

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 23-ICA-203

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HP, INC.,

Petitioner,

v.

JUDITH THOMAS,

Respondent.

Appeal from final order of  
the Circuit Court of Putnam  
County, West Virginia (21-C-142)

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**OPENING BRIEF OF PETITIONER HP, INC.**

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## ASSIGNMENTS OF ERROR

The Circuit Court awarded Respondent, Judith Thomas, \$43,638.25 in an Amended Default Judgment for a dispute involving a laptop computer purchased by Respondent for approximately \$1,500.00 and an instant ink subscription service that charged Respondent just \$213.92. The Circuit Court awarded Respondent \$1,597.28 for the cost of the defective laptop, \$1,309.92 for Respondent's purchase of a replacement laptop, \$425.00 for Petitioner's unauthorized and excessive charges and \$12,175.72 for Respondent's annoyance and inconvenience. These damages were awarded despite the valid, bargained-for limitation of damages provisions set forth in two relevant agreements between Petitioner, HP, Inc., and Respondent, that limited Respondent's recovery to an amount that could not have met the statutory jurisdictional amount-in-controversy threshold for the Circuit Court to adjudicate Respondent's Complaint. Additionally, inclusive in the Circuit Court's award was an award of \$8,800.00 in attorney's fees to Respondent, a *pro se* litigant, and \$20,000.00 in punitive damages. Accordingly, the Circuit Court erred when it:

1. Abused its discretion in denying Petitioner's request to set aside the Amended Default Judgment for lack of subject matter jurisdiction;
2. Abused its discretion in awarding Respondent, a *pro se* litigant, attorney's fees;
3. Erroneously awarded Respondent \$20,000.00 in punitive damages without making detailed findings that adhere to the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991);
4. Failed to find good cause to set aside the Amended Default Judgment.

This Court should reverse the Circuit Court's clear abuse of discretion and legal errors and set aside the Amended Default Judgment.

## STATEMENT OF THE CASE

### ***I. Introduction***

This appeal arises from the Circuit Court's award of \$43,638.25 in an Amended Default Judgment for a dispute involving a laptop computer purchased by Respondent for approximately \$1,500.00 and an instant ink subscription service that charged Respondent just \$213.92. The Amended Default Judgment failed to account for the valid, bargained-for limitation of damages provisions set forth in Petitioner's HP Services Agreement and HP Instant Ink Services Agreement (collectively, the "HP Agreements"), which limited Respondents' damages to an amount that did not exceed the statutory jurisdictional threshold of \$7,500.00. Notwithstanding, the Amended Default Judgment also erroneously awarded Respondent \$8,800.00 in attorney's fees and \$20,000.00 in punitive damages. These errors warranted a vacation and/or setting aside of the Circuit Court's Amended Default Judgment for good cause. Yet, the Circuit Court denied Petitioner's Motion to Set Aside, standing firm on the erroneous bases for its award to Respondent. This Court should reverse the Circuit Court's denial of Petitioner's Motion to Set Aside and set aside the Circuit Court's erroneous Amended Default Judgment. Alternatively, at a minimum, this Court should correct the Circuit Court's plain legal errors in awarding Respondent attorney's fees and punitive damages.

### ***II. Relevant Facts***

Respondent purchased an HP laptop from a Best Buy on July 15, 2019 for \$1,527.98. [JA at p. 17.] Respondent alleged that a year after she purchased the laptop, she also purchased a three (3)-year extended warranty from Petitioner (the "Extended Warranty"). [JA at p. 17.] In purchasing the Extended Warranty, Respondent entered into an HP Support Service Agreement



(“HP Services Agreement”). [JA at pp. 141-46.] Critically, the HP Services Agreement outlined limitations of Petitioner’s express and limited warranties:

**3. Limited Warranty:** WE PROVIDE A LIMITED WARRANTY AGAINST DEFECTS IN HARDWARE MATERIALS AND WORKMANSHIP FOR 90 DAYS AFTER RETURN OF THE HP PRODUCT TO YOU OR FOR THE REMAINING TERM OF THIS AGREEMENT, WHICHEVER IS LONGER, FOR REPLACEMENT PARTS PROVIDED TO MAINTAIN HP HARDWARE PRODUCTS SERVICES UNDER THIS AGREEMENT . . . . IF WE RECEIVE NOTICE OF DEFECTIVE HARDWARE REPLACEMENT PARTS DURING THE TERM OF THIS AGREEMENT, WE WILL, AT OUR OPTION, REPAIR OR REPLACE THE REPLACEMENT PART(S) THAT PROVE TO BE DEFECTIVE. **THE ABOVE LIMITED WARRANTY IS EXCLUSIVE AND NO OTHER WARRANTY, WHETHER WRITTEN OR ORAL, IS EXPRESSED OR IMPLIED. TO THE EXTENT PERMITTED BY LAW. WE SPECIFICALLY DISCLAIM THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE,** TITLE, AND NON-INFRINGEMENT. SOME STATES DO NOT ALLOW A LIMITATION OF IMPLIED WARRANTIES FOR CONSUMER PRODUCTS OR OF A CONSUMER’S STATUTORY RIGHTS. IN SUCH STATES SOME EXCLUSIONS OR LIMITATIONS OF THIS LIMITED WARRANTY MAY NOT APPLY TO ANY IMPLIED WARRANTIES THAT MAY BE IMPOSED BY LAW ARE LIMITED IN DURATION TO THE WARRANTY PERIOD.

