NO. 22-0333

IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

ESTATE OF SHERRY CLINE TILLEY,
by and through Jesse Graybeal,
Candice Cline, Bradley Graybeal,
and Ernest Cline, Individually
and as Co-Administrators of
the Estate of Sherry Cline Tilley,

Plaintiffs Below, Petitioners,

v.

Civil Action No.: 09-C-30-M
Honorable Rudolph J. Murensky, II

JUSTIN JUSTICE,

Defendant Below, Respondent.

PETITIONERS' BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitution

Statutes

Rules

ASSIGNMENTS OF ERROR

I. The Circuit Court of McDowell Count erred in applying the doctrine of laches and finding the judgment entered on behalf of the Plaintiffs unenforceable. The proper course for the Circuit Court, if it found the default proper but that the judgment against the Defendant should be set aside, was to set the matter for a hearing on damages.

II. The Circuit Court of McDowell County erred in denying the Plaintiffs due process by not setting the matter for a hearing on damages or setting aside both the default and the judgment and setting the matter for trial.

STATEMENT OF THE CASE

This case arose from an automobile accident on August 19, 2008, which ultimately resulted in the death of Sherry Cline Tilley on November 7, 2008. The Plaintiffs below, the Estate of Sherry Cline Tilley, by and through Jesse Graybeal, Candice Cline, Bradley Graybeal, and Ernest Cline[1], Individually and as Co-Administrators of the Estate of Sherry Cline Tilley ("Petitioners") sought compensatory damages from the Defendant below Justin Justice ("Respondent") and others.

Petitioners filed the *Complaint* in this action on March 4, 2009. (*Complaint* ("*Compl.*"), Appendix Record ("A.R.") 7-13). The *Complaint* asserted the following claims: Count I – Negligence/Gross Negligence/Reckless Indifference/Wanton Disregard in Design, Manufacture, and Distribution; Count II – Product Liability; Count III – Breach of Warranty; and, Count IV – Recklessness and Negligence of Defendant Drivers/Negligent Entrustment/Violation of West Virginia Motor Laws. Counts I through III were asserted against defendants Chrysler, LLC, Chrysler Motors, LLC, and Mitsubishi Motors North America, Inc. Count IV was asserted

[1] Ernest Cline has passed away. Petitioners will amend the pleadings in accordance with the Rules of Civil Procedure and file a Suggestion of Death.

against defendants Wendell K. Russell, Jr., Justin Justice, and Michelle Mitchell. (*Id.*)

Petitioners alleged that on August 29 2008, Petitioners' decedent Sherry Cline Tilley was driving her 1993 Dodge Colt on State Route 16 in an area commonly known and referred to as Wolf Pen on the Welch-Pineville Road. (*Compl.*, A.R. 8 at ¶ 9 and *Final Order Granting Motion to Set Aside Default Judgment* ("*Order Granting Mot. to Set Aside*"), A.R. 151 at ¶ 2.) At that time, Sherry Cline Tilley lawfully and properly exited the driveway of Tommy Graybeal, crossed the southbound lane of Route 16, and turned north. (*Compl.*, A.R. 8 at ¶ 10.)

At the same time, defendant Wendell K. Russell Jr. was operating Michelle Mitchell's 1998 Ford ZX2 recklessly and negligently south on Route 16 being followed by and/or racing Respondent and further alleged that the speeds of these vehicles exceeded 80 miles per hour in a 55 mile per hour zone. (*Compl.*, A.R. 8 at ¶¶ 11-12 and *Order Granting Mot. to Set Aside,* A.R. 151 at ¶ 3.) As the defendants Russell and Respondent traveled south at alarmingly high rates of speed, the Mitchell/Russell vehicle traveled across the northbound lane of traffic and violently crashed into the vehicle of Sherry Cline Tilley causing the vehicles to collide with the guardrail on the northbound lane of traffic. (*Compl.*, A.R. 8 at ¶ 12.)

Petitioners' decedent was taken from the scene of the accident via ambulance to Charleston Area Medical Center for the serious life-threatening injuries to her upper and lower body. (*Compl.*, A.R. 9 at ¶ 15.) She sustained the following injuries as a direct and proximate result of the defendants' misconduct: grade I spleen laceration; temporal contusion/traumatic brain injury; multiple facial fractures; pneumomediastinum/bilateral pneumothoraces; bilateral multiple rib fractures; right pulmonary contusion, right upper extremity radius/ulna dislocation from the humerus; bilateral femur fractures; bilateral tibia and fibula fractures; right pubic fracture; left sacral ala fracture; and, pelvic hemorrhage. (*Id.*) These injuries resulted in her death

on November 7, 2008. (*Id.*)

The *Complaint* alleged, with respect to defendants Wendell K. Russell Jr. and Respondent that they were liable for the damages suffered by Petitioners due to defendants' recklessness and negligence. (*Compl.*, A.R. 12 at ¶ 34 and *Order Granting Mot. to Set Aside*, A.R. 152 at ¶ 4.) The defendants' reckless and negligent conduct included reckless driving in violation of West Virginia Code Section 17C-5-3, driving too fast for road conditions in violation of West Virginia Code Section 17C-6-1; and, failure to yield right of way in violation of West Virginia Code Section 17C-9-3. (*Id.*) Petitioners alleged that defendant Michelle Mitchell negligently entrusted her vehicle to defendant Wendell K. Russell Jr. (*Compl.*, A.R. 12 at ¶ 35.) As a result of the defendants' recklessness and negligence, Sherry Cline Tilley experienced physical pain and suffering, mental anguish and loss of enjoyment of life, death and disfigurement. (*Compl.*, A.R. 12 at ¶ 36.)

More specifically, Petitioners sought the following damages: for damages that Sherry Cline Tilley suffered prior to her death, past medical expenses totaling $160,000.00; loss of earning capacity; pain and suffering; mental anguish and emotional distress; loss of enjoyment of life; scarring and disfigurement; loss of earning capacity; pain and suffering; mental anguish and emotional distress; and, loss of enjoyment of life. (*Compl.*, A.R. 12-13 at ¶ 38.) Additionally, damages were requested in the form of burial and funeral expenses totaling approximately $15,000 and sorrow, grief, loss of kindly offices suffered by the relatives and beneficiaries of Sherry Cline Tilley. (*Id.*) Petitioners also sought punitive damages, prejudgment interest and postjudgment interest. (*Compl.*, A.R. 13.)

