IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. MONSTER TREE SERVICE, INC.,

Petitioner,

v.

HON. JEFFEREY D. CRAMER, Circuit Court Judge of Marshall County, West Virginia, **and DAVID S. DUVALL,**

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

FROM THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
(CIVIL ACTION NO. 19-C-24)

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Monster Tree Service, Inc. petitions this Honorable Court for a Writ of Prohibition against the Honorable Jefferey D. Cramer, in his capacity as Judge of the Circuit Court of Marshall County, West Virginia, and David S. Duvall ("Respondent") from enforcing the Circuit Court's *Order Denying Monster Tree Service, Inc.'s Motion to Set Aside Default Judgment*,[1] entered on December 17, 2019.[2]

I. QUESTIONS PRESENTED

1. Whether the Circuit Court committed clear error and irremediably prejudiced Monster Tree Service, Inc.'s Constitutional rights by refusing to set aside its Default Order as void because Monster Tree Service, Inc. was never served, and the Circuit Court lacked personal jurisdiction. *See Beane v. Dailey*, 226 W. Va. 445, 450, 701 S.E.2d 848, 853 (2010).

2. Whether the Circuit Court committed clear error and irremediably prejudiced Monster Tree Service, Inc.'s rights by denying its Motion to Set Aside Default when Monster Tree Service, Inc. clearly demonstrated material issues of fact and meritorious defenses exist; any purported delay was caused by Respondent's failure to serve Monster Tree Service, Inc.—not intransigence; significant interests are at stake; and Respondent is not prejudiced by any delay in answering. *See* Syl. pt. 4, *Hardwood Grp. v. Larocco*, 219 W. Va. 56, 58, 631 S.E.2d 614, 616 (2006).

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[1] Although Monster Tree Service, Inc.'s motion was styled as a Motion to Set Aside Default Judgment, it was in fact a motion to set aside default.

[2] The Circuit Court's Order is dated December 17, 2019; however, the Clerk appears to have entered it on December 18, 2019, at 2:11 p.m.

II. STATEMENT OF THE CASE

Respondent sued three similarly named but distinctly separate entities: Monster Tree Service of the Upper Ohio Valley ("the Franchisee"), Monster Franchise, LLC ("the Franchisor"), and the Petitioner, Monster Tree Service, Inc. ("Monster Tree"). Monster Tree is a Pennsylvania company providing tree trimming and removal services exclusively in Pennsylvania. Monster Tree does not conduct business in West Virginia. The Franchisor is a limited liability company that handles franchising the "Monster Tree" name and marks. The Franchisee is a tree trimming and removal service that operates in the Wheeling, West Virginia area.

On April 16, 2019, Respondent filed an Amended Complaint alleging that he worked for the Franchisee and was severely injured while trimming a large tree at a worksite in West Virginia's northern panhandle. (A.R. 45–65). Respondent further alleges that both Petitioner, Monster Tree, and the Franchisor breached a purported duty to ensure that Franchisee appropriately trained its employees in a "reasonable, careful, and non-negligent manner" and "implemented all applicable safety procedures and requirements." (A.R. 61, at ¶ 80–81).

A Summons was issued on April 17, 2019.[3] (A.R. 1). On April 22, 2019, the West Virginia Secretary of State accepted service and forwarded the Summons and Amended Complaint to Monster Tree at its registered address in Pennsylvania. On April 26, 2019, someone unknown and certainly unauthorized to accept or receive mail signed for the

[3] The same day Respondent's counsel sent a letter to David J. Allsman, Esq., Monster Tree's outside general counsel, which enclosed a courtesy copy of the Amended Complaint and stated, "[s]ervice of the same is being made in accordance with applicable law." A.R. 311.

Summons and Amended Complaint sent by the West Virginia Secretary of State's Office to Monster Tree. (A.R. 200–02).

Only 35 days later, on May 31, 2019, without providing any notice to Monster Tree's outside general counsel,[4] Respondent moved for default against Monster Tree and the other defendants. Within five days, based upon Respondent's representations, the Circuit Court granted Respondent's motion and issued the Default Order on June 5, 2019.

