IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. MONSTER TREE SERVICE, INC.,

Petitioner,

v. **Case No.: 20-0043**

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

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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

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QUESTIONS PRESENTED

1. Did the Circuit Court of Marshall County clearly err and irremediably prejudice Monster Tree Service, Inc., when it denied Monster Tree Service, Inc.'s Motion to Set Aside the Circuit Court's June 5, 2019 Entry of Default finding that Respondent had made a *prima facie* showing of personal jurisdiction over Monster Tree Service, Inc. and that service of process was effective pursuant to the provisions of W. Va. Code §56-3-33(c) (2017) and W.Va. Code §31D-15-1510(e) (2008)[1] where Monster Tree Service, Inc.'s statutorily appointed agent for service of process, the West Virginia Secretary of State, accepted service of the Summons and Amended Complaint on behalf of Monster Tree Service Inc., an unauthorized foreign corporation doing business in the State of West Virginia, on April 22, 2019, promptly forwarded the same to Monster Tree Service, Inc.'s registered address on record in its state of incorporation by certified mail and the United States Postal Service's delivery of the certified mail to the correct address on April 26, 2019 was confirmed by electronic signature?

2. Did the Circuit Court of Marshall County clearly err and irremediably prejudice Monster Tree Service, Inc., when it denied Monster Tree Service, Inc.'s Motion to Set Aside the Circuit Court's June 5, 2019 Entry of Default finding that Monster Tree Service, Inc. acted with significant intransigence when it failed to timely respond to the Amended Complaint?

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[1] Monster Tree Service, Inc.'s Petition ignores the circuit court's findings that Monster Tree Service, Inc. was deemed to be doing business in West Virginia under W.Va. Code §31D-15-1501(d) and was also properly served pursuant to W. Va. Code §31D-15-1510(e). App. 376, 379-80. It appears that transposition of numbers occurred in the order's reference to W. Va. Code §31D-15-1510(e) in paragraphs 15 and 16 of the conclusions of law where W. Va. Code §31D-15-1510(e) appears as W. Va. Code §31D-15-1501(e). App. 380. The context of the findings make clear the circuit court was referring to W. Va. Code §31D-15-1510(e).

STATEMENT OF THE CASE

On November 17, 2017, Respondent David Duvall was severely injured after falling 40-50 feet from a tree to the ground while working for and at the direction of Monster Tree Service of the Upper Ohio Valley, Inc. [hereinafter "Monster UOV"] in Marshall County, West Virginia. Monster UOV is a Monster Tree Service franchise affiliate with its principal place of business in Wheeling, Ohio County, West Virginia. At the time of the November 17, 2017 fall, Respondent had been provided no safety training, had been provided inadequate and potentially faulty safety equipment by his employer and was being instructed by his boss, Monster UOV president Kevin Stingle, to perform cutting activities in an unsafe manner. The fall was caused when a limb, being held under pressure by Kevin Stingle with a come along/pull line, snapped and struck Respondent and the safety harness which had been provided to Respondent for use failed. App. 15. The circumstances in which Respondent was working on November 17, 2017 are directly contrary to the public representations Petitioner Monster Tree Service, Inc. [hereinafter "Monster Tree Service"] makes to potential customers and franchisees regarding the safety requirements it imposes on franchisees ***and the safety training and operational support it provides to franchisees, including at the franchisee's own location***. *See, e.g.*, App. 173-78, 225-26, 229-30, 238.

Although Petitioner attempts to portray itself as simply a tree trimming and removal business operating only in Pennsylvania, the public record, including admissions of its president and CEO, Joshua Skolnick [hereinafter "Mr. Skolnick"], demonstrates that Monster Tree Service is actively involved in franchising activities, including the training of franchisees in both operational and safety issues and providing regular operational support. *See, e.g.*, App. 173-78, 216, 225-26, 229-30, 238, 254-260. Monster Tree Service has a corporate officer dedicated to "Franchise Operations and Safety" who spends a week on site at each franchisee's location during

the startup phase, in addition to providing quarterly field support. App. 233-34, 238. This evidence, discussed more fully below, was presented to the circuit court and considered by the circuit court when finding personal jurisdiction existed. App. 173-78, 216-66, 368-69, 372-74, 376-80.

Press releases relative to franchising activities and Mr. Skolnick's published statements consistently represent that Monster Tree Service began franchising in 2008.[2] App. 173, 222, 226, 236, 242, 245, 251.[3] Monster Franchise, LLC [hereinafter "Monster Franchise"], the entity that Petitioner represents, without evidentiary support, is the franchisor did not come into existence until October 2011, ***three (3) years after*** Monster Tree Service began franchising. Petition, p. p., 2; App. 213-15. Petitioner noticeably omits any reference to this evidence of record or the circuit court's findings relative to the same in the Petition.[4]

Pre-suit investigation into the involvement of the franchisor in the daily activities of Monster UOV revealed that Monster Tree Service was the franchisor. Monster Tree Service advertised itself to be "the nation's first tree service franchise" and that it does "everything possible to ensure our employee's safety . . . [and] that we are fully compliant with OSHA Work Safety rules, . . . and all statutes and regulations issued by each state[.]" App. 173-74. Monster Tree

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[2] Additionally, the Our History page of the Monster Tree Service website, www.whymonster.com, states: "In 2008, Monster Tree Service began as a small tree service company providing arboricultural care to Pennsylvania, Delaware and New Jersey. . . Now, we've become the nation's **first** tree care franchise . . .". App. 173 (emphasis in original). Although Petitioner disavows any connection to the whymonster.com website, emails from support@whymonster.com identify the sender as "Monster Tree Service". Petition, p. 15, App. 134, 254. Additionally, the address on the www.whymonster.com website is Fort Washington, Pennsylvania, a location associated with Monster Tree Service. App. 173, 199.

[3] Respondent included a disc containing three (3) videos discussing the history of Monster Tree Service, including admissions by Mr. Skolnick, as Exhibit 32 to Plaintiff's Response in Opposition to Monster Tree Service, Inc.'s Motion to Set Aside Default Judgement. *See*, App. 165. The copy of the Appendix received by Respondent did not include this exhibit. Respondent assumes it was included in the Court's copies. If not, the videos produced as Exhibit 32 can be found online at https://youtu.be/CJiN61e-_eY; https://youtu.be/mQldUe-Pbag, and https://youtu.be/Kj0AvqTWp0M.

[4] Petitioner likewise made no attempt to refute this evidence before the circuit court. App. 315-21.

Service promotes that its "crews are trained in TCIA-approved safety programs, representing the best practices and training in the arboriculture field." App. 174. Monster Tree Service's home page on the www.whymonster.com website is not specific to individual affiliates or franchises and represents that "**Our[5] crews have extensive training, skills and equipment**[.]" App. 175 (emphasis in original). The website also provides a "careers" tab providing interactive links for potential employees to apply for jobs at franchise locations throughout the country. App. 173. It similarly provides potential customers an interactive ability to find its local franchise and/or obtain free estimates, regardless of where the customer is located. App. 173-75.

The "franchise information" tab on the www.whymonster.com website is a link to www.monsterfranchising.com, *a different website*, which provides additional information about the "hands-on training" franchisees receive, including training and on-site[6] support at the franchisee's location. The www.monsterfranchising.com website also provides the ability to enter contact information to receive a direct response about franchising opportunities. App. 173-78.

In light of Monster Tree Service's express, public representations regarding its involvement in franchisee activities, Respondent forwarded a letter of representation and notice of duty to preserve to Mr. Skolnick and Monster Tree Service on September 14, 2018. App. 179-180. On October 1, 2018, Monster Tree Service's Pennsylvania counsel responded to letter. App. 181-82.

Respondent initiated suit against Monster UOV and Monster Tree Service on February 8, 2019, asserting direct negligence claims against Monster Tree Service arising from the safety training and operational support it publicly admits providing to franchises, such as Monster UOV.

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[5] Implying any crew working under the Monster Tree Service name, including franchisee crews.
[6] The franchisee's location for Monster UOV is Wheeling, West Virginia.

