IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0332

RESOURCES LIMITED, LLC,
Defendant Below, Petitioner,

v.

NEW TRINITY COAL, INC.,
Plaintiff Below, Respondent

Honorable Paul M. Blake, Jr.
Circuit Court of Fayette County
Civil Action No.: 21-C-12

PETITIONER'S BRIEF

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II. ASSIGNMENT OF ERROR

Whether the circuit court abused its discretion by finding that Petitioner failed to demonstrate excusable neglect under the standards applicable to Rule 60(b) of the West Virginia Rules of Civil Procedure.

III. STATEMENT OF THE CASE

On or around November 2017, Petitioner agreed to mine coal as a contract miner for Respondent in Fayette County, West Virginia. Petitioner began mining and continued mining until on or about June 2019.

On February 12, 2021, Respondent filed the cause of action underlying this appeal alleging one count each of breach of contract and unjust enrichment arising from the contract mining agreement. The Complaint generally alleged that Petitioner was overpaid by Respondent in the amount of $1,271,216.29 and that Respondent had perfected a lien on certain of Petitioner's mining equipment to protect a sum of monies which Respondent had allegedly advanced to Petitioner in order to capitalize the work contemplated by the contract mining agreement.

The Civil Case Information Statement (hereinafter "CCIS") which was appended to the Complaint stated that service upon Petitioner had or would be effectuated by and through the West Virginia Secretary of State and that Petitioner had thirty days from the date of such service to file its answer. *See* JA001. The Summons which was appended to the Complaint stated that Petitioner was required to serve its answer within thirty days after service thereof, exclusive of the date of service. *See* JA003. Petitioner was served with the Complaint by the Secretary of State on February 22, 2021. *See* JA041. Pursuant to the CCIS, which was executed by Respondent's counsel, the Summons, which was executed by the circuit court, and the *West Virginia Rules of Civil Procedure* describing service by and through the Secretary of State, Petitioner was required to file its answer by March 24, 2021. On March 24, 2021, under the mistaken belief that the *West Virginia Rules of*

Civil Procedure permitted parties to file responsive pleadings by sending the same via certified mail on the day that filing of the responsive pleading was due, Petitioner "filed" its Answer by certified mail. On March 26, 2021, the circuit court received Petitioner's "Answer and Affirmative Defenses" via certified mail and marked it "filed."[1] *See* JA079.

On March 23, 2021, the day before Petitioner's answer was due, Respondent filed a Motion for Default Judgment. Therein, Respondent alleged that Petitioner's president, David Huffman, was served by certified mail on February 17, 2021. Thus, according to Respondent, Petitioner's answer was due on March 9, 2021. In support thereof, Respondent attached a domestic return receipt dated February 19, 2021 bearing what Respondent purports to be David Huffman's signature. *See* JA040. The signature, however, is not Mr. Huffman's, who explicitly denies having received or signed for the package. Rather, on information and belief, the signature belonged to the United States Postal Service employee who purportedly delivered the document pursuant to Covid-19 related guidance allowing for such employees to substitute the recipient's signature with their own. *See* USPS, *Coronavirus Updates for Business Customers*, United States Postal Service (July 20, 2021), https://faq.usps.com/s/article/USPS-Coronavirus-Updates-for-Business-Customers.[2]

On March 24, 2021, *the day Petitioner's responsive pleading was due*, the circuit court entered an Order granting default judgment against Petitioner and ordering "that the Clerk shall enter an order awarding Plaintiff the sum certain set forth [$1,271,216.29] in its Complaint, and

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[1] Petitioner acknowledges that its oversight resulted in its Answer being filed two days late under the *West Virginia Rules of Civil Procedure*. As further developed below, however, Plaintiff was not in any way prejudiced by this oversight.

[2] Petitioner also questions whether the purported service via certified mail was proper, as it questions whether the certified mail was transmitted by the Circuit Clerk together with a summons as required under WV Rule of Civil Procedure 4(c)(3)(B). Since the Petitioner never received the Complaint purportedly mailed to its President, Petitioner does not have a copy of exactly what was purportedly mailed to its President on or about February 17, 2021.

the Court further directs the Sheriff to seize the Defendant's mining equipment in which Plaintiff has a secured financial interest." *See* JA056–57. Contemporaneously, the circuit court entered an Order directing that "Plaintiff be given immediate possession of the secured collateral referenced in the Complaint and attached hereto." *See* JA054–55.