[JA at p. 142, § 3 (emphasis added).] The HP Services Agreement also limited a purchaser’s recovery to either the cost of repair or replacement value of the laptop and excluded recovery of any consequential or special damages.

THE TOTAL AMOUNT THAT HP WILL PAY FOR REPAIRS OR REPLACEMENT MADE IN CONNECTION WITH ALL CLAIMS ON ANY COVERED PRODUCT SHALL NOT EXCEED THE PURCHASE PRICE OF THE COVERED PRODUCT EXCLUDING TAX AND SHIPPING . . . .

**FOR ANY BREACH OF THIS AGREEMENT BY US, YOUR REMEDY AND OUR LIABILITY WILL BE LIMITED TO A REFUND OF THE PRICE PAID FOR THIS AGREEMENT BY YOU FOR THE HP PRODUCTS AT ISSUE.** WE WILL NOT BE LIABLE FOR PERFORMANCE DELAYS OR FOR

NONPERFORMANCE DUE TO CAUSES BEYOND ITS REASONABLE CONTROL, INCLUDING WHEN PRODUCT OR PARTS ARE NOT AVAILABLE. TO THE EXTENT THAT WE ARE HELD LEGALLY LIABLE TO YOU, OUR LIABILITY IS LIMITED . . . FOR OTHER DIRECT DAMAGES FOR ANY CLAIM BASED ON A MATERIAL BREACH OF SUPPORT SERVICES UP TO A MAXIMUM OF THE SUPPORT CHARGES YOU PAID FOR THIS AGREEMENT FOR THE HP PRODUCTS AT ISSUE. **THE REMEDIES PROVIDED IN THIS AGREEMENT ARE YOUR SOLE AND EXCLUSIVE REMEDIES. EXCEPT AS INDICATED ABOVE, IN NO EVENT WILL WE . . . BE LIABLE FOR LOSS OF DATA OR FOR DIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL (INCLUDING DOWNTIME COSTS OR LOST PROFIT), OR OTHER DAMAGES WHETHER BASED IN CONTRACT, TORT OR OTHERWISE.**

[JA at p. 145, § 6 (emphasis added).]

During the extended warranty period, Respondent claimed that her laptop malfunctioned, which led her to make a warranty claim on May 10, 2021, which Respondent alleged Petitioner wrongfully denied. [JA at p. 18, ¶ 7.] Based on this conduct, Respondent alleged claims for breach of express and implied warranties and claimed damages for the replacement costs of the laptop, along with consequential damages for “loss of use, loss of data, business interruption, [and] annoyance and inconvenience.” [JA at pp. 18-19.]

In addition to her breach of warranty claim, Respondent made a claim for breach and misrepresentation concerning services she received from HP’s Instant Ink. [JA at pp. 19-20, ¶¶ 15-22.] Respondent asserted that she paid Petitioner between \$19.99 and \$24.95 to allow her to print up to 700 pages per month, with unused pages rolling over. [JA at p. 19, ¶ 16.] Respondent decreased her package and claimed that Petitioner inappropriately took her rollover pages, which required Respondent to purchase a higher cost plan. [JA at pp. 19-20.] Respondent further alleged that she attempted to cancel the plan after her laptop issues, but Petitioner refused to cancel for two months. [JA at p. 20, ¶ 21.]

Like the limitations contained in the HP Service Agreement, HP Instant Ink also provided Terms of Service (“HP Instant Ink Services Agreement”). [JA at pp. 147-57.] The HP Instant Ink Terms of Service contained a limitation of liabilities and remedies clause.

**IF YOU ARE IN ANY WAY DISSATISFIED WITH THE SERVICE OR ANY PART THEREOF INCLUDING, BUT NOT LIMITED TO, A SERVICE PLAN, PROMOTION OR THE SITE, TO THE FULLEST EXTENT PERMITTED BY LAW, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE SERVICE AND/OR THE APPLICABLE HP SERVICE PLAN.** TO THE FULLEST EXTENT PERMITTED BY LAW, IN NO EVENT WILL HP, ITS SUCCESSORS, OR AFFILIATES BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL (INCLUDING BUT NOT LIMITED TO DOWNTIME COSTS, LOST PROFIT, LOST REVENUE OR LOST DATA OR OTHER CONTENT) OR OTHER DAMAGES ARISING OUT OF OR IN ANY WAY RELATED TO THE SERVICE, SUBSCRIPTION, CARTRIDGES, HP INSTANT INKS, OR THE SITE, WHETHER BASED IN CONTRACT, TORT, STATUTE OR ANY OTHER LEGAL THEORY, EVEN IF HP, ITS SUCCESSORS, OR AFFILIATES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IF THE REMEDY FAILS OF ITS ESSENTIAL PURPOSE. **WITHOUT LIMITING THE FOREGOING, TO THE EXTENT HP, ITS SUCCESSORS, OR AFFILIATES ARE HELD LEGALLY LIABLE TO YOU, HP'S, ITS SUCCESSORS', AND AFFILIATES' AGGREGATE MAXIMUM LIABILITY TO YOU IS LIMITED TO THE AMOUNT OF YOUR MONTHLY FEE PAID BY YOU TO HP FOR THE SERVICE AND/OR A SERVICE PLAN FOR THE ONE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH YOUR CLAIM AROSE OR SUCH AMOUNT AS IS THE MINIMUM AMOUNT ALLOWABLE AS SUCH A LIMIT ON LIABILITY.** TO THE FULLEST EXTENT PERMITTED BY LAW, THE REMEDIES PROVIDED IN THIS AGREEMENT ARE YOUR SOLE AND EXCLUSIVE REMEDIES.

