No. 34712 - Leslie Equipment Company, A West Virginia Corporation v. Wood Resources Company, L.L.C., Christopher Todd Zack, individually and d/b/a Wood Resources Company, L.L.C., Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C., and Wendell L. Koprek, individually and d/b/a Wood Resources Company, L.L.C.

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OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part:

In this case, the trial court denied the appellants' motion to set aside a default judgment. The majority opinion concluded that service of process on the appellants under Rule 4(e)(2) of the West Virginia Rules of Civil Procedure was invalid because service of process had to be made pursuant to W. Va. Code § 56-3-33 (2008) (Supp. 2009). I concur in this finding. However, for the reasons set out below, I respectfully dissent from the majority opinion's analysis and ultimate disposition of the case.

DISCUSSION

The basis of my dissent rests on three grounds. First, I disagree with the majority opinion's analysis of Rule 4(e)(2). Second, I believe the issue of insufficiency of service of process was waived, at least as to one of the appellants. Third, this case should have been remanded for the trial court to set out findings of fact to support its decision consistent with *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979). I will address each issue separately.

I. Understanding the Application of Rule 4(e)

The current version of Rule 4(e) was the result of an amendment in 1998. The instant case is the first opportunity this Court has had to construe the new version of Rule 4. Unfortunately, the majority opinion decided to "talk" around the rule rather than confronting it on the merits. As I will hereinafter explain, the current version of Rule 4(e), like its predecessor, can be used to permit a circuit court to obtain personal jurisdiction over a defendant for service of process in one limited area of law.

A. The case law involving Rule 4(e) prior to 1998. Prior to 1998, Rule 4(e)(1) read, in relevant part:

> If the plaintiff shall file with the court an affidavit . . . that the defendant is a nonresident of the State . . . the clerk shall enter an order of publication against such named . . . defendant[]. And, where the residence of a nonresident defendant . . . is known to the plaintiff, the clerk shall serve such defendant by mailing a copy of the summons and of the complaint by first-class mail to such defendant . . .; and such summons shall notify him that he must appear and defend within 30 days after the date of mailing, otherwise, judgment by default will be rendered against him at any time thereafter.

Clearly, under former Rule 4(e)(1), when a plaintiff knew the address of a nonresident defendant, both publication and mailing had to occur in order to commence a valid proceeding against the defendant.[1] Insofar as this Court created former Rule 4(e)(1) pursuant

[1]Under the current version of Rule 4(e), publication is not required when a plaintiff knows the address of a nonresident defendant. *See* Section I.B., *infra*.

to our constitutional rule-making authority, the rule must have been intended to have application in some context. One context in which the Rule had application was a divorce proceeding against a nonresident defendant. However, the Rule did not apply in tort actions against a nonresident defendant.

In the case of *Teachout v. Larry Sherman's Bakery, Inc.*, 158 W. Va. 1020, 216 S.E.2d 889 (1975), the plaintiffs, husband and wife, effected service of process on a nonresident defendant by publication and mailing.[2] The plaintiffs brought the action to recover damages for injuries received by the wife when she fell near a building owned by the nonresident defendant. The nonresident defendant filed a motion to dismiss the complaint because of lack of jurisdiction and insufficient service of process. After the motion was denied, the nonresident defendant filed an answer to the complaint. A verdict was eventually rendered in favor of the plaintiffs. On appeal, the nonresident defendant argued that service of process by publication and mailing could not give the circuit court in personam jurisdiction over him. This Court agreed with the nonresident defendant and held that "the attempted service on the defendant did not confer upon the trial court jurisdiction over his person[.]" *Teachout*, 158 W. Va. at 1027, 216 S.E.2d at 893-94.

[2]The decision in *Teachout* did not cite the authority relied upon by the plaintiff to effect constructive service. However, it is clear that the plaintiff relied upon former Rule 4(e)(1).

For the purposes of my dissent, the opinion in *Teachout* stands for the proposition that, *in a tort action*, constructive service of process on a nonresident defendant by publication and mailing under former Rule 4(e)(1) will not confer personal jurisdiction over the nonresident defendant. However, this limitation on former Rule 4(e)(1) by *Teachout* did not extend to divorce actions.