On March 26, 2021, Petitioner filed its Motion to Set Aside Default Judgment pursuant to Rule 60 of the *West Virginia Rules of Civil Procedure*. Therein, Petitioner explained the above circumstances and set forth various legal arguments in support of setting the default judgment aside. *See* JA061–65. Petitioner further explained his mistaken belief that mailing of its Answer on March 24 constituted "filing" of the Answer and that Petitioner's President "swears he never signed for any certified mail associated with this case." JA061–62. On March 30, 2021, the circuit court held a hearing on Petitioner's Motion. Therein, Respondent again argued that Mr. Huffman or an employee acting on his behalf accepted service of the Complaint on February 19, 2021. *See* JA142:21–143:1. Further, Respondent set forth arguments outlining the prejudice which it allegedly had incurred and would continue to incur if Petitioner's Motion were granted—namely, that Petitioner's ongoing use and control of the mining equipment upon which Respondent alleged to have a security interest would cause that equipment to depreciate in value. *See* JA143:10–17.

On March 30, 2021, the circuit court entered its Order Denying Petitioner's Motion to Set Aside Default Judgment. *See* JA087–090. In support thereof, the circuit court found that Petitioner's contention that Mr. Huffman did not sign the certified mail return receipt was "meritless, as he is the President of the company, *so regardless of whether or not he signs for the certified mail*, his name is being signed to the green card thus holding him fully responsible on behalf of the company." JA088. (emphasis added). Further, the Court held

> that Plaintiff has suffered an extreme prejudice by Defendant's actions and/or inactions in this matter. In support of this conclusion, the Court notes that Plaintiff

> has a secured interest in the equipment owned (and still operated) by Defendant. Every day that Defendant is permitted to continue operating this equipment, and profiting from this work, Plaintiff is prejudiced. Every day that this equipment is used, the value of said equipment diminishes. Plaintiff has been owed substantial sums of money for almost two years now, and Defendant continues to operate its business to Plaintiff's detriment.

JA089.

On April 14, 2021, Respondent filed an Emergency Motion to Enforce Compliance with Order Denying Defendant's Motion to Set Aside Default Judgment. *See* JA099. Therein, Respondent broadly alleged that the parties had failed to agree on a repayment plan, that Petitioner had failed to provide proof of the location of where the mining equipment on which Respondent alleged to have a security interest was being stored, and that Petitioner had failed to provide proof that any such equipment had been idled. In the April 16, 2021, hearing thereon, Petitioner argued that the parties were making a good faith effort to negotiate payment pursuant to the Court's order, that it had not yet determined precisely where each of the pieces of equipment were being stored but that such locations would be provided in three days' time, that it did not believe that the equipment was in use at the time at which default judgment was ordered, and that, accordingly, there was nothing to "idle." *See* JA154:18–155:19. Nevertheless, the Court granted Respondent's Emergency Motion, reasoning thus:

> Well, it sounds like you're—well for all the Court knows and the parties know, I mean, the coal company is just rawhiding this equipment to a fare the well all the time that this matter is before the Court.
> We don't know where it's at. We don't know what it's being used for. Don't know what the hours are.
> And of course that's always the danger in something like this. I mean, you pick up the newspaper—our Governor is in a situation where he has numerous coal interests and this appears to be a pattern with a lot of coal companies owing monies to equipment suppliers, or whatever—just put it off, put it off, put it off, wear the equipment out then when it's a piece of junk—well, then just walk free from it.
> . . .
> But here again, [Respondent], you know, has to look at the facts of life, all right. And, as I say using these examples, I've seen in the newspapers from the accounts

of Bluestone Resources and Southern Coal and some of those things, I mean, it's just a disturbing pattern.

JA156:6–157:10.