App. 8-30. Plaintiff ***did not*** assert vicarious liability claims against Monster Tree Service arising from the acts and/or omissions of Monster UOV. App. 8-30. The West Virginia Secretary of State [hereinafter "WVSOS"] accepted service of the Summons and Complaint on behalf of Monster Tree Service on February 19, 2019 and forwarded the same to Monster Tree Service at Mr. Skolnick's registered address[7] via certified mail. App. 183-88, 197. On April 4, 2019, Monster Tree Service's Pennsylvania counsel acknowledged the suit and demanded its dismissal, threatening Rule 11 sanctions if Respondent did not comply.[8] App. 189-90.

Despite actual knowledge of the suit, Monster Tree Service did not timely file a responsive pleading. Respondent did not, however, seek default against Monster Tree Service as to the February 8, 2019 Complaint because tracking information for the WVSOS's notice of service stopped on April 4, 2019, the same day as counsel's letter acknowledging the suit, without a delivery confirmation. App. 186. On April 23, 2019, Monster Tree Service's insurer acknowledge the lawsuit. App. 193.

In the April 4, 2019 letter, counsel also admitted representation of Monster Franchise, LLC [hereinafter "Monster Franchise"], an entity also owned and controlled by Mr. Skolnick, and represented that Monster Franchise had a contractual relationship with Monster UOV relative to Monster UOV's operations in West Virginia. App. 189-90, 197-98, 214-15. A copy of the franchise agreement purported to be between Monster Franchise and Monster UOV was not produced at that time nor has it ever been produced and made a part of the evidentiary record. As such, there is no way for Respondent, the circuit court or this Court to verify the accuracy of any representation made regarding the parties thereto, their duties and obligations or any other term.

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[7] This is the address Mr. Skolnick listed for himself in Monster Tree Service's corporate filings with the Pennsylvania Department of State, Bureau of Corporations [hereinafter "Pennsylvania BOC"].

[8] Counsel's acknowledgement of the suit strongly implies that the notification was actually delivered.

With no defendant having filed a responsive pleading, Respondent filed his Amended Complaint on April 16, 2019, to add Monster Franchise as a party asserting negligence claims mimicking those previously asserted against Monster Tree Service in the February 8, 2019 Complaint. App. 45-70. A courtesy copy of the Amended Complaint was sent to Monster Tree Service's and Monster Franchise's Pennsylvania counsel. App. 191-92.

On April 22, 2019, the WVSOS accepted service of the Summons and Amended Complaint on behalf of Monster Tree Service pursuant to W. Va. Code §31D-15-1510 and W.Va. Code §56-3-33(a) and forwarded the same, via certified mail, to Monster Tree Service's registered office address on file with the Pennsylvania BOC. App. 43, 45-71, 99-100, 199. The United States Postal Service delivered the WVSOS's certified mail to Monster Tree Service's registered office address on April 26, 2019, which delivery was confirmed by electronic signature, a point Monster Tree Service has never denied. App. 101-03. Despite actual notice of both the original Complaint and the Amended Complaint and actual receipt of the WVSOS's notification of service on April 6, 2019, Monster Tree Service failed to file a responsive pleading on or before May 22, 2019 as required by the *West Virginia Rules of Civil Procedure*, W.Va. Code §31D-15-1501(e) and W.Va. Code §56-3-33(c). As a result, Respondent applied for an entry of default on May 31, 2019.[9] App. 89-107, 109. The Circuit Court of Marshall County entered default on June 5, 2019. App. 109.

[9] On page 3 of the Petition, Monster Tree Service notes that notice of the application for default was not provided to Monster Tree Service's general counsel in an apparent attempt to imply misconduct. However, West Virginia law does not require notice be provided when applying for a default as to liability under Rule 55(a) of the *West Virginia Rules of Civil Procedure*. *See also*, syl. pt. 2, *Cales v. Wills*, 212 W.Va. 232, 569 S.E.2d 479 (2002) ("A default relates to liability and a default judgment occurs after damages have been ascertained."). The notice requirement attaches when seeking entry of a ***default judgment*** under Rule 55(b). The Respondent's Application for Default and the Entry of Default were both pursuant to Rule 55(a). App. 89, 109.

Monster Tree Service filed a two page Motion to Set Aside Default Judgment[10] on June 21, 2019 and its memorandum in support thereof six (6) weeks later on August 5, 2019.[11] App. 110-35. On September 6, 2019, Respondent filed his Response in Opposition. App. 152-266. Monster Tree Service replied nearly two months later, October 30, 2019. App. 315-21. The Circuit Court of Marshall County denied Monster Tree Service's Motion by order entered December 17, 2019.[12] App. 367-87. Thereafter, Monster Tree Service instituted this original jurisdiction proceeding. For the reasons set forth herein, the Petition for Writ of Prohibition should be denied.

SUMMARY OF ARGUMENT

Constitutionally permissible specific personal jurisdiction exists over Monster Tree Service under both of West Virginia's long arm statues, W. Va. Code §56-3-33 and W.Va. Code §31D-15-1501, as demonstrated by consideration of the evidence presented to the circuit court regarding Monster Tree Service's direct involvement in franchising, including the providing safety training and operational support to its West Virginia franchise, Monster UOV, evidence omitted from the Petition. The circuit court correctly found that Respondent had made a *prima facie* showing of personal jurisdiction under both W.Va. Code §31D-15-1501(d) and W.Va. Code §56-3-33(a). Syl. Pt. 4, *in part, State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997) (party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction to survive a Rule 12(b)(2) motion to dismiss[13]); App. 276-82. In making the

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[10] Petitioner's representation that its June 24, 2019 motion included demonstrated evidence establishing good cause is not refuted by the motion itself which included no evidence. Petition, p. 5; App. 110-11. Similarly, its representation regarding the time between default and filing of the motion is shortened because the mailed service date is used in the calculation instead of the actual filed date. *Id.*

[11] As acknowledged in the Petition, default judgment had not been entered.

[12] The order was filed in the circuit clerk's office on December 18, 2019.

[13] Monster Tree Service, despite actual notice of the lawsuit and effective service of process, chose to not appear for the limited purposes of raising its jurisdictional and insufficiency of service defenses in a Rule 12(b) motion and, instead, chose to ignore the suit permitting a default to be entered.

prima facie showing of jurisdiction, Respondent presented documentary evidence, including Mr. Skolnick's own published admissions, refuting Monster Tree Service's summary denial of jurisdiction conferring actions contained in the Skolnick Affidavit.[14] This evidence established that Monster Tree Service is an unauthorized foreign corporation doing business in West Virginia.

To accept Monster Tree Service's argument that an unauthorized foreign corporation doing business in the State of West Virginia may avoid a finding of effective service by disavowing recognition of an electronic signature documenting delivery of certified mail from the WVSOS would effectively nullify the provisions of W. Va. Code §56-3-33(c) and W.Va. Code §31D-15-1510(e) and render service on a foreign corporation a practical impossibility. To be clear, as found by the circuit court, Monster Tree Service has never disputed ***actual receipt*** of the WVSOS's certified mail containing the notification of service. App. 120-21, 133-4, 317, 371. Instead, it has simply asserted the signature was not that of its president or anyone it deems authorized to accept lawful service of process and is otherwise "not identifiable" and, therefore, it cannot confirm the certified mail was accepted by a duly authorized agent. App. 133. Acceptance

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[14] Evidence produced by Respondent, particularly when viewed in the light most favorable to Respondent drawing all inferences in favor of jurisdiction as required by governing law, demonstrated that Monster Tree Service engages in a persistent course of conduct of soliciting business in West Virginia by both soliciting new franchisees and soliciting business for Monster UOV; contracting, either directly or through its authorized agent/substantially controlled related company Monster Franchise, with Monster UOV to provide services in West Virginia; providing operational, safety and business training and/or support to Monster UOV in West Virginia; causing tortious injury to Respondent in West Virginia; providing equipment training and/or support to Monster UOV for use in its West Virginia operations; deriving substantial revenue from Monster UOV's West Virginia operations through franchise fees; engaging in a persistent course of conduct of representing to West Virginia customers and employees working under the Monster Tree Service name that Monster Tree Service and its franchisees, including Monster UOV, ensure the safety of workers, are fully compliant with OSHA Work Safety rules and all federal and state regulations, train crews in TCIA-approved safety programs, represent the best practices and training in the aboriculture field, utilize crews that have extensive training skills and equipment; and that employees are provided with the training, skills and equipment to safely perform their job duties. App. 173-8; 222, 225-26, 229-30, 233, 238, 242-43, 254-60, 376-78; *see also*, fn. 3, *supra*.

by a "duly authorized agent" is not a condition for effective service under W.Va. Code §31D-15-1510(e). Perhaps, that is why Monster Tree Service ignores the circuit court's findings relative to the effectiveness of service under W.Va. Code §31D-15-1510(e).

