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

**No. 21-0332**

**RESOURCES LIMITED, LLC,**

*Defendant Below, Petitioner,*

**DO NOT REMOVE  
FROM FILE**

**v.**

**Fayette County  
Civil Action No.: 21-C-12**

**NEW TRINITY COAL, INC.,**

*Plaintiff Below, Respondent*

**FROM THE CIRCUIT OF FAYETTE COUNTY**

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**RESPONDENT'S SUMMARY RESPONSE TO  
THE PETITION FOR APPEAL**

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Pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure, Respondent New Trinity Coal, Inc. herewith provides its Summary Response to the Petition for Appeal of Resources Limited, LLC.

## I. ASSIGNMENT OF ERROR

Respondent has no issue with Assignment of Error as framed.

## II. STATEMENT OF THE CASE

Paragraph No. 1: Respondent clarifies that pursuant to Respondent's Complaint, the parties entered into a contract on or around January 26, 2018, wherein Petitioner agreed to mine coal on property owned by Respondent. JA005.

Paragraph No. 3: The sentence beginning at Line No. 7 ("Pursuant to the CCIS...") and ending on Line No. 13 ("certified mail.") is conclusory and argumentative.

Paragraph No. 4: The paragraph is substantially argumentative.

Paragraph No. 8: Lines 2 (beginning with "Therein,") through 6 (ending with "idled;") substantially misrepresent Paragraphs 5 through 11 of Respondent's *Emergency Motion to Enforce Compliance with Order Denying Defendant's Motion to Set Aside Default Judgment*.

Paragraph No. 8: Respondent asserts that Petitioner critically, and arguably, intentionally omits an important section of the Circuit Court's analysis and ruling from the bench, which is as follows: "I don't know whether this company is in that situation or not. I would hope not. I would hope that it is a legitimate company that wants to pay its debts or whatever, but it's an intolerable situation where this court orders certain things to be done and the coal company doesn't comply and, you know I can understand Mr. Lightner's client wanting the money. They don't want a piece of the equipment that they can't use. They'd like to have it paid." JA 156: 20-24—157: 1-4.

### III. SUMMARY OF ARGUMENT

In accordance with Respondent's authorities and arguments discussed herein, the Circuit Court of Fayette County did not abuse its discretion in denying Petitioner's *Motion to Set Aside Default Judgment*.

### IV. STANDARD OF REVIEW

The case *sub judice* is before the Supreme Court on appeal from the Circuit Court of Fayette County's order denying motion to set aside a default judgment under Rule 60(b) of the West Virginia Rules of Civil Procedure.

As this Court explained in *Hardwood Group v. Larocca*, 219 W.Va. 56, 631 S.E.2d 614 (2006), [a] motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion.' Syl. Pt. 3, *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970) [overruled on other grounds by *Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002)]." Syl. pt. 6, *Games-Neely ex rel. West Virginia State Police v. Real Prop.*, 211 W. Va. 236, 565 S.E.2d 358 (2002).

The *Hardwood* Court has further stated that "appellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering the default judgment.' Syllabus point 3, *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983)." Syl. pt. 1, *Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002). **Further guidance is obtained from our previous holding that "on an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and**

judgment in and of the trial court." Syl. pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973). 219 W.Va. 56 at 60, 631 S.E.2d 614 at 618. (Emphasis added).

## V. ARGUMENT

Notably, Petitioner "acknowledges" in Footnote 1 of *Petitioner's Brief* "that its oversight resulted in its Answer being filed two days late under the West Virginia Rules of Civil Procedure."

The relatively recent decision of this Court, *Hardwood Group v. Larocca*, 219 W.Va. 56, 631 S.E.2d 614 (2006), sets forth the following Syllabus Points applicable to this case, thus simplifying this Court's analysis and providing two original Syllabus Points —specifically Four and Five—which control this Court's determination herein:

1. "'A motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion.' Syl. Pt. 3, *Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 175 S.E.2d 452 (1970) [overruled on other grounds by *Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002)]." Syllabus point 6, *Games-Neely ex rel. West Virginia State Police v. Real Property*, 211 W. Va. 236, 565 S.E.2d 358 (2002).

2. "'Appellate review of the propriety of a default judgment focuses on the issue of whether the trial court abused its discretion in entering the default judgment.' Syllabus point 3, *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983)." Syllabus point 1, *Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002).

3. "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; (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." Syllabus point 3, in part, *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979).

4. 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.

5. In addressing a motion to set aside a default judgment, "good cause" requires not only considering the factors set out in Syllabus point 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979), **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.** (Emphasis added).

Additionally, a review of factual detail, which is not included in Petitioner's Brief, is relevant hereto. See the following excerpts from *Respondent's Motion for Default Judgment* at JA043-JA045:

5. At no time since the filing of the Complaint has the Defendant contacted undersigned counsel, nor has Counsel appeared for the Defendant in the action. To date, no responsive pleading or notice of appearance has been filed with this Court.

6. Undersigned counsel attempted on numerous occasions to communicate with Defendant without the necessity of court intervention. Specifically, two certified letters were sent to Mr. David Huffman, President of Resources Limited LLC, the first being mailed on November 9, 2020, and the second on February 2, 2021. No response was received. Additionally, undersigned counsel reached out to Mr. Huffman via electronic mail on December 2, 9, 10, 14 and 22 of 2020, and January 4, 2021. Mr. Huffman replied only once, on December 9, 2020. In that response, he advised that Defendant was working on reconciling the payments due and owing Plaintiff. No further communication occurred.