A mere sixteen days after the Circuit Court entered default against Monster Tree, it filed a Motion to Set Aside Default.[5] (A.R. 110). Monster Tree argued that good cause exists to set aside the default. *Id.* Specifically, less than 20 days had passed since the Circuit Court entered default, Monster Tree has several meritorious defenses, including insufficient service of process and lack of personal jurisdiction, and Monster Tree has a significant interest in avoiding a judgment by default on claims for which it cannot legally be held liable. *Id.*

Monster Tree filed a Memorandum in Support of its Motion on July 31, 2019 and noticed its motion for a hearing. (A.R. 114–29; 136). On August 27, 2019, the Circuit Court *sua sponte* vacated the hearing on Monster Tree's Motion. (A.R. 143). Respondent filed a Response in Opposition on September 6, 2019. (A.R. 152–72). Monster Tree filed a Reply in Support of its Motion on October 28, 2019. (A.R. 337–43). The Circuit Court's law clerk advised the parties on November 21, 2019, that the motions to set aside the default would be denied, and requested that Respondent's counsel submit proposed orders.[6] The

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[4] Monster Tree's outside general counsel was known to Respondent. *See* FN 3, *supra.*

[5] On October 11, 2019, the Franchisor also moved to set aside the default. (A.R. 271).

[6] Respondent responded to the Franchisor's motion to set aside default on November 20, 2019, the day before the Circuit Court law clerk's email notifying the parties of the decision to deny the motions to set aside. (A.R. 346).

proposed orders were submitted by letter dated December 12, 2019. On December 17, 2019, the Circuit Court signed Respondent's proposed Order denying Monster Tree's Motion to Set Aside Default. (A.R. 425).

III. SUMMARY OF ARGUMENT

The Circuit Court abused its discretion when it denied the motion to set aside default. Monster Tree was never properly served, and the Circuit Court lacked personal jurisdiction over Monster Tree when it entered the June 5, 2019 Default Order. Accordingly, the Circuit Court's Default Order is void. *See Beane v. Dailey*, 226 W. Va. 445, 450, 701 S.E.2d 848, 853 (2010).

Moreover, pursuant to Rule 55(c), the Circuit Court should have granted Monster Tree's motion to set aside default upon a showing of good cause. The law clearly favors setting a default aside and proceeding on the merits. *See, e.g., Parsons v. Consol. Gas Supply Corp.*, 163 W. Va. 464, 471, 256 S.E.2 758, 762 (1979) (This Court "established as a basic policy that cases should be decided on their merits, and consequently default judgments are not favored and a liberal construction should be accorded a Rule 60(b) motion to vacate a default order."). Upon consideration of a motion to set aside default, as in the instant case, "a trial court should apply a more lenient and less stringent standard than would otherwise be used in reviewing a motion to set aside a default judgment." Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 1201 (4th ed. 2012). Monster Tree demonstrated good cause to set aside the default, in accordance with the factors outlined in *Hardwood Grp. v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006), and it should be permitted to present its defenses.

At best, the Circuit Court made "a serious mistake in weighing" the *Hardwood Group* factors. *See Prima Mktg., LLC v. Hensley*, No. 14-0275, 2015 WL 869265, at *2

(W. Va. Feb. 27, 2015) (explaining that "an appellate court may reverse a circuit court's ruling for an abuse of discretion . . . when . . . the circuit court makes a serious mistake in weighing [the appropriate factors.]"). Most notably, the Circuit Court concluded that Monster Tree waived its meritorious defenses by not filing a Rule 12 motion, which disregards Monster Tree's evidence that ***it was never properly served.*** The Circuit Court also disregarded ample material issues of fact cited in Monster Tree's Motion and supporting arguments.

In sum, the Circuit Court lacks personal jurisdiction over Monster Tree, which was never properly served, but still promptly filed a motion to set aside the default and demonstrated evidence adequately establishing good cause in accordance with the *Hardwood Group* factors ***sixteen days*** after the Circuit Court entered its Default Order. Despite the liberal standard for reviewing a motion to set aside default and this Court's clear preference for proceeding on the merits, the Circuit Court erroneously denied the motion. Because the Circuit Court abused its discretion, Monster Tree respectfully requests that this Court issue a decision prohibiting enforcement of the December 17, 2019 Order denying the motion to set aside default and instructing the Circuit Court to vacate its June 5, 2019 Default Order.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted under Rule 19(a) of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law requiring a writ prohibiting the exercise of jurisdiction by a Circuit Court lacking jurisdiction over Monster Tree, based upon the application of well-established legal principles.

V. ARGUMENT

A. ORIGINAL JURISDICTION IS PROPER

A writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. This Court examines five factors when determining whether to entertain and issue a writ of prohibition:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). These factors are general guidelines, and all five factors need not be satisfied for a writ to issue; however, the existence of clear error as a matter of law is given substantial weight. *Id.*

As discussed in more detail below, this Court should issue a writ of prohibition in this case because there are no other adequate means to challenge denial of a motion to set aside default;[7] the Circuit Court clearly erred, and its Order irremediably prejudices Monster Tree's right to assert jurisdictional defenses or proceed on the merits.