As the June 5, 2019 Entry of Default was not void from inception due to lack of personal jurisdiction as argued by Monster Tree Service, Monster Tree Service was required to establish good cause to set aside the default. W.Va. R.Civ.P. 55(c). The circuit court did not abuse its discretion in finding that Monster Tree Service had failed to demonstrate good cause to set aside the June 5, 2019 Entry of Default. *See*, syl. pts. 1 and 2, *Hardwood Group v. LaRocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006) (noting abuse of discretion standard). The circuit court's finding of significant intransigence is well supported by the documentary evidence. The significant intransigence, coupled with Monster Tree Service's unjustifiable reason for failing to timely answer or otherwise respond are sufficient in and of themselves to support the circuit court's decision, notwithstanding Monster Franchise's arguments relative to the remaining *Hardwood Group* factors. *See*, syl. pt. 4, *Hardwood Group*, 219 W.Va. 56, 631 S.E.2d 614.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the circuit court did not clearly err nor abuse its discretion under the facts and circumstances of this case, a memorandum decision without oral argument is appropriate as the circuit court simply applied established West Virginia law to the facts presented herein. To the extent this Court deems oral argument appropriate or necessary, placement on the Rule 19 docket would be appropriate.

ARGUMENT

I. APPLICABLE STANDARDS OF REVIEW

The high standard to be met before a writ of prohibition will issue was recently succinctly set forth in *State ex rel. West Virginia Regional Jail Authority v. Webster*, -- W.Va. --, 836 S.E.2d 510 (2019). Therein, this Court explained:

> "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). Furthermore,
>
> > "this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014).
>
> Syl. pt. 3, *State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 794 S.E.2d 10 (2016). Moreover, in Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), this Court set forth the following standard for issuance of a writ of prohibition when it is alleged a lower court has exceeded its legitimate authority:
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> > In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for

> determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.
>
> We have further held that, " '[i]n determining the third factor, the existence of clear error as a matter of law, we will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue.' *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002)." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (2007).

SER West Virginia Reg. Jail Auth., -- W.Va. --, 836 S.E.2d at 515-16. Relief in prohibition, however, is inappropriate where the circuit court's "jurisdiction turns on contested issues of fact." *State ex rel. Ford Motor Co. v. McGraw*, 237 W.Va. 573, 580, 788 S.E.2d 319, 326 (2016).

This Court generally reviews findings of fact for clear error and conclusions of law *de novo*. *SER Ford Motor Co.*, 237 W.Va. at 380, 788 S.E.2d at 326. Ostensible findings of fact which entail application of law or constitute legal judgments transcending ordinary factual findings may be subjected to a *de novo* review. *Id.*, 788 S.E.2d at 326. A circuit court's decision on whether or not to set aside a default under Rule 55(c) of the *West Virginia Rules of Civil Procedure* is subject to review for an abuse of discretion. Syl. pts. 1 and 2, *Hardwood Group*, 219 W.Va. 56, 631 S.E.2d 614.

Petitioner has failed to meet the exacting standards necessary for extraordinary relief and, as a result, the Petition should be denied consistent with this Court's precedent refusing to grant relief to a party who, despite actual notice of a suit, fails to timely respond to assert any jurisdictional defenses it may have and, instead, allows a default to be entered. *See, e.g., Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W.Va. 247, 250-51, 624 S.E2d 594, 597-98 (2005) (*per curiam*) (upholding default judgment where WVSOS accepted service of complaint on behalf of defendant and there was no evidence in the record to suggest defendant did not have actual

notice of suit); *Lee v. Gentlemen's Club, Inc.*, 208 W.Va. 564, 566, 569, 542 S.E.2d 78, 80, 82 (2000) (*per curiam*) (upholding denial of motion to set aside default where certified mail containing summons and complaint were returned as "unclaimed" and defendant had or reasonably should have had notice of action); *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 71, 75, 501 S.E.2d 786, 788, 792 (1998) (upholding entry of default where defendant had actual notice of action and challenged service on basis that certified mail containing summons and complaint disappeared after being signed for by an employee); *Coury v. Tsapis*, 172 W.Va. 103, 111, 304 S.E.2d 7, 15 (1983) (reinstating default order set aside by circuit court where defendant had actual notice of suit and failed to timely file a responsive pleading while waiting on an insurer's coverage opinion and remanding for hearing on damages).

II. THE CIRCUIT COURT DID NOT CLEARLY ERR IN REFUSING TO SET ASIDE THE JUNE 5, 2019 ENTRY OF DEFAULT BECAUSE MONSTER TREE SERVICE WAS PROPERLY SERVED AND PERSONAL JURISDICTION EXISTED OVER MONSTER TREE SERVICE AT THE TIME OF ENTRY

Jurisdiction over non-West Virginia residents, such as Monster Tree Service, may be obtained two ways: by satisfying the one or more requirements of West Virginia's Long-Arm Statute, W.Va. Code §56-3-33, *or* for foreign corporations, such as Monster Tree Service, by satisfying one or more requirements of W.Va. Code §31D-15-1501(d) such that it is deemed to be transacting business in West Virginia.[15] *See Griffith & Coe Advertising, Inc. v. Farmers & Merchants Bank & Trust*, 215 W.Va. 428, 431, 599 S.E.2d 851, 854 (2004) (*per curiam*) (recognizing West Virginia has two long arm statutes, W.Va. Code §56-3-33 applicable to any

[15] W. Va. Code §56-3-33(e)(2) defines "nonresident" in pertinent part, as "any person, other than voluntary unincorporated associations, who is not a resident of this state . . . and among others includes a nonresident firm, partnership or corporation." By contrast, W. Va. Code §31D-15-1501(d) is specific to foreign corporations doing business in the State of West Virginia regardless of whether or not the foreign corporation is authorized to do business in West Virginia.

nonresident and W.Va. Code §31D-15-1501 (d) and (e) specific to foreign corporations); *SER Ford Motor Co.*, 237 W.Va. at 581, 788 S.E.2d at 327 (same). Respondent made a *prima facie* showing of constitutionally sufficient personal jurisdiction under both W.Va. Code §31D-15-1501(d) and W.Va. Code §56-3-33(a). Syl. Pt. 4, *in part*, *SER. Bell Atlantic-West Virginia, Inc.*, 201 W.Va. 402, 497 S.E.2d 755.

Respondent presented unrefuted factual evidence demonstrating Monster Tree Service's public admissions of its involvement in franchisee operations, involvement which would include involvement in the West Virginia operations of Monster UOV as well as the solicitation of business in West Virginia. App. 173-78, 211-12, 216-22, 225-26, 229-39, 242-46, 250-51, 254-60, 265-66. These admissions demonstrate Monster Tree Service may be deemed to be transacting business in West Virginia for jurisdictional purposes notwithstanding the summary denial set forth in the Skolnick Affidavit, the *only* evidence produced by Monster Tree Service to contest jurisdiction. App. 133-34.

Petitioner made no attempt to contradict Respondent's evidence of Monster Tree Service's published promotion of "the Monster Tree Service vision to partner with homeowners across the country", of Mr. Skolnick building "Monster Tree Service into a thriving national franchise system" or of its COO's goal to "help franchise partners enhance their operations". App. 222, 226, 229, 251; n.3, *supra*. Nor did Monster Tree Service present evidence attempting to disprove the ample other evidence Respondent presented to the circuit court demonstrating that Monster Tree Service *and its corporate officers* consistently, publicly acknowledge Monster Tree Service's active involvement in franchising activities, including on-site at franchisee locations. App. 173-75, 216-35, 242-46, 250-51, 254-260, 265-66, 315-20; *see also*, *supra* at fn. 3. If the franchise agreement that Monster Tree Service and Monster Franchise argue demonstrate that they are not

involved in the daily activities and operations of franchisees, including Monster UOV, one would think that they would produce the same to provide evidence as opposed to mere argument. Evidence of the national scope of Monster Tree Service's activities, including on-site at franchisee locations and soliciting business and employment applications on behalf of franchisees, demonstrates that Monster Tree Service is doing business in West Virginia inasmuch as it is providing support to its West Virginia franchisee, Monster UOV, at or for use at its principal place of business in West Virginia.