On April 19, 2021, Petitioner filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code and filed its Suggestion of Bankruptcy with the circuit court, thus staying enforcement of the proceedings below pursuant to 11 U.S.C § 362.

IV. SUMMARY OF ARGUMENT

The circuit court below abused its discretion in denying Petitioner's Motion to Set Aside Default Judgment because it failed to consider all of the factors which this Court has admonished trial courts to consider when ruling on a motion filed under Rule 60(b) of the *West Virginia Rules of Civil Procedure*, inappropriately weighed the factors it did consider, and considered improper factors when reaching its conclusion. Thus, the circuit court committed reversible error in denying Petitioner's Motion to Set Aside Default Judgment, and its decision to that effect should be reversed.

V. ARGUMENT

A. Legal Standard

This Court has long recognized "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." *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 471, 256 S.E.2d 758, 762 (1979)); *see* Syl. pt. 2, *Parsons v. McCoy*, 157 W.Va. 183, 202 S.E.2d 632 (1973) ("The Rules of Civil Procedure pertaining to the setting aside of default judgments should be liberally construed in order to provide the relief from onerous consequences of default judgments."). In keeping with this Court's policy disfavoring default judgments, a

motion to set aside an order granting default judgment may be granted upon a showing of good cause. *See Jackson Gen. Hosp. v. Davis*, 195 W. Va. 74, 76, 464 S.E.2d 593, 595 (1996).

"[I]n addressing a motion to set aside a default judgment, 'good cause' requires not only considering the factors set out in . . . *Parsons v. Consolidated Gas Supply Corp.*, but also requires a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied." *Hardwood Group v. Larocco*, 219 W. Va. 56, 63, 631 S.E.2d 614, 621 (2006) (citing *Parsons*, 163 W.Va. at 471, 256 S.E.2d at 762.). In other words, "the *Parsons* factors and excusable neglect, or any other relevant factor under Rule 60(b), constitute 'good cause' for setting aside a default judgment." *Hardwood*, 219 W. Va. at 63, 631 S.E.2d at 621.

In *Parsons*, this Court held that

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

Parsons, Syl. Pt. 3, 163 W. Va., 256 S.E.2d.

Rule 60(b) of the *West Virginia Rules of Civil Procedure* sets forth six individually enumerated grounds to set aside a default judgment:

> [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

W. Va. R. Civ. P. 60(b).

B. Standard of review

"With respect to a motion to vacate a default judgment, we review the circuit court's decision under an abuse of discretion standard, **but with a presumption in favor of the adjudication of cases upon their merits.**" *State ex rel. United Mine Workers of America, Local Union 1938 v. Waters*, 200 W. Va. 289, 296, 489 S.E.2d 266, 273 (1997) (emphasis added) (citing *Evans v. Holt*, 193 W.Va. 578, 457 S.E.2d 515 (1995)). "If any doubt exists as to whether relief should be granted, **such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits.**" *Waters*, 200 W. Va. at 298, 489 S.E.2d at 275 (emphasis added) (citing *Parsons*, 157 W.Va. at 191, 202 S.E.2d at 637).

"In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are addressed but the circuit court makes a serious mistake in weighing them." *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257, 274 (2020). Thus, it was an abuse of discretion if the circuit court ignored any of the *Parsons* factors, made a serious mistake in weighing them, or relied on improper factors (*i.e.* those which were not identified in *Parsons*).

C. The circuit court erred in denying Petitioner's Motion to Set Aside Default Judgment because it incorrectly applied the *Parsons* factors and failed to appropriately consider whether Petitioner's conduct was excusable.

Here, the circuit court abused its discretion by failing to fairly apply all of the *Parsons* factors to the facts of this case, by committing serious error in weighing them, and by considering improper factors outside of the *Parsons* analysis. Further, the circuit court failed to address Petitioner's arguments in favor of finding excusable neglect under Rule 60(b) of the *West Virginia Rules of Civil Procedure*. Thus, the circuit court committed reversible error, and its order denying Petitioner's Motion to Set Aside Default Judgment should be reversed.