[JA at p. 154, § 11.c (emphasis added).] The HP Instant Ink Services Agreement also set out the terms and limitations of the accumulation of rollover pages. [JA at p. 151, § 6.d.] Unsurprisingly to anyone that reviewed the HP Instant Ink Services Agreement, reducing the monthly subscription services also reduces the maximum carryover of rollover pages. [JA at p. 151, § 6.d.]

Nevertheless, Respondent claimed that Petitioner misrepresented this portion of the HP Instant Ink Services Agreement.

### **III. Procedural History**

Respondent filed her Complaint with the Circuit Court, initiating this civil dispute, on September 2, 2021. [JA at pp. 17-20.] On September 13, 2021, Respondent served the Complaint and Summons through the West Virginia Secretary of State on Petitioner's registered agent, CT Corporation. [JA at pp. 158-60.] By mistake, the Complaint was internally routed to Petitioner's Executive Customer Relations division rather than its legal department. [JA at p. 161, ¶ 4.] Gehrig Chatfield oversaw this division, which typically consists of small claims. [JA at p. 161, ¶ 5.] At the time service of the Complaint occurred, unfortunately, Mr. Chatfield had taken an unexpected leave of absence due to a life-threatening medical issue. [JA at p. 161, ¶ 6.] As Petitioner scrambled to find a suitable temporary replacement, the Complaint was overlooked and not sent to legal, which caused Petitioner to not respond. [JA at p. 162, ¶¶ 7-8.]

On January 1, 2022, the Circuit Court set a scheduling conference. [JA at p. 23.] The clerk attempted to notice Petitioner of this conference, but Petitioner never received the notice.<sup>1</sup> [JA at p. 24.] On February 28, 2022, Respondent moved for default judgment and sought replacement costs of her laptop, compensatory damages of \$15,000, her own attorneys' fees and punitive damages of \$25,000.00.<sup>2</sup> [JA at pp. 25-27.] On May 2, 2022, Respondent filed a memorandum in support of her default motion. [JA at pp. 57-71.] In the memorandum, Respondent clarified that she requested default for: "(1) breach of the factory and extended warranties; (2) breach of the implied warranty of merchantability; (3) breach of the implied warranty of fitness for a particular

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<sup>1</sup> The docket is replete with instances of attempted service by the clerk of various procedural filings, none of which Petitioner received. [JA at pp. 24, 56, 73, 108-09, 256-58.]

<sup>2</sup> Respondent filed subsequent motions for default judgment after February 28, 2022.

purpose; and (4) tortious misrepresentation of HP’s warranties and Instant Ink subscription service.” [JA at p. 57.] In the memorandum, Respondent admitted that she advised HP representatives from the outset that, “with the disastrous failure of two new HP laptops and her daily reliance upon a computer **for business purposes**, she could no longer afford to rely on an HP product and was seeking a purchase price refund . . . .” [JA at p. 60 (emphasis added).]

The Circuit Court held a hearing on Respondent’s motion for default judgment on July 29, 2022 and, following the hearing, on October 21, 2022, the Circuit Court entered default judgment against Petitioner. [JA at pp. 101-07.] About a month later, on November 27, 2022, the Circuit Court entered its Amended Default Judgment. [JA at pp. 1-7.] In the Amended Default Judgment Order, the Circuit Court awarded Respondent compensatory damages of \$14,507.92, which consisted of the replacement costs of a laptop, as well as damages for Plaintiff’s annoyance and inconvenience and loss of use. This Court also awarded Respondent, a *pro se* litigant, attorneys’ fees and costs, along with punitive damages of \$20,000.00.<sup>3</sup> [JA at pp. 6-7.] In all, the Circuit Court awarded Respondent \$43,638.25 in damages with post-judgment interest, all for a dispute arising out of Respondent’s purchase of an approximately \$1,500.00 laptop computer.

On January 10, 2023, Petitioner received a copy of the Amended Default Judgment through its attorney-in-fact. [JA at p. 111.] Petitioner immediately contacted and retained undersigned counsel, who moved the Circuit Court to vacate and/or set aside its Amended Default Judgment on January 19, 2023. [JA at pp. 119-20.] In its Motion to Vacate and/or Set Aside the November 22, 2022 Amended Final Order for Default Judgment (the “Motion to Set Aside”), Petitioner argued that the Amended Default Judgment should be vacated and/or set aside because, among other reasons, (1) the Circuit Court lacked subject matter jurisdiction over Respondent’s claims

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<sup>3</sup> Respondent is a licensed West Virginia attorney that chose to represent herself in this action

insofar as the statutory amount-in-controversy threshold had not been pleaded nor could be met given the limitations on damages outlined in the HP Services Agreement and HP Instant Ink Agreement, (2) the Amended Default Judgment erroneously awarded Respondent, a *pro se* litigant, attorneys' fees, and (3) the Amended Default Judgment erroneously awarded Respondent punitive damages. [JA at pp. 122-40.]

Respondent responded to Petitioner's Motion to Set Aside on March 14, 2023. [JA at pp. 173-86.] In her response, Respondent argued (1) that Petitioner had not established sufficient grounds pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure to vacate the Circuit Court's Amended Default Judgment, (2) that the West Virginia Consumer Credit Protection Act (the "WVCCPA") precluded vacation of the Court's Amended Default Judgment, and (3) that the WVCCPA supported the Circuit Court's award of punitive damages and attorneys' fees. [JA at pp. 175-85.]