Respondent was personally served by Nathan A. Glanden ("Glanden") with the Complaint. (*Declaration of Service,* A.R. 24.) Respondent testified during the February 18, 2022

hearing regarding his *Motion to Set Aside Default Judgment and for Stay* that he spoke with the investigator and process server Glanden regarding the accident. (*Order Granting Mot. to Set Aside*, A.R. 152 at ¶ 5 and *Transcript of Proceedings Held on February 18, 2022 ("Feb. 2022 Trans.")*, A.R. 111, lines 16-24 - 112, lines 1-10.) The Circuit Court determined that Respondent was personally served with a copy of the summons and the *Complaint* on April 10, 2009 by Glanden at a bluish grey singlewide trailer located off Welch and Pineville Road in accordance with *W. Va. R. Civ. Pro.(4)(d)(1)(A)*. (*Order Granting Mot. to Set Aside*, A.R. 165-166 at ¶ 10.)

The claims against the other defendants were settled and were dismissed in 2010. On August 10, 2010, Petitioners filed a *Motion for Default Judgment* against Respondent for failure to plead or otherwise defend. (*Motion for Default Judgment*, A.R. 29-31.) A hearing on the motion was held on October 25, 2010. (*Transcript of Proceedings Held on October 25, 2010, 2022 ("Oct. 2010 Trans.")*, A.R. 37-46.) The Respondent did not appear. (*Oct. 2010 Trans.*, A.R. 41, lines 14-17.)

The Circuit Court of McDowell County orally granted the motion. (*Id.* at lines 23-24.) The Court determined the special damages totaled $1,519,534.00 (One Million Five Hundred Nineteen Thousand Five Hundred and Thirty-Four Dollars) and determined that judgment would be in the amount of $3,750,000.00 (Three Million Seven Hundred Fifty Thousand Dollars). (*Oct. 2010 Trans.*, A.R. 44, lines 10-11 and 17-18.) The amount of $500,000.00 (Five Hundred Thousand Dollars) from the award was designated as punitive damages. (*Id.*, A.R. 44, lines 19-24 - 45, line 1.) The Circuit Court requested an *Affidavit for Default Judgment* with an Order. (*Id.*, A.R. 42, lines 17-22.)

An incorrect *Final Judgment Order* was entered on November 20, 2019, the Court not having received the affidavit. (*Order Granting Mot. to Set Aside*, A.R. 158, ¶ 23 and *Final*

Judgment Order, A.R. 69-70.) This order was not appealed nor was a Rule 60(b) motion filed. (*Order Granting Mot. to Set Aside*, A.R. 158-159, ¶ 24.) The Clerk sent a copy of the Order to the post office box address and there is no evidence it was returned. (*Id.*)

Petitioners' counsel, Stephen New, by letter of March 2, 2021, requested that certain clerical errors in the November 20, 2019 *Final Judgment Order* be corrected. (*Id.* at A.R. 159, ¶ 25.) Petitioners' current counsel, Clinton Smith, requested a hearing regarding the correction of the order and the hearing was held on September 14, 2021. (*Id.* at ¶¶ 26-27 and *Transcript of Proceedings Held on September 14, 2021* ("*Sept, 2021 Trans.*", A.R. 47-66.) The documents were mailed to Respondent's post office box address, but the address was no longer a valid address for Respondent. (*Order Granting Mot. to Set Aside*, A.R. 159-160, ¶ 27.)

The Circuit Court, having received the *Affidavit*, entered an *Amended Final Judgment Order* on November 10, 2021, which was mailed to Respondent at the invalid post office box address. (*Id.* at A.R. 160, ¶ 28 and *Amended Final Judgment Order*, A.R. 72-74.) Judgment was granted against the Respondent in the amount of $3,961,904.41 (Three Million Nine Hundred Sixty-One Thousand Nine Hundred Four Dollars and Forty-One Cents), which included compensatory damages, non-economic damages, punitive damages, and pre-judgment interest and post–judgment interest beginning in November 2021. (*Id.* at A.R. 161, ¶ 30 and *Amended Final Judgment Order*, A.R. 73-74.)

The Circuit Court noted that Respondent's counsel entered a notice of appearance on November 22, 2021 and the *Motion to Set Aside Default Judgment and for Stay* was filed on December 8, 2021. (*Order Granting Mot. to Set Aside*, A.R. 161, ¶¶ 31-32 and *Motion to Set Aside Default Judgment and Stay* ("*Motion to Set Aside*"), A.R. 78-81.) Respondent argued, without attaching an affidavit, that he was prejudiced by the length of time between the hearing

on Petitioners' *Motion for Default Judgment* and the entry of the November 10, 2021 *Order*. (*Motion to Set Aside*, A.R. 78 at ¶ 4.) Respondent contended that the only document he ever received was the November 10, 2021 *Order*. (*Id.*, A.R. 79 at ¶ 6.) Further, Respondent proffered that the action should have been dismissed pursuant to *West Virginia Rules of Civil Procedure 41* for inactivity. (*Id.*, A.R. 80 at ¶ 12.) Liability was denied. (*Id.*, A.R. 80 at ¶ 15.)

Respondent also contended "[t]hat the statute of limitations for the collection of a judgment has passed since the Court announced default judgment in 2010 . . . ." (*Id.*, A.R. 80 at ¶ 16.) Respondent requested that the default judgment be set aside and the case dismissed. (*Id.*, A.R. 80.) The *Motion for Stay* requested a stay until the Circuit Court resolved the *Motion to Set Aside*. (*Id.*, A.R. 81.)

