W.Va. 179, 220 S.E.2d 887 (1975), ***a plaintiff is not required to shoot with precision at a moving target.*** The appellant three times attempted to obtain service on the appellee, the third time using the specific corporate name and address provided by appellee's president and designated agent. The Secretary of State mailed a copy of the complaint addressed to the appellee's president and designated agent, at the address provided by the appellee's president during those discussions. ***Avoidance of service by a corporate-agent-for-service-of-process's failure to sign for or otherwise accept a certified mailing from the Secretary of State should not inure to the benefit of a corporate defendant, particularly when the defendant has knowledge of the claim.***

Id. at 298, 617 S.E.2d at 845. Monster Franchise's Managing Member/CEO and its counsel had actual notice of Respondent's lawsuit, including the Amended Complaint. Monster Franchise's failure to sign for or otherwise accept a certified mailing from the WVSOS at its registered address should not inure to its benefit to avoid a finding of effective service where its principal corporate officer and its counsel had actual notice of the lawsuit prior to the time of the attempted delivery.

Conversely, in *Evans v. Holt*, 193 W.Va. 578, 457 S.E.2d 515 (1997), another case heavily relied upon by Monster Franchise, no evidence was presented that the foreign corporate defendant had any notice of the proceeding or the motion for default judgment or that service had been attempted at a registered address for the foreign entity. *Evans*, 193 W.Va. at 582-3, 457 S.E.2d at

519-20. Additionally, the appellee therein had also failed to make a good faith attempt to comply with West Virginia statutory requirements for service on the out of state entity. *Id.* at 585-86, 457 S.E.2d at 522-23.

Monster Franchise, an unauthorized foreign entity transacting business in the State of West Virginia, should not be permitted to avoid service of process for claims arising in West Virginia from its West Virginia business transactions when notification of service is directed to its office registered with its home state and it has actual knowledge of the action. This is especially true when the law of its home state requires such address registration be kept current and deems service effective when directed to the registered office even if the defendant claims the address is no longer valid.

III. THE CIRCUIT COURT DID NOT CLEARLY ERR IN FINDING MONSTER FRANCHISE EFFECTIVELY REFUSED SERVICE

The circuit court correctly looked at the totality of the circumstances, as directed in *Crowley* and *Burkes*, to find that Monster Franchise effectively refused service when the certified mail from the WVSOS was returned as undeliverable after the United States Postal Service attempted delivery at Monster Franchise's current registered address at a time when Monster Franchise representatives, including counsel, had actual knowledge of the Amended Complaint. The initial question to be answered is whether notification was directed to the proper address. The answer to that question is clearly yes as Monster Franchise had not provided a different address to the WVSOS as it had not sought authorization to do business in West Virginia and it was the current registered address on file with Monster Franchise's home state.

The circuit court correctly found that service was attempted at the correct address, notwithstanding the Skolnick Affidavit to the contrary, by looking to the law of Monster

Franchise's home state of Pennsylvania which imposes a mandatory duty on entities such as Monster Franchise to maintain a current, correct address registered with the Pennsylvania BOC. App. 396; 15 Pa. C.S.A. §8825. The circuit court likewise noted a registered address remains valid for service purposes under Pennsylvania law. App. 396; *Coleman v. Phoenix Trans, Inc.*, 2014 WL 10803074. The circuit court also correctly found that Monster Franchise had actual notice of the Amended Complaint prior to the attempted delivery of the notification of service by virtue of the confirmed delivery of notification of service to Monster Tree Service, an entity having the same counsel and whose principal corporate officer/President is Mr. Skolnick, Monster Franchise's Managing Member/CEO, as well as by the fact that its counsel had been provided a courtesy copy of the Amended Complaint by ordinary mail. App. 394-95; 397-98.

Consistent with the principals of *Crowley* and *Burkes*, the circuit court refused to sanction Monster Franchise's evasive conduct relative to service. Respondent and the WVSOS acted in good faith and facially complied with W.Va. Code §56-3-33(c) by sending the notification of service, Summons and Amended Complaint to Monster Franchise's registered address. *See, Federal Deposit Ins. Co.*, 731 F.2d at 1137. As such, the circuit court had jurisdiction to enter default when Monster Franchise failed to answer or otherwise respond to the Amended Complaint by May 22, 2019. W.Va. Code §56-3-33(c). As stated in *Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC*, 883 N.W.2d 917, 925-26 (N.D. 2016):

> A defendant who has notice of an action against him may force the plaintiff to prove that service has been made and that jurisdiction is proper by filing a Rule 12(b) motion to dismiss. The defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits, for whatever reason, until a later time to challenge the plaintiff's action, should have to bear the consequences of such delay.