(1) **The court below abused its discretion in finding that Respondent was prejudiced because it misinterpreted the first *Parsons* factor as allowing prejudice to result from Respondent being compelled to litigate its claims.**

"In determining whether a default judgment should be . . . vacated upon a Rule 60(b) motion, the trial court should consider: (1) The degree of prejudice suffered by the plaintiff from the delay in answering; . . . ." *Parsons*, Syl. Pt. 3, 163 W. Va., 256 S.E.2d (in part).

"The initial inquiry under *Parsons* requires a determination of the degree of prejudice to the non-defaulting party if the default judgment is vacated." *Groves v. Roy G. Hildreth & Son, Inc.*, 222 W. VA. 309, 315, S.E.2d 531, 537 (2008) ("[P]rejudice occurs when circumstances have changed since the entry of the default judgment which impairs the plaintiff's ability to prosecute its claim."). The analysis requires courts to look not at the degree of prejudice to which a plaintiff would be exposed if it were forced to litigate its claim, but to the degree of prejudice from which it suffered as a direct result of the defendant's default. *See id.* at 315–16, 537–38 ("[T]he fact that the plaintiff would have to try the case on the merits if relief is granted is not the kind of prejudice that should preclude relief."). Further,

> The fact that a party may be required to undergo the expense of preparing and conducting a trial on the merits is an insufficient basis for denying relief from default. Furthermore, we believe the authority granted West Virginia trial courts under Rule 60(b) when granting relief from a default judgment to impose "... such terms as are just ..." provides courts with the power to minimize the effect upon the non-defaulting party when ordering relief from default judgments. We find these principles consistent with our jurisprudence and applicable to the instant case.

Id. at 316, 538.

Under procedural facts similar to those present here, the *Groves* Court applied *Parsons* and *Hardwood* and reversed a circuit court's order denying the Petitioner's motion to set aside default judgment. In determining the degree of prejudice suffered by the plaintiff below, the Court looked specifically to events which had unfolded subsequent to the grant of default judgment and found

"nothing in the record to indicate that circumstances have changed since the entry of the default judgment which would impair the plaintiff's ability to prosecute its claim on the merits." *Id.* Thus, the Court held that there was "nothing to indicate that the Groves would be prejudiced by vacation of the default judgment" because "no such prejudice exists." *Id.* at 316, 538.

As an initial matter, Respondent has at no point in this litigation contended that it was prejudiced by the Petitioner's two-day delay in responding to the Complaint caused by Petitioner's misunderstanding of the deadline for filing a responsive pleading. Rather, Respondent's arguments against and the Court's Order denying Petitioner's Motion to Set Aside Default Judgment rely exclusively on the extent to which Respondent would be prejudiced if it were forced to litigate its claims. In its analysis, the court below accepted as true what was only alleged in the Complaint: that "Plaintiff has a secured interest in the equipment owned (and still being operated) by Defendant." JA089. In its Answer, Petitioner specifically denied that any such valid security interest exists. *See* JA079 ¶6. Nor has Respondent presented any evidence in support of its claim aside from an unsigned financing statement which Respondent filed on its own behalf. *See* JA036. Prior to entry of the default judgment, Respondent adduced no evidence whatsoever that Petitioner ever agreed to provide its equipment as collateral for any loan, nor has Respondent established that Petitioner owns the equipment it purports to have an interest in at all. Rather, Respondent has proffered an unsigned financing statement and a list of equipment worth a purported $2,535,000.[3]

[3] A financing statement alone—the purpose of which is only to provide notice that a creditor may, or may not, have a security interest in the listed property—cannot double as a security agreement. *E.g., Mid–Eastern Electronics, Inc. v. First Nat'l Bank*, 380 F.2d 355, 356 (4th Cir. 1967) (stating that a financing statement is only notice that a security interest is claimed with the acquiescence of the debtor); *Bank of America N.A.* v. *Outboard Marine Corp., et al.* (*In re Outboard Marine Corp.*), 300 B.R. 308, 322 (Bankr. N.D. Ill. 2003) (citing cases that hold a financing statement, by itself, cannot double as a security agreement); *Gibson County Farm Bureau Coop. Ass'n v. Greer*, 643 N.E.2d 313, 320 (Ind. 1994) ("[W]e are not willing to go so far as to hold that a standard-form UCC–1 financing statement alone is, as a matter of law, sufficient evidence that the parties intended to create a security interest . . . .").