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[7] Because entry of a default order is not a final order, it is not appealable. Monster Tree would suffer extreme prejudice and it would be clear error if the Circuit Court, lacking personal jurisdiction, entered Default Judgment, which would warrant a less favorable review by this Court than an entry of default. The instant Petition is the only adequate means to challenge the

B. THE STANDARD OF REVIEW IS *DE NOVO* FOR THE FIRST QUESTION PRESENTED AND ABUSE OF DISCRETION FOR THE SECOND.

The first question presented challenges the lower court's erroneous determination that it possessed personal jurisdiction over Monster Tree. The Circuit Court clearly lacked personal jurisdiction, and therefore, its default order is void. In a case presenting the same issue, this Court explained that it "reviews findings of fact for clear error and conclusions of law *de novo*. Ostensible findings of fact, which entail application of law or constitute legal judgments that transcend ordinary factual findings, must be reviewed *de novo*." State ex rel. Ford Motor Co. v. McGraw, 237 W. Va. 573, 580, 788 S.E.2d 319, 326 (2016) (citing Syl. pt. 1, *State ex rel. Cooper v. Caperton,* 196 W.Va. 208, 470 S.E.2d 162 (1996)).

The second question presented challenges the Circuit Court's findings and conclusions in denying Monster Tree's motion to set aside default under Rule 55(c). It appears there is no controlling law on the applicable appellate standard for reviewing denial of a motion to set aside entry of default; however, this Court reviews a motion to set aside default judgment under an abuse of discretion standard. *See* Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 1202–03, n.272 (4th ed. 2012) (collecting cases). Importantly, the commentary notes, "[n]otwithstanding the deference due to this discretionary decision, a reviewing tribunal should not stay its hand if the trial court errs by reading Rule 55(c)'s good cause too grudgingly." *Id.* at 1203. Further, "[t]he circumscribed scope of the trial court's discretion in the context of a default is a reflection of the preference for resolving disputes on the merits. Thus, when doubt exists as to whether a default should be granted or vacated, the

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Circuit Court's improper exercise of jurisdiction over Monster Tree and its abuse of discretion in not setting aside the default.

doubt should be resolved in favor of the defaulting party." *Id.* "In *Gentry v. Mangum*, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995), [this Court] found that an appellate court may reverse a circuit court's ruling for an abuse of discretion . . . when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.'" *Prima Mktg., LLC v. Hensley*, No. 14-0275, 2015 WL 869265, at *2 (W. Va. Feb. 27, 2015).

C. THE CIRCUIT COURT COMMITTED CLEAR ERROR AND IRREMEDIABLY PREJUDICED MONSTER TREE'S CONSTITUTIONAL RIGHTS BY REFUSING TO SET ASIDE ITS DEFAULT ORDER AS VOID BECAUSE MONSTER TREE WAS NEVER SERVED AND THE CIRCUIT COURT LACKED PERSONAL JURISDICTION

Rule 55(c) of the West Virginia Rules of Civil Procedure provides, "[f]or good cause shown the court may set aside an entry of default[.]" Typically, courts must determine whether a defendant has established good cause to set aside a default. However, if a court lacks personal jurisdiction when it enters default against a defendant, its order is void—obviating the court's requirement to conduct a good cause analysis.

1. A good cause analysis is unnecessary because the Circuit Court lacked personal jurisdiction over Monster Tree when it entered the default order, rendering it void.

When the basis for setting aside a default or default judgment is ineffective service of process, a court does not need to perform the "good cause" analysis described in *Parsons* and *Hardwood Group*. Instead, if a defendant has been improperly served, then the court never exercised personal jurisdiction over the defendant, and the default or default judgment is simply void. *Beane v. Dailey*, 226 W. Va. 445, 447, 701 S.E.2d 848, 850 (2010) ("In the discussion that follows, however, it is clear that the default judgment in this case is void because the trial court did not have personal jurisdiction over the

defendant, therefore we need not perform a *Parsons'* analysis."); *see also Rhoe v. Berkeley Cnty. Fire Bd.*, App. No. 13-0108, 2013 WL 6283832, *2 (W. Va. Dec. 4, 2013) (Mem. D.) ("However, this Court further explained in *Beane* that a *Parsons* analysis is unnecessary where a default judgment is void due to a lack of personal jurisdiction."); Cleckley, et al., *Litigation Handbook* 1199 (4th ed. 2012) ("A default judgment rendered without personal jurisdiction is void.").

a. Respondent never properly served Monster Tree.

The Default Order is void because, as demonstrated by the sworn testimony of Monster Tree's Owner, Joshua Skolnick, Monster Tree was never served with the Summons and Amended Complaint. Monster Tree did not appoint the West Virginia Secretary of State as its agent for process under the long arm statute, West Virginia Code § 56–3–33. Moreover, no "duly authorized agent" of Monster Tree received the Summons and Amended Complaint from the West Virginia Secretary of State. (A.R. 133–34). Without proper service, the Circuit Court lacked personal jurisdiction.