The circuit court correctly found that Monster Tree Service's conduct satisfied the jurisdictional requirements of *both* W. Va. Code §56-3-33(a) and W.Va. Code §31D-15-1501(d). App. 376-80. Thus, so long as Monster Tree Service was served in accordance with either W. Va. Code §56-3-33(c) *or* W.Va. Code §31D-15-1510(e), service was effective and personal jurisdiction existed over Monster Tree Service at the time of the June 5, 2019 Entry of Default rendering the Entry of Default valid and enforceable.[16] Moreover, notwithstanding Monster Tree Service's protests to the contrary, the exercise of jurisdiction over it comports with federal constitutional standards.

A. The Circuit Court Correctly Found That West Virginia Has Personal Jurisdiction Over Monster Tree Service Pursuant To W.Va. Code §31D-15-1501(d) And W. Va. Code §56-3-33(a).

A party asserting jurisdiction over a foreign corporation must only make a *prima facie* showing of personal jurisdiction. Syl. Pt. 4, *in part*, *SER Bell Atlantic-West Virginia, Inc.*, 201 W.Va. 402, 497 S.E.2d 755. In determining whether a party has made the required *prima facie*

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[16] Monster Tree Service cites to the case of *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010) (*per curiam*), to argue that the June 5, 2019 Entry of Default was void due to ineffective service. To the extent Monster Tree Service is attempting to rely on *Beane* in support of its ineffective service of process argument, *Beane* has no bearing inasmuch it involved Rule 4(d) and an attempt to serve a nonresident defendant by delivering only a summons to the defendant's mother at her home in West Virginia.

showing, a court must view the allegations in the light most favorable to such party and draw all inferences in favor of jurisdiction. *Id.*; *see also*, syl. pt. 6, *SER Ford Motor Co.*, 237 W.Va. 573, 788 S.E.2d 319. Additionally, jurisdiction that does not offend federal due process standards may be asserted against a nonresident corporation which, despite separate corporate structures, exercises substantial control over a related corporation doing business in West Virginia. *SER Bell Atlantic-West Virginia, Inc.*, 201 W.Va. at 416-17, 497 S.E.2d at 769-70. As such, the personal jurisdiction over Monster Franchise would extend to Monster Tree Service because, as demonstrated below, Monster Tree Service may be deemed to exercise substantial control over Monster Franchise as they operate as a single entity. The circuit court correctly held that Respondent made a *prima facie* showing of constitutionally sufficient personal jurisdiction after analyzing the parties' competing evidence in light of these established principles of law. App. 372-77.

1. Evidence of Monster Tree Service Activities in West Virginia

The only evidence presented by Monster Tree Service in support of its claim that it is not subject to the jurisdiction of West Virginia courts is the conclusory affidavit of Mr. Skolnick. App. 133-34. In making his jurisdictional showing, Respondent contradicted Mr. Skolnick's averments with governmental filings and his own published and recorded statements regarding Monster Tree Service, its history and growth. Mr. Skolnick is the President of Monster Tree Service, the President of Monster LandCare, Inc. and the Organizer of Monster Franchise, LLC. App. 197-99, 209, 213-15. Although Monster Tree Service argues, without evidentiary support, that Monster Franchise is the entity having a franchise agreement with Monster UOV, the public admissions of Monster Tree Service's corporate officers, including Mr. Skolnick, regarding its history, the nature

of its business and its involvement in the operations of franchisees along with governmental filings demonstrate Monster Tree Service and Monster Franchise operate as a single entity and/or that Monster Tree Service exercises substantial control over Monster Franchise.[17]

In his Affidavit, Mr. Skolnick portrays Monster Tree Service as simply a tree-cutting company in Pennsylvania utilizing the Monster Tree Service trademark pursuant to a licensing agreement. App. 133-34. Like the franchising agreement alleged to be between Monster Franchise and Monster UOV, the licensing agreement was not produced or submitted into evidence. Accordingly, the veracity of this claim, like those relating to the franchising agreement, cannot be confirmed. Mr. Skolnick does not aver Monster Tree Service is a franchise of Monster Franchise. *Id.* The Monster Tree Service trademark is not registered to Monster Franchise; instead, it is registered to Monster LandCare, Inc., an entity incorporated in 2006 with Mr. Skolnick as its President *five (5) years before* Monster Franchise came into existence and one year *after* Monster Tree Service was incorporated. App. 197, 203-09, 213-15. This timing coupled with the public representations regarding the history of Monster Tree Service detailed below, strongly infer that Monster Tree Service is the parent company and in control of all franchising operations, including providing safety training and equipment to franchisees. Indeed, the Better Business Bureau identifies Monster Franchise, LLC and Monster LandCare, Inc. as alternate business names for Monster Tree Service, Inc., and identifies a "Manager of Franchisee Development" as in business management at Monster Tree Service, Inc. App. 252-53. Further refuting its claim to be a mere

[17] The unity of interest and operation between Monster Tree Service and Monster Franchise is further exemplified by Monster Franchise's arguments in Case No. 20-0044 as to why the default against Monster Tree Service should be set aside. *See, e.g.* Case No. 20-0044 Petition, pp. 1-2, 5-6, 15.

tree-cutting company is Monster Tree Service's omission from the list of Pennsylvania service provider locations on www.whymonster.com.[18] App. 211-12.

In his LinkedIn profile, Mr. Skolnick portrays himself as the "CEO/Founder of Monster Tree Service," a position held since June 2008, three years before Monster Franchise was established. App. 213, 216. Neither Monster Franchise nor Monster LandCare are referenced in this profile thus, implying that all Monster Tree Service related entities owned by Mr. Skolnick operate as a single entity – Monster Tree Service. *Id.* Similarly, corporate officers involved in franchising are consistently publicly identified as associated with Monster Tree Service, not Monster Franchise. App. 225, 229, 231-34. This includes Joseph Demkovich, "Director of Franchise Operations and Safety for Monster Tree Service". App. 233-34.

Monster Tree Service's LinkedIn Profile expressly links itself with franchising stating:

> Founded in 2008 in Fort Washington, PA by Founder and CEO Josh Skolnick, Monster Tree Service is the first and only national franchise brand serving the $17 billion tree care industry. Over the past decade, Skolnick has aggressively built Monster Tree Service into a thriving national franchise system - working day and night to build the company into a $10+ million business with 29 franchised outlets in 10 states throughout the country.

App. 222; *see also*, App. 225-26, 236-39, 242-43, 245-46, 250-51 (press releases and franchising advertisements stating Monster Tree Service started in 2008 and has grown into a national franchise system); n. 3, *supra*. Monster Tree Service's LinkedIn profile also admits that its website is www.whymonster.com notwithstanding Mr. Skolnick's affidavit to the contrary. App. 134, 222. Monster Tree Service's involvement in franchising training and operations is also evidenced by the fact that it shares, for certain purposes (including U.S Department of Transportation filings),

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[18] As noted above, despite Mr. Skolnick's averment that Monster Tree Service "does not operate or contribute in any way to" the www.whymonster.com website, emails to franchisees and others from support@whymonster.com are identified as being sent by Monster Tree Service. App. 254.

the 95 North Broad Street, Doylestown, Pennsylvania address on the corporate "Monster Mash" newsletter to franchisees. App. 260-61, 263, 265-66.

Evidence of Monster Tree Service's involvement in franchising activities is significant because it is the publicly disclosed representations of training and experience, compliance with applicable safety laws, safety training and on-going operations support, including on-site training and support, provided to franchisees such as Monster UOV which forms the basis not only of Respondent's claims but also establishes the jurisdictional connection to West Virginia.[19] *See, e.g.*, App. 174-178.[20] Monster Tree Service's negligence in performing its publicly assumed duty to train Monster UOV on employee and operational safety issues and safety laws and provide operational support and/or safety equipment to Monster UOV to ensure compliance with applicable safety laws was a direct and proximate cause of Respondent's injuries on November 17, 2017 in Marshall County, West Virginia.

