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)

REPLY BRIEF OF PETITIONER HP INC.

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I. Each Assignment of Error asserted by Petitioner is properly before this Court because the Circuit Court's erroneous rulings were raised by Petitioner in its Rule 60(b) Motion to Vacate and/or Set Aside the November 22, 2022 Amended Final Order for Default Judgment.

As an initial matter, Respondent suggests that Petitioner is "improperly using this appeal of a Rule 60(b) denial as an indirect means of defeating the *Default Judgment* granted in the underlying action . . . ." [Resp't Br. at 14.] In this regard, Respondent claims that Petitioner's "assignments of error regarding punitive damages, attorney fees, and costs concern the substance of the Circuit Court's *Default Judgment* in the underlying action and are outside the limited appellate review permissible in [Petitioner's] appeal of the *Denial Order*." [*Id.* at 1.] Respondent's shortsighted framing of the record below, however, fails to recollect that Petitioner challenged the recoverability of punitive damages and attorney's fees as good cause to vacate and/or set aside the Circuit Court's November 22, 2022 Amended Final Order for Default Judgment in its Rule 60(b) Motion. *See* JA000135 ("[T]he Amended Default Judgment mistakenly awarded Plaintiff attorneys' fees of $8,800.00," and "fails to set forth this Court's award of punitive damages pursuant to the factors of *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).")

Petitioner argued below that these plain legal errors supported a finding of good cause to vacate and/or set aside the Amended Default Judgment, specifically under the second factor for assessing good cause under *Hardwood Group v. LaRocco*, 631 S.E.2d 614 (W. Va. 2006)—that is, whether any material issues of fact or meritorious defenses were present. Petitioner properly raised these issues and directed the Circuit Court to legal authorities establishing that *pro se* litigants are not entitled to an award of attorney's fees, *see* JA000135, and legal authorities establishing that the Circuit Court's award of punitive damages erroneously failed to account for the *Garnes* factors, *see* JA000135–136.

These meritorious defenses were raised by Petitioner in support of the second *Hardwood Group* factor—that is, whether any meritorious defenses were present. On appeal, Petitioner argues the same, that is, that the Circuit Court's legal errors in awarding Respondent attorney's fees and punitive damages support a finding of good cause to set aside and/or vacate the Circuit Court's Amended Default Judgment. [*See* Opening Br. of Pet'r at 17 ("[T]he 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.").]

Respondent claims that she "disagrees with the expansive scope of review urged by [Petitioner]," and directs this Court to a string cite of decisions she claims "provides that appellate review is limited to the lower court's denial of a Rule 60(b) motion to vacate, and consideration of the underlying default judgment is prohibited." [*See* Resp't Br. at 13 (collecting cases).] While true that "[a]n appeal of the denial of a Rule 60(b) motion . . . brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order," *see Toler v. Shelton*, 204 S.E.2d 85, 89 (W. Va. 1974), Petitioner does not seek review of the substance supporting the underlying judgment and final judgment order in this appeal. Rather, Petitioner seeks review of the Circuit Court's denial of its Rule 60(b) Motion to Set Aside the Amended Default Judgment.

Rule 60(b) permitted the Circuit Court to "relieve [Petitioner] . . . from a final judgment. . . ." *See* W. VA. R. CIV. P. 60(b). Rule 60(b)(1) explicitly authorized the Circuit Court to correct legal substantive mistakes in its final order. *See* Louis J. Palmer, Jr. & Robin Jean Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 60(b)(1), 1401 (5th ed. 2017). And, the West Virginia Supreme Court of Appeals has instructed circuit courts to construe

Rule 60(b) "liberally [] for the purpose of accomplishing justice," and has explained that Rule 60(b) "was designed to facilitate the desirable legal objective that cases are to be decided on their merits." *See Davey v. In re Higgs*, 637 S.E.2d 350, 353 (W. Va. 2006).

Relatedly, Rule 55(c) authorized the Circuit Court to, "[f]or good cause shown . . . set aside entry of default [judgment] . . . in accordance with Rule 60(b)." *See* W. VA. R. CIV. P. 55(c). Good cause is to be assessed by examining the following four factors:

> (1) the 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*, 631 S.E.2d 614 (emphasis added).