Accordingly, Monster Tree was not obligated to answer or otherwise respond to the Amended Complaint, and this Court should void the default order entered by the Circuit Court on June 5, 2019.

i. Because Monster Tree did not engage in any of the activities listed in West Virginia's long-arm statute, it never appointed the West Virginia Secretary of State as an agent for proper service.

Under West Virginia's long arm statute, if a nonresident defendant engages in any of the following seven activities, the nonresident defendant has deemed the secretary of state its agent for lawful process:

(1) Transacting any business in this state;

(2) Contracting to supply services or things in this state;

> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (6) Having an interest in, using or possessing real property in this state; or
>
> (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

W. Va. Code § 56–3–33(a)(1–7). Service through the secretary of state is effective if it is accepted by the nonresident defendant or its "duly authorized agent," which means a person who, at the direction of or with the knowledge or acquiescence of the nonresident, usually receives and receipts mail addressed to such nonresident. *See* W. Va. Code § 56–3–33(c), (e)(1).

Here, as evidenced by the affidavit presented to the Circuit Court and explained herein, Monster Tree never engaged in any of the seven activities listed in the longarm statute. West Virginia Code § 56–3–33; (A.R. 133–34). "When jurisdiction over a nonresident is based solely upon the provisions of the longarm statute, only a cause of action arising from or growing out of one or more of the acts specified in W. Va. Code § 56–3–33(a)(1–7) may be asserted against him or her." W. Va. Code § 56–3–33(b).

Notably, Monster Tree is not affiliated in any way with the Franchisee. Instead, Monster Tree is a Pennsylvania tree-cutting company that operates solely in Pennsylvania and uses the Monster Tree trademark pursuant to a licensing agreement. (A.R. 133–34). Monster Tree has never conducted business in West Virginia, it does not contract or

supply services or things in West Virginia, and it did not cause "tortious injury" in West Virginia. *Id.*

Further, Monster Tree did not breach any express or implied warranty resulting in tortious injury in this state (*id.*), nor does Respondent allege Monster Tree did. Lastly, Monster Tree does not have an interest in any property in West Virginia or contract to insure any person or property within West Virginia. *Id.* Because Monster Tree did not engage in any of the seven activities in this state's long-arm statute, it did not appoint the West Virginia Secretary of State as its agent for process. Respondent's claims against Monster Tree are akin to a plaintiff suing a Philadelphia-based McDonald's in West Virginia for an injury sustained at a McDonald's in Wheeling: the two entities may have the same name, but the relationship—and a legally cognizable cause of action for the hypothetical plaintiff—ends there.

ii. **Assuming *arguendo* Monster Tree engaged in one or more of the activities outlined in the long-arm statute, service was ineffective because a "duly authorized agent" did not sign for the Summons and Amended Complaint under West Virginia law.**

Service is effective only if Monster Tree's "duly authorized agent" accepts lawful process on behalf of the nonresident defendant. W. Va. Code § 56–3–33. Here, the West Virginia Secretary of State sent the Summons and Amended Complaint to Monster Tree's registered address; however, ***it was not accepted by a duly authorized agent of Monster Tree.*** (A.R. 133–34). Mr. Skolnick testified that the signature on the return (A.R. 132) is not his own, or that of anyone authorized to receive or receipt mail for Monster Tree. (A.R. 133–34). Respondent's response gravely and gratuitously mischaracterized a crucial point of Monster Tree's evidence and argument, which the Circuit Court erroneously adopted in its Order.

Specifically, Respondent argued and the Circuit Court found that Mr. Skolnick "disavows recognizing the signature on the certified mail receipt"; "does not recognize the electronic signature[;] and cannot verify the certified delivery was accepted by somebody authorized to accept service of process on behalf of Monster Tree Service or who usually receives mail on its behalf." (A.R. 393). The Respondent's, and ultimately the Circuit Court's, mischaracterization is so egregious that it completely altered the testimony before it. Mr. Skolnick's actual testimony was

> **The signature** on the return of service posted on the Secretary of State's website attached as Exhibit 1 **is not my own and does not belong to anyone else authorized to accept service of lawful process on behalf of Monster Tree**. I have inquired of persons who usually receive and receipt mail for Monster Tree and the signature on the return of service is not identifiable.

(A.R. 133) (emphasis added).

"When service of process is challenged, the plaintiff bears the burden of proving its validity." Cleckley, et al., *Litigation Handbook* 382 (4th ed.). The Respondent did not produce reliable evidence that the signature on the return is that of Monster Tree's duly authorized agent. Therefore, the Circuit Court should have accepted Mr. Skolnicks' testimony that Respondent never served him or someone duly authorized to accept service on Monster Tree's behalf. W. Va. Code § 56-3-33(e)(1).