In the Amended Complaint, Respondent incorporated all of Monster Tree Service's parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures and organizational entities as acting on behalf of Monster Tree Service into his allegations against Monster Tree Service. App. 46-7. Thus, to the extent any Monster entity controlled by Mr. Skolnick, such as Monster Franchise, was acting for, as an agent of, jointly with or on behalf of Monster Tree Service, at the time the entity committed an act or omission which conferred jurisdiction in West

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[19] Monster Tree Service represents that it provides two-weeks of hands-on training to its franchisees in Fort Washington, Pennsylvania. App. 177, 238. Fort Washington, Pennsylvania is associated with Monster Tree Service, not Monster Franchise. App. 197, 213-215, 222, 226, 234, 251, 260; *see also*, fn. 3, *supra*.

[20] Contrary to Petitioner's argument, Respondent did not provide evidence of the website to establish personal jurisdiction in West Virginia *by virtue of the existence of the website*. Petition, pp. 15-17. The website information was produced *as evidence of Monster Tree Service's public representations as to safety, and the training and operational support* provided to franchisees at their location which, for Monster UOV, is West Virginia.

Virginia, those jurisdiction conferring acts and/or omissions would likewise constitute jurisdiction conferring acts or omissions of Monster Tree Service. *SER Bell Atlantic-West Virginia, Inc.*, 201 W.Va. at 416-17, 497 S.E.2d at 769-70.

2. Jurisdiction under W.Va. Code §31D-15-1501(d)

A foreign corporation such as Monster Tree Service is deemed to be transacting business in West Virginia and, thus, subject to the jurisdiction of West Virginia courts if it "makes a contract to be performed, in whole or in part, by any party thereto in this state; [or] the corporation commits a tort, in whole or in part, in this state[.]" W.Va. Code §31D-15-1501(d)(1)-(2). West Virginia Code §31D-15-1501(d)(1) confers jurisdiction over all parties to a contractual relationship wherein at least one party performs contractual terms in West Virginia. Monster Franchise has not asserted a personal jurisdiction challenge. The evidence of record refers only to Monster Tree Service when discussing the training and support provided to franchisees and when soliciting business in West Virginia. However, if the argument advanced by Monster Tree Service and Monster Franchise is accepted despite the lack of evidentiary support, that Monster Franchise is the "franchisor" and it is assumed the name "Monster Tree Service" in the public records, profiles, advertisements and press releases really means. "Monster Franchise", jurisdiction would still be conferred over Monster Tree Service.

Monster UOV has a contractual relationship with someone to operate under the Monster Tree Service name in West Virginia. Assuming the franchise agreement is with Monster Franchise as urged by Petitioner, it cannot be disputed that Monster UOV was performing under the franchise agreement in West Virginia on November 17, 2017 when Respondent was injured.[21] The evidence

[21] It bears repeating that the purported franchise agreement between Monster UOV and Monster Franchise has not been produced by any defendant in the action below. Thus, there is no way to determine at this juncture the veracity of the representations regarding the terms of the same.

of record also indicates that Monster Franchise and Monster Tree Service operate as a single business entity and/or Monster Tree Service is substantially controlled by Monster Franchise. Personal jurisdiction is conferred over Monster Tree Service by W.Va. Code §31D-15-1501(d)(1) to the extent that Monster Tree Service has a contractual relationship with Monster UOV, either directly or through its relationship with Monster Franchise.

Monster Tree Service also becomes subject to the jurisdiction of West Virginia courts where it commits a tort, in whole or in part, in West Virginia. W.Va. Code §31D-15-1501(d)(2). As noted above throughout, Monster Tree Service publicly admits in press releases and advertisements that it is actively involved in providing safety training and equipment to franchisees to make certain that all work perform under the Monster Tree Service name is done safely and in compliance with all applicable safety laws and standards. Monster Tree Service specifically represents that it provides franchisees with on-site training at the franchisee's location, in addition to continuing on-site support and training. App. 176-77, 238, 243. Monster UOV, the Monster Tree Service affiliate involved in this litigation maintains its principal place of business in Wheeling, Ohio County, West Virginia, thus, all on-site training provided is in West Virginia.

Whether Monster Tree Service's negligence occurred at its facility in Fort Washington, Pennsylvania or in West Virginia, it committed a tort, at least partially, in West Virginia, because its negligence proximately caused injury to David Duvall in West Virginia. App. 47-54, 60-64, 174, 177-78. The circuit court correctly found that jurisdiction existed over Monster Tree Service under the provisions of W.Va. Code §31D-15-1501(d)(1) and (2). App. 379-80.

3. Jurisdiction under W.Va. Code §56-3-33(a)

West Virginia's Long-Arm Statute, W. Va. Code §56-3-33(a), confers jurisdiction over a nonresident where the nonresident or its "duly authorized agent" engages in activities such as:

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

W.Va. Code §56-3-33 (a)(1)-(4). A "duly authorized agent" in the context of this statute:

> means and includes among others a person who, at the direction of or with the knowledge or acquiescence of a nonresident, engages in such act or acts and includes among others a member of the family of such nonresident or a person who, at the residence, place of business or post office of such nonresident, usually receives and receipts for mail addressed to such nonresident.

W. Va. Code §56-3-33(e)(1). Thus, jurisdiction exists over Monster Tree Service not only for its own acts, but also for acts of its duly authorized agents acting at its direction or with its knowledge or acquiescence. The evidence of record viewed in the light most favorable to respondent and drawing all inferences in favor of jurisdiction, reveals a *prima facie* establishment of jurisdiction under W.Va. Code §56-3-33(a). Syl. pt. 4, *SER Bell Atlantic-West Virginia*, 201 W.Va. 402, 497 S.E.2d 755; syl. pt. 6, *SER Ford Motor Co.*, 237 W.Va. 573, 788 S.E.2d. 319.

As explained above in connection with the W.Va. Code §31D-15-1501(d) analysis, Monster Tree Service may be deemed to be doing business in the State of West Virginia rendering it subject to the jurisdiction of West Virginia courts. The same activities which form the basis of the W.Va. Code §31D-15-1501(d) finding satisfy the requirements of W.Va. Code §56-3-33(a)(1) and (2).

Whether Monster Tree Service providing the safety training and operational support at issue herein in West Virginia or Pennsylvania, its negligence proximately caused injury in West Virginia subjecting it to jurisdiction under W.Va. Code §56-3-33(a)(3) and/or (4). W.Va. Code §56-3-33(a)(4)'s additional requirement of regularly conducting or soliciting business or engaging

in a persistent course of conduct or deriving substantial revenue from services rendered in West Virginia is satisfied several ways. Consistent with the representations regarding continuous on-site operational support provided to franchisees to make them "even better at everything we do" and "enhance their operations", Monster Tree Service regularly provides training and support to Monster UOV in West Virginia. App. 173-87, 225, 229-30, 238, 254-60.

Monster Tree Service also derives significant revenue as a direct and proximate result of Monster UOV's operations in West Virginia. Franchise fees alone range from $26,400 to $49,500 annually. App. 236, 243. Monster Tree Service publicizes that the revenue it drives from franchise operations has resulted in growing itself into a $15+ million business with 50 franchises in 23 states operating 100+ franchise territories. App. 226, 250-51. A portion of that revenue necessarily comes from Monster UOV's West Virginia operations, thus providing Monster Tree Service with substantial revenue derived from services rendered in West Virginia and satisfying the jurisdictional requirements of W.Va. Code §56-3-33(a)(4).

Monster Tree Service's self-serving, conclusive statements contained in the Skolnick Affidavit, the only evidence it produced it its attempt to avoid a finding of personal jurisdiction in West Virginia are contradicted not only by the documentary evidence of record but also by Mr. Skolnick's own words in the promotional videos he has published - videos which highlight Monster Tree Service's purported emphasis on safety and how he built Monster Tree Service into a national company. *See*, n. 3, *supra* (YouTube videos: Josh Skolnick - Monster Tree Service CEO Vision Story; Monster Tree Service; Monster Tree Service Commercial). This evidence, coupled with Monster UOV's West Virginia operations and the facts underlying Plaintiff's injury, demonstrate specific personal jurisdiction exists over Monster Tree Service in West Virginia and

that Respondent made a *prima facie* showing that one or more requirements of W.Va. Code §56-3-33(a) and/or W.Va. Code §31D-15-1501(d) have been met.