Such "evidence" is plainly insufficient to establish that Respondent would be prejudiced by vacation of the default judgment because it wholly fails to establish that Respondent has any security interest in the equipment at all.

Indeed, the circuit court's having inappropriately applied the first *Parsons* factor serves only to highlight the peril of its holding in light of this Court's consistent guidance disfavoring default judgment as a remedy. The "prejudice" upon which the circuit court relied consisted exclusively of damages which Respondent would hypothetically suffer if Petitioner were permitted to defend the claims against it on the merits. In sum, Respondent would have suffered no prejudice if the circuit court had granted Petitioner's Motion to Set Aside Default Judgment because it would not have been at all prejudiced in its ability to prosecute its claim on the merits. The same remains true today, and the order below should accordingly be reversed.

(2) **The court below abused its discretion by summarily ignoring the second *Parsons* factor and by accepting as true Respondent's unsupported contentions of fact despite Petitioner's contentions to the contrary.**

"In determining whether a default judgment should be . . . vacated upon a Rule 60(b) motion, the trial court should consider: . . . (2) the presence of material issues of fact and meritorious defenses; . . ." *Parsons*, Syl. Pt. 3, 163 W. Va., 256 S.E.2d (finding material issues of fact and meritorious defenses based solely on the defendant's assertions thereof in its untimely filed answer). For purposes of determining whether there are material issues of fact and/or meritorious defenses counseling in favor of granting a Rule 60(b) motion, this Court "need only determine whether 'there is reason to believe that a result different from the one obtained would have followed from a full trial." *Hinerman v. Levin*, 172 W. Va. 777, 783–84, S.E.2d 843, 850 (1983).

Here, Petitioner filed an answer denying nearly all of Respondent's substantive claims. Therein, Petitioner specifically asserted ten affirmative defenses, none of which have been litigated on the merits. Petitioner's Motion to Set Aside Default Judgment set forth numerous factual issues which very plainly remain subject to dispute. *See* JA 062–63. Moreover, as referenced above, Respondent has adduced no material evidence in support of its claim that it has a perfected lien on Petitioner's equipment. Rather than afford appropriate weight to this important factor, the circuit court summarily dismissed the whole of Petitioner's contentions in two swift sentences buried deep in the hearing transcript: "The Court also, based upon all the pleadings in this matter—it appears that there are really no material issues of fact or meritorious defenses. This appears to be a stalling tactic on behalf of this Defendant." JA062–63. The Order denying Petitioner's Motion to Set Aside Default Judgment does not discuss this factor at all.

The record makes clear that the circuit court committed reversible error by summarily dismissing Petitioner's factual contentions at all points during the proceedings below. Such a ruling by the circuit court serves only to highlight the importance of this Court's long-held policy strongly disfavoring default judgment as a remedy. Accordingly, this Court should reverse the circuit court's decision below.

(3) **The court below abused its discretion by attributing "the significant interests at stake" in the proceedings below as weighing exclusively on the prejudice which Respondent alleged it would hypothetically suffer were it forced to litigate its claims.**

"In determining whether a default judgment should be entered in the face of a Rule 60(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: . . . (3) the significance of the interests at stake; . . ." *Parsons*, Syl. Pt. 3, 163 W. Va., 256 S.E.2d.

In *Groves*, this Court held that a default judgment in the amount of $704,000.00 was significant enough to satisfy the third *Parsons* factor. *See Groves*, 222 W. Va. at 316, 664 S.E.2d

at 538. In *Hinerman*, this Court held that a default judgment for $12,088.54 was a "substantial sum" weighing in favor of vacation. *Hinerman*, 172 W. Va. at 784, 210 S.E.2d 843, 850. In *Parsons* itself, $35,000 was "not an insignificant claim." *Parsons* 163 W. Va. at 473, S.E.2d at 763. And indeed in this case, the court acknowledged that the over $1.2 million in alleged damages "are significant interests." JA093. However, rather than consider the significant interests at stake in this case as a factor in favor of granting Petitioner's Motion to Set Aside Default Judgment, as *Parsons* requires, the court again reverted to its prejudice analysis and attributed the significance of the interests in this matter as weighing solely in Respondent's benefit. And again, in this case, the circuit court freely accepted Respondent's version of the facts and summarily dismissed Petitioner's sworn contentions to the contrary. As further referenced above, Respondent would not have been prejudiced in the slightest if the court below granted Petitioner's Motion to Set Aside Default Judgment.