If a return of service does not show that the service requirements have been complied with, then effective service has not been made. *Johnson v. Ludwick*, 58 W. Va. 464, 52 S.E. 489, 491 (1905). Without effective service of process, the Default Order entered on June 5, 2019 against Monster Tree is void and must be set aside.

"[T]his Court has consistently held that default judgments entered upon defective service of process are void." Beane v. Dailey, 226 W. Va. 445, 451, 701 S.E.2d 848, 854

(2010). *Beane*, 226 W. Va. at 451, 701 S.E.2d at 854 (citing *Jones v. Crim*, 66 W.Va. 301, 66 S.E. 367 (1909) ("A default decree rendered upon a defective substituted service of process is void for want of jurisdiction.")). Here, because Monster Tree was improperly served, the Circuit Court never had personal jurisdiction over it and the default is simply void. *Beane*, 226 W. Va. at 451, 701 S.E.2d; W. Va. Code § 56-3-3(c)).

b. Had a "duly authorized agent" accepted the Secretary of State's certified mail, the attempted exercise of personal jurisdiction over Monster Tree remains unconstitutional under *International Shoe v. Washington*, 326 U.S. 310 (1945).

A court may assert specific personal jurisdiction over a "nonresident defendant to hear claims against the defendant arising out of or relating to the defendant's contacts or activities in the state by which the defendant purposefully avails itself of conducting activities in the state so long as the exercise of jurisdiction is constitutionally fair and reasonable." *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 788 S.E.2d 319, 323 (2016).

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state court's authority to proceed against a defendant because the assertion of jurisdiction subjects defendants to the state's coercive power. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). "Personal jurisdiction protects an individual liberty interest and represents a restriction on judicial power." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This Court has held:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution operates to limit the jurisdiction of a state court to enter a judgment affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant.

Syl. pt. 1, *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991).

A state "may authorize its courts to exercise personal jurisdiction over an out-of-state defendant" if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). The due process standard for determining whether a court may exercise personal jurisdiction over a nonresident depends on whether the defendant's contacts with the forum state provide the basis for the suit.

The inquiry in specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation." *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 589, 788 S.E.2d 319, 335 (2016) citing *Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (citation omitted). The specific jurisdiction analysis for determining whether a forum's exercise of jurisdiction over a nonresident defendant meets due process standards has three prongs.

The first prong requires a determination that the nonresident defendant has minimum contacts with the forum. To meet the second prong, it must be determined that the plaintiff's claims arise out of or relate to the defendant's contacts with the forum. Under the third prong, it must be constitutionally reasonable to assert the jurisdiction so as to comport with fair play and justice. To determine "the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 (1987). "It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of

controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" *Id.* (quoting *World-Wide Volkswagen,* 444 U.S., at 292, (citations omitted)).

i. Monster Tree does not have minimum contacts in West Virginia.

Here, the first prong is not satisfied because Monster Tree does not have minimum contacts with the forum. As stated above, Monster Tree does not conduct any business in West Virginia. (A.R. 133–34). Establishing minimum contacts involves an "examination of whether the defendant purposefully availed itself of the privilege of conducting activities within the forum." *State ex rel. Ford Motor Co. v. McGraw,* 237 W. Va. 573, 589, 788 S.E.2d 319, 335 (2016). Monster Tree removes trees in Pennsylvania; it does not have any contact with the Franchisee—Respondent's former employer. (A.R. 133–34).

Here, Respondent contends that Monster Tree purposefully availed itself in the forum state by marketing "training" online toward customers in the forum state. However, Monster Tree is not the entity that operates the whymonster.com website. (A.R. 133–34). Even if Monster Tree did operate the website, courts have only conferred personal jurisdiction in cases where "interactive" uses of the internet have taken place within the state. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713–14 (4th Cir. 2002) citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Interactive contact encompasses two-way online communication which fosters an ongoing business relationship, while "passive" contacts are those that simply make information available to interested viewers. *Id.* The Fourth Circuit has considered the issue of purposeful availment regarding internet jurisdiction and concluded, "the likelihood that personal jurisdiction can be constitutionally exercised is directly

proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* Recognizing a "sliding scale" for defining when electronic contacts with a State are sufficient, the *Zippo* court elaborated:

> When a defendant runs an interactive site, through which he "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet," he can properly be haled into the courts of that foreign jurisdiction. *Zippo*, 952 F. Supp. at 1124. If, by contrast, the defendant's site is passive, in that it merely makes information available, the site cannot render him subject to specific personal jurisdiction in a foreign court. Occupying a middle ground are semi-interactive websites, through which there have not occurred a high volume of transactions between the defendant and residents of the foreign jurisdiction, yet which do enable users to exchange information with the host computer. "In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs."

Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 399 (4th Cir. 2003) citing *Zippo*, 952 F. Supp. at 1124; *see Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999) (citing the *Zippo* standard for "passive" Web sites and thus finding a corporation's website an insufficient basis for an exercise of personal jurisdiction); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (applying *Zippo's* sliding scale test); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (quoting *Zippo* for the proposition that "[c]ourts that have addressed interactive sites have looked to the 'level of interactivity and commercial nature of the exchange of information that occurs on the Web site' to determine if sufficient contacts exist to warrant the exercise of jurisdiction").

As evidenced by Mr. Skolnick's Affidavit, Monster Tree does not operate the website Respondent alleges targeted the Franchisee and advertised training to establish contacts in West Virginia. (A.R. 133–34). In this case, there is no viable basis to even conduct the test to evaluate the "exercise of jurisdiction . . . by examining the level of

interactivity and commercial nature of the exchange of information that occurs" because Monster Tree is not the entity that operates the website at issue. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 399 (4th Cir. 2003) citing *Zippo*, 952 F. Supp. at 1124. Thus, after conducting an "examination of whether the defendant purposefully availed itself of the privilege of conducting activities within the forum," it is evident that Monster Tree does not have any of the requisite necessary contacts with the forum state. *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 589, 788 S.E.2d 319, 335 (2016).

ii. Respondent's claims do not arise out of or relate to Monster Tree's contacts with the forum.

Respondent's claims do not arise out of Monster Tree's contacts with the forum because ***Monster Tree does not have any contacts with West Virginia.*** To exercise specific jurisdiction over a defendant, the action must arise out of the defendant's contact with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The minimum contacts requirements cannot be met if the defendant's only contacts with the forum are wholly unrelated to the cause of action. *See Lane v. Boston Scientific Corp.*, 481 S.E.2d 753; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

Specific jurisdiction requires a causal connection, not a mere relation, between the defendant's forum contacts and the cause of action. Monster Tree does not have employees in West Virginia; is not the Franchisor; does not conduct its tree-trimming business in West Virginia; does not solicit West Virginians' business; and does not operate the "whymonster.com" website. Monster Tree has *no contacts* with West Virginia. Thus, Respondent's claims cannot possibly arise out of or relate to Monster Tree's contacts with

the forum *because it has none. See Lane v. Boston Scientific Corp.*, 481 S.E.2d 753; *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985).

iii. Respondent's claims are not constitutionally reasonable.

Whether the amount and kind of activities carried on in the forum by a nonresident defendant "make it reasonable and just" to exercise personal jurisdiction "must be determined by the facts and circumstances of each case." Syl. pt. 2, *Chase v. Greyhound Lines, Inc.*, 158 W. Va. 382 (1975). In analyzing that issue, West Virginia courts have considered various factors, including whether 1) the defendant does business or maintains offices, agents, or employees in the forum; 2) the defendant owns property in the forum; or 3) the defendant made contracts to be performed in whole or in part in the forum. *See id.* at 385–86; Syl. pt. 2, *Hodge v. Sands Mfg. Co.*, 151 W. Va. 133 (1966).

Monster Tree does not maintain offices, agents, or employees in the forum state. (A.R. 133–34). Further, Monster Tree does not own property in the forum or carry out contract work to be performed in any manner in the forum state. *Id.* Respondent could neither identify West Virginia property owned by Monster Tree, nor cite to specific business transactions Monster Tree conducted in West Virginia. Respondent has not, and cannot, point to any specific facts demonstrating that Monster Tree conducted business in West Virginia.

Therefore, the Circuit Court entered default without personal jurisdiction over Monster Tree and prior to Respondent effecting proper service—as his counsel indicated would occur.

D. THE CIRCUIT COURT COMMITTED CLEAR ERROR AND IRREMEDIABLY PREJUDICED MONSTER TREE'S RIGHTS BY DENYING ITS MOTION TO SET ASIDE DEFAULT WHEN MONSTER TREE CLEARLY ESTABLISHED GOOD CAUSE UNDER WEST VIRGINIA LAW

Although the default order is void for lack of personal jurisdiction, the Circuit Court also committed clear error in determining that good cause to set aside the default was lacking. An entry of default may be set aside for "good cause." W. Va. R. Civ. P. 55(c). "When addressing a motion to set aside an entry of default, a trial court must determine whether 'good cause' under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met." Syl. Pt. 4, *Hardwood Grp. v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006).

> In analyzing "good cause" for purposes of motions to set aside a default, the trial court should consider: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; (4) the degree of intransigence on the part of the defaulting party; and (5) the reason for the defaulting party's failure to timely file an answer.