Petitioner filed its reply to Respondent's response on March 15, 2023. [JA at pp. 190-98.] In its reply, Petitioner pointed out that Respondent, under the facts of this case, is not a "consumer" within the meaning of the WVCCPA and never pleaded any claims under the WVCCPA. Respondent also argued that Respondent failed to address the substantive arguments made by Petitioner regarding the Circuit Court's award of punitive damages and attorneys' fees. [JA at pp. 190-95.]

A hearing was held before the Circuit Court on Petitioner's Motion to Set Aside on March 17, 2023. [JA at pp. 218-54.] During the hearing, the Circuit Court heard the arguments of counsel and the *pro se* Respondent. The Circuit Court indicated at the hearing that it would be denying Petitioner's Motion to Set Aside and explained its rationale for its ruling. [JA at pp. 239-57.] The Circuit Court entered its Order Denying HP's Motion to Set Aside Default Judgment on April 26,

2023. [JA at pp. 9-15.] In its Order, the Circuit Court found that Petitioner had failed to show good cause warranting a vacation of the Circuit Court’s Amended Default Judgment. Notably, the Circuit Court—in a one sentence paragraph—stated that Petitioner’s “contention that [Respondent], as a *pro se* litigant, cannot recover attorneys fees, while arguably an issue for appeal if [Petitioner] had defended this action, is not the type of mistake that can serve as the basis for setting aside the *Default Judgment* under Rule 60(b).” [JA at p. 15.]

### **SUMMARY OF THE ARGUMENT**

The Circuit Court awarded Respondent \$43,638.25 in an Amended Default Judgment for a dispute involving a laptop computer purchased by Respondent for approximately \$1,500.00 and an instant ink subscription service that charged Respondent just \$213.92. The Circuit Court awarded Respondent \$1,597.28 for the cost of the defective laptop, \$1,309.92 for Respondent’s purchase of a replacement laptop, \$425.00 for Petitioner’s unauthorized and excessive charges and \$12,175.72 for Respondent’s annoyance and inconvenience. These damages were awarded despite the valid, bargained-for limitation of damages provisions set forth in two relevant agreements between Petitioner and Respondent that limited Respondent’s recovery to an amount that could not have met the statutory jurisdictional amount-in-controversy threshold for the Circuit Court to adjudicate Respondent’s Complaint. Additionally, inclusive in the Circuit Court’s award was an award of \$8,800.00 in attorney’s fees to Respondent, a *pro se* litigant, and \$20,000.00 in punitive damages.

In awarding its Amended Default Judgment, the Circuit Court failed to evaluate or consider whether it possessed subject matter jurisdiction to adjudicate Respondent’s claims. The evidence presented established that Respondent valued her HP laptop at \$1,527.98 and eight (8) months of HP’s Instant Ink services at \$213.92. Against this evidence, the Circuit Court erred when it failed

to evaluate its subject matter jurisdiction against the limitation of damages that applied to both of Respondent's claims under the HP Agreements. Without subject matter jurisdiction, the Amended Default Judgment was void. The void judgment should have been set aside by the Circuit Court.

And yet, even if the Circuit Court possessed subject matter jurisdiction, the Circuit Court still erred when it failed to find good cause existed to set aside the Amended Default Judgment based on the legal errors contained in the Circuit Court's order. Absolutely no authority existed to permit the Circuit Court to award Respondent any attorneys' fees, as she chose to represent herself in the action. This legal error, in and of itself, justified setting aside or, at a minimum, correcting the Amended Default Judgment to preclude the award of attorneys' fees. Likewise, the Circuit Court erred in awarded Respondent punitive damages because it failed to make the requisite findings pursuant to *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) justifying an award of punitive damages. In any event, Respondent did not pray for punitive damages in her Complaint, nor did she seek leave to amend to pursue an award of punitive damages.

Finally, the Circuit Court misevaluated the factors to set aside default judgment, all of which weighed in Petitioner's favor. Respondent suffered no prejudice from setting aside the default judgment and Petitioner possessed many meritorious defenses. The Amended Default Judgment Order concerned significant stakes based on the Circuit Court awarding attorneys' fees and punitive damages. For all these reasons, this Court should reverse the Circuit Court's clear abuse of discretion and legal error, and set aside the Amended Default Judgment.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because this action involves an issue of first impression. Specifically, this case allows



this Court to determine whether a limitation of remedies and/or damages provision in a contract applies in the event of a default or a default judgment. As argued below, subject matter jurisdiction did not exist because of the limitation on damages in the HP Service Agreement and HP Instant Ink Agreement, the contracts that Respondent based her claims on. Despite this clear, unambiguous contractual language, the Circuit Court awarded Respondent damages beyond the limits of the contract. This case presents this Court an opportunity to denote that the contractual limitations of damages and remedies apply irrespective of a finding of default.