In *Dierkes v. Dierkes*, 165 W. Va. 425, 268 S.E.2d 142 (1980), the plaintiff husband filed for a divorce in West Virginia. At the time of the filing of the complaint, the plaintiff's wife lived in Ohio. The plaintiff made constructive service of process by publication only. The defendant wife did not answer the complaint or make an appearance. A divorce was granted to the plaintiff. Subsequently, the plaintiff remarried. Several years after his remarriage, the plaintiff was killed in an automobile accident. After the plaintiff's death, his former wife filed a petition seeking to set aside the divorce decree on the ground that she was not properly served with process under Rule 4(e)(1). The circuit court agreed with the former wife and set aside the decree. The estate of the husband appealed. This Court addressed the requirements of publication and mailing under Rule 4(e)(1) for divorce purposes as follows:

> Our research reveals that this Court has never reached the precise issue involved in the instant case; i.e., whether failure to comply with the mailing aspect of Rule 4(e)(1) on constructive service of process will void an otherwise valid divorce decree. Most courts faced with the question hold that strict compliance with constructive service statutes is essential to give a court jurisdiction to grant a divorce. And when the rule or statute

> requires that a copy of the summons and complaint be mailed to the out-of-state defendant in addition to publication, and the mailing requirement is not complied with, the service is void.

Dierkes, 165 W. Va. at 429, 268 S.E.2d at 144-45. We ultimately adopted the position taken by the majority of courts and held in Syllabus point 1 of *Dierkes* that "[f]ailure to comply with the mailing requirement of Rule 4(e)(1) of the West Virginia Rules of Civil Procedure on constructive service of process will void an otherwise valid divorce decree."[3] 165 W. Va. 425, 269 S.E.2d 142.

Dierkes stands for the proposition that, in a divorce action, constructive service of process on a nonresident defendant by publication and mailing under former Rule 4(e)(1) will confer personal jurisdiction over the nonresident defendant *solely* on the issue of divorce. In my review of the cases where former Rule 4(e)(1) was expressly relied upon for service of process, I found that all of these cases involved divorce actions. *See Hawkinberry v. Maxwell*, 176 W. Va. 526, 345 S.E.2d 826 (1986) (divorce complaint constructively served under Rule 4(e)(1)); *Shaw v. Shaw*, 155 W.Va. 712, 187 S.E.2d 124 (1972) (same); *Brinkley v. Brinkley*, 147 W. Va. 557, 129 S.E.2d 436 (1963) (same); *Tate v. Tate*, 149 W. Va. 591, 142 S.E.2d 751 (1965) (same). *Cf. McAtee v. McAtee*, 174 W. Va. 129, 323 S.E.2d 611

[3]The opinion in *Dierkes* remanded the case for a determination of whether laches barred the former wife's attempt to void the divorce decree.

(1984).[4]

B. The 1998 amendment to Rule 4(e). In 1998, this Court amended and rewrote Rule 4(e). Under its present form, Rule 4(e) does not require constructive service by both publication and mailing. In fact, the procedure for publication and mailing are set out in separate sections. Because of what seems to be a clear drafting error, one must examine the publication procedures set out in Rule 4(e)(1) to show what was actually intended under the mailing procedure set out in Rule 4(e)(2).

Constructive service by publication is governed by Rule 4(e)(1). This rule provides in relevant part:

> . . . If the plaintiff files with the court an affidavit:
>
> (A) That the defendant is a foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or
>
> (B) That *the defendant is a nonresident of the State for whom no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had*; . . .

[4]The decision in *McAtee* involved granting a divorce and child custody pursuant to process being served under former Rule 4(e)(1). The nonresident defendant in the case did not appeal the divorce issue. Instead, the defendant argued that service of process under former Rule 4(e)(1) did not confer jurisdiction over her for the purpose of child custody. This Court agreed with the defendant that personal jurisdiction was not obtained for purposes of child custody, but found that the Uniform Child Custody Jurisdiction Act permitted the trial court to decide the child custody issue.

. . . .

> then the clerk shall enter an order of publication against such named . . . defendant[]. Every order of publication shall state. . . . that each named . . . defendant must appear and defend on or before a date set forth in the order, which shall be not fewer than 30 days after the first publication thereof; otherwise, that judgment by default will be rendered against the defendant[] at any time thereafter. . . .

(Emphasis added). For the limited purpose of this dissent, it is clear that under Rule 4(e)(1), constructive service by publication upon a nonresident defendant may occur only when "no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had." Rule 4(e)(i)(B).

Constructive service by mail is governed by Rule 4(e)(2). Rule 4(e)(2) states, in relevant part:

> When . . . *plaintiff knows the residence of a nonresident defendant* or the principal office of a nonresident defendant foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had, *plaintiff shall obtain constructive service of the summons and complaint upon such defendant by the method set forth in Rule 4(d)(1)(D).* The summons in such instance shall notify the defendant that the defendant must appear and defend within thirty days of the date of mailing pursuant to Rule 4(d)(1)(D); otherwise, that judgment by default will be rendered against the defendant at any time thereafter.