7. Plaintiff has a secured interest in the coal mining equipment owned by Defendant Resources, LLC. See Exhibit C.

8. Plaintiff requests that the financial interest be satisfied from the seizure and selling of Defendant's mining equipment if Defendant remains unwilling to lawfully pay its debt to Plaintiff.

Moreover, in its *Order Granting Motion for Default Judgment*, the Circuit Court found that Plaintiff filed its civil action on February 12, 2021; that Plaintiff's counsel attempted on numerous to achieve an amicable resolution with Defendant before filing suit, to no avail, and that at no time herein have Defendant or counsel filed notice of appearance or responsive pleading. JA056-JA057.

The Court subsequently ordered that "Plaintiff be given immediate possession of the secured collateral ("Collateral") referenced in the Complaint." JA059.

A review of *Plaintiff's Response to Defendant's Motion to Set Aside Default Judgment* (JA 091-096). provides a compelling, succinct and comprehensive synopsis of Respondent's position herein, as follows:

8. In its Motion to Set Aside Default Judgment, Defendant now contends, for the first time, that Mr. David Huffman, President of Resources, LLC, has never signed for certified mail that has been sent to him in these proceedings, both before and after suit was filed.

9. However, this contention is 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.

10. This case is a clear breach of contract, wherein no discovery is necessary as Defendant simply did not uphold its end of the bargain, thus defaulting on the contract in June, 2019.

11. Since that time, Defendant has made no effort to pay the debt it rightfully owes to Plaintiff, and in fact, has since undertaken further mining jobs wherein it continues to mine coal and profit in this business venture.

12. Defendant now asks the Court to set aside the default judgment that was properly granted against it. In support of this argument, Defendant relies on Rule 60(b) of the Rules of Civil Procedure, as well as West Virginia case law.

13. As this Court is aware, there are five factors the Court can consider in setting aside a default judgment. These factors are 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 issues at stake; (4) the degree of intransigence on the part of the defaulting party; and (5) the existence of excusable neglect. *Harwood Group v. Larocco*, 631 S.E.2d 614 (W.Va. 2006).

Urging the lower Court to uphold the default judgment which was properly entered on March 24, 2021, your Respondent further thoroughly addressed the *Harwood* factors, *supra*, as follows:

1. The degree of prejudice suffered by the Plaintiff/ Respondent from the delay in answering is extreme. Respondent has a secured interest in the equipment owned (and still operated) by the Defendant/Petitioner. Respondent further states: "Every day that Defendant is permitted to continue operating his equipment, and profiting from his 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."

2. There are no material issues of fact and Petitioner has no meritorious defenses. Respondent asserts that it has no fault in this clear breach of contract case and further factual development is unnecessary. The facts are clear: Petitioner did not uphold its end of the contract and continues to benefit from its wrongdoing. Additionally, Plaintiff has been, and remains, willing to resolve the matter for far less than the amount rightfully owed with late fees, penalties, etc. for the breach of contract.

3. Significant interests are at stake in this case. Respondent argues: "Plaintiff and Defendant do agree on this one matter. However, for going on two years Plaintiff's significant interests have not been satisfied, that being the amount of money they are rightfully owed by Defendant. Yet, Defendant continues to mine coal, utilizing equipment pledged to Plaintiff as security, and operate his business to Plaintiff's detriment."

4. Petitioner, the defaulting party, has been intransigent, refusing to compromise or agree since November, 2020. Counsel for Respondent has provided evidence to the court below of the numerous attempts to contact Petitioner in an effort to resolve the matter without court intervention. Respondent argues: "Then, when the Complaint was filed February 12, 2021, undersigned counsel provided via email a copy of the stamped complaint to Defendant the same

day. Upon information and belief, not one time did Defendant do anything in an attempt to retain counsel to assist in the defense of the claim until it was too late. In fact, the Defendant never even contacted Plaintiff to discuss the case. Now, Defendant asks this Court for mercy."

5. Finally, Petitioner cannot demonstrate any excusable neglect. Respondent argues: "Defendant has, since the beginning, refused to cooperate or work with Plaintiff in anyway to resolve its debt. And now, it comes before this Court claiming that because it filed an answer a few days late, it should be permitted to participate in litigating claims it lawfully owes."

## VI. CONCLUSION

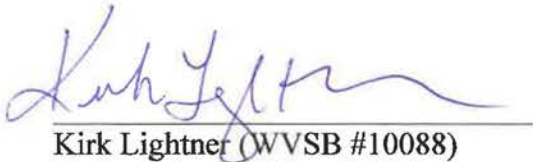
Your Respondent asserts that this a simple breach of contract case and respectfully requests that the default judgment entered by the Circuit Court of Fayette County be affirmed by this Court and that this Court further order Petitioner to immediately idle its equipment to avoid further financial damage to Respondent and for other and further relief that this Court deems proper.

## VII. PRAYER FOR RELIEF

Therefore, based on the authorities and argument set forth herein, New Trinity Coal, Inc., Respondent herein, Plaintiff Below, respectfully requests that the *Order Granting Motion for Default Judgment* (JA056-JA057) of the Circuit Court of Fayette County be affirmed.

Respectfully submitted,

New Trinity Coal, Inc.  
Respondent/Plaintiff Below



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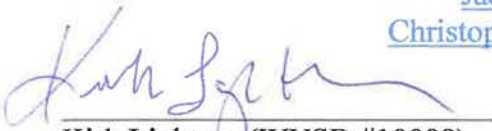
Respondent

**CERTIFICATE OF SERVICE**

I, Kirk Lightner, counsel for Respondent New Trinity Coal, Inc., hereby certify that on the 16<sup>th</sup> day of September, 2021, I served "Respondent's Summary Response" upon Petitioner, in person via hand delivery, at the following address:

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