A hearing on this motion was held February 18, 2022. (*Transcript of Proceedings Held on February 18, 2022*, ("*Feb. 2022 Trans.*"), A.R. 82-148.) On March 11, 2022, the Circuit Court entered a *Final Order Granting Motion to Set Aside Default Judgment*. (*Final Order Granting Motion to Set Aside Default Judgment* ("*Order Granting Mot. to Set Aside*"), A.R. 150-175.) The Circuit Court refused to set aside the default, however, applying the doctrine of laches, the Court declared the judgment previously entered unenforceable. (*Order Granting Mot. to Set Aside*, A.R. 174, ¶¶ 31-33.)

Respondent provided testimony at the hearing. The Circuit Court found that Respondent admitted to being present at the time the accident occurred, but denied engaging in any racing. *Order Granting Mot. to Set Aside*, A.R. 152, ¶ 5.) Respondent also admitted to speaking with investigator and process server Nathan A. Gladen regarding the accident. (*Id,*) The vehicle being operated by Respondent at the time of the accident was insured, but Respondent never contacted his insurance company regarding the accident. (*Id.*, A.R. 152-153 at ¶ 6.)

Respondent testified that he lived with his brother Dustin Justice and his father Andy Justice at the time of the accident. (*Id.*, A.R. 153 at ¶¶ 7 and 9.) Respondent and his brother resembled one another at that time. (*Id.*, A.R. 153 at ¶ 7.) The Justice family lived on Welch / Pineville Road in a singlewide trailer and the mailing address for all three of them was P.O. Box 1846, Pineville, West Virginia 24874. (*Id.*, A.R. 153 at ¶ 9.) Respondent further testified that his brother was a drug addict and his father was an alcoholic and illiterate. (*Feb. 2022 Trans.*, A.R. 113, lines 22-23 and 119, lines 23-24.) Respondent further testified that he was not personally served and believes his brother Dustin was the individual served with the *Summons* and *Complaint*. (*Id.*, A.R. 153-154 at ¶ 10.)

The Circuit Court, in reviewing the file, determined that Respondent was sent copies of twelve (12) documents during the pendency of the civil action at his P.O. Box address. (*Id.*, A.R. 154-155 at ¶ 10.) Further, the Clerk for the Circuit Court mailed the *Stipulation and Agreed Order of Dismissal* entered January 11, 2010 to the post office box address and it was not returned. (*Id.*, A.R. 154-155 at ¶ 11.)

The Circuit Court noted that settlements were entered into between Petitioners and the other defendants in the civil action. (*Id.*, A.R. 155-156 at ¶¶ 13-15.) Interestingly, the Court stated that Petitioners received a "paltry sum" from defendant Wendell K. Russell, Jr.'s insurer and that the settlement with defendant Mitsubishi Motors represented "a little more than 18.6 percent of the default judgment." (*Id.*, A.R. 155 at fns. 7-8.) These observations are somewhat perplexing considering the Circuit Court originally awarded the damage amount, which the Court now appears to consider excessive.

The Circuit Court further acknowledged that the *Motion for Default Judgment* was sent on July 26, 2010 by certified mail to Respondent's post office box address, even though the

motion did not need to be served because Respondent did not enter an appearance. (*Order Granting Mot. to Set Aside*, A.R. 156, ¶ 17 and fn. 9.) Respondent testified that he was still living at the singlewide trailer with his father and brother at that time. (*Id.* at ¶ 17.) A notice of hearing and an amended notice of hearing regarding the Motion for Default Judgment were sent by certified mail and the green cards were signed by Respondent's brother and father. (*Order Granting Mot. to Set Aside*, A.R. 156-157, ¶¶ 18 and 19.) Respondent admitted receiving mail at that post office box address until sometime in 2018 or 2019. (*Feb. 2022 Trans.*, A.R. 110, lines 12-18.)

After reviewing this course of events, the Circuit Court determined "[a]lthough he denied any knowledge of the pendency of this matter at the times relevant (which this Court **FINDS** not credible), Defendant Justin Justice admitted during the February 18, 2022 hearing that his father and his brother likely would have inquired of him as to why he was receiving numerous correspondence from practitioners of the bar." (*Id.*, A.R. 157, ¶ 20 (emphasis in original).) Concomitantly, the Circuit Court found that "the prior grant of *default* was properly made and therefore will not be set aside." (*Id.*, A.R. 167, ¶ 20 (footnote omitted).)

The Circuit Court then stated that the *Motion for Default Judgment* was granted contingent upon Petitioners' counsel submitting an affidavit that Respondent was not an infant, incompetent person, or a convict and a proposed order reflecting the Court's oral rulings. (*Id.*, A.R. 158, ¶ 22.) The affidavit was submitted on October 6, 2021. (*Id.*)

Despite testifying that he did not receive any of the other numerous documents in this case, Respondent's counsel represented that Respondent received the *Amended Final Judgment Order* by "happenstance," that is, a postal carrier knew Respondent and his address. (*Id.* at A.R. 161, ¶ 33.) Further representations by counsel included that Respondent was "judgment proof" at

the time of the civil action and could have filed bankruptcy or placed assets in the name of his significant other. (*Id.* at A.R. 162, ¶ 34.) Additionally, Respondent claimed to have assets acquired through his business over the years and could not seek bankruptcy protection now. (*Id.*) The only evidence offered regarding this issue, either by way of an affidavit by Respondent or by testimony at trial, was that Respondent did not own property or a business at the time of the litigation. (*Feb. 2022 Trans.*, A.R. 138, line 24-139, line 6.) The following exchange subsequently occurred:

> Q by MR. LUPARDUS: But now you do, right?
>
> THE COURT: Well, maybe he owned so little he didn't really care whether he got sued or not.
>
> MR. LUPARDUS: Well, there's no evidence to that.
>
> THE COURT: Well, I know but we've just got a lot of **speculation** going on thru here.
>
> (*Id.* at A.R. 139, lines7-12 (emphasis added).)

After this exchange, no evidence was presented regarding Respondent's alleged change in his financial condition. Despite failing to provide any evidence in support, Respondent argued that laches should bar enforcement of the judgment due to the length of time that passed between the hearing and the November 2021 judgment, which resulted in prejudice to him. (*Order Granting Mot. to Set Aside*, A.R. 162, ¶ 35.) Despite not having any evidence presented, the Circuit Court concluded that "Defendant Justin Justice has acquired certain assets by virtue of engaging in a successful business for many years." (*Id.* at A.R. 173, ¶ 30.)