## STANDARD OF REVIEW

### I. Rule 60(b) Motion to Set Aside Default Judgment

Appellate courts review circuit courts' rulings on motions made under Rule 60(b) of the West Virginia Rules of Civil Procedure to set aside a default judgment under the abuse of discretion standard. *Amoruso v. Commerce & Indus. Co.*, 826 S.E.2d 642, 645 (W. Va. 2019). Indeed, “[a] motion to vacate a default judgment is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion.” Syl. Pt. 6, *Games-Neely ex rel. W. Va. State Police v. Real Prop.*, 565 S.E.2d 358 (W. Va. 2002) (quoting Syl. Pt. 3, *Intercity Realty Co. v. Gibson*, 175 S.E.2d 452 (W. Va. 1970), *overruled on other grounds by Cales v. Wills*, 569 S.E.2d 479 (W. Va. 2002)). However, courts must remain mindful that there is a presumption in favor of the adjudication of cases upon their merits. See *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 501 S.E.2d 786, 789 (W. Va. 1998); *State ex rel. United Mine Workers of Am., Local Union 1938 v. Waters*, 489 S.E.2d 266, 273 (W. Va. 1997); *Evans v. Holt*, 457 S.E.2d 515, 523 (W. V. 1995).

Rule 55(c) of the West Virginia Rules of Civil Procedure provides that “[f]or good cause shown the court may set aside entry of default [judgment] . . . in accordance with Rule 60(b).”<sup>4</sup> See W. VA. R. CIV. P. 55(c). In determining whether good cause exists, this Court weighs and considers four (4) factors:

- (1) [t]he degree of prejudice suffered by the plaintiff from the delay in answering;
- (2) the presence of the material issues of fact and meritorious defenses;
- (3) the significance of the interest at stake; and
- (4) the degree of intransigence on the part of the defaulting party.

Syl. Pt. 3, *Hardwood Group v. LaRocco*, 631 S.E.2d 614 (W. Va. 2006). This Court applies these factors in “a more lenient and less stringent” manner because “[p]ublic policy favors litigation results that are based on the merits of a particular case and not on technicalities. If any doubt exists as to whether relief from a default judgment should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be presented on the merits.” See Louis J. Palmer, Jr. & Robin Jean Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 55(c), 1286 (5th ed. 2017); See *Cnty. Com’n of Wood Cnty v. Hanson*, 415 S.E.2d 607, 609 (W. Va. 1992) (“Any doubt regarding the propriety of setting aside a default judgment should be resolved in favor of granting relief . . . to examine the case on its merits.”).

## **II. Awards of Attorneys’ Fees and Costs**

Likewise, awards of attorneys’ fees and costs are reviewed on appeal under the abuse of discretion standard. Syl. Pt. 2, *Auto Club Prop. Cas. Ins. Co. v. Moser*, 874 S.E.2d 295 (W. Va. 2022); *Lewis v. Chafin*, 592 S.E.2d 790, 793 (W. Va. 2003); *Beto v. Stewart*, 582 S.E.2d 802, 806 (W. Va. 2003); *Hopkins v. Yarbrough*, 284 S.E.2d 907, 912 (W. Va. 1981); Syl. Pt. 2, *Bond v. Bond*, 109 S.E.2d 16 (1959).

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<sup>4</sup> “The Rules of Civil Procedure pertaining to setting aside of default judgment should be liberally construed in order to provide the relief from onerous consequences of default judgments.” See syl. pt. 3, *State ex rel. Dept. of Health & Human Res. ex rel. Schwab v. Schwab*, 526 S.E.2d 327 (W. Va. 1999).

### III. Awards of Punitive Damages

Finally, awards of punitive damages are reviewed *de novo* on appeal. *See Constellium Rolled Products Ravenswood, LLC v. Griffith*, 775 S.E.2d 90, 96 (W. Va. 2015) (citing Syl. Pt. 16, *Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d 791 (W. Va. 2009)).

## ARGUMENT

### I. **The Circuit Court lacked subject matter jurisdiction to consider Respondent claims because, even assuming the truth of the allegations set forth in her Complaint, the sum of her claims fell below the jurisdictional threshold of W. Va. Code § 51-2-2.**

The Constitution of the State of West Virginia generally confers original jurisdiction to the State's circuit courts to preside over "all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increased by the Legislature[.]" W. VA. CONST. Art. 8, § 6. As codified in West Virginia Code § 51-2-2(b), the Legislature has limited the subject matter jurisdiction of circuit courts to preside over civil actions involving an amount-in-controversy, excluding interest, exceeding \$7,500.00. W. VA. CODE § 51-2-2(b).

Subject matter jurisdiction may never be waived. *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 111 (W. Va. 2000); *Dishman v. Jarrell*, 271 S.E.2d 348, 350 (W. Va. 1980); *W. Va. Secondary School Activities Comm'n v. Wagner*, 102 S.E.2d 901 (W. Va. 1958). Additionally, parties are not precluded from raising the lack of subject matter jurisdiction for the first time on appeal. *See Easterling v. Am. Optical Corp.*, 529 S.E.2d 588, 597 (W. Va. 2000) (citing *Jan-Care Ambulance Serv., Inc. v. Pub. Serv. Comm'n of W. Va.*, 522 S.E.2d 912, 918 n.4 (W. Va. 1995)).

This dispute arises out of Respondent's purchase of an approximately \$1,500.00 laptop computer. [JA at p. 17.] In her Complaint, Plaintiff pursues relief subject to two HP Agreements:

(1) HP Service Agreement; and (2) HP Instant Ink Terms of Service. [JA at pp. 17-20, 141-157.] Both of the HP Agreements contain limitations of damages provision. [JA at pp. 145, § 6; 154, § 11.c.] The HP Service Agreement limits damages to the recovery of either the cost of repair or replacement cost of the laptop and expressly excludes all other consequential and special damages. [JA at p. 145, § 6.] Likewise, the HP Instant Ink Terms of Service limit damages to the recovery of the subscription charge and also excludes the recovery of all consequential and special damages. [JA at p. 154, § 11.c.]

