INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

JASON HUDSON,

Plaintiff Below, Respondent

v.

No. 24-ICA-173
(Civil Action #22-C-706)

STEAK ESCAPE OF KANAWHA CITY II, LLC, d/b/a STEAK ESCAPE and JOSH MACLEERY

Defendants Below, Petitioners

BRIEF OF PETITIONERS STEAK ESCAPE OF KANAWHA CITY II, LLC, d/b/a STEAK ESCAPE and JOSH MACLEERY

Andrew F. Maunz (WV ID No. 14012)
andrew.maunz@jacksonelewis.com
JACKSON LEWIS P.C.
1001 Liberty Avenue, Suite 1000
Pittsburgh, PA 15222
(412) 232-0404
(412) 232-3441 (facsimile)

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ASSIGNMENTS OF ERROR

The Circuit Court erred in denying Steak Escape of Kanawha City II, LLC's, d/b/a Steak Escape ("Steak Escape") and Josh Macleery's Motions to Set Aside Such Judgment. Steak Escape and Josh Macleery specifically challenge the following findings as errors justifying reversal under an abuse of discretion standard, and the punitive damage award de novo:

i. The Trial Court committed error by concluding Steak Escape was properly served by Jason Hudson. The summons and Complaint were never delivered to a Steak Escape agent designated to accept service on behalf of Steak Escape. Further, Hudson's attempt at service through certified mail sent by the Secretary of State was not delivered and the record does not contain any facts supporting failed delivery was caused by Steak Escape. Steak Escape submitted evidence that the designated office address provided to the Secretary of State was currently maintained, which the Trial Court completely disregarded. Without proper service, Steak Escape cannot have defaulted on the complaint. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 667, 584 S.E.2d 517, 523 (2003) ("This Court has consistently held that default judgments entered upon defective service of process are void.").

ii. The Trial Court committed error by determining there was not good cause to set aside a default judgment against Steak Escape and Macleery applying the factors of *Parsons v. McCoy*, 157 W. Va. 183, 202 S.E.2d 632 (1973). The Trial Court conceded the first three *Parsons* factors by failing to address them in its Order, but its finding that Steak Escape was intransigent was clear error. Prior to affording Steak Escape any opportunity to present a defense, the Trial Court made ostensibly predisposed comments regarding the entity's sophistication and ability to respond to the summons and Complaint. No facts supporting this disposition were ever established on the record. Also, the uncontested facts established by both parties reveal Steak Escape's conduct

amounted to excusable mistake and not an intentional extensive series of delays. Steak Escape believed it had satisfied all its obligations in the case and *Hudson's* mistakes caused Steak Escape's delayed response to the Trial Court's entry of default. The Trial Court in its Order completely failed to address how Macleery personally engaged in intransigence. The only time Macleery was mentioned in the Trial Court's Conclusions of Law is to support its findings against Steak Escape and lower Defendant Hill. Regardless, any finding of Macleery's intransigence would be clear error because Macleery never engaged in intransigent behavior. Macleery was instructed by two Steak Escape superiors that the corporate office would "take care" of his obligations in the suit, a promise previously executed in a prior lawsuit against Steak Escape in which named Macleery.

iv. The Trial Court committed error by awarding punitive damages and did not reference the current statutory punitive damages standard in West Virginia under W.Va. Code § 55-7-29. West Virginia punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award; and second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive. Syl. pt. 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 131, 475 S.E.2d 122, 131 (1996). The Trial Court failed to assess the first step of whether the conduct at issue herein is sufficient to expose Steak Escape and Macleery to punitive damages for their actions towards Hudson. The Trial Court's finding that Petitioners acted "maliciously" is also clear error. The West Virginia State Court of Appeals has stated in *dicta*, "[t]he foundation of the inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual." *Addair v. Huffman*, 156 W. Va. 592, 603, 195 S.E.2d 739, 746 (1973). Because Respondent claimed discrimination based on disability in