As previously stated, the Circuit Court concluded that Respondent was personally served with the *Summons* and *Complaint* and service of process was sufficient. (*Id.* at A.R. 167, ¶ 14 (footnotes omitted).) The Court held that the grant of default was proper and would not be set aside. (*Id.*) The Circuit Court concluded, however, that the enforcement of the judgment was

barred by the doctrine of laches. (*Id.*)

In reaching this conclusion, the Circuit Court discussed, in a footnote, the applicability of *W.Va. Code §38-3-18*, which sets a ten-year statute of limitations for the enforcement of a judgment. (*Id.*, at fn. 15.) The Court noted that Respondent's motion asserted that the statute of limitations precluded enforcement of the November 2021 judgment. (*Id.*) Respondent's motion suggested the statute began to run on October 25, 2010 when the Court made an oral grant of judgment. (*Id.*) The Circuit Court found, however, that the statute of limitations began to run on judgment was entered on November 20, 2019 and, in the alternative found that the statute of limitations began to run on November 10, 2021. (*Id.*) Respondent made no challenge to these alternative determinations of the dates upon which the statute of limitations began to run.

The Circuit Court then proceeded to consider whether enforcement of the judgment was barred by laches, acknowledging the general precedent that laches applies only when a delay results in placing the other party at a disadvantage. (*Id.* at A.R. 168, ¶ 16.) The Court concluded that since the October 2010 hearing, Respondent materially changed his position. (*Id.* at A.R. 173, ¶ 29.) Respondent went from being "judgment proof" to acquiring assets that could not be protected through bankruptcy. (*Id.*) The Court engaged in the following reasoning:

> The default judgment would have in favor of Plaintiffs would have been essentially uncollectible at the time it should have been entered in 2010. It is only now after Defendant Justin Justice has acquired certain assets by virtue of engaging in a successful business for many years do the Plaintiffs seek to enforce their rights against him.
>
> (*Id.* at ¶ 30.)

The Circuit Court ruled that "[g]iven the totality of the circumstances, Defendant Justin Justice's contest of the allegations contained in the 'Complaint' and the respective amount of the settlements that Plaintiffs received compared to the amount of default judgment, equity and

fundamental fairness compel the Court to **FIND** that enforcement of the 'Amended Final Judgment Order' should be barred by the doctrine of laches." (*Id.* at A.R. 174, ¶ 30.)

The Court relied upon Rule 60(b)(6) of the *West Virginia Rules of Civil Procedure*, "any other reason justifying relief from the operation of the judgment. (*Id.* at ¶ 32.) The Court found that the judgment was barred by the doctrine of laches and unenforceable. (*Id.* at ¶ 33.) Petitioners were "enjoined, restrained, and prohibited from attempting to execute on the November 10, 2021 'Amended Final Judgment Order.'" (*Id.* at A.R. 174.)

Petitioners filed a *Motion to Set Aside, Amend, or Alter Judgment* on March 21, 2022 contending that the Circuit Court erroneously applied the doctrine of laches; denied Petitioners due process of law by dismissing their claim; and for such other grounds as would be assigned at a hearing on the motion. (*Motion to Set Aside, Amend, or Alter Judgment*, A.R. 176-178.) On April 1, 2022, the Circuit Court denied the motion without hearing. (*Final Order Denying Motion to Set Aside, Amend, or Alter Judgment*, A.R. 187-192.) Petitioners filed a Notice of Appeal on April 29, 2022.

In this appeal, Petitioners respectfully request that this Honorable Court reverse the Circuit Court's prohibition against enforcement of the *Amended Final Judgment Order* on November 10, 2021.

SUMMARY OF ARGUMENT

"[A] right yet good under the statute is not lost by *laches.*" *Condry v. Pope*, 152 W. Va. 714, 722, 166 S.E.2d 167, 172 (1969) (citation omitted). "If a legal right gets into equity, the statute governs." *Id.* Petitioners have a legal right to compensation for the damages caused by the wrongful acts of Respondent. The legal right to execute on the judgment against Respondent is protected by statute for a minimum of ten years. *West Virginia Code § 38-3-18* provides that

"[o]n a judgment, execution may be issued within ten years after the date thereof." Therefore, the Circuit Court erred in applying laches, rather than the statute of limitations, to find that the November 10, 2021 *Amended Final Judgment Order* against Respondent was unenforceable and enjoining Petitioners from attempting to execute on that judgment.

Further, the Circuit Court concluded that Respondent had a change in his financial condition but had no evidence upon which to base that conclusion, only the argument of counsel. It is axiomatic that his counsel's arguments are not evidence." *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 296, 810 S.E.2d 286, 298 (2018). Therefore, the Circuit's grant of Respondent's *Motion to Set Aside Default Judgment* was clearly erroneous.

Most importantly, the Circuit Court denied Petitioners' due process rights. Petitioners have a protected property interest in the judgment for damages. The Court correctly declined to set aside the entry of default, even finding that Respondent was not a credible witness, but determined that the judgment should not be enforced. The bases for this determination included a finding that Respondent had acquired assets since the judgment and the Court's disagreement with the amount of damages the Court previously awarded. Thus, the Court acted arbitrarily in deciding to prohibit the enforcement of the judgment.

A definite miscarriage of justice occurred in the present case. Respondent ignored the litigation and now complains about the consequences of his actions as if Petitioners' loss of a loved one was nothing more than an inconvenience to him. Respondent had motor vehicle insurance at the time of the accident. Yet, his actions deprived Petitioners of even the opportunity to receive compensation paid by that insurance policy. The resulting precedent of the Circuit Court that disregards the statute of limitations, applies laches, and denies Petitioners their due process rights cannot stand. The decision should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error addressing the improper application of the equitable doctrine of laches in the face of a statutory time limit on the execution of a judgment, thus presenting an issue that requires clarification under West Virginia law. Therefore, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

I. THE CIRCUIT COURT OF MCDOWELL COUNTY ERRED IN APPLYING THE DOCTRINE OF LACHES AND FINDING THE JUDGMENT ENTERED ON BEHALF OF THE PLAINTIFFS UNENFORCEABLE. THE PROPER COURSE FOR THE CIRCUIT COURT, IF IT FOUND THE DEFAULT PROPER BUT THAT THE JUDGMENT AGAINST THE DEFENDANT SHOULD BE SET ASIDE, WAS TO SET THE MATTER FOR A HEARING ON DAMAGES.