This Court has made it abundantly clear that where the interests at stake are significant, the third *Parsons* factor has been satisfied. Nevertheless, the court below gave short shrift to what Petitioner stood to lose in the proceedings below and simply treated the third *Parsons* factor as an element of the first: "And there is significant interest in this matter—large amount of money that is owed by the Defendant for this particular equipment that the Plaintiff has an interest in . . . ." JA145. The Order denying Petitioner's Motion to Set Aside Default Judgment does not address the third *Parsons* factor at all because the Court erroneously failed to consider it. Accordingly, the circuit court committed an abuse of discretion, and its Order Denying Petitioner's Motion to Set Aside Default Judgment should be reversed.

(4) **The court below abused its discretion by finding that Petitioner was intransigent because it erroneously relied on conduct which Petitioner had allegedly engaged in prior to the initiation of the proceedings below.**

"In determining whether a default judgment should be entered in the face of a Rule 6(b) motion or vacated upon a Rule 60(b) motion, the trial court should consider: . . . (4) the degree of intransigence on the part of the defaulting party." *Parsons*, Syl. Pt. 3, 163 W. Va., 256 S.E.2d. This analysis requires courts to look not to a party's alleged intransigence leading up to the initiation of a lawsuit but to the degree of intransigence in responding thereto. *See Groves*, 222 W. Va. at 316 ("Under *Parsons* fourth factor, we examine the degree of intransigence by [the defaulting party] *in failing to respond to the complaint*.") (emphasis added).

Here, Respondent's arguments in favor of finding intransigence on the part of Petitioner focused exclusively on Petitioner's alleged intransigence leading up to the filing of the proceedings below. Respondent's arguments were wholly beside the point, however, because at no point prior to the initiation of the proceedings below was Petitioner required to communicate with Respondent. Courts determining whether to grant a Rule 60(b) motion should not consider any alleged intransigence leading up to the initiation of a lawsuit because those events have absolutely nothing to do with the lawsuit itself. Of course, any alleged intransigence leading up to the initiation of this suit may have provided a basis for Respondent's initiation of the proceedings to begin with, but any such intransigence is wholly irrelevant to *Parsons*, which requires courts to look at the degree of intransigence in responding to the complaint.

Furthermore, it appears that the Court below abused its discretion by inexplicably considering the intransigence of non-parties in its decision-making process: namely, Governor Jim Justice and his business entities. In this regard, at the April 16, 2021, hearing regarding the Respondent's motion to enforce the default judgment, the circuit court commented as follows:

> We don't know where [the equipment at issue is] at. We don't know what it's being used for. Don't know what the hours are.
> And of course that's always the danger in something like this. I mean, you pick up the newspaper—our Governor is in a situation where he has numerous coal interests

> and this appears to be a pattern with a lot of coal companies owing monies to equipment suppliers, or whatever—just put it off, put it off, put it off, wear the equipment out then when it's a piece of junk—well, then just walk free from it.
> . . .
> But here again, [Respondent], you know, has to look at the facts of life, all right. And, as I say using these examples, I've seen in the newspapers from the accounts of Bluestone Resources and Southern Coal and some of those things, I mean, it's just a disturbing pattern.

JA156:6–157:10.

Here, Petitioner was clearly not intransigent because it at no point attempted to avoid service of the Complaint or the jurisdiction of the circuit court. Rather, Petitioner made a reasonable mistake in believing that it was timely filing a responsive pleading. Respondent clearly was not prejudiced by the two-day delay in responding to the Complaint caused by Petitioner's misunderstanding of the deadline for filing responsive pleadings. Nor did Respondent at any stage in the proceedings below allege that it suffered prejudice as a result of Petitioner's filing a late Answer at all. Rather, the whole of Respondent's contentions respecting Petitioner's alleged intransigence arise, like the rest of Respondent's arguments, from prejudice which it would suffer if it were forced to litigate its claims on the merits.