violation of the Human Rights Act, in order to receive punitive damages Respondent had to demonstrate that Petitioners showed a disregard of his rights as disabled under the law. *See Constellium Rolled Prods. Ravenswood, LLC v. Griffith*, 235 W. Va. 538, 547, 775 S.E.2d 90, 99 (2015). The Trial Court failed to make any finding that Petitioners disregarded Respondent's rights as disabled under the law. Even if it had, no facts in the record support such a finding. Hudson admitted Steak Escape and Macleery never refused Hudson's requests for medically related time off and although fellow employees called Petitioner "slow" and to "hurry up," Hudson admitted it was important that he complete his tasks in a timely manner. The Trial Court also committed error by awarding punitive damages at beyond what is reasonable under the circumstances. Syl. pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (emphasis added). The Trial Court's opinion that Steak Escape and Macleery acted "maliciously" is unsupported by the record; thus, a punitive damages award, if deemed proper, should be reduced. *See Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 604-05, 490 S.E.2d 678, 691-92 (1997) (reducing punitive damages award $466,260 because "the record in this case lacks evidence that [Appellant's] conduct towards Appellee with regard to the unlawful termination/failure to rehire claims was prompted by malice or an intent to cause her specific harm and because the evidence on these claims similarly fails to demonstrate fraud, trickery, or deceit on [Appellant's] part.").

vii. The Trial Court committed error by awarding attorney's fees in the amount of $67,304.80. Under the circumstances, this award of attorney fees was not reasonable.

STATEMENT OF THE CASE

I. Procedural History

Respondent Jason Hudson raised three claims against Petitioners Steak Escape of Kanawha City II, LLC, d/b/a Steak Escape ("Steak Escape") and Josh Macleery (collectively "Petitioners"), as well as lower Defendant Michael Hill in his Complaint: 1) disability discrimination under the West Virginia Human Rights Act ("WVHRA"), 2) failure to accommodate under the WVHRA, and 3) reprisal for requesting accommodation under the WVHRA and W. Va. Code §§ 5-11-9(7). Due to improper service and misconstruing their obligations, as discussed below, Petitioners did not timely provide an answer to Respondent's summons and Complaint. Thus, on or about December 14, 2022, Respondent filed a Motion for Default Judgment and a Memorandum in Support.

On or about January 10, 2023, the Court issued an Order granting Respondent's Motion for Default Judgment. After receiving notice of that Order weeks later and immediately retaining counsel, Petitioners sent the Court an Emergency Motion to Set Aside Default Judgment on March 1, 2023. The Court thereafter converted the default hearing on March 3, 2023, into a hearing on the Petitioners' Motion and ordered Respondent to conduct limited depositions to address various issues raised by Petitioners in their opposition to the default judgment. After two subsequent hearings on May 10, 2023, and June 23, 2023, the Court issued an Order on September 18, 2023, denying the Motion to Set Aside with respect to Respondents, but set aside the judgment against lower Defendant Hill for lack of service. A damages hearing was held and then on March 21, 2023, Court issued a Judgment Order awarding Respondent lost wages, compensatory damages, punitive damages, and attorney fees.

II. Statement of Facts

Respondent worked as a crew member for Petitioner Steak Escape, a franchised fast-food restaurant chain, at its 3700 MacCorkle Avenue SE, Charleston, West Virginia location. App. 000005-000006. During his employment and prior to his termination on June 14, 2022, Respondent was allegedly diagnosed with an "ulnar nerve palsy". App. 000006. Respondent brought this action against Petitioners for disability discrimination, failure to accommodate, and reprisal for requesting accommodation in violation of the WVHRA related to this condition.