The Circuit Court of McDowell County concluded that Respondent was served with the summons and *Complaint*, failed to timely respond, and ruled that the default entered was proper and could not be set aside. Respondent did not appeal this ruling. The Circuit Court then found that enforcement of the default judgment was barred by the doctrine of laches and unenforceable rather than vacate the judgment and hold a hearing on damages. The reasoning underlying this determination is flawed, erroneous, and wrongfully shortens the statute of limitations governing Petitioners' legal right to attempt to collect on the judgment. "[A] right yet good under the statute is not lost by *laches.*" *Condry v. Pope*, 152 W. Va. 714, 722, 166 S.E.2d 167, 172 (1969).

W.Va. Code § 38-3-18 grants Petitioners a minimum of ten years to attempt to collect on the judgment. When an unsatisfied execution attempt occurs within the ten years, "other executions may be issued on such judgment within ten years from the return day of the last

execution issued thereon, on which there is no return by an officer, or which has been returned unsatisfied." *Id.* The Circuit Court's ruling negated the statute.

Further, under the Circuit Court's ruling, any time a judgment debtor acquired assets during the ten year period after entry of judgment collection of that judgment would be barred by laches due to the defendant's change in financial circumstances. The Court erroneously justified the decision by relying upon the Court's speculation that Petitioners only seek to enforce their rights against Respondent after Respondent has acquired assets. (*Order Granting Mot. to Set Aside*, A.R. 173, ¶ 30.) Obviously, if a judgment debtor does not have assets, no reason exists to attempt to collect the judgment. The law does not require the doing of a useless act. Moreover, one can conclude that the legislative intent underlying the statute is to exactly allow for those circumstances, that is, a judgment debtor becoming solvent and collectible. Furthermore, the Circuit Court's logic is flawed in that it assumes that Respondent, who denied receiving every document served upon him, would have become aware of the judgment in 2010 in order to file bankruptcy or protect any assets he may acquire.

A ruling on a motion to vacate judgment is reviewed under an abuse of discretion standard. Syl. Pt. 1, in part, *Delapp v. Delapp (In re Delapp)*, 213 W. Va. 757, 758, 584 S.E.2d 899, 900 (2003). In determining that the entry of default should not be set aside, the Circuit Court considered "whether 'good cause' under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met." Syl. Pt. 4, in part, *Hardwood Grp. v. LaRocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006). Thus, the Circuit Court considered:

> (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; (4) the degree of intransigence on the part of the defaulting party; and (5) the reason for the defaulting party's failure to timely file an answer.

(*Id.*)

In order to vacate a default judgment upon a Rule 60(b) motion, the same first four factors should be considered and "a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied" is required. *Id.* at Syl. Pt. 3 (citing, Syl. Pt. 3, in part, *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979) and Syl. Pt. 5).

In refusing the set aside the entry of default, the Circuit Court determined that consideration of the four factors for demonstrating "good cause" pursuant to Rule 55(b) weighed in favor of the Petitioners. Thus, the Circuit Court's decision to prohibit enforcement of the judgment was based solely on the Court's determination that laches applied and justified relief from the operation of the judgment. (*Order Granting Mot. to Set Aside*, A.R. 173, ¶ 32.)

However, the Circuit Court was prevented from applying the doctrine of laches to prohibit enforcement of the judgment because the minimum ten year statute of limitations set forth in *W.Va. Code § 38-3-18* applied. The Court's consideration of that statute was relegated to a footnote wherein the Court determined that the final order was entered on November 20, 2019 or, alternatively, November 10, 2021. (*Order Granting Mot. to Set Aside*, A.R. 167, fn. 15.) No consideration was given to whether the Court could apply the doctrine of laches in the face of a statute of limitations regarding the right to enforce a judgment.

Also relegated to a footnote was the Circuit Court's discussion of Respondent's contention that the case *sub judice* should "have been dismissed pursuant to the West Virginia Rules of Civil Procedure Rule 41 long ago for inactivity, and the Defendant was denied due process by the lack of said dismissal." (*Mot. to Set Aside*, A.R. 80, ¶ 12.) West Virginia Trial Court Rule 16.13(a) requires the circuit clerk to periodically inform the circuit court on the status

of cases which may be dismissed pursuant to *W.Va. R.Civ.P. 41(b). W. Va. T.C.R., Rule 16.13(b)* places upon Circuit Courts the duty to "effectuate . . . timely disposition of all cases assigned to them" and "to control their dockets." The Circuit Court did not "address these general and abstract assertions and arguments given the Court's resolution of the motion." (*Order Granting Mot. to Set Aside*, A.R. 168, fn. 16.)

The doctrine of laches is unavailable to bar a plaintiff from seeking a legal remedy, execution of a judgment for money damages, for which the West Virginia Legislature has enacted a ten-year statute of limitations in *W.Va. Code § 38-3-18*. The Circuit Court erroneously ruled that the judgment "is barred by the doctrine of laches and therefore is **unenforceable**." (*Order Granting Mot. to Set Aside*, A.R. 174 at ¶ 33.) (emphasis in original). In essence, the Circuit Court found that the ten-year statute of limitations was inapplicable and the Petitioners' right to execute on the judgment was time-barred by the doctrine of laches, thus overriding the legislation.