Petitioner responded to the Complaint precisely when Respondent expected it to when it filed the same. *See* JA001–02 (CCIS executed by Respondent's counsel providing Petitioner with thirty days to respond). Petitioner filed an Answer that appeared timely pursuant to timeframes set forth on the Respondent's Civil Case Information Sheet, which stated that service would occur by Secretary of State and that an Answer was required within thirty days. On the same day Petitioner filed its Answer, Petitioner was apprised that the Fayette County Circuit Court had entered a default judgment against Petitioner based upon Respondent's argument that service had occurred five days earlier than the service date reflected on the West Virginia Secretary of State Service of Process website. *See* JA070–71. Within two days, Petitioner filed a Motion to Set Aside Default

Judgment. Five days later, the circuit court held a hearing on Petitioner's Motion to Set Aside Default Judgment, at which Petitioner's counsel entered his appearance and participated in the hearing. From the date of the entry of default judgment to the date the Order denying the same was entered, seven days had elapsed.

Save for Petitioner's mistake which resulted in a *two-day delay* in filing its Answer, Petitioner has been wholly responsive at all stages in the proceedings below. Notably, in *Parsons*, this Court found that "the period of delay in answering was approximately one and one-half months, which we do not consider extraordinary, and plaintiff does not point to any factor of prejudice by reason of the delay." 163 W.Va. at 763, 256 S.E.2d at 473. Accordingly, Petitioner has not been intransigent under the meaning of *Parsons*, and the court below abused its discretion in holding that it was. Thus, the Order below should be reversed.

(5) **The circuit court erred in finding that Defendant did not have grounds for relief under Rule 60(b) of the *West Virginia Rules of Civil Procedure*.**

"Service [by certified mail] shall not be the basis for the entry of a default judgment or a judgment by default unless the record contains a return receipt showing acceptance *by the defendant* on a return envelope showing refusal of the registered or certified mail by the defendant." W. Va. R. Civ. P. 4(d)(1)(E) (emphasis added). "Obviously, the stronger the excusable neglect or good cause shown, the more appropriate it is to give relief against the default judgment." *Parsons*, 163 W. Va. at 471, 256 S.E.2d at 761.

In *Parsons*, the defendant failed to timely file an answer to the plaintiff's complaint because the defendant's counsel was under the wrongful impression that he had reached an agreement with the plaintiff's counsel allowing for an extension of the filing deadline. *See Parsons*, 163 W. Va. at 759, 256 S.E.2d at 466. In finding the presence of excusable neglect, the Court held that "the period of delay in answering was approximately one and one-half months, which we do not consider

extraordinary, and plaintiff does not point to any factor of prejudice by reason of the delay." *Id* at 763, 473.

In the present case, at best, the default judgment arose from Petitioner having filed its Answer two days late based on its misunderstanding that the *West Virginia Rules of Civil Procedure* permitted parties to file responsive pleadings by sending the same via certified mail on the day that filing was due. At worst, the default judgment arose from Petitioner having filed its Answer fifteen days late as a result of Respondent having purportedly served Petitioner via certified mail despite Petitioner's reasonable belief that it would be served by and through the Secretary of State and that a response thereto would be due thirty days following the service thereof (the day on which Petitioner mailed its responsive pleading to the Circuit Clerk via certified mail). Under either circumstance, the delay resulting from Petitioner's failure to timely answer was much less significant than the month and a half that the *Parsons* court found excusable, and Petitioner's conduct below clearly fits within the categories of mistake, excusable neglect, and/or inadvertence warranting relief from default judgment under W. Va. R. Civ. P. 60(b)(1).