On or about August 24, 2022, Respondent filed a Complaint in the Circuit Court of Kanawha County West Virginia against Petitioners. App. 000004. On September 8, 2022, a deputy sheriff came to the 3700 MacCorkle restaurant to serve the summons and complaints to all three lower Defendants. App. 000269. The deputy sheriff gave the summons and complaint addressed to "Josh McLeary" to Josh Macleery and did not leave the summons and complaint addressed to Steak Escape. App. 000344-000345. After receiving the complaint, Macleery informed Robert Brubaker, Area Supervisor, and Michael Contes, Director of Operations for Escape Enterprises, the franchisor of Steak Escape. App. 000269. Both Brubaker and Contes told Macleery that the corporate office would "take care of it." App. 000267; 000269. Macleery understood this to mean Steak Escape would satisfy his obligations related to the case. App. 000268.

After failed service on Steak Escape at the 3700 MacCorkle restaurant, Respondent attempted to serve Steak Escape by delivering a copy of the summons to the West Virginia Secretary of State to be sent by certified mail. App. 000253. The designated office address provided to the West Virginia Secretary of State by Steak Escape was 1013 ½ Quarrier Street, Charleston, West Virginia 25301. App. 000246. Steak Escape's 30(b)(7) witness, director of operations and supply chain for Escape Enterprises, Dirk Ahlgrim, testified that the address was

for a partner of Steak Escape, John Smallridge, and to the organization's knowledge, the address was up to date. App. 000247. Smallridge subsequently submitted an affidavit affirming the address is currently maintained. App. 000466. However, the Secretary of State's mailing was returned as "NOT DELIVERABLE AS ADDRESSED." App. 000035-000036. There is no evidence that John Smallridge or any Steak Escape employee refused service. App. 000253.

As promised by Brubaker and Contes, Escape Enterprises corporate officials met to discuss how to respond to the documents provided by the sheriff. App. 000251. This included Brubaker, Contes, Ahlgrim, and Ken Smith, part owner of Escape Enterprises and Steak Escape. App. 000251. Together, they decided to respond to the interrogatories which was enclosed with the summons and complaint. App. 000251. On or about September 22, 2022, less than two weeks after Macleery was given the summons and complaint by the sheriff, Brubaker mailed the answers with a package of responsive documents to Plaintiff's counsel by certified mail. App. 000251. At this point, it was Steak Escape's understanding that by answering the interrogatories that it was fulfilling the current obligation it had in the matter. App. 000254.

On or about December 14, 2022, Respondent filed a Motion for Default Judgment and a Memorandum in Support. App. 000016-000019. Steak Escape did not timely receive these documents, however, because they were misaddressed and sent to 1109 Sullivan Avenue, Columbus, Ohio. App. 000254. Meanwhile, the correct address for the corporate office of Steak Escape is 1099 Sullivan Avenue, Columbus, Ohio. App. 000246. Steak Escape only received documents regarding the default judgment at the very end of January because an attentive mail carrier recognized the address was mislabeled and delivered the mailing to Steak Escape's 1099 Sullivan Avenue office. App. 000255. Once Steak Escape received the notification of a default judgment, they recognized the gravity of the situation and began searching for counsel, a process that the organization had not done in over ten years. App. 000250; 000259.

On March 1, 2023, immediately after retaining counsel, Petitioners sent the Court an Emergency Motion to Set Aside Default Judgment.

SUMMARY OF ARGUMENT

A. The Trial Court erred in denying Steak Escape's Motion to Set Aside Default Judgment because the Company was never properly served. No designated agent ever received the summons and Complaint. The Secretary of State's attempts at service similarly failed as the documents were returned "NOT DELIVERABLE AS ADDRESSED." Under West Virginia law, if certified mail sent by the Secretary of State is not delivered then service is not considered effectuated. *See* W. Va. Code § 31D-5-504(c). Only where delivery is refused, is service considered effectuated. *Id.* Here, there is no indication Steak Escape refused delivery because the Postal Service did not stamp it as refused.