B. The Circuit Court Correctly Found That Monster Tree Service Was Effectively Served Under The Provisions Of W.Va. Code §31D-15-1510(e) And W. Va. Code §56-3-33(c).

There can be no legitimate dispute that the certified mail from the WVSOS containing the notification of service, Summons and Amended Complaint was delivered to Monster Tree Service's registered address by the United States Postal Service on April 26, 2019 as the United States Postal Service records confirm delivery. App. 103. Delivery by certified mail creates an especially strong presumption of effective service. Syl. pt. 4, *Dunn v. Watson*, 211 W.Va. 418, 566 S.E.2d 305 (2002); *see also*, syl. pt. 3, *State ex rel. Yahn Elec. Co. v. Baer*, 148 W.Va. 527, 135 S.E.2d 687 (1964) (presumption exists that person signing for receipt of registered mail had authority to do so). Evidence to overcome the presumption of service created by delivery by certified mail must be clear and convincing. *Federal Deposit Ins. Co. v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984). The sole evidence produced by Monster Tree Service, the Skolnick Affidavit, states simply:

> 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*.

App. 133 (emphasis added). Notably, the Skolnick Affidavit *does not deny actual receipt* of the certified mail, simply that the signature is not his nor anyone authorized to accept service of lawful process[22] and the *electronic signature* is otherwise not identifiable. App. 133-134. As this Court

[22] The reference to persons authorized to accept service of lawful process on behalf of Monster Tree Service is a red herring inserted to divert attention from the actual issue presented. Unlike in West Virginia, corporations in Pennsylvania are not required to disclose agents for service of process to the Pennsylvania

held in *Dunn*, the mere denial of receipt "is simply insufficient to rebut the presumption of receipt established" by the receipt signature and does not create a genuine issue of material fact. *Dunn*, 211 W.Va. at 422, 566 S.E.2d at 309.

Pursuant to W.Va. Code §56-3-33(c) and W.Va. Code §31D-15-1510(e), nonresidents or foreign corporations doing business in the State of West Virginia are deemed to have designated the WVSOS as their agent for service of process. Once the WVSOS accepts service on behalf of a nonresident or foreign corporation, the WVSOS is then required to provide notice to the nonresident or foreign corporation. West Virginia Code §56-3-33(c) requires the WVSOS to provide notice of service:

> by registered or certified mail, return receipt requested, by a means ***which may include electronic issuance and acceptance of electronic return receipts***, by the Secretary of State ***to the defendant at his or her nonresident address*** and the defendant's return receipt signed by himself or herself or his or her duly authorized agent[.]

W.Va. Code §56-3-33(c) (emphasis added). By contrast, W.Va. Code §31D-15-1510(e), requires the WVSOS to provide notice:

> by registered or certified mail, return receipt requested, by a means which may include electronic issuance and acceptance of electronic return receipts, to the corporation at the address of its principal office, which address shall be stated in the process or notice. The ***service or acceptance of process or notice is sufficient if the return receipt is signed by an agent or employee of the corporation***[.]

W.Va. Code §31D-15-1510(e) (emphasis added). West Virginia Code §31D-15-1510(e)'s omission of a duly authorized agent provision for unauthorized foreign corporations is an apparent recognition that by transacting business in the State of West Virginia when not authorized to do so allows a foreign corporation to avoid disclosing the identity of its duly authorized agent for service

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BOC and are not otherwise publicly available. *See*, App. 197-99, 209-10, 213-15. Thus, the identity of those authorized to accept lawful process is known only to the corporation itself and can change at any time or as benefits the corporation's purpose at the time.

of process purposes as the statute provides for service on a foreign corporation's registered agent where the foreign corporation is authorized to do business in West Virginia. *See* W.Va. Code §31D-15-1510(d). Monster Tree Service's failure to address the effectiveness of service under W.Va. Code §31D-15-1510(e) is telling inasmuch as it has presented ***no*** evidence that the electronic signature confirming receipt of the Summons and Complaint at Monster Tree Service's principal office was not of an agent or employee.

Not only was service effective under W.Va. Code §31D-15-1510(e), it was also effective under W.Va. Code §56-3-33(c) notwithstanding Monster Tree Service's arguments to the contrary. Monster Tree Service has not denied actually receiving the certified mail from the WVSOS and has only contested the authority of the person signing for receipt to accept service of process. Courts, including this Court, have addressed and rejected similar arguments before focusing instead on whether the defendant had notice of the action.

For example, in *Farm Family Mut. Ins. Co.*, this Court upheld an entry of default where the summons and complaint was delivered by registered mail to a nonresident defendant's place of business and was signed for by an employee. *Farm Family Mut. Ins. Co.*, 202 W.Va. at 71, 501 S.E.2d at 788. The mail apparently disappeared and was not acted upon by the nonresident defendant. *Id.* As in this case where Monster Tree Service's counsel acknowledged the action, a representative of the defendant contacted the plaintiff to make inquiries regarding the lawsuit. *Id.* at 72, 501 S.E.2d at 789. Thereafter, default judgment was entered without notice to the defendant as a result of the defendant's failure to file any responsive pleading. *Id.* On appeal, this Court upheld the default but remanded for an evidentiary hearing on damages. *Id.* at 75, 501 S.E.2d at 792.

The critical inquiry in determining sufficiency of process where there is an allegation that service was accepted by an alleged unauthorized person is whether the defendant had actual notice of the lawsuit and an opportunity to be heard. *Federal Deposit Ins. Co. v. Spartan Mining Co.*, 670 F.R.D. 677, 681 (S.D.W.Va. 1983), *aff'd, Federal Deposit Ins. Co. v. Schaffer*, 731 F.2d 1134 (4th Cir. 1984). On appeal, the United States Court of Appeals for the Fourth Circuit discussed the evidence necessary to overcome the presumption of effective service under W.Va. Code §56-3-33(c) where the summons and complaint are delivered to a defendant's correct address by certified mail. Therein, the Fourth Circuit rejected attempts by two defendants to avoid a finding of effective service under W.Va. Code §56-3-33(c) where certified mail was delivered and signed for at the correct address for each defendant. One defendant, whose counsel admitted to the court had notice of the lawsuit, acknowledged delivery by registered mail but disavowed the authority of the person signed to accept service and denied actual receipt. *Federal Deposit Ins. Co.*, 731 F.2d at 1137-38. As to the other defendant, the Fourth Circuit disregarded an affidavit that, like Mr. Skolnick's Affidavit, did not deny actual receipt of the mail or notice of the lawsuit but instead disavowed recognition of the signature if the person signing for the registered mail. *Id.* at1138. The Fourth Circuit upheld the default judgment entered against each defendant and, by so doing, likewise, found service to be effective and personal jurisdiction to exist. *Id.*

The significance of actual notice of a lawsuit in the face of a claim of ineffective service of process was also recently discussed by the North Dakota Supreme Court who relied on this Court's decision in *Dunn*, when rejecting an attempt like that advanced by Monster Tree Service herein to avoid a finding of effective service by disclaiming the authority of the signatory to accept certified mail containing a summons and complaint. The North Dakota court explained:

> Where, as here, the signator is not the 'Addressee,' it is reasonable to assume that the signator must be an 'Agent.' A contrary rule 'could result in much uncertainty and potentially allow great mischief.' *Dunn* [*v. Watson*, 211 W.Va. 418], 566 S.E.2d [305] at 308 [2002].

Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC, 883 N.W.2d 917, 925 (N.D. 2016). In upholding entry of a default judgment, the North Dakota court emphasized the significance of actual notice when faced with an attempt to set aside a default judgment based upon a claim of ineffective service of process recognizing that:

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

Monster Heavy Haulers, 833 N.W.2d at 925-926. Acknowledging the importance of actual notice in the context of attempts to set aside default judgments, agreed with and adopted the approach of other courts stating:

> Although [the defendant] is correct that the plaintiff generally has the burden to establish jurisdiction, *see Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir.1978), we believe the better rule in this context is that a defendant moving to vacate a default judgment based on improper service of process, where the defendant had actual notice of the original proceeding but delayed in bringing the motion until after entry of default judgment, bears the burden of proving that service did not occur.

Id. at 925, *quoting Securities and Exchange Comm'n v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007) (internal citations omitted).