In light of the inequities where a defendant seeks to set aside a default judgment that was entered at a time when the defendant had actual notice of a lawsuit, the court in *Monster Heavy Haulers* joined other courts which shift the burden to show that service did not occur to the defaulting defendant. *Monster Heavy Haulers, LLC*, 883 N.W.2d at 925.

Monster Tree Service has engaged in gamesmanship in an attempt to avoid having to defend its actions on their merits not only by its attempt to evade service, but also by boldly asserting that the undisclosed agreement with Monster UOV somehow provides it with immunity from Respondent's claims.[18] This Court should not sanction Monster Franchise's behavior. To do so would, in essence, provide foreign businesses doing business in West Virginia without authorization with a blueprint on how to avoid the jurisdiction of West Virginia courts in actions seeking redress for injury they cause in West Virginia.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN REFUSING TO SET ASIDE THE DEFAULT

When reviewing a circuit court's decision on whether to overturn a default or default judgment, a demonstration of "good cause is a necessary predicate to [this Court] overruling a lower court's exercise of discretion." *Hinerman v. Levin*, 172 W.Va. 777, 782, 310 S.E.2d 843, 848 (1983). As stated in *Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 377, 175 S.E.2d 452, 547 (1970):

> [w]here 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

---

[18] Whether the undisclosed agreement between Monster Franchise and Monster UOV contains defense and indemnification provisions is a matter between those parties and does not negate Respondent's direct claims against Monster Franchise. Further, whether or not the undisclosed agreement deems Monster UOV an independent contractor or however it declares the relationship between Monster UOV and Monster Franchise does not negate Respondent's direct claims against Monster Franchise which are based upon Monster Franchise's own conduct and public representations.

> 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.

Monster Franchise bears the burden of demonstrating error below with "all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. pt. 2, *in part*, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973), *see also*, *Cook v. Channel One, Inc.*, 209 W.Va. 432, 434, 549 S.E.2d 306, 309 (2001) (discussing good cause and abuse of discretion standards in context of default judgment). Monster Franchise has not demonstrated an abuse of discretion by the circuit court.[19]

Contrary to Monster Franchise's assertion, the June 5, 2019 Entry of Default was not void for want of jurisdiction. As demonstrated above, service was effective. As such, the circuit court did not clearly err in refusing to set aside the default as void.

Rule 55(c) of the *West Virginia Rules of Civil Procedure* required Monster Franchise to demonstrate "good cause" to set aside the default. W.Va. R.Civ.P. 55(c). In *Hardwood Group* this Court held:

> When addressing a motion to set aside an entry of default, a trial court must determine whether "good cause" under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met. In analyzing "good cause" for purposes of motions to set aside a default, the trial court should consider: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; (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.

---

[19] Monster Franchise's argument that the circuit court erred by resolving every doubt against setting aside the default ignores these standards and the overwhelming evidence of its intransigence and evasive conduct. Petition, p. 23-24. Indeed, Monster Franchise continues its intransigence by claiming there was no evidence to dispute the Skolnick Affidavit; such evidence has been discussed herein throughout. *Id.*

Syl. pt. 4, *Hardwood Group*.[20] Such factors "do not automatically relieve a defendant from the consequences of a default as there still must be some showing of excusable neglect." *Coury*, 172 at 110, 304 S.E.2d at 14 (discussing similar *Parsons* factors). Any evidence of intransigence should be weighed heavily against a defaulting party. *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W.Va. 309, 316, 664 S.E.2d 531, 538 (2008) (*per curiam*); *Hardwood Group*, 219 W.Va. at 65, 631 S.E.2d at 623; *Hinerman v. Levin*, 172 W.Va. at 782, 310 S.E.2d at 849 (1983). Strong evidence of excusable neglect as the reason for failing to respond is needed before it may become appropriate to grant relief from a default. *Hardwood Group*, 219 W.Va. at 65, 631 S.E.2d at 623; *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 471, 256 S.E.2d 758, 762 (1983).