In determining the date upon which the judgment in the matter became final, the Circuit Court relied upon *State ex rel. W. Va. Dep't of Health & Human Res., Child Support Enf't Div. v. Varney*, 221 W. Va. 517, 655 S.E.2d 539 (2007). *Varney* establishes that "for purposes of determining when the limitation period began to run in this case, the proper date is the date of entry of the judgment by the circuit clerk in the civil docket." *Id.* at 524. The *Varney* Court also held that "The ten-year statute of limitations in *W.Va. Code, 38-3-18* [1923] and not the doctrine of laches applies when enforcing a decretal judgment which orders the payment of monthly sums for alimony or child support." Syllabus point 6, *Robinson v. McKinney,* 189 W.Va. 459, 432 S.E.2d 543 (1993).' Syl. Pt. 6, *Collins v. Collins,* 209 W.Va. 115, 543 S.E.2d 672 (2000)." *Id.* at Syl. Pt. 3.

Laches is intended to be "gap-filling, not legislation-overriding." *Petrella v. MGM*, 572 U.S. 663, 680, 134 S. Ct. 1962 (2014). This precept coincides with recent a pronouncement of the West Virginia Supreme Court of Appeals: "More importantly, a circuit court has no authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of *W. Va. Code § 55-7B-6*." *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 242 W. Va. 335, 345, 835 S.E.2d 579, 589 (2019).

Thus, a plaintiff whose civil action was dismissed for failure to follow the statutory requirements of the MPLA could not file a motion for relief from judgment pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* seeking equitable relief. Such relief would be barred as the MPLA statutes would control the plaintiff's rights just as *W. Va. Code § 38-3-18* controls the rights of Petitioners in the case *sub judice* to execute upon the judgment regardless of Respondent's request for equitable relief under Rule 60(b) to prohibit enforcement of the judgment.

The United States Supreme Court decided two cases wherein the Court held that the doctrine of laches was not available as a defense when the claim was brought within the statute of limitations. The cases involved the three-year statute of limitations in copyright infringement cases and the six-year statute of limitations in patent infringement cases. *See, Petrella v. MGM*, 572 U.S. 663, 134 S. Ct. 1962 (2014) and *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017), respectively. However, the Supreme Court did note that "[i]n extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief **equitably** awardable." *Petrella*, at 685 (emphasis added).

The defendants in *Petrella* and *SCA Hygiene* made some of the same arguments in favor of applying laches as Respondent herein and the Supreme Court rejected these arguments as not supporting the premise that laches should apply. Those arguments included waiting to assert one's rights; the loss of evidence due to the passage of time; a change in position during the time of the delay; and the inability of taking action earlier (such as filing a Declaratory Judgment action) to protect the defendant's rights. The defendant in *Petrella* claimed the delay was 18 years and the Defendant in *SCA Hygiene* claimed the delay was 7 years.

Both the United States Supreme Court and the Circuit Court in the case *sub judice* cite *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582 (1946). The Circuit Court cites the case for the proposition that "a suit in equity may fail due to laches, though not barred by the statute of limitations." (*Order Granting Mot. to Set Aside*, A.R. 169-170 at ¶ 19.) The *Petrella* Court cites the case for the proposition that "this Court has cautioned against invoking laches to bar legal relief." *Petrella,* at 678. The *SCA Hygiene* Court reiterated "that laches cannot be invoked to bar a claim for damages incurred within a limitations period specified by Congress." *SCA Hygiene,* at 963.

Holmberg was an action in equity brought in New York District Court to enforce rights granted by a federal statute. The defendants raised both a New York statute of limitations defense and a laches defense. The United States Supreme Court held that the forum state's statute of limitations is inapplicable in enforcement of a federally created equitable right. *Id.* at Syl. No. 1. Thus, the Circuit Court misinterprets and misapplies the *Holmberg* holding. Under *Homberg*, an action in equity may be barred even though an analogous statute of limitations exists. The statute of limitations does not determine the length of time permitted to bring the action in equity, but the length of the statute of limitations may assist the court in determining

whether the action in equity is barred by laches. The Circuit Court appears to cite *Holmberg* for the proposition that laches can bar a claim even though the statute of limitations has not expired when the claim is not equitable.

The Circuit Court also relies heavily upon *Maynard v. Bd. of Educ.*, 178 W. Va. 53, 357 S.E.2d 246 (1987). *Maynard* involved a Declaratory Judgment action, which the Court determined was an equitable claim, even though monetary damages were sought. *Id.* at 60. The Court accepted the reasoning in *Homberg*:

> a court of equity, in examining the delay in asserting a claim for **equitable relief**, is not bound by any analogous statute of limitations. In a given case involving equitable relief which is alleged to be barred by laches, the **analogy** of the statute of limitations may be applied; or a longer period than that prescribed by the statute may be required; or a shorter time may be sufficient to bar the claim for equitable relief. *Id.* at 60; (*Order Granting Mot. to Set Aside*, A.R. 169-170 at ¶ 19) (emphasis added).

The *Maynard* Court, however, approved the application of the ten-year statute of limitations to the contract claim that was the subject of the declaratory action. *Id.* at 58. The claim for retroactive monetary relief was denied on public policy grounds: "Generally, courts have been reluctant to award retroactive monetary relief to public employees who have filed actions after a lengthy delay, where to afford such relief would cause substantial prejudice to the public's fiscal affairs." *Id.* at 61. The plaintiffs were non-teaching employees seeking wages claimed to be due.

The West Virginia Supreme Court of Appeals has also approved the application of both the statute of limitations and laches in a mandamus action, which is considered equitable:

> However, the applicability of laches does not necessarily foreclose the equal application of the statute of limitations. Clearly both laches and statutes of limitations may co-exist: 'The doctrine of laches may apply in equity, *whether or not a statute of limitation also applies* and whether or not an applicable statute of limitation has been satisfied.' 30A C.J.S. Equity § 176 (emphasis added). The Court's prior holding regarding the applicability of laches does not—either

> expressly or by implication—foreclose the equal applicability of the statute of limitations. *See Maynard v. Bd. Of Educ. Of the Cty. Of Wayne*, 178 W. Va. 53, 357 S.E.2d 246 (1987) (finding declaratory judgment action filed within statute of limitations but barred by laches).
>
> *Sluss v. McCuskey*, No. 18-0626, 2019 W. Va. LEXIS 567, at *9 (Nov. 13, 2019).