(Emphasis added). The problem presented by Rule 4(e)(2) is that it can be read to mean that service by mailing on a nonresident defendant may occur *under any circumstance*. That is,

under a literal reading of the provision, there is no requirement of showing that the nonresident does not have an "agent, or appointed or statutory agent or attorney in fact . . . in the State upon whom service may be had." *Id.* Obviously, this literal reading was not the intent of this Court when the provision was drafted. Rule 4(e)(2) was intended to apply the same limitations for constructive service on a nonresident defendant as is provided for constructive service by publication under Rule 4(e)(1). In other words, Rule 4(e)(2), like Rule 4(e)(1), should be interpreted as permitting service on a nonresident defendant by mail only when "no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had." Rule 4(e)(i)(B).

The majority opinion, rather than explaining that Rule 4(e)(2), in fact, has limitations that were inadvertently omitted, has chosen to ridicule the rule as somehow being of little value to presumptively obtain personal jurisdiction. Rule 4(e)(2) has application to a divorce proceeding when one of the parties is a nonresident.[5]

Rule 4(e)(2)[6] provides the mechanism for service on a divorce defendant who is not a resident of West Virginia. None of the criteria set forth in W. Va. Code § 56-3-33

[5]To be clear, I do not believe that there is any due process violation in serving process under Rule 4(e)(2) upon a nonresident defendant who was married in the State, but subsequently moved away.

[6]Service on a divorce defendant who is not a resident of West Virginia may also be made through Rule 4(e)(1), when properly invoked.

would make the Secretary of State the statutory agent or attorney in fact for a nonresident divorce defendant.[7] This point is clear. The Legislature has expressly indicated that the Rules of Civil Procedure are to be utilized for service of process in divorce actions. That is, pursuant to W. Va. Code § 48-5-103(b) (2001) (Repl. Vol. 2004), the Legislature has indicated that, in a divorce action, "[a] judgment order may be entered upon service of

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[7]The majority opinion suggests that constructive service under W.Va. Code § 56-3-33 is somehow more legally binding than constructive service under Rule 4. This suggestion is inconsistent with our constitutional rule-making authority and W. Va. Code § 56-3-33, itself. This Court has made quite clear that "[u]nder article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to *process*, practice, and procedure, which *shall have the force and effect of law*." Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988) (emphasis added). Moreover, W. Va. Code § 56-3-33(f) specifically recognizes that "[t]he provision for service of process herein is cumulative and nothing herein shall be construed as a bar to the plaintiff in any action or proceeding from having process in such action served in any other mode or manner provided by the law of this state[.]" Consequently, I reject the suggestion in the majority opinion that constructive service of process under Rule 4 does not presumptively provide personal jurisdiction over a defendant. It has been recognized that "[a] signed return certificate filed in the clerk's office provides a rebuttable presumption that the party to whom the service was sent has been properly served." *Kingvision Pay-Per-View, Ltd. v. Ayers*, 886 So. 2d 45, 53 (Ala. 2003) (internal quotations and citation omitted). This rebuttable presumption assumes that a trial court has personal jurisdiction over a defendant. The defendant can rebut this presumption by presenting evidence to establish that personal jurisdiction is lacking. *See Private Capital Group, LLC v. Walpuck*, No. CV054007509S, 2006 WL 3290481, at *2 (Conn. Super. Ct. Oct. 25, 2006) ("When service of process is made . . . and jurisdiction turns on the truth of the matters stated in the officer's return, there is a presumption of the truth of the matters stated in the officer's return, and the burden of proving lack of jurisdiction is on the defendant."); *Watts v. Brown*, No. 45638, 1983 WL 5633, at *6 (Ohio Ct. App. Aug. 4, 1983) ("Where service of process is had by ordinary mail, and default judgment is taken against a defendant, a rebuttable presumption arises that defendant resided at the address certified by the plaintiff, and that the trial court was invested with jurisdiction over the person of the defendant."); *Brenner v. Port of Bellingham*, 765 P.2d 1333, 1335 (Wash. Ct. App. 1989) ("When there is a recital in a default judgment that proper service of process has occurred, a presumption of jurisdiction arises, but such presumption may be overcome[.]").

process in the manner specified in the rules of civil procedure for the service of process upon individuals." Further, it is provided in Rule 9(b) of the Rules of Practice and Procedure for Family Court that, in a divorce action, "[t]he petitioner shall choose a method of service in accordance with the Rules of Civil Procedure." The majority opinion's characterization of constructive service under Rule 4(e)(2) as somehow not affording personal jurisdiction would nullify its use for divorce purposes when one party is a nonresident.