“[T]he primary goal of a court construing a contract is to ascertain and give effect to the parties’ intent.” *See Antero Res. Corp. v. Directional One Servs. Inc. USA*, 873 S.E.2d 832 (W. Va. 2022). “Where the terms of a contract are clear and unambiguous, they must be applied and not construed.” Syl. pt. 2, *Miller v. St. Joseph Recovery Ctr., LLC*, 874 S.E.2d 345 (W. Va. 2022). “[W]ords of an agreement should be given their natural and ordinary meaning, because the parties presumably used the words in the sense in which they were generally understood.” *See Chancellor Senior Mgmt, Ltd. v. McGraw*, 873 S.E.2d 811, 818 (W. Va. 2022) (quoting *Bennett v. Dove*, 277 S.E.2d 617, 619 (W. Va. 1981)). The HP Agreements clearly limited Respondent’s remedies and damages. The HP Services Agreement limited Respondent to the recovery of the purchase price of the laptop. [JA at p. 145, § 6.] Likewise, the HP Instant Ink Agreement limited Respondent to the recovery of the monthly fee paid to Petitioner. [JA at p. 154, § 11.c.] The Circuit Court’s Amended Default Judgment ignored these clear contract damages limitations.

The HP Agreements’ damages limitations provisions absolutely applied under the West Virginia Uniform Commercial Code. As Respondent conceded in her Motion for Default Judgment, Respondent used her HP laptop daily for business purposes. [JA at p. 60.] Under the Uniform Commercial Code, specifically, West Virginia Code § 46-2-719, “the agreement may

provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages . . . as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair . . . .” *See* W. VA. CODE § 46-2-719(a) (1963). This same provision notes that “[c]onsequential damages may be limited or excluded, unless the limitation is unconscionable . . . . [A] limitation of damages where the loss is commercial is not [*per se* unconscionable].” *Id.* at § 46-2-719(3); *see also Appalachian Leasing, Inc. v. Mack Trucks, Inc.*, 765 S.E.2d 223 (W. Va. 2014). In essence, these damages limitations applied and, when applied, no subject matter jurisdiction existed for the Circuit Court because of the amount in controversy.

At least one court reviewing a substantially similar HP damage limitation found it applicable in determining whether subject matter jurisdiction existed. *See Flint v. Hewlett-Packard Co.*, No. 3:10-cv-597, 2011 WL 6152958 (W.D. Ky. Dec. 12, 2011). In *Flint*, a *pro se* plaintiff made claims against HP concerning breach of warranty and fraud related to problems that plaintiff experienced with his HP printer. *Id.* at \*1. In reviewing whether it possessed subject matter jurisdiction, the United States District Court for the Western District of Kentucky, sua sponte, reviewed the HP service agreement and noted the limitation of liability/damages section, which provided:

TO THE EXTENT ALLOWED BY LOCAL LAW, EXCEPT FOR THE OBLIGATIONS SPECIFICALLY SET FORTH IN THIS WARRANTY STATEMENT, **IN NO EVENT SHALL HP OR ITS THIRD PARTY SUPPLIERS BE LIABLE FOR DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES,** WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY AND WHETHER ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

*Id.* at \*3 (emphasis added). The district court observed that the limitation of consequential damages limited plaintiff to recovering either the repair costs or the replacement costs of the printer, which fell far below the federal jurisdiction of \$75,000.00. *Id.* at \*4. The lack of subject

matter jurisdiction required the district court to dismiss plaintiff's complaint without prejudice. *Id.* at \*6. The same analysis applies here.

Both HP Agreements contain a limitation of damages and expressly exclude the recovery of consequential and special damages. [JA at pp. 145, § 6; 154, § 11.c.] These HP agreements limit Respondent to the recovery of either replacement or repair costs of the laptop and the subscription fee for the HP Ink service. [JA at pp. 145, § 6; 154, § 11.c.] In her Memorandum in Support of Motion for Default Judgment, Respondent explicitly recognized a value of the laptop at \$1,527.98 and HP Ink services for 8 months—\$213.92. [JA at pp. 64, 96.] Other than these damages, the UCC and the HP Agreements limit Respondent's further recovery.<sup>5</sup> W. VA. CODE § 46-2-719.

Yet, in clear defiance of these limitation provisions and the UCC, the Circuit Court assumed jurisdiction over Respondent's Complaint, notwithstanding the fact that Respondent's damages could never exceed the \$7,500.00 threshold to invoke subject matter jurisdiction. *See* W. VA. CODE § 51-2-2; [J.A. at pp. 1-7, 13-19.] To award Respondent contract damages, the Circuit Court needed Respondent to prove her damages with reasonable certainty. *Syl. pt. 2, Ky. Fried Chicken of Morgantown, Inc. v. Sellaro*, 214 S.E.2d 823 (W. Va. 1975). Other than awarding Respondent for the replacement value of her laptop and the monthly fee for HP Instant Ink, no reasonably certain evidence existed for the other damages based on the clear limitations in the HP Agreements. Because Respondent lacks the ability to pursue potential damages in an amount

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<sup>5</sup> As discussed *infra*, West Virginia law clearly precludes Respondent, as a *pro se* litigant, from receiving any award of attorneys' fees. *See Smith v. Bradley*, 673 S.E.2d 500, 506 (W. Va. 2007) (the *pro se* litigant has not paid attorneys' fees and, therefore, cannot collect them).

above the Circuit Court’s jurisdictional limits, this Court should reverse the Circuit Court’s decision to deny Petitioner’s Motion to Set Aside.<sup>6</sup>

**II. The Circuit Court erred in refusing to set aside its Amended Default Judgment because it abused its discretion in awarding Respondent, a *pro se* plaintiff, attorneys’ fees and punitive damages.**

Notwithstanding the absence of subject matter jurisdiction for the Circuit Court to adjudicate Respondent’s claims, the Circuit Court’s Amended Default Judgment should have been set aside because it erroneously awarded Respondent, a *pro se* litigant, attorney’s fees, as well as punitive damages without setting forth sufficient grounds for making an award of punitive damages. Both of these reasons warranted a vacation or setting aside of the Amended Default Judgment, and the Circuit Court abused its discretion failing to correct these plain legal errors.