The District Court for the Southern District of West Virginia explained these principles as follows:

> Under equitable principles the statute of limitations applicable to analogous actions at law is used to create a 'presumption of laches.' This principle 'presumes' that an action is barred if not brought within the period of the statute of limitations and is alive if brought within the period. Some courts agree with the Sixth Circuit's bright-line principle. Others, however, view the analogous statute of limitations more as a benchmark.
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> *Boster v. Live Well Fin., Inc.*, No. 2:17-cv-3857, 2018 U.S. Dist. LEXIS 55064, ** 16-17, (S.D. W. Va. Mar. 30, 2018) (internal citations and quotation marks omitted).
>
> Moreover, West Virginia precedent establishes that:
>
> Enforcement of such decretal judgment can be barred by the statute of limitations, but its enforcement may not be barred by laches. *Cunningham* v. *Lumber Co.*, 89 W. Va. 326, 334, 109 S.E. 251; *Werdenbaugh Adm'r., et al.* v. *Reid, et al.*, 20 W. Va. 588.
>
> *Korczyk v. Solonka*, 130 W. Va. 211, 218, 42 S.E.2d 814, 819 (1947).

The *Korczyk* Court stated that a decree requiring the payment of money was no different from a judgment, thus, the enforcement of the decree could not be barred by the application of the doctrine of laches. *Id.*

Relief sought under Rule 60(b) is equitable in nature; however, the Circuit Court's Order results in the application of laches to bar enforcement of a judgment when a statute of limitations exists permitting execution on a judgment for a period of ten years, which can be lengthened by attempts at execution or partial satisfaction by execution. The import of this ruling is that even though Petitioners have ten (or more) years to attempt to collect the judgment pursuant to *W.Va.*

Code § 38-3-18, laches bars the collection. The West Virginia Legislature enacted this statute, presumably taking into consideration the very arguments made by Respondent and accepted by the Circuit Court. Therefore, the application of laches is tantamount to an impermissible and prohibited "judicial repeal" of *W.Va. Code § 38-3- 18.*

Even if the doctrine of laches were applicable, the Court did not have any evidence before it regarding any change in Respondent's financial condition. This factual finding is clearly erroneous. "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, in part, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 226, 470 S.E.2d 177, 180 (1996). In the case *sub judice*, no evidence exists.

Respondent never testified as to the state of his financial condition from the time of the litigation to the time that judgment was entered against him. No information as to his current financial condition was set forth in any affidavit. The only statements made regarding Respondent's current finances were those made by his attorney, who represented that Respondent was "judgment proof" at the time of the accident and since then had acquired assets.

The only evidence offered by Respondent regarding his financial condition was that Respondent did not own property or a business at the time of the litigation and could have filed bankruptcy. (*Feb. 2022 Trans.*, A.R. 138, line 24-139, line 6.) The Circuit Court even admitted that "we've just got a lot of speculation going on thru here." (*Feb. 2022 Trans.*, A.R. 139, lines 11-12.) Neither the arguments of counsel nor assertions in briefs are facts or evidence. *State v. Stepanian*, No. 20-0721, 2022 W. Va. LEXIS 81, at *5 (Jan. 18, 2022) (memorandum decision) (See also, *State v. Benny W.*, 242 W. Va. 618, 629, 837 S.E.2d 679, 690 (2019).) Without evidence, the Circuit Court could not conclude that Respondent "has acquired certain assets by

virtue of engaging in a successful business for many years." (*Order Granting Mot. to Set Aside*, A.R. 133, ¶ 30.) Therefore, the Circuit Court erred in granting Respondent's *Motion to Set Aside Default Judgment* as no evidence existed regarding Respondent's financial condition at the time the motion was filed and Respondent failed to show any prejudice resulting from the delay.

Petitioners respectfully request that this Court reverse the decision of the Circuit Court prohibiting enforcement of the *Amended Final Judgment Order* entered on November 10, 2021. The Circuit Court abused its discretion in applying laches to override a statute of limitations and erroneously concluded that Respondent had been disadvantage by the delay when no evidence supporting that conclusion was offered by Respondent.

II. THE CIRCUIT COURT OF MCDOWELL COUNTY ERRED IN DENYING THE PETITIONERS DUE PROCESS BY NOT SETTING THE MATTER FOR A HEARING ON DAMAGES.

Article III, Section 10 of the West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Petitioners were denied due process by the Circuit's Court's decision to prohibit enforcement of the judgment rather than setting the matter for a hearing on damages. "Due process of law is synonymous with fundamental fairness. It has been described as the very essence of the concept of ordered justice." *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 422, 249 S.E.2d 765, 766 (1978) (citing, *Brock v. North Carolina*, 344 U.S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1953)).

"The threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 141, 819 S.E.2d 251, 287 (2018) (citations and

quotation marks omitted). Wrongful death beneficiaries possess a property interest as set forth in *W. Va. Code §§ 55-7-5 & 6(a) - (c)* and "they have a specific entitlement to recover damages for their losses occasioned by the death of the decedent." *Stonerise Healthcare, LLC v. Oates*, No. 19-0215, 2020 W. Va. LEXIS 388, at *38-39 (June 16, 2020). "[A] n accrued legal claim is a vested property right." *Goldstein v. Peacemaker Props., Ltd. Liab. Co.*, 241 W. Va. 720, 729, 828 S.E.2d 276, 285 (2019) (footnote omitted). This vested right cannot be extinguished by a retroactive change in a statute without violating the federal and state due process clauses and the certain remedy provision of Article III, Section 17 of the West Virginia Constitution. *Id.* at 729-730, 285-286 (footnotes omitted). The Circuit Court's application of laches in the face of an applicable statute of limitations violated the Petitioners' due process rights by retroactively shortening the time within which the Petitioners could enforce the judgment.