In support of its Rule 60(b) Motion to Set Aside, Petitioner raised numerous meritorious defenses, including, among others, that Respondent was not—and could not have been—entitled to attorney's fees, that Respondent was not entitled to an award of punitive damages, and that the Circuit Court was deprived of subject matter jurisdiction. These meritorious defenses—which comprise the substance of this appeal—are directly tailored to establishing the second *Hardwood Group* factor, and are sufficient grounds for a finding of good cause to set aside the Amended Default Judgment. Accordingly, the Circuit Court's error in awarding Respondent attorney's fees and punitive damages are properly before this Court on appeal.

II. Petitioner's Warranty Limitations are not void, and the Circuit Court plainly lacked subject matter jurisdiction to adjudicate Respondent's claims.

Petitioner's first assignment of error is that the Circuit Court abused its discretion in denying Petitioner's request to set aside the Amended Default Judgment insofar as the Circuit Court lacked subject matter jurisdiction to adjudicate Respondent's claims. [Opening Br. of Pet'r at 1.] As explained in Petitioner's Opening Brief, the Circuit Court lacked subject matter

jurisdiction because the two contracts relevant to Respondent's claims both contained provisions limiting the amount of damages Respondent would be entitled to, and that amount falls far short of the statutory $7,500.00 jurisdictional amount-in-controversy under W. VA. CODE § 51-2-2(b).

In response, Respondent claims that the West Virginia Consumer Credit Protection Act, 46A-1-101, et seq. (the "WVCCPA"), prohibits Petitioner from limiting remedies available for breach of express or implied warranties. [Resp't Br. at 15 (citing W. VA. CODE § 46A-6-107(a)).]

A. The West Virginia Consumer Credit and Protection Act is inapplicable.

Respondent claims that the WVCCPA applies to her claims in this case for the simple reason that Petitioner is a merchant that sells consumer goods in West Virginia. [*Id.* at 16.] Setting aside that Respondent never pleaded any claims under the WVCCPA, the WVCCPA simply fails to apply to the laptop and ink services that Respondent purchased from Petitioner to operate her law practice.

Under the WVCCPA, a "[c]onsumer transaction [i]s a sale or lease to a natural person or persons for a ***personal, family, household or agricultural purpose***." W. VA. CODE § 46A-6-102(2) (emphasis added); *see also Any Occasion, LLC v. Florists' Transworld Delivery, Inc.*, No. 5:10CV44, 2010 WL 3584411, at *2 (N.D. W. Va. Sept. 13, 2010) (recognizing that the WVCCPA only applies to "consumer transactions," and finding that the plaintiffs' purchase of a computer system "in order . . . to conduct their floral business" did not fall within the purview of the WVCCPA); *Wolfe v. Welton*, 558 S.E.2d 363, 375 (W. Va. 2001) (noting, generally, that the WVCCPA's warranty exclusion prohibition "applies to sales to consumers in a consumer transaction").

Respondent's purchase of her laptop was not a "consumer transaction" protected by the provisions of the WVCCPA. Indeed, Respondent unabashedly represented to the Circuit Court that she used her HP laptop and Instant Ink subscription for business purposes:

> In May 2021, the Replacement Laptop suddenly became inoperable. This failure had the catastrophic effect of losing ten years of Plaintiff's stored data as well ***as well as a legal brief due within days***.
>
> . . . .
>
> Plaintiff 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***, that she could no longer afford to rely on a HP product and was seeking a purchase price refund, a remedy available under the Extended Warranty.

JA000077. Because the purchase of the laptop and ink services were not consumer transactions, the limitation on warranties under W. VA. CODE § 46A-6-107(a) simply fail to apply. W. VA. CODE § 46A-6-107.

In her own words, the laptop purchased by Respondent, a lawyer, was used "daily" for business purposes. JA000077. Consequently, the HP laptop Respondent purchased is not, under the facts of this case, subject to the WVCCPA's provisions prohibiting the exclusion of warranties or the limitation of remedies.

B. The West Virginia Uniform Commercial Code explicitly contemplates the contractual limitation of damages.

Where the special provisions of the WVCCPA are inapplicable, the general provisions governing the sales of goods under the West Virginia Uniform Commercial Code ("WVUCC") apply. Specifically, W. VA. CODE § 46-2-316 contemplates the exclusion and modification of express and implied warranties, and, relevant here, provides for the limitation of remedies for breach of warranty in accordance with the WVUCC's provisions on liquidation or limitation of damages and on contractual modification of remedy. W. VA. CODE § 46-2-316(4).

Indeed, the WVUCC provides that

> the agreement may provide for remedies in addition to or in substitution for those provided in [the WVUCC] and may limit or alter the measure of damages recoverable under [the WVUCC], ***as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts***[.]