B. The Trial Court erred in denying Steak Escape's Motion to Set Aside Default Judgment because it improperly found Steak Escape was intransigent. The Trial Court premised its opinion upon Steak Escape being "fully aware of their obligations to participate in the lawsuit" and Steak Escape's "extensive series of delays was not an excusable mistake made by unsophisticated parties who did not know any better." Both of these findings are unsupported by the record. The Trial Court wholly dismissed the 30(b)(7) witness's testimony regarding the Company believing it had satisfied its obligations in the case by responding to the Interrogatories enclosed with the summons and Complaint. Further, the Court imputed knowledge of response obligations based solely on the Company's participation in a lawsuit ten years prior without any determination regarding whether any individual currently employed played any role. The Trial Court also assumed, without any facts on the record, that Steak Escape was "sophisticated" before it could even make an argument at the initial hearing.

C. The Trial Court erred in denying Macleery's Motion to Set Aside Default Judgment because it improperly found Macleery was intransigent. The Trial Court completely failed to assess Macleery's intransigence personally in its Order. In fact, the only time Macleery is mentioned in the Trial Court's Conclusions of Law is to support its findings against Steak Escape and lower Defendant Hill. Regardless, any finding of Macleery's intransigence would be clear error. Macleery was instructed by two Steak Escape superiors that the corporate office would "take care" of his obligations in the suit. Macleery testified that in the lawsuit ten years prior, Steak Escape made the same promise and satisfied Macleery's obligations.

D. The Trial Court erred by not referencing the current standard for awarding punitice damages under W. Va. Code § 55-7-29. West Virginia punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award; and second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive. Syl. pt. 7, *Alkire*, 197 W. Va. at 131, 475 S.E.2d at 131. The Trial Court failed to assess the first step, whether the conduct at issue herein is sufficient to expose Steak Escape and Macleery to punitive damages for their actions towards Hudson under the current statutory standard.

E. The Trial Court erred in finding Petitioners acted "maliciously" for purposes of awarding punitive damages. Because Respondent claimed discrimination based on disability in violation of the Human Rights Act, in order to receive punitive damages Respondent had to demonstrate that Petitioners showed a disregard of his rights as disabled under the law. *See Constellium Rolled Prods. Ravenswood, LLC*, 235 W. Va. at 547, 775 S.E.2d at 99. The Trial Court plainly failed to make any finding that Petitioners disregarded Respondent's rights as disabled under the law. Even if it had, no facts in the record support such a finding. Hudson admitted Steak Escape and Macleery never refused his requests for medically related time off and

although fellow employees called Petitioner "slow" and to "hurry up," Hudson admitted it was important that he complete his tasks in a timely manner.

F. The Trial Court erred in awarding punitive damages beyond what was reasonable under the circumstances. Syl. pt. 15, *TXO Production Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (emphasis added). No facts support the Trial Court's determination that Petitioners acted "maliciously" or with extreme negligence or wanton disregard. Accordingly, a punitive damages award, if deemed proper, should be reduced significantly. *See Vandevender v. Sheetz, Inc.*, 200 W. Va. at 604-05, 490 S.E.2d at 691-92 (reducing punitive damages award $466,260 because "the record in this case lacks evidence that [Appellant's] conduct towards Appellee with regard to the unlawful termination/failure to rehire claims was prompted by malice or an intent to cause her specific harm and because the evidence on these claims similarly fails to demonstrate fraud, trickery, or deceit on [Appellant's] part.").

G. The Trial Court erred in awarding attorney's fees in an amount not reasonable under the circumstances.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Petitioners believe that the decisional process would be significantly aided by oral argument and therefore herein requests that the Intermediate Court of Appeals set this case for a Rule 20 argument.

ARGUMENT

The Circuit Court erred in denying Petitioners Motion to Set Aside Default Judgment. As explained in detail below, Steak Escape was never properly served, and even if it had, the *Parsons* factors weigh against upholding a default judgment. Furthermore, the Circuit Court incorrectly

awarded Respondent punitive damages and attorney's fees. This Court should overturn the Circuit Court's unfounded decisions and overrule the Circuit Court's previous rulings.