In the final analysis, the majority opinion should have explained that Rule 4(e)(2) should be read as permitting process to be mailed to a nonresident defendant only when "no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had." Rule 4(e)(1)(B). When Rule 4(e)(2) is properly applied, it is clear that, in the instant case, the appellee could not rely upon that Rule. W. Va. Code § 56-3-33 made the Secretary of State the statutory agent or attorney in fact for the appellants.

II. The Defense of Insufficiency of Service of Process Was Waived by at Least One of the Appellants

As a preliminary matter, I need to point out that the majority opinion's fixation with the phrase "personal jurisdiction" resulted in a flawed analysis of the dispositive issue confronting the Court. The opinion in *Roque v. United States*, 857 F.2d 20, 21-22 (1st Cir. 1988), addressed the concern I have as follows:

> Rule 12(b) distinguishes between the defenses of lack of personal jurisdiction[] and insufficient service of process. . . .

> If the true objection is insufficient service of process, we do not think it is too much to require a litigant to plainly say so. [A party] should not couch its true objection to the sufficiency of service in the garb of formalistic incantations of lack of personal jurisdiction[.]

Roque, 857 F.2d at 21-22. In the instant case, the majority opinion has clothed the Rule 12(b)(5) issue of insufficiency of service of process with the "garb of formalistic incantations of lack of personal jurisdiction" under Rule 12(b)(2).[8] In other words, the true issue in this case was the appellants' contention that process was not properly served on them.[9] In fact, the majority opinion clearly stated that the "Appellants contend that the manner in which Leslie Equipment sought to effect service of process on them deprived the trial court of the necessary personal jurisdiction to enter an enforceable default judgment." Maj. op. at 5.

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[8]Rule 12(b)(2) is concerned with due process minimum contacts with the State. *See Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 592 (5th Cir. 1999) ("In a Rule 12(b)(2) motion, Westin Mexico alleged that there were insufficient minimum contacts to bring it within the personal jurisdiction of the court."); *ReedHycalog UK, Ltd. v. United Diamond Drilling Servs., Inc*., No. 6:07CV251, 2009 WL 2834274, at *1 (E.D. Tex. Aug. 31, 2009) ("UDLP filed this Motion to Dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure claiming that the Court does not have personal jurisdiction over UDLP because UDLP does not have sufficient minimum contacts with the State of Texas."); *Faxon & Booth Golf Design, LLC v. South Shore Tri-Town Dev. Corp*., No. 09-135-P-S, 2009 WL 1873515, at *1 (D. Me. June 29, 2009) ("A motion pursuant to Rule 12(b)(2) raises the question whether a defendant has purposefully established minimum contacts in the forum State."). Footnote 19 of the majority opinion states that the issue of "minimum contacts" is not before the Court. Nevertheless, the majority opinion treats the issue of insufficient service of process as though it was a Rule 12(b)(2) personal jurisdiction issue.

[9]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.

Inasmuch as the majority opinion concluded, and I concur, that Rule 4(e)(2) was not the proper vehicle for service of process on the appellants, the next step in the analysis should have been a determination of whether the appellants waived the defense of insufficiency of service of process under Rule 12(b)(5).[10]

The majority opinion indicates in footnote 5 that Appellant Zack received and accepted process by mail at his residence in New Mexico. Appellant Goeke did not actually receive process at her home in Iowa. It appears that process for Appellant Goeke was sent to Appellant Zack's residence.[11] Under these facts, an analysis is required to determine whether Appellant Zack waived the defense of insufficiency of service of process under Rule 12(b)(5).

To begin, Rule 12(a)(1) provides that "when service of process is made upon a defendant in the manner provided in Rule 4(e) . . ., the answer shall be served within 30

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[10]I realize that the trial court's order did not address the waiver issue. However, our cases are clear in holding that we may affirm on grounds different than that relied upon by the trial court. *See Schmehl v. Helton*, 222 W. Va. 98, 106 n.7, 662 S.E.2d 697, 705, n.7 (2008) ("[T]his Court may in any event affirm the circuit court on any proper basis, whether relied upon by the circuit court or not."); *Murphy v. Smallridge*, 196 W.Va. 35, 36-37, 468 S.E.2d 167, 168-96 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.").

[11]As I indicate later in my dissent, the issue of waiver by Appellant Goeke should have been remanded to the trial court.

days after service of the summons[.]" Under Rule 12(b),

> [e]very defense, in law or fact, to a claim for relief . . . shall be asserted in the responsive pleading . . ., except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process. . . . A motion making any of these defenses shall be made before pleading[.]