Analysis of the *Hardwood Group* factors confirms the circuit court did not abuse its discretion when refusing to set aside the default.[21]

(1) Degree of Prejudice: Any prejudice to Monster Franchise which would result from the failure to set aside the June 5, 2019 default was created by Monster Franchise itself. Monster

---

[20] Monster Franchise's reliance on *Tudor's Biscuit World of America v. Critchley*, 229 W.Va. 396, 729 S.E.2d 231 (2012) (*per curiam*), to argue that the circuit court clearly erred in applying these factors is entirely misleading and inappropriate. Petition, p. 26-28. *Tudor's Biscuit World of America* involved an attempt to hold a franchisor liable for the deliberate intent of the franchisee, a claim the plaintiff therein acknowledged was not viable. *Tudor's Biscuit World of America*, 229 W.Va. at 399, 405, 729 S.E.2d at 234, 240. Further distinguishing *Tudor's Biscuit World of America* is the fact that the circuit court acknowledged insufficient service but nevertheless upheld an entry of default and the defendant was not provided notice of the damages hearing prior to entry of default judgment. *Id.* at 406-07, 729 S.E.2d at 240-41. The facts of *Tudor's Biscuit World of America* are wholly inapposite of the facts before this Court where there are negligence claims against the franchisor *for its own negligence* and service was effective.

[21] Contrary to Monster Franchise's argument, the circuit court did not use post-litigation misconduct as a basis for refusing to set aside the default. Petition, p. 23. Indeed, Monster Franchise's citations to the record to support this argument are to the circuit court's order denying Monster Tree Service's motion. Petition, p. 23, n. 85. To the extent similar findings are included in the order applicable to Monster Franchise, a review confirms that other than reference to the June 18, 2019 telephone call, all are to *pre-default* actions which demonstrate that Monster Franchise did not make a mistake when it failed to respond, that it had knowledge of applicable rules of procedure. App. 391-93, 401-02. The June 18, 2019 telephone call is noted only to confirm the lack of mistake. App. 393.

Franchise had actual knowledge of the Amended Complaint, including impending service, and effectively refused to accept the notification of service at its registered address. Monster Franchise was, at all times relevant, represented by counsel who had expressed an understanding of West Virginia law and the *West Virginia Rules of Civil Procedure.* App. 354-55. Monster Franchise made the decision to not file a responsive pleading and raise the vary defenses it now argues will result in its prejudice if it is not permitted to raise and litigate.

By contrast, Plaintiff has been prejudiced by Monster Franchise's refusal to acknowledge his claims, including the delay in his ability to prosecute his claims and obtain any relief to which he may be legally entitled for his injuries. Monster Franchise, however, attempted to evade service so that it would not have to defend itself and then delayed another four (4) months after it had notice of the default before filing its Motion to Set Aside Default. At this juncture, Plaintiff has experienced a delay of nearly a year in prosecuting his claims.

(2) **Presence of material issues of fact and meritorious defenses** – Monster Franchise's argued meritorious defenses of ineffective service of process and lack of jurisdiction have been raised and addressed herein and, as demonstrated herein, are without merit. Any other additional defenses arising from Monster Franchise's claimed contractual agreement with Monster UOV are matters between those parties, do not involve Respondent and are not of record herein. That is, Monster Franchise may seek to enforce purported contractual terms in an action against Monster UOV. However, Respondent is not a party to the alleged franchise agreement and is, therefore, not bound by the terms of the same.

Again, it must be emphasized, Respondent has not asserted vicarious liability claims against Monster Franchise pursuant to which the undisclosed contractual terms of the alleged

franchise agreement may have become relevant *at some point* if they include indemnification provisions. However, since vicarious liability claims are not asserted, the relationship between Monster Franchise and Monster UOV, if any, is between those parties. Respondent seeks to hold Monster Franchise liable *for its own negligence*.

In arguing clear error by not resolving doubts regarding the defenses in its favor, Monster ignores the fundamental fact that evidence of the actual contractual terms themselves and any defenses which could potentially arise therefrom have never been disclosed or made a part of the record. *See*, Petition, p. 24. As a result, it is Monster Franchise that wants this Court to speculate that contractual terms exist in a purported agreement between Monster Franchise and Monster UOV that provide Monster Franchise with meritorious defenses as against Respondent's claims.

(3) **Significance of Interests at Stake** – Significant issues are at stake for Respondent in this litigation given the alleged severity of his injuries and damages.

(4) **Degree of Intransigence of the Defaulting Party** – Monster Franchise's intransigence was substantial, extreme and severe. Monster Franchise, through both its Managing Member/CEO and its counsel, had actual notice of Amended Complaint yet chose to ignore the same. With an admitted knowledge of West Virginia law and an understanding of the obligations imposed by the *West Virginia Rules of Civil Procedure*, Monster Franchise chose not to file a responsive pleading asserting any meritorious defenses it believed it possessed and, instead, threatened to seek Rule 11 sanctions if Plaintiff pursued his claims against it. App. 354-55. Monster Franchise's acknowledgment of the suit and reference to the *West Virginia Rules of Civil Procedure* are significant inasmuch as they demonstrate that the decision to not respond was a conscious decision and not a matter of inadvertence or oversight.