The significance of actual notice of a lawsuit in determining the effectiveness of service and propriety of default is also demonstrated by comparing the difference between ineffective service which will set aside a default and the waiver of the defense of ineffective service of process by failing to file a Rule 12(b)(2) responsive pleading. W.Va.R.Civ.Pro. 12(h)(1); *State ex rel.*

Ford Motor Co., 237 W.Va. at 579, 598, 788 S.E.2d at 325, 344 (recognizing personal jurisdiction defense may be waived by failing to assert in initial pleading but rejecting argument that defendant had waived the defense by participating in discovery insomuch as jurisdictional defense was raised and preserved when action was removed to federal court prior to remand). In cases were default is upheld, the defaulting party had actual notice of the lawsuit but failed to timely respond. *See, e.g.*, *Realco Ltd. Liability Co.*, 218 W.Va. at 250, 624 S.E2d at 597 (2005); *Lee*, 208 W.Va. at 566, 569, 542 S.E.2d at 80, 82; *Farm Family Mut. Ins. Co.*, 202 W.Va. at 75, 501 S.E.2d at 792; *Federal Deposit Ins. Co.*, 670 F.R.D. at 681-83; *Federal Deposit Ins. Co.*, 731 F.2d at 1137. By contrast where default is set aside, the defaulting party did not have notice of the suit and, therefore, would not be able to respond with a Rule 12(b)(2) motion challenging the effectiveness of service prior to answering. *See, e.g.*, *Beane*, 226 W.Va. at 447-48, 451-52, 701 S.E.2d at 850-51, 854-55 (finding defendant was unaware of the litigation). Thus, where there is notice, an appearance for purposes of challenging jurisdiction and service pursuant to Rule 12(b) is required; where there is no notice, insufficiency of process and lack of jurisdiction are appropriately made in a Rule 55(c) motion.

The WVSOS accepted service on the Amended Complaint on behalf of Monster Tree Service on April 22, 2019 pursuant to its authority under W.Va. Code §56-3-33 and W.Va. Code §31D-15-1510. App. 43, 194. As a result, service was effective and personal jurisdiction was conferred over Monster Tree Service on April 22, 2019 once notification of service was delivered on April 26, 2019. Syl. pt. 3, *Leslie Equipment Co. v. Wood Resources Co., LLC,* 224 W.Va. 530, 687 S.E.2d 109 (2009) (acceptance by the WVSOS is the equivalent of personally serving Monster Tree Service within West Virginia); *Lozinski v. Lozinski*, 185 W.Va. 558, 563, 408 S.E.2d 310,

315 (1991). Monster Tree Service had actual notice of the lawsuit and was required to raise its jurisdictional and sufficiency of process defenses in a Rule 12(b) motion.

C. Monster Tree Service's contacts with West Virginia are more than sufficient to satisfy the minimum contacts requirements of *International Shoe Co. v. Washington*

Monster Tree Service purposefully availed itself of the benefits of doing business and expanding its business in West Virginia and assumed the duty to ensure operations performed by persons identifying themselves as affiliated with Monster Tree Service in West Virginia were performed in a safe manner, consistent with OSHA Work Safety Rules. Monster Tree Service's negligence in performing these duties directly resulted to David Duvall sustaining life-threatening and life-altering injuries in West Virginia. *See*, syl. pts. 5, 8-10, *SER Ford Motor Co.*, 237 W.Va. 573, 788 S.E.2d 319 (discussing constitutional consideration for establishing specific personal jurisdiction over a non-resident); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (specific jurisdiction asks whether the litigation results from alleged injuries that "arise out of or relate to" the nonresident defendant's activities in the forum).

Contrary to Petitioner's claim that Respondent's sole argument for contact with West Virginia is the www.whymonster.com website, Respondent produced evidence demonstrating Monster Tree Service's numerous contacts with West Virginia discussed above at length and which was omitted in its entirety from the instant Petition. Moreover, Petitioner likewise completely misconstrues Respondent's reliance on the representations in the www.whymonster.com website as utilizing the existence of the website itself to establish jurisdiction in West Virginia. Respondent's relied on the website to provide evidence of Monster Tree Service's representations regarding its involvement in franchisee operations, including in the State of West Virginia, where its Monster UOV franchise partner maintains its principal place of

business, and to provide evident of its solicitation of customers and employees on behalf of franchisees such as Monster UOV. The *Zippo* analysis to ascertain whether the whymonster.com website confers jurisdiction urged by Petitioner is not warranted in this case because, as demonstrated throughout, Monster Tree Service had specific contacts with West Virginia providing an independent and valid basis for personal jurisdiction. *Christian Science Bd. Of Directors of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 218 (4th Cir. 2001); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp.1119 (W.D. Pa. 1997).[23]

Consistent with *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), West Virginia courts may exercise general personal jurisdiction over a nonresident corporate defendant if the nonresident's affiliations with West Virginia are so substantial, continuous, and systematic that the nonresident is essentially home in West Virginia. *SER Ford Motor Co.*, 237 W.Va. at 586, 788 S.E.2d at 332. General jurisdiction applies where the cause of action is unrelated to and distinct from the nonresident's contacts in the forum. *Id.* at 582-83, 788 S.E.2d at 328-29. Specific jurisdiction, which is at issue herein, is where the cause of action arises out or relates to the nonresident's contacts with the forum. *Id.* at 583, 788 S.E.2d at 329. Due process requires only certain minimum contacts that "maintenance of the suit does not offend

[23] Petitioner's citation to *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), as supportive of its position is misplaced because in *ALS Scan*, the jurisdictional analysis was not directed at the owner of the website who placed the content at issue on the website, but rather the internet service provider which hosted the website. *ALS Scan, Inc.*, 293 F.3d at 708 ("The question presented in this appeal is whether a Georgia-based Internet Service Provider subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet, in violation of a Maryland corporation's copyrights."). Further, application of the *Zippo* sliding scale analysis to the facts of this case in light of the totality of evidence produced by Respondent and ignored by Monster Tree Service demonstrates that www.whymonster.com may be found to be an interactive site that solicits franchisees and customers in West Virginia, including providing interactive portions for those interested to provide information to and solicit additional information from Monster Tree Service. App. 173-76.

traditional notions of fair play and substantial justice." *Id.* at 584, 788 S.E.2d at 330, *quoting International Shoe Co.*, 326 U.S. at 316.

"[S]pecific jurisdiction asks whether the litigation results from alleged injuries that 'arise out of or relate to' the nonresident's activities in the forum. *Id.* at 596, 788 S.E.2d at 342; *Burger King Corp.*, 471 U.S. at 472, 105 S.Ct. at 2182. As demonstrated herein throughout, despite its blanket denials to the contrary, Monster Tree Service has purposefully availed itself of the privilege of doing business in the State of West Virginia by providing training, equipment and operational support to Monster UOV *in West Virginia* directly and/or through its substantially controlled affiliated company, Monster Franchise. As this Court recognized in *SER Bell Atlantic-West Virginia*, where related corporations operate as one entity, as Monster Tree Service and Monster Franchise do herein, their separate corporate structures will not prevent an exercise of jurisdiction over the nonresident. Syl. pt. 5, *SER Bell Atlantic-West Virginia*, 201 W.Va. 402, 497 S.E.2d 755. It is Monster Tree Service's negligence in training Monster UOV, including in West Virginia, in proper safety practices and safe tree-cutting methods and in providing the operational and/or equipment support to Monster UOV in West Virginia to ensure compliance with safety rules and standards that directly led to Respondent's injuries at issue herein, injuries which occurred in West Virginia.

Respondent is not seeking to hail Monster Tree Service into a West Virginia Court based upon an isolated, fortuitous or random act; rather Respondent seeks to hold Monster Tree Service responsible for its negligent conduct directed at its West Virginia franchise, Monster UOV, which negligent conduct caused injury to Respondent in West Virginia. *See*, syl. pt. 9, *SER Ford Motor Co.*, 237 W.Va. 573, 788 S.E.2d 319. West Virginia has an interest in making certain that where a nonresident corporation publicly assumes the duty to train a West Virginia business in safety

practices, comes into West Virginia to provide training and support and derives revenue from the operations of the West Virginia business, that nonresident can be held accountable in West Virginia courts where its negligence in performing its publicly assumed duties causes injury in West Virginia. *See*, syl. pt. 10, *SER Ford Motor Co.* 237 W.Va. 573, 788 S.E.2d 319. Personal, specific jurisdiction exists over Monster Tree Service that comports with federal due process requirements.