Id.

The Circuit Court's analysis of the *Hardwood Group* factors can be found on pages 18–21 of its Order denying Monster Tree's motion. Applying the factors to the facts of this case while recognizing the law's preference cases be decided on their merits, the Circuit Court clearly abused its discretion, exceeded its authority, and violated Monster Tree's rights by denying the motion to set aside default.

1. There are material issues of fact and Monster Tree has meritorious defenses.

The Circuit Court's examination of this factor is succinct and lacking in analysis or support for the ultimate conclusion: "Monster Tree Service's argued meritorious defenses of ineffective service of process and lack of jurisdiction have been raised and addressed herein and found to be without merit." (A.R. 407).

Surveying the remainder of the Circuit Court's Order, its determination on this factor is that Monster Tree had "actual knowledge of the action and ***effective service*** of the Amended Complaint," so it "waived any defenses it may have had, including that of ineffective service of process." (A.R. 405) (emphasis added). In other words, the Circuit Court concluded that because Monster Tree had effective service it waived its defense of ineffective service of process. The Circuit Court's analysis is clearly incorrect.[8]

First, Monster Tree submitted an Affidavit establishing that it was never served. (A.R. 133–34). Respondent took the position that *someone* signed for the summons and amended complaint, so service was effected. That is not the law in West Virginia, and the Circuit Court clearly erred by adopting the Respondent's argument. Instead, the Circuit Court should have accepted the uncontroverted evidence, *supra* Section (C)(1)(a), establishing that Monster Tree was not properly served.

Furthermore, the Circuit Court's ruling undercuts the Legislature. It is well established in this State that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 586, 466 S.E.2d 424, 437 (1995) (internal quotations omitted). The Circuit Court committed clear error by concluding that Monster Tree waived meritorious defenses by not filing a pleading in response to an amended complaint ***that was never properly served*** under West Virginia Code Section 56-3-33.

[8] As more fully explained below, the suggestion that Monster Tree's "actual knowledge" is sufficient for default is wholly without merit.

Finally, a review of Mr. Skolnick's affidavit demonstrates not only material issues of fact but also meritorious defenses. (A.R. 133–34). Therein, Mr. Skolnick, as the owner of Monster Tree, swore that it is "not affiliated in any way with [the Franchisee]"; "operates solely in Pennsylvania"; "uses the Monster Tree Service trademark pursuant to a licensing agreement"; never transacted or conducted business in West Virginia"; does not "maintain offices, agents, or employees in West Virginia"; "does not contract or supply services or things in West Virginia"; "does not regularly do or solicit business in West Virginia, or derive substantial revenue from goods used or consumed or services rendered in West Virginia"; "does not have any interest in any property in West Virginia"; "does not contract to insure any person or property within West Virginia"; "does not operate or contribute in any way to the Monster Tree Service website"; and "does not advertise or hold itself out as an entity qualified to train companies regarding tree removal in West Virginia[.]" *Id.*

This Court has previously rejected the similarly flawed analysis of a circuit court. In *Prima Marketing*, cited in Monster Tree's Reply (A.R. 341), the circuit court found that because the "petitioner never filed a responsive pleading, there was no evidence on the record that any material issues of fact and meritorious defenses existed." *Prima Mktg., LLC v. Hensley*, No. 14-0275, 2015 WL 869265, at *3 (W. Va. Feb. 27, 2015). However, this Court noted "that in its motion to set aside default judgment, petitioner disputes the material allegations of the plaintiff's complaint and argues that it is not liable for petitioner's alleged injuries and damages. Accordingly, we find that the requirement of a meritorious defense exists." *Id.* (reversing a circuit court's order denying motion to set aside default judgment). Stated otherwise, meritorious defenses need not be raised in an

answer or responsive pleading and it is entirely proper for a defendant to raise such matters in challenging default.

2. Any purported delay was caused by Respondent's failure to serve Monster Tree—not intransigence.[9]

The Circuit Court found Monster Tree's "intransigence was substantial and severe." (A.R. 407). The Circuit Court wrongly conclude that default was proper because of Monster Tree's alleged "complete disregard of this action and significant intransigence by failing to respond and preserve any defenses it may have had to a suit of which it had [actual notice of]." (A.R. 408).

Although the phrase "actual notice" appears seven times in the Circuit Court's Order, nowhere does the Circuit Court explain the basis for its conclusion that Monster Tree had actual notice of Respondent's Amended Complaint. It is possible that the Circuit Court presumed actual notice because the summons and Amended Complaint were sent, certified mail, by the Secretary of State and *someone* signed for them as advanced by Respondent. However, for the reasons stated in Mr. Skolnick's affidavit and erroneously mischaracterized by Respondent and ultimately the Circuit Court, service was not effected on Monster Tree. Perhaps the Circuit Court presumed actual notice because Respondent's counsel referenced a letter sent to Monster Tree's outside corporate counsel indicating a courtesy copy of the Amended Complaint was enclosed. (A.R. 191).