Rule 12(b) of the *West Virginia Rules of Civil Procedure* provides a mechanism for asserting defenses of ineffective service of process. Monster Franchise had the opportunity to make a limited appearance before the circuit court for the purpose of asserting its ineffective service of process defense but chose not to take advantage of this opportunity to be heard and, instead, simply ignored the lawsuit filed against it. Monster Franchise exhibited a complete disregard of the lawsuit and exhibited significant intransigence by failing to respond and preserve its defenses to a suit of which it had actual pre-suit notice of the claim, actual notice of the filing of the Amended Complaint and actual notice of impeding service.

Monster Franchise's repeated reference in the Petition to Respondent's acknowledgement that service would be effected in accordance with applicable law is quite ironic. Applicable law required notification of service to be directed to Monster Franchise's registered address. Monster Franchise knew at all times what its registered address was with the Pennsylvania BOC and disavowed the same for purposes of notification of service *after* notification of service was directed to its registered address and default entered. Monster Franchise has made no attempt to explain how service can be effected in accordance with applicable law if Monster Franchise has ignored applicable law requiring it to maintain registration of its current address with the Pennsylvania BOC. According to Monster Franchise, the registered address (the only appropriate address for service) is not its address at all (if Monster Franchise is to be believed) and, accordingly, Monster Tree Service is apparently immune from service under W.Va. Code §56-3-33(c) as service could never be effective because there is no correct principal or registered address to which to direct notification of service.

To the extent Monster Franchise would seek to raise advice of counsel to justify this conduct, this Court has held that reliance on advice of counsel will not serve as an excuse for failure to respond which would justify the setting aside of a default judgment. *White v. Berryman*, 187 W.Va. 323, 332, 418 S.E.2d 917, 926 (1992).

(5) **The reason for the failure to respond/excusable neglect** – 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 a default does not constitute excusable neglect. The proper way to assert such a defense is through a Rule 12(b) motion. Additionally, Monster Franchise's Respondent said "service would be affected in accordance with law" "excuse" for its failure to timely respond to the Amended Complaint was addressed above when discussing Monster Franchise's significant intransigence and does not withstand scrutiny. Likewise, Monster Franchise has provided no authority to support its argument that waiting on a response to a request for a defense and indemnification excuses it from timely filing a responsive pleading.

A demonstration of good cause is a necessary predicate for seeking relief from an entry of default or a default judgment. *Groves*, 222 W.Va. at 317, 664 S.E.2d at 539; *Hinerman*, 172 W.Va. at 782, 310 S.E.2d at 848. Monster Franchise, through its counsel, expressed understanding of West Virginia law, including the *West Virginia Rules of Civil Procedure*, and chose to ignore the same with respect to its duty to respond to the Amended Complaint and raise defenses it believed it possessed. This informed decision negates any potential for finding excusable neglect. *See*, *Federal Deposit Ins. Corp.*, 96 F.R.D. 677 at 682-83. This Court has recently upheld a refusal to set aside a default judgment due to the failure to establish good cause where, as here, the defendant was served in accordance with applicable law, had notice of the litigation and yet failed to timely

respond. *Chamblee v. State*, No. 18-0310, 2019 WL 2246091 (W.Va. May 24, 2019) (memorandum).

The circuit court appropriately applied the *Hardwood Group* factors and found that good cause did not exist to set aside the June 5, 2019 Entry of Default, particularly in light of Monster Franchise's significant and extreme intransigence. App. 400-03. As the circuit court's exercise of its discretion does not constitute a clear error of law, the Petition should be denied.

CONCLUSION

Monster Franchise attempted to evade effective service by evading the WVSOS's notification of service directed to its registered address. In so doing, Monster Franchise ignored that of which it was well aware in its attempt to avoid the jurisdiction of West Virginia courts to answer for its own actions in causing injury to Respondent. The circuit court did not clearly err when finding effective service nor did it abuse its discretion when denying Monster Franchise's Motion to Set Aside Entry of Default. As such, Monster Franchise has failed to meet the high standard required for issuance of a Writ of Prohibition and its Petition should be denied in its entirety.

Respectfully submitted,

Michelle Marinacci (#7482)
Counsel of Record
Christopher M. Turak (#8611)
GOLD, KHOUREY & TURAK, L.C.
510 Tomlinson Avenue
Moundsville, WV 26041
T: (304) 845-9750
F: (304) 845-1286
E: mlm@gkt.com; cmt@gkt.com
Counsel for Respondent, David S. Duvall