III. THE CIRCUIT COURT OF MARSHALL COUNTY DID NOT ABUSE ITS DISCRETION NOR CLEARLY ERR WHEN IT REFUSED TO SET ASIDE THE JUNE 5, 2019 ENTRY OF DEFAULT.

In *Hardwood Group v. LaRocco*, this Court held:

> When addressing a motion to set aside an entry of default, a trial court must determine whether "good cause" under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met. In analyzing "good cause" for purposes of motions to set aside a default, the trial court should consider: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; (4) the degree of intransigence on the part of the defaulting party; and (5) the reason for the defaulting party's failure to timely file an answer.

Syl. pt. 4, *Hardwood Group*. Any evidence of intransigence should be weighed heavily against a defaulting party. *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W.Va. 309, 316, 664 S.E.2d 531, 538 (2008) (*per curiam*); *Hardwood Group*, 219 W.Va. at 65, 631 S.E.2d at 623; *Hinerman v. Levin*, 172 W.Va. 777, 782, 310 S.E.2d 843, 849 (1983). Strong evidence of excusable neglect as to the reason for failing to respond is needed before it may become appropriate to grant relief from a default. *Hardwood Group*, 219 W.Va. at 65, 631 S.E.2d at 623; *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 471, 256 S.E.2d 758, 762 (1979). Herein, the primary thrust of Monster Tree Service's argument is that it was never properly served so it had not obligation to respond and, therefore, the circuit court erred in refusing to find good cause to set aside the default.

As demonstrated above, Monster Tree Service *was* properly served. As such, it had an obligation to respond and failed to do so.

Analysis of the *Hardwood Group* factors, demonstrates that circuit court did not abuse its discretion nor clearly err when found Monster Tree Service had not established good cause to set aside the default:

(1) Degree of Prejudice Monster Tree Service summarily dismisses the prejudice suffered by its failure to answer arguing that default was entered "a mere 35 days after purported service" and it filed its motion to set aside the default sixteen days after the order was entered.[24] Petition, p. 23. What Monster Tree Service omits is that it had actual notice of Respondent's intention to file suit since at least September 25, 2018, actual notice of the February 8, 2018 Complaint since at least April 4, 2019 and actual notice of the April 16, 2019 filing of the Amended Complaint from the time its counsel received the courtesy copy mailed to him on April 17, 2019. App. 179-80, 189-92. Had Respondent not informed Monster Tree Service's counsel of the Entry of Default on June 18, 2019, Monster Tree Service would likely have never responded based upon its previously articulated demand that Respondent simply dismiss the Complaint and refrain from further action. App. 189-90, 363-64.

By contrast, Respondent was left with no defendant having responded despite actual notice and proper service and no other way to proceed with his claims other than to pursue defaults and default judgments. Prejudice occurs where the failure to timely respond impairs the plaintiff's ability to prosecute claims. *Groves*, 222 W.Va. at 315-316, 664 S.E.2d at 537-538. Nearly a year delay has now occurred with not movement toward a resolution on the merits and Monster Tree

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[24] Again, Monster Tree Service is using faulty math as it did with respect to the filing of its motion by calculating from the mailed date as opposed to the filed date. The time between the WVSOS's acceptance of service on April 22, 2019 and the Entry of Default on June 5, 2019 is 44 days, not 35.

Service's goal to avoid a trial on the merits has been made clear by its refusal to acknowledge the evidence establishing personal jurisdictions and its unjustified disclaimer of service.

(2) Presence of material issues of fact and meritorious defenses: Monster Tree Service had, at all times material and relevant, actual notice of the Amended Complaint and an awareness of the jurisdiction defenses it sought to assert. Nevertheless, Monster Tree Service failed to appear and assert those defenses in a responsive pleading. As demonstrated above, it's jurisdictional and effectiveness of service defenses are not meritorious. To the extent Monster Tree Service may have factual defenses beyond its general denial of everything related to this litigation, it has not presented evidence of the same to date.

Monster Tree Service's attempt to rely on *Prima Marketing, LLC v. Hensley*, No. 14-0275, 2015 WL 869265 (W.Va. Feb. 27, 2015) (memorandum), for the proposition that this Court set aside a default due to the existence of meritorious defenses is taking the crux of *Prima Marketing* too far. The crux of *Prima Marketing* is that the circuit court's finding of significant intransigence was not supported by the record as it was apparent the defendant had attempted to change its registered address but the WVSOS had failed to appropriately record the same. *Prima Marketing*, 2015 WL 869265, *3. To the extent this Court agrees that service was proper and personal jurisdiction exists, Monster Tree Service's claimed meritorious defenses necessitating issuance of a writ of prohibition have been analyzed and found to be without merit.

(3) Significance of Interests at Stake: Significant interests are at stake as Mr. Duvall's medical bills alone approach $1 Million and he sustained permanent physical and emotional injuries in the November 17, 2017 accident. Respondent was off work two years due to the severity of his injuries.

(4) Degree of Intransigence of the Defaulting Party: Monster Tree Service's intransigence was substantial and severe. Monster Tree Service had actual notice of both the February 8, 2019 Complaint and the April 16, 2019 Amended Complaint yet chose, with the apparent advice of counsel, to ignore the same. App. 189-96, 200-02. Instead of responding and asserting any defenses it may have had, Monster Tree Service threatened to seek sanctions if Plaintiff did not cede to its demand to dismiss it from the suit. App. 189-90. Actual notice and a failure to respond and preserve defenses constitutes complete disregard of an action and significant intransigence. *Groves*, 222 W.Va. at 316-317, 664 S.E.2d at 538-539; *Realco Ltd. Liability Co.*, 218 W.Va. at 250, 624 S.E2d at 597; *Lee*, 208 W.Va. at 568, 542 S.E.2d at 82. Monster Tree Service has never denied actual receipt of the April 26, 2019 certified mail. As discussed herein throughout, service was effective. As in *Lee*, to the extent Monster Tree Service is attempting to argue it did not understand the significance of the April 26, 2019 certified mail, such argument is unpersuasive. *Lee*, 208 W.Va. at 568, 542 S.E.2d at 82.

(5) The reason for the failure to respond/excusable neglect: Monster's sole "excuse" for failing to respond is its on-going contention that service had not been effective and West Virginia courts do not have jurisdiction over it. These arguments have been addressed and refuted herein. To the extent it would seek to raise advice of counsel to justify this conduct, this Court has held that reliance on advice of counsel will not serve as an excuse for failure to respond which would justify the setting aside of a default judgment. *White v. Berryman*, 187 W.Va. 323, 332, 418 S.E.2d 917, 926 (1992).

A demonstration of good cause is a necessary predicate for seeking relief from an entry of default or a default judgment. *Hinerman*, 172 W.Va. at 782, 310 S.E.2d at 848. This Court has recently upheld a refusal to set aside a default judgment due to the failure to establish good cause

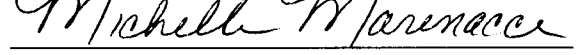
where, as here, the defendant was served in accordance with applicable law, had notice of the litigation yet failed to timely respond. *Chamblee v. State*, No. 18-0310, 2019 WL 2246091 (W.Va. May 24, 2019) (memorandum decision).

The circuit court appropriately applied the *Hardwood Group* factors and found that good cause did not exist to set aside the June 5, 2019 Entry of Default. App. 384-87; syl. pt. 4, *Hardwood Group*, 219 W.Va. 56, 631 S.E.2d 614. As the circuit court's exercise of its discretion does not constitute a clear error of law, the Petition should be denied.

CONCLUSION

Monster Tree Service ignored that of which it was well aware in its attempt to avoid the jurisdiction of West Virginia courts to answer for its own actions in causing injury to Respondent. The circuit court did not clearly err when finding personal jurisdiction and effective service. Likewise, the circuit court did not abuse its discretion when upheld the June 5, 2019 Entry of Default. As such, Monster Tree Service has failed to meet the high standard required for issuance of a Writ of Prohibition and its Petition should be denied in its entirety.

Respectfully submitted,



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