Rule 12(b) has been explained as follows:

> Rule 12(b) permits a defendant to raise certain defenses and objections by motion filed before serving an answer. A defendant may forego a pre-answer motion and assert in an answer to a complaint every defense, objection or response the defendant has to the plaintiff's complaint, including jurisdictional challenges, denials, affirmative defenses and counterclaims.

Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b) (3d ed. 2008) (hereinafter referred to as "Litigation Handbook").

Under Rule 12(h)(1), "[a] defense of . . . insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading[.]" The issue of insufficiency of service of process has been explained as follows:

> An objection [to sufficiency of service of process] challenges the mode of delivery or lack of delivery of the summons and complaint. . . . A Rule 12(b)(5) [insufficiency of service of process] motion is proper only to challenge noncompliance with a provision of Rule 4 that deals specifically with service of process. A trial court lacks personal jurisdiction over a defendant if there is insufficient service of process.

Litigation Handbook, at § 12(b)(5).

It is clear from the majority opinion that Appellant Zack did not file an answer or pre-answer motion to the complaint. Consequently, a default judgment was eventually entered. Under our law, the failure of a defendant to file an answer or pre-answer motion asserting the defense of insufficiency of service of process constitutes a waiver of that issue. Moreover, I have been unable to find any case by this Court or from other jurisdictions that permits a defendant to belatedly raise the issue of insufficiency of service of process when the defendant received process, but permitted a default judgment to be entered. *See In re Appointment of Trs. for Woodlawn Cemetery*, 222 W. Va. 351, 354, 664 S.E.2d 692, 695 (2008) ("[B]ecause the appellants failed to make a motion or file any pleading challenging the sufficiency of the appellees' service of process by publication . . . the appellants waived their objections."); Syl. pt. 1, in part, *Vanover v. Stonewall Cas. Co.*, 169 W. Va. 759, 289 S.E.2d 505 (1982) ("Where a defendant . . . fails to appear and allows a default judgment to be taken, the default judgment cannot be set aside on a claim of lack of venue, since the venue issue has been waived by the failure to assert it.").[12]

Based upon the foregoing, I believe that Appellant Zack waived the issue of lack of personal jurisdiction based upon insufficiency of service of process. Further, insofar

[12]There is authority that recognizes an exception to the waiver rule only for a Rule 12(b)(2) personal jurisdiction defense, when a default judgment is entered. "In this situation some courts hold that 'a party's right to contest personal jurisdiction is not waived by his failure to appear at all.'" *Litigation Handbook*, at § 12(h)(1) (quoting *Jackson v. Fie Corp.*, 302 F.3d 515 (5th Cir. 2002)).

as it appears that Appellant Goeke's objection to personal jurisdiction was based upon insufficiency of service of process, I would have remanded this issue for a determination of (1) exactly when and how she received notice of the action and (2) whether she had sufficient time to file a motion or answer objecting on insufficiency of service of process grounds prior to a "default" (not the default judgment) being entered against her.

III. The Trial Court's Order and Majority Opinion Failed to Set out an Analysis of the *Parsons* Factors

The appellants in this case filed a motion with the circuit court to set aside a default judgment. This Court recently has held that,

> [i]n addressing a motion to set aside a default judgment, "good cause" requires not only considering the factors set out in Syllabus point 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979), but also requires a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied.

Syl. pt. 5, *Hardwood Group v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006). The *Parsons* factors have been stated as follows:

> In determining whether a default judgment should be . . . vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.

Syl. pt. 3, in part, *Parsons*, 163 W. Va. 464, 256 S.E.2d 758..

A review of the trial court's order in this case shows that it summarily held that the Appellants "failed to show either good cause or excusable neglect in support of the relief requested[.]" There is no discussion of the *Parsons* factors. Further, the majority opinion also has failed to perform an analysis of the *Parsons* factors–the majority opinion simply adopts the ground for relief asserted under Rule 60(b)(4). The decision in *Larocco* has made clear that a challenge to a default judgment must include an analysis of the *Parsons* factors *and* any ground asserted under Rule 60(b).

Consequently, in view of the manner in which I would have addressed the issue of service of process, I would reverse the trial court's order and remand the case so that the trial court could reconsider the motion to set aside. Finally, in remanding the case, I would have instructed the trial court to issue an order that included findings of fact consistent with *Parsons* and an analysis of any Rule 60(b) ground asserted by the appellants. Based upon the foregoing, and in light of the majority's contrary decision, I respectfully concur, in part, and dissent, in part.