W. VA. CODE § 46-2-719(1)(a) (emphasis added). Additionally, "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." W. VA. CODE § 46-2-719(1)(b). Finally, this provision of the WVUCC provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable . . . . [L]imitation of damages where the loss is commercial is not [prima facie unconscionable]." W. VA. CODE § 46-2-719(3).

Both the HP Services Agreement and the HP Instant Ink Services Agreement provide that the limited remedies set forth therein were Respondent's "**SOLE AND EXCLUSIVE REMEDIES**." JA000145 (emphasis added). Under the HP Services Agreement, Respondent's remedies were limited to either the cost of repair or replacement value of the laptop, and consequential and special damages were expressly excluded.

> 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** . . . . 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.**

JA000145. Similarly, the HP Instant Ink Services Agreement also 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** . . . . **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 PADI 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.

JA000154 (emphasis added).

These remedy limitation provisions are valid and cognizable under the WVUCC. The remedy limitation provisions plainly limited Respondent to the recovery of either replacement or repair costs of the laptop and the subscription fee for the HP Instant Ink service. The value of the laptop was indisputably just $1,527.98, and the value of the HP Instant Ink services paid for by Respondent was just $213.92.

C. Petitioner's Warranty Limitations clearly limited Respondent's recovery to an amount insufficient to meet the statutory amount-in-controversy threshold, thereby depriving the Circuit Court of subject matter jurisdiction.

Subject matter jurisdiction may never be waived, *see State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 111 (W. Va. 2000), and, as a matter of law, may be raised 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)). The West Virginia 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). This dispute involves a laptop valued at just $1,527.98 and an instant ink service for which Respondent paid just $213.92. JA000145; JA000154.

Under no circumstances would Respondent stand to recover any amount exceeding $7,500.00, exclusive of interest. Because Respondent lacks the ability to pursue potential damages in an amount above the Circuit Court's jurisdictional threshold, the Amended Default Judgment was void *ab initio* and good cause exists for this Court to vacate and/or set aside the Circuit Court's Order upholding its award of default judgment. *See* W. VA. R. CIV. P. 60(b) ("On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . .").

III. The Circuit Court's award of attorney's fees to Respondent, a *pro se* litigant, was a clear abuse of discretion insofar as *pro se* litigants are categorically barred from recovering attorney's fees.

Petitioner's second assignment of error is that the Circuit Court should have set aside its Amended Default Judgment for good cause insofar as it abused its discretion in awarding Respondent, a *pro se* litigant, attorney's fees. [Opening Br. of Pet'r at 1.] Again, Respondent primarily argues that the Circuit Court's award of attorney's fees is improperly raised by Petitioner

on appeal. But, as explained above, the Circuit Court's abuse of discretion in awarding Respondent attorney's fees was raised as grounds for the Circuit Court to find good cause to set aside its Amended Default Judgment. *See* JA000134 (arguing that good cause existed to set aside the Amended Default Judgment because the Circuit Court awarded Respondent damages she was legally unable to recover, including, *inter alia*, attorney's fees of $8,800.00). Respondent's second assignment of error is pointed to the second *Hardwood Group* factor—that is, whether meritorious defenses were present. *See* Syl. Pt. 3, *Hardwood Group*, 631 S.E.2d 614. This issue is properly raised before this Court on appeal.

Notwithstanding, Respondent directs this Court to two legal authorities she claims permitted the Circuit Court to award her attorney's fees. [*See* Resp't Br. at 21.] First, Respondent cites *City Nat'l Bank of Charleston v. Wells*, 384 S.E.2d 374 (W. Va. 1989) for the proposition that "consequential damages include attorneys fees as they are a foreseeable expense resulting from a breach of warranty that the buyer cannot prevent by cover or otherwise." [*Id.*] There are two principal problems with Respondent's reliance on *Wells*. First, the plaintiff in that case was actually represented by an attorney. *See Wells*, 384 S.E.2d at 377 (noting that the plaintiff, Leonard Wells, was represented by C. Page Hamrick, III). Having not been a *pro se* litigant, and having actually incurred attorney's fees in the prosecution of his claims, it was a proper exercise of the court's discretion to award the plaintiff his attorney's fees. Second, the plaintiff's claims in *Wells* were based upon the federal Magnuson-Moss Act, 15 U.S.C. § 2310(d)(2), which formed an explicit statutory basis for the plaintiff to recover his attorney's fees. *Id.* at 388.

Here, on the other hand, Respondent proceeded *pro se* throughout the entirety of the underlying proceedings. West Virginia law clearly precludes the recovery of attorney's fees by a *pro se* litigant. *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); *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).