**A. The Circuit Court abused its discretion in awarding Respondent attorneys’ fees.**

The Circuit Court’s Amended Default Judgment mistakenly awarded Respondent attorneys’ fees of \$8,800.00. [JA at pp. 5-6, 15, 213-14, 246-50.] West Virginia law clearly precludes the recovery of attorneys’ fees from a *pro se* litigant. *See Smith*, 673 S.E.2d at 506 (W. Va. 2007); *Moss v. Bonnell*, 412 S.E.2d 495 (W. Va. 1991) (“[A] basic requirement of the award is a fee charged by an attorney. Mr. Moss acting *pro se* did not have to pay any attorneys’ fees and an award for his attorneys’ fees is an abuse of discretion.”); *see also Kay v. Ehrler*, 499 U.S. 432, 435 (1991) (finding that a *pro se* attorney may not recover attorneys’ fees under § 1988). Without a legal right to recover attorneys’ fees, the Circuit Court abused its discretion in awarding Respondent, a *pro se* litigant, her attorneys’ fees in the Amended Default Judgment. Accordingly,

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<sup>6</sup> Importantly, a reversal from this Court would not leave Respondent without a remedy. Under West Virginia Code § 50-2-1, West Virginia magistrate courts possess jurisdiction of all civil actions where the amount in controversy is not more than \$10,000.00. *See W. VA. CODE § 50-2-1* (2016). Respondent, at her discretion, can refile her Complaint with the Putnam County Magistrate Court.

this Court should reverse the Circuit Court's decision to award Respondent attorneys' fees in pursuing her Complaint as a *pro se* litigant.

**B. The Circuit Court abused its discretion in awarding Respondent punitive damages.**

The Circuit Court awarded Respondent \$20,000.00 in punitive damages. [JA at pp. 5-7, 13-14, 214-15, 246.] Yet, the Circuit Court's Amended Default Judgment failed to set forth its award of punitive damages pursuant to the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).<sup>7</sup> In *State ex rel. Harper-Adams v. Murray*, the West Virginia Supreme Court of Appeals evaluated a default judgment that awarded punitive damages. 680 S.E.2d 101, 108–09 (W. Va. 2009). Although the circuit court listed the *Garnes* factors in its order, the West Virginia Supreme Court noted that:

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<sup>7</sup> [T]he court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
- (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
- (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
- (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
- (5) The financial position of the defendant is relevant.

Syl. pt. 3, *Garnes*, 413 S.E.2d 897.



The circuit court did not make the necessary findings required by *Garnes* in order to justify an award of punitive damages. Specifically, the circuit court made no finding regarding the reprehensibility of defendant's conduct or why such conduct was so willful, wanton and malicious as to warrant punishment by way of punitive damages. It also made no findings regarding whether there was a reasonable relationship of the amount awarded to the actual harm . . . .

*Id.*

The Circuit Court's Amended Default Judgment suffers from the same legal error and fails to even identify the *Garnes* factors. [J.A. at 5-7.] Further, Respondent never prayed for punitive damages in her Complaint nor sought leave to amend and, therefore, Petitioner had no notice of possibility of any punitive award irrespective of default.<sup>8</sup> [JA at p. 20.] Because the Amended Default Judgment fails to properly consider its award of \$20,000.00 for punitive damages, the Circuit Court plainly abused its discretion in awarding Respondent punitive damages. This clear legal error warranted a setting aside of the Circuit Court's Amended Default Judgment.

**C. The other *Hardwood Group* factors support setting aside the Amended Default Judgment.**

Finally, the other *Hardwood Group* factors support setting aside the Amended Default Judgment. The first factor supports setting aside default because Respondent suffers no prejudice from the delay. Syl. pt. 3, *Hardwood Group*, 631 S.E.2d 614. Prejudice requires “[d]amage or detriment to one’s legal rights or claims.” See BLACK’S LAW DICTIONARY, Prejudice (11th ed. 2019). “[T]he fact that the plaintiff would have to try the case on the merits if relief is granted is not the kind of prejudice that should preclude relief. Similarly, the fact that reopening the judgment would delay plaintiff’s possible recovery has not, in itself, been deemed to bar relief.” See *Res.*

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<sup>8</sup> The award of punitive damages in violation of West Virginia law further supported a meritorious defense from Petitioner.

*Ltd., LLC v. New Trinity Coal, Inc.*, 874 S.E.2d 309, 316 (W. Va. 2022) (quoting 10A FED. PRAC. & PROC. § 2699 (3d ed. 1998)).