The court below simply did not bother to address Petitioner's argument that the Summons with which it was served—ostensibly on both February 17, 2021 and February 22, 2021—clearly indicated that a response was not due until thirty days after Petitioner was served by the Secretary of State. *See* JA003 (summons indicating a 30-day deadline to file an answer); JA063–65 (Petitioner's arguments in favor of finding excusable neglect); *see also* W. Va. R. Civ. P. 4(a) ("The summons shall . . . state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint."). Nor did the court below bother to address the fact that the CCIS, which was drafted and executed by Respondent's counsel, clearly stated that Petitioner

had or would be served by and through the Secretary of State and that a response thereto would be due thirty days thereafter. *See* JA 001–02.

Despite Petitioner's having fully pleaded inadvertence, mistake and excusable neglect in the proceedings below, the circuit court gave short shrift to Petitioner's arguments and based its decision to deny Petitioner's Motion to Set Aside Default Judgment exclusively on an improper understanding of the first *Parsons* factor. Accordingly, there is very little discussion in the record reflecting the court's decision-making with respect to whether any mistake, inadvertence, or excusable neglect on Petitioner's part counseled in favor of granting Petitioner's Motion. Rather, the circuit court appeared to assume that because Petitioner's President had signed for service by certified mail, the Complaint was served on February 17, 2021, and a response thereto was due on March 9, 2021.

Although the return receipt upon which Respondent relies contains a notation that says "D. Huffman", the notation is not Petitioner's President signature, and he specifically denies ever having received the Complaint via certified mail.[4] *See* JA062. Nor is there any indication that any of Mr. Huffman's employees signed for the Complaint. Taken together, the receipt does not "show[] acceptance by the defendant" because it does not appear to have been accepted—or for that matter, rejected—by Petitioner at all. Even if Petitioner had received the Complaint via certified mail, which it did not, the same was not provided to Petitioner's counsel, who thus had no choice but to rely on the Summons and Complaint with which Petitioner had been served through the Secretary of State. Although Petitioner's counsel might reasonably be expected to

[4] It seems likely that the "signature" belonged to the United States Postal Service employee who purportedly delivered the document pursuant to Covid-19 related guidance in existence at the time allowing for such employees to substitute the recipient's signature with their own. *See* USPS, *Coronavirus Updates for Business Customers*, United States Postal Service (July 20, 2021), https://faq.usps.com/s/article/USPS-Coronavirus-Updates-for-Business-Customers

understand that pleadings filed by certified mail are due in a shorter timeframe than those received by a statutory agent of process, Petitioner is not an attorney and could not be expected to understand the significance of the purported separate service via certified mail.

No matter when Petitioner was served with the Complaint, the delay which resulted from any inadvertence, mistake, or excusable neglect on Petitioner's part was *de minimis* when compared with that which was considered excusable in *Parsons*. Because the court below did not appropriately weigh whether Petitioner's conduct was excusable, the court abused its discretion in denying Petitioner's Motion to Set Aside Default Judgment. Accordingly, its order to that effect should be reversed.

VI. CONCLUSION

Pursuant to the facts and law discussed above, the *Parsons* factors and the excusable neglect, mistake, and/or inadvertence on the Petitioner's part under Rule 60(b)(1) constitute "good cause" for setting aside the default judgment. The conduct of the Petitioner in the circuit court case below was clearly not intransigent, and the 2-day delay in the filing of a responsive pleading under the circumstances of this case clearly warrants relief from the default judgment. Finally, this Court has clearly and repeatedly held 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. Accordingly the Court below abused its discretion, and its granting of default judgment should be reversed.

VII. PRAYER FOR RELIEF

For the foregoing reasons, Petitioner is entitled to relief and prays that this Court enter an order reversing the ruling of the circuit court and remanding this case for further proceedings consistent with the Court's ruling.

Respectfully submitted,
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By counsel,

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IN THE SUPREME COURT OF WEST VIRGINIA

Resources Limited, LLC,
Petitioner,

v. **Appeal No. 21-0332**

New Trinity Coal, Inc.,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2021, I served the foregoing "***Petitioner's Brief***" upon Respondent at the following address:

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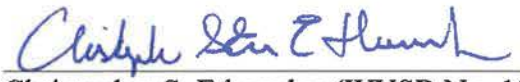

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