The second case Respondent cites, *Tri-State Petro. Corp. v. Coyne*, 814 S.E.2d 205 (W. Va. 2018), is cited for the proposition that there exists an "equitable exception to the general prohibition on recovering attorney fees . . . 'when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons' in conduct leading to the litigation or in connection with the litigation.'" [Resp't Br. at 21.] But, again, the plaintiff in that case was represented by counsel. *Coyne*, 814 S.E.2d at 209 (noting that the plaintiff, Kevin P. Coyne, was represented by W. Howard Klatt, Esq. of Klatt Law Offices, and Traci S. Rea, Aleksandra V. (Sasha) Williams, James C. Martin, and David B. Fawcett of Reed Smith LLP). And, in any event, the exception Respondent relies on was denoted by the Supreme Court of Appeals as "a narrow, equitable exception" to the general rule—which West Virginia follows—that "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Id.* at 227. Ultimately, the Supreme Court of Appeals reversed the circuit court's award of attorney's fees in *Coyne* because it found that the circuit court failed to make sufficient findings of fact and conclusions of law to enable the Supreme Court of Appeals to determine whether the circuit court did or did not abuse its discretion. *Id.* at 228.

Again, Respondent proceeded in this action as a *pro se* litigant. She did not hire—let alone pay—any attorney to represent her in these proceedings. The authorities cited by Petitioner in its Opening Brief and above overwhelmingly establish that Respondent cannot, as a *pro se* litigant,

obtain an award of attorney's fees. The Circuit Court's factual findings with respect to Petitioner's alleged "bad faith" are immaterial and irrelevant because the essential prerequisite to any award of attorney's fees—that is, the incursion of fees charged by an attorney—is not present here. Accordingly, the Circuit Court abused its discretion in awarding Respondent $8,800.00 in attorney's fees, and the Circuit Court's abuse of discretion in this regard was good cause to set aside the Amended Default Judgment under the second *Hardwood Group* factor.

IV. The Circuit Court erred in awarding Respondent punitive damages—which she did not even plead or request in her Complaint—because it made no findings under *Garnes* supporting an award of punitive damages.

Petitioner's third assignment of error is that the Circuit Court 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). [Opening Br. of Pet'r at 1.] In this regard, the Circuit Court's error constituted good cause to set aside the Amended Default Judgment. Petitioner, once again, hangs her hat on the idea that the Circuit Court's error in this regard is not reviewable on appeal for the same reason its award of attorney's fees is not reviewable. [Resp't Br. at 22.] But, again, the Circuit Court's error in awarding Respondent punitive damages was raised as grounds for the Circuit Court to find good cause to set aside its Amended Default Judgment. *See* JA000135 (arguing that good cause existed to set aside the Amended Default Judgment because the Circuit Court awarded Respondent punitive damages without properly considering, or even identifying, the *Garnes* factors). Respondent's third assignment of error is pointed to the second *Hardwood Group* factor—that is, whether meritorious defenses were present. *See* Syl. Pt. 3, *Hardwood Group*, 631 S.E.2d 614. This issue is properly raised before this Court on appeal.

Respondent also claims that Petitioner has waived review of the Circuit Court's award of punitive damages because Petitioner did not address the factors set forth in Syllabus Points 3 and 4 of the *Garnes* decision. [Resp't Br. at 23.] The irony in Respondent's position in this regard is that the Circuit Court, in its Amended Default Judgment, did not even identify the *Garnes* decision in finding that Respondent was entitled to an award of punitive damages. *See* JA000001–7. Rather, in a single sentence, the Circuit Court stated that Petitioner's "knowing misrepresentations of its' express warranty and ink subscription terms, deceitful and patently unfair handling of [Respondent's] warranty claim and refusal to provide refunds constitute fraudulent, malicious, oppressive, wanton, willful and reckless conduct warranting the assessment of punitive damages." JA000005.

In reviewing an award of punitive damages, trial courts must consider the following factors:

> (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 . . . 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.[1]

The Circuit Court made no findings with respect to each of the above-identified factors. It stands to reason, then, that Petitioner could not adequately assess each of the *Garnes* factors if the Circuit Court made no findings of fact with regard to any of those factors in its Amended Default Judgment.

Respondent cites a two-page list of "findings of fact" and "conclusions of law" she claims evidences the Circuit Court's consideration of the *Garnes* factors—despite the fact that the Circuit Court did not even cite to the *Garnes* decision in its Amended Default Judgment.