If this Court sets aside the Amended Default Judgment, Respondent still possesses the ability to pursue her claims against HP, and Respondent has not lost any evidence from the delay. Further, to the extent Respondent prevails on her claims, West Virginia Code § 56-6-27 allows Respondent to potentially recover an award of prejudgment interest to compensate her for the time between the alleged breaches of the HP Agreements and judgment. *See W. VA. CODE § 56-6-27* (1923). Because no prejudice exists, the first *Hardwood Group* factor supports setting aside the default judgment.

The second factor considers whether material issues of fact exist and whether Respondent possesses meritorious defenses. Syl. pt. 3, in part, *Hardwood Group*, 631 S.E.2d 614; *Res. Ltd., LLC*, 874 S.E.2d at 317. As set forth *supra*, Petitioner possesses numerous defenses to Respondent's damages. The HP Agreements preclude Respondent from recovering consequential damages, which the Circuit Court awarded for annoyance and inconvenience (\$12,175.72) and loss of use (\$1,175.72). [JA at pp. 145, § 6; 154, § 11.c.]

Damages arguments aside, legal questions also existed on the viability of certain of Respondent's claims. West Virginia Code § 46-2-316 allows Petitioner to exclude the implied warranty of merchantability and fitness for a particular purpose. W. VA. CODE § 46-2-316 (1963). With respect to the claim for breach of express warranty, Respondent lacked evidence to support a breach. Under the HP Service Agreement, Petitioner does "NOT PROVIDE ANY WARRANTY FOR SUPPORT SERVICES FOR HP SOFTWARE. ANY SUPPORT SERVICES FOR HP SOFTWARE ARE PROVIDED 'AS IS.'" [JA at p. 142, § 3.]

Moreover, Respondent lacked a viable claim for misrepresentation about HP Instant Ink Agreement. The HP Instant Ink Agreement sets forth how participants accumulate rollover pages and the limitations on rollover pages, depending on the amount of the monthly services selected.

- d. Rollover Pages. When You do not print all of Your Service Plan Pages allocation (or pages in an Additional Set purchased) in a Month Period (“Included Pages”), then the unused Included Pages will roll-over (“Rollover Pages”) and be available for Your subsequent use, **provided that the total number of Rollover Pages that you can carry over at the beginning of each Month Period is limited to three times for ink and two times for toner of Your monthly Service Plan Pages allocation for that Month Period. Any additional unused pages that You may have that exceed this limit would not become Rollover Pages and are forfeited at the end of the Month Period.** Consequently, the total number of pages You can have available at the beginning of a Month Period is 4 times for ink and 3 times for toner of Your Service Plan Page allocation at that time (i.e. Your Service Plan allocation plus 3 times for ink and 2 times for toner the Service Plan pages allocation as Rollover Pages.) Promotions may vary treatment or availability of Rollover Pages in the applicable terms and conditions for the Promotion.

[JA at p. 151, § 6.d (emphasis added).] Further, the HP Instant Ink Agreement specified the impact on rollover pages when a customer changes their service plan.

- c. Changing Your Service Plan. You may change Your choice of Service Plan by following the directions on Your Dashboard. Downgrading Your Service Plan will become effective as of the beginning of Your next Month Period and will not retroactively apply. Upgrading the plan will be effective, at Your discretion either (1) immediately, and the changes retroactively applied to the current billing cycle, or (2) from the beginning of the next billing cycle. To view Your current Service Plan and other details, go to Your Dashboard. **When you have changed Your Service Plan, the cap on Rollover Pages will be calculated based on the new Service Plan for the first Month Period of the new Service Plan.** To view Your current Service Plan and other details, go to Your Dashboard.

[JA at p. 153, § 8.c (emphasis added).] Absent extraordinary circumstances, the failure to read a contract does not excuse a party from being bound to its terms. *See Sedlock v. Moyle*, 668 S.E.2d 176, 180 (W. Va. 2008). No misrepresentation existed here.

The third factor considers the stakes of the litigation. Syl. pt. 3, *Hardwood Group*, 631 S.E.2d 614. Significant stakes exist because the Circuit Court assessed punitive damages and attorneys' fees against Respondent based on allegations of dissatisfaction with a laptop computer. The stakes are also significant because damages' award provides Respondent with almost 40 times the damages that are available under the HP Agreements.

Finally, Petitioner committed no insurgenge in failing to timely respond. Petitioner failed to timely respond to Respondent's Complaint because a routing mistake occurred when the Complaint was delivered to HP's Executive Customer Relations division on the erroneous belief that it was a small claims case. [JA at pp. 161-62.] Mr. Chatfield, who handles small claims filings for the Executive Customer Relations division, took an unexpected leave due to a life-threatening medical issue. [JA at p. 161, ¶ 6.] In the midst of finding a replacement for Mr. Chatfield, the division failed to re-route the Complaint to the legal department, which led Petitioner to miss its response deadline. [JA at pp. 162, ¶¶ 7-8.] In sum, these factors all supported setting aside the Circuit Court's Amended Default Judgment

### **CONCLUSION**

This Court should reverse the Circuit Court's Order denying Petitioner's Motion to Set Aside and vacate and/or set aside the Circuit Court's Amended Default Judgment. Alternatively, at a minimum, this Court should correct the plain legal errors committed by the Circuit Court in awarding Respondent attorney's fees and punitive damages.

Respectfully submitted by,

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By Counsel

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**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 23-ICA-203

HP, INC.,

Petitioner,

v.

JUDITH THOMAS,

Respondent.

Appeal from final order of  
the Circuit Court of Putnam  
County, West Virginia (21-C-142)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this **28th day of August 2023**, the foregoing ***Opening Brief of Petitioner HP, Inc.*** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel record.

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