However, failing to file an answer upon receipt of a supposed courtesy copy of an amended complaint should hardly be construed as "substantial and severe" intransigence—particularly when (1) the letter from Respondent's counsel indicates that

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[9] Because these two factors (the degree of intransigence and reason for failure to timely respond) rely on the same arguments and are heavily intertwined, Monster Tree has combined them to facilitate this Court's review in the interests of judicial economy.

proper service was forthcoming, and (2) Monster Tree filed a motion to set aside default sixteen days after default was entered. Monster Tree was awaiting service, which it never received, and only discovered the Amended Complaint was purportedly served upon receipt of the Circuit Court's Default Order. An Order that Monster Tree immediately moved to set aside *so it could assert its meritorious defenses.*

3. Significant interests are at stake.

In analyzing this factor, the Circuit Court concluded, "[s]ignificant issues are at stake in this litigation given the alleged severity of [Respondent's] injuries and damages." (A.R. 407). Monster Tree agrees. Moreover, in addition to the significant interest the Circuit Court noted, the Circuit Court lacks personal jurisdiction over Monster Tree. Accordingly, this factor is not at issue.

4. Respondent[10] is not prejudiced by any delay in answering.

The Circuit Court found that the "delay" prejudiced Respondent by delaying discovery and "his ability to prosecute his claims . . . ." (A.R. 407). To be clear, the default order was entered a mere 35 days after purported service through the Secretary of State, and Monster Tree filed its motion to set aside the Circuit Court's default Order only ***sixteen days*** after the order was entered. Respondent's counsel opposed the motion and through briefing several months have passed since the Circuit Court first entered its default Order.

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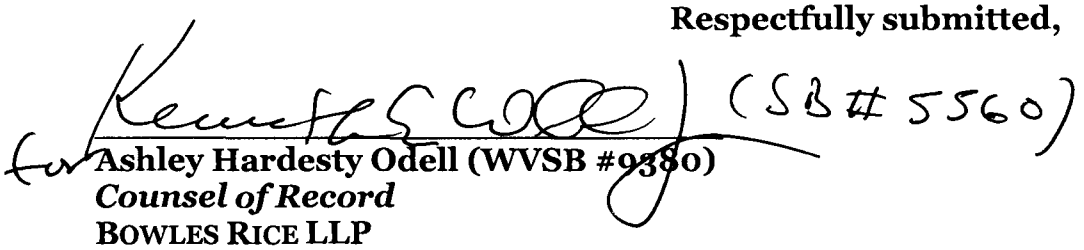
[10] The Circuit Court's Order considered the degree of prejudice as to Monster Tree, but Syllabus Point 4 in *Hardwood Group* clear states the relevant question is: "the degree of prejudice ***suffered by the plaintiff*** from the delay in answering . . . ." Thus, Monster Tree will not address the portion of the Circuit Court's Order considering the degree of prejudice to Monster Tree. Notwithstanding, Monster Tree will be severely prejudiced if it is held liable by default when it has meritorious defenses to jurisdiction in this State.

Nonetheless, the "prejudice" upon which the Circuit Court rested its decision is not really "prejudice" at all. It is simply the delay present in every case where a defendant seeks to set aside a default; indeed, there is never a motion to set aside a default without delay to the plaintiff's case and discovery. Respondent pointed to no "prejudice" beyond the typical delay associated with moving to set aside a default because there simply is none.[11] Relying upon *only* this supposed "prejudice" the Circuit Court abused its discretion. *See Prima Mktg., LLC v. Hensley*, No. 14-0275, 2015 WL 869265, at *3 (W. Va. Feb. 27, 2015).

VI. CONCLUSION

Monster Tree respectfully requests that this Court prohibit the Circuit Court from enforcing its *Order Denying Monster Tree Service, Inc.'s Motion to Set Aside Default Judgment* and remand this case with instructions that the Circuit Court vacate its June 5, 2019 Default Order.

Respectfully submitted,



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[11] To the extent Respondent argues their ability to inspect evidence was impeded by Monster Tree's purported delay, the argument is of no moment. Monster Tree does not possess any evidence related to this case. And any delay was not because Monster Tree did not file a responsive pleading, it is because Respondent never properly served Monster Tree. Regardless, Monster Tree quickly filed its motion to set aside default, which Respondent opposed. Thus, any delay—and any inability to review evidence possessed by another separate and distinct party—arose from Respondent's conduct.

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