The Circuit Court had the duty to apply *W.Va. Code § 38-3-18* to the Petitioners' right to seek enforcement of the judgment. When a statute is plain, a Court must apply its clear terms. *Willey v. Bracken*, 228 W. Va. 244, 247, 719 S.E.2d 714, 717 (2010). Moreover, when "one pursues a legal right within the applicable statute of limitations, the right cannot be cut short by the assertion of laches." *Miller v. Diversified Loan Serv. Co.*, 181 W. Va. 320, 322, 382 S.E.2d 514, 516 (1989). The *Miller* Court determined that the statute of limitations set forth in *W. Va. Code, 55-2-5*, "as it expressly fixes the time for enforcement of liens created by trust deeds and certain other instruments." *Id.* at 323, 517. Further, the *Miller* Court determined that "[t]he doctrine of laches is inapplicable to shorten this statutory period." *Id.*

The Circuit Court in the case *sub judice* considered the actions of Respondent during the pendency of the litigation. The Circuit Court determined that Respondent was personally served with a copy of the summons and the *Complaint* on April 10, 2009 by Glanden at a bluish grey

singlewide trailer located off Welch and Pineville Road in accordance with *W. Va. R. Civ. Pro.(4)(d)(1)(A)*. (*Order Granting Mot. to Set Aside*, A.R. 165-166 at ¶ 10 and A.R. 24.) Respondent admitted that he spoke with the investigator and process server Glanden regarding the accident. (*Id*, A.R. 152 at ¶ 5 and *Feb. 2022 Trans.*, A.R. 111, lines 16-24 - 112, lines 1-10.) Respondent, however, argued that the only document he ever received was the November 10, 2021 *Order*. (*Mot. To Set Aside*, A.R. 79 at ¶ 6.) Respondent attempted to convince the Court that he was not aware of any documents in the litigation because his brother and father had addiction problems and his father was illiterate. (*Feb. 2022 Trans.*, A.R. 113, lines 22-23 and 119, lines 23-24.) Respondent attempted to show that it was his brother that was personally served. (*Id.*, A.R. 153-154 at ¶ 10.) The Circuit Court, in reviewing the file, determined that Respondent was sent copies of twelve (12) documents during the pendency of the civil action at his P.O. Box address. (*Id.*, A.R. 154-155 at ¶ 10.) Respondent admitted receiving mail at the post office box address used for service in the litigation until sometime in 2018 or 2019. (*Feb. 2022 Trans.*, A.R. 110, lines 12-18.) Respondent ignored the litigation while it was pending and attempted to convince the Circuit Court that Respondent was unaware of the litigation. Fortunately, the Circuit Court refused Respondent's arguments and did not vacate the entry of default.

The Circuit Court, however, felt compelled to prohibit the enforcement of the default judgment depriving Petitioners of their due process rights. The Circuit Court observed "we've just got a lot of speculation going on thru here," referring to the Respondent's testimony regarding his finances. (*Feb. 2022 Trans.*, A.R. 139, lines 11-12.) Despite this observation of speculation and without any supporting evidence, the Circuit Court concluded that: "Defendant Justin Justice has acquired certain assets by virtue of engaging in a successful business for many

years." (*Order Granting Mot. to Set Aside*, A.R. 173, ¶ 30.)

The Circuit Court also impermissibly relied upon the difference in the judgment entered against Respondent and the amount of Petitioners' settlements with other parties. The Circuit Court noted that settlements were entered into between Petitioners and the other defendants in the civil action. (*Id.* at A.R. 155-156 at ¶¶ 13-15.) The Circuit Court stated that Petitioners received a "paltry sum" from defendant Wendell K. Russell, Jr.'s insurer and that the settlement with defendant Mitsubishi Motors represented "a little more than 18.6 percent of the default judgment." (*Id.* at A.R. 155 at fns. 7-8.) Respondent had motor vehicle liability insurance at the time of the accident, but Respondent never contacted his insurance company regarding the accident. (*Id.*, A.R. 152-153 at ¶ 6.) This insurance could have provided additional compensation to Petitioners and resulted in a release for Respondent.

Judge Murensky determined the judgment amount after hearing the economic damages presented by counsel for Petitioners at the damages hearing for the default judgment. In 2022, Judge Murensky apparently believes that the damage award was excessive, and he uses this belief to support his decision to prohibit enforcement of the award. Petitioners' special damages did not change between 2010 and 2022, but apparently those damages are no longer justified according to the judge.

The Circuit Court arbitrarily decided to deprive Petitioners of the judgment without having any evidence to support the decision. If the Circuit Court believed that the damages were excessive, given the Court's ruling that the default was not vacated, the Circuit Court should have vacated the damages award and set the matter for another hearing or trial on damages.

Based upon the actions of Respondent at the time the litigation was pending, the determination that the default should not be vacated, the Circuit Court's reliance upon a damage

amount it awarded, and the lack of evidence to support Respondent's claimed change in position, Petitioners were denied due process of law resulting in the loss of their property right, the judgment. Therefore, Petitioners respectfully request that the Circuit Court's *Final Order Granting Motion to Set Aside Default Judgment* be reversed.

CONCLUSION

WHEREFORE, based upon the foregoing, Petitioners the Estate of Sherry Cline Tilley, by and through Jesse Graybeal, Candice Cline, and Bradley Graybeal, Individually and as Co-Administrators of the Estate of Sherry Cline Tilley respectfully pray that the Supreme Court of Appeals of West Virginia reverse the *Final Order Granting Motion to Set Aside Default Judgment* and Petitioners be permitted to execute on the judgment.

ESTATE OF SHERRY CLINE TILLEY, by and through Jesse Graybeal, Candice Cline, Bradley Graybeal, and Ernest Cline, Individually and as Co-Administrators of the Estate of Sherry Cline Tilley

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NO. 22-0333

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ESTATE OF SHERRY CLINE TILLEY,
by and through Jesse Graybeal,
Candice Cline, Bradley Graybeal,
and Ernest Cline, Individually
and as Co-Administrators of
the Estate of Sherry Cline Tilley,

Plaintiffs Below, Petitioners,

v.

Civil Action No.: 09-C-30-M
Honorable Rudolph J. Murensky, II

JUSTIN JUSTICE,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Stephen P. New, Esq., counsel for Petitioners herein, do hereby certify that the foregoing *Petitioner's Brief* and *Appendix Record* was served via U.S. Mail and/or electronic means on the 28th day of July 2022, upon the following:

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