I. Standard of Review

A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. Civ. P., 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 such discretion." Syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 784, 204 S.E.2d 85, 90 (1974). Similarly, 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." Syl. Pt. 1, *Beane v. Dailey*, 226 W.Va. 445, 447, 701 S.E.2d 848, 850 (2010) (quoting Syl. Pt. 3, *Hinerman v. Levin*, 172 W.Va. 777, 310 S.E.2d 843 (1983)). The Supreme Court of Appeals has cautioned that it "will not simply rubber stamp the trial court's decision when reviewing for an abuse of discretion." *State v. Hedrick*, 204 W. Va. 547, 553, 514 S.E.2d 397, 403 (1999). Instead, the court has said that "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 assessed but the circuit court makes a serious mistake in weighing them." *Id.* at 553, 514 S.E.2d at 403 (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995)).

On appeal, 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). However, in default judgment appeals there is "a presumption in favor of the adjudication of cases upon their merits." *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W. Va. 69, 72, 501 S.E.2d 786, 789 (1998) (citations omitted).

II. Steak Escape Was Never Properly Served.

In order to make a corporation amenable to the jurisdiction of West Virginia courts, service of process must be made upon its officers or designated agents through whom it is capable of acting. *Schweppes U.S.A. Ltd. v. Kiger*, 158 W. Va. 794, 800, 214 S.E.2d 867, 871 (1975). This may be accomplished by personally serving such officers or agents or under a statute providing that service may be made upon and accepted by some state officer such as the Secretary of State. *Id.* Where service is attempted through the secretary of State:

> Service or acceptance of process or notice is sufficient if return receipt is signed by an agent or employee of the corporation, or the registered or certified mail sent by the Secretary of State is refused by the addressee and the registered or certified mail is returned to the Secretary of State, or to his or her office, showing the stamp of the United States Postal Service that delivery has been *refused*, and the return receipt or registered or certified mail is received by the Secretary of State by a means which may include electronic issuance and acceptance of electronic return receipts.

W. Va. Code § 31D-5-504(c) (emphasis added).

Despite applying this standard, the Trial Court erred by refusing to set aside the default judgment against Steak Escape due to lack of service. The deputy sheriff never left the summons and complaint directed at Steak Escape when serving Macleery at the 3700 MacCorkle restaurant. App. 000275. Even if it had, there is no evidence to suggest Macleery had authority as a designated agent to accept service on behalf of Steak Escape.

In its September 18, 2023 Order, the Court recognized Petitioners' argument that it was never properly served because "the service of process sent through the Secretary of State was returned 'NOT DELIVERABLE AS ADDRESSED.'" App. 000525. Under West Virginia law, if certified mail sent by the Secretary of State is not delivered then service is not considered effectuated. *See* W. Va. Code § 31D-5-504(c). Only where delivery is refused, is service considered effectuated. *Id.* Here, there is no indication Steak Escape refused delivery because the

Postal Service did not stamp it as refused. *State ex rel. Monster Tree Serv. C. Cramer*, 244 W. Va. 355, 366, 853 S.E.2d 595, 606 (2020) (stating that the Postal Service is the "sole arbiter" of whether mail was refused and without the stamp that it was refused, there is no evidence that it was).

In its September 18 Order, the Court also noted that it gave Steak Escape ten days from the June 23, 2023 hearing to provide evidence that the organization could receive mail at the designated office address with the Secretary of State. App. 000525-000526. However, at that June 23 hearing, the Court granted default judgment against Petitioners *immediately* after allowing Steak Escape this time to provide such evidence:

> Court: I want someone to tell me physically that there is a mailbox there and a person who can accept service before I proceed in this case. So I am going to give you about ten days to figure that out. That is really what we are down to as far as your company goes.
>
> Petitioners: Certainly we can – I will try to do that, Your Honor, but I think that what remains as far as the argument, I think the service is kind of – is one piece of this.
>
> Court: Well, here is what I am going to do then alternatively. I am going to grant default judgment against Steak Escape, against [Macleery].

Thus, the