First, Respondent states that "[i]n granting Default Judgment, the Circuit Court deemed as true [her] allegations and claims in the Complaint as well as those in her sworn testimony and written attestations." [Resp't Br. at 24.] Notwithstanding, as a matter of law, "it is still incumbent upon the party moving for a default judgment to establish by competent evidence the amount of recoverable damages and costs to which [s]he is entitled." *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 501 S.E.2d 786, 792 (W. Va. 1998). Thus, while factual allegations in a complaint may be deemed as true for liability purposes, Respondent still was required to prove, by competent evidence, the amount of recoverable damages and costs to which she is entitled. In other words,

[1] Additionally, a trial court must also consider, at a minimum:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Id. at Syl. Pt. 4.

Respondent still was required to set forth competent evidence that she was entitled to punitive damages.

Second, citing her Memorandum in Support of Motion for Default Judgment, Respondent states that she "asserted claims for [Petitioner's] tortious misrepresentations concerning the warranty remedies available for defective products and the terms of tis Instant Ink subscription service." [Resp't Br. at 24.] However, the simple fact that Respondent asserted such a claim does not automatically entitle her to an award of punitive damages, particularly where she did not plead any entitlement to punitive damages in her Complaint. JA000020.

Third, Respondent claims that her Complaint sought, among other damages, "such other relief as the Court or jury deems proper." [Resp't Br. at 24.] Presumably, Respondent claims that such an averment is equivalent to a request for punitive damages. The Supreme Court of Appeals disagrees. To assert a claim for punitive damages, a plaintiff must plead that the defendant "acted willfully, wantonly, and intentionally." *See Criss v. Criss*, 356 S.E.2d 620, 622 n.5 (W. Va. 1987) (citing Syl. Pt. 3, *Peck v. Bez*, 40 S.E.2d 1 (W. Va. 1946)). Respondent did not allege in her Complaint that Petitioner acted "willfully," "wantonly," or "intentionally." JA000016–20. It was only until she filed her Motion for Default Judgment that Respondent requested an award of punitive damages. [Resp't Br. at 24.]

Fourth, Respondent claims that she "provided evidentiary proof of [Petitioner's] fraudulent, willful, wanton, and reckless misrepresentations and other bad faith action," that Petitioner "handled [her] warranty claim in an arbitrary and capricious manner," that Petitioner "established, concealed, and strictly enforced a corporate policy that prohibited the purchase price refund represented to be a warranty remedy," that Petitioner "denied [Respondent's] warranty claim for a purchase price refund for meritless reasons," that Petitioner "intentionally

misrepresented the terms of Instant Ink for its financial gain at [Respondent's] expense," that Petitioner "refused to refund admitted overcharges," that Petitioner "failed and refused to honor its promise to provide [Respondent] with ink cartridges as partial compensation for intentional overcharges," that Petitioner "refused to honor [Respondent's] requests to cancel subscription plans," and that Petitioner's "wrongful actions caused [Respondent] an extraordinary and unnecessary expenditure of effort and time, annoyance, and inconvenience." [*Id.* at 24–25.] In support of each of these averments, Respondent cites her Motion for Default Judgment and her own affidavit wherein she affirms that the factual representations contained in her Motion for Default Judgment were true and accurate. [*Id.*] Respondent's Motion for Default Judgment contained no exhibits, no other evidence, and only contained her own recitation of the factual allegations underlying her Complaint.

Simply put, there was no basis for the Circuit Court to find an award of punitive damages warranted. Indeed, the Circuit Court did not even assess the relevant *Garnes* factors in analyzing whether an award of punitive damages was even appropriate in the first place. The Circuit Court's failure to analyze the *Garnes* factors and to carefully scrutinize Respondent's conclusory factual allegations was good cause for it to set aside its Amended Default Judgment to permit the case to proceed to its merits. Indeed, 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.*, 501 S.E.2d at 789, and that "[p]ublic policy favors litigation results that are based on the merits of a particular case and not on technicalities." Palmer, Jr. & Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 55(c), 1286 (5th ed. 2017). These matters of public policy are only exacerbated when awards of punitive damages are contemplated. Accordingly, Petitioner demonstrated good cause to set aside the Circuit Court's Amended Default Judgment insofar as its

award of punitive damages to Respondent was inadequately supported on the record. This Court should reverse the Circuit Court's decision to deny Petitioner's Motion to Set Aside.

V. All of the *Hardwood Group* factors support setting aside the Circuit Court's Amended Default Judgment.

The remaining *Hardwood Group* factors—the degree of prejudice suffered by the plaintiff from the delay in answering; the significance of the interest at stake; and the degree of intransigence on the part of Petitioner—all weigh in setting aside the Amended Default Judgment. Petitioner has not explained how she will be prejudiced if the Amended Default Judgment is set aside. Instead, she claims—without directing this Court to any portion of the record—that she has suffered "additional financial loss and compounded the unnecessary and excessive loss of time, resources, and delay . . . in attempting to resolve her claims before filing suit. [Resp't Br. at 28.] Respondent also directs this Court to the purported prejudice the Circuit Court will apparently suffer if the Amended Default Judgment is set aside. [*Id.*]

As explained in Petitioner's Opening Brief, if this Court sets aside the Amended Default Judgment, Respondent still may pursue her claims against Petitioner, and she has not lost any evidence from the delay. Additionally, should Respondent ultimately prevail, she could be entitled to an award of prejudgment interest, which would compensate her for the time between the alleged breaches of the HP Agreements and final judgment. *See* W. VA. CODE § 56-6-27. No prejudice to Respondent exists, and the first *Hardwood Group* factor favors setting aside the Amended Default Judgment.

Respondent also details what she describes as "significant intransigence" in her Response brief. [Resp't Br. at 28.] She argues that Petitioner's 15-month delay in appearing and defending the underlying civil action should "weigh heavily against" Petitioner, and that Petitioner's failure to appear during that timeframe warranted the Circuit Court's entry of the Amended Default Order.

[*Id.*] Respondent also claims that Petitioner was required "to show some excusable or unavoidable cause to explain the delay in answering." [*Id.* at 27.]

While true that Petitioner's delay in appearing in the underlying civil action was for a period of 15 months, Petitioner is not required to show some excusable or unavoidable cause to explain the delay in answering, as Respondent suggests it must. Rather, Petitioner must merely show that "the *Parsons* factors[2] and excusable neglect, ***or any other relevant factor under Rule 60(b)***, constitute 'good cause' for setting aside a default judgment." *Hardwood Group*, 631 S.E.2d at 621 (emphasis added). Here, Petitioner has directed this Court to significant legal errors committed by the Circuit Court that may render the Amended Default Judgment void and, at the very least, constitute plain legal error "justifying relief from the operation of the judgment." *See* W. VA. R. CIV. P. 60(b). There was no degree of intransigence here. Petitioner's failure to timely respond to the Complaint occurred because a critical employee took unexpected medical leave and Respondent Complaint was not routed to Petitioner's legal department. JA000161–62. Other than this notice, Petitioner received no other notice concerning this legal action until after the award of Amended Default Judgment. JA000024; JA000056; JA000073; JA000108–09.

Finally, significant stakes exist. The Amended Default Judgment awarded Petitioner $14,507.92 in compensatory damages, $20,000.00 in punitive damages and $9,130.33 in attorneys' fees (a total of $43,611.25) on claims stemming from the purchase of $1,527.98 laptop and $213.92 in ink services ($1,741.90). JA000117; JA000145; JA0000154. In other words, the Amended Default Judgment awarded Respondent 2,503.66% more damages than she was entitled to as a

[2] The *Parsons* factors were identified by the Supreme Court of Appeals in Syl. Pt. 3 of *Parsons v. Consolidated Gas Supply Corp.*, 256 S.E.2d 758 (W. Va. 1979), and were reiterated in Syllabus Point 3 of *Hardwood Group*. Thus, the factors discussed above have been referred to as the *Hardwood Group* factors by Petitioner, but they are the same factors as those set forth in *Parsons*.

matter of law. The significance of these stakes wholly supports setting aside the Amended Default Judgment.

To the extent this Court is not inclined to relieve Petitioner from the operation and effect of the Circuit Court's Amended Default Judgment, at the very least, it should set the Amended Default Judgment aside and remand for the Circuit Court to correct the plain legal errors set forth in the Amended Default Judgment. In any event, Petitioner demonstrated good cause to the Circuit Court to set aside the Amended Default Judgment. The Circuit Court's denial of Petitioner's Motion to Set Aside was a clear abuse of its discretion given the plain legal errors committed therein. Accordingly, this Court should reverse the Circuit Court's Order Denying HP's Motion to Set Aside Default Judgment.

CONCLUSION

For the reasons explained in greater detail above, and for those set forth in Petitioner's Opening Brief, 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,

HP INC.,

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 **7th day of November 2023**, the foregoing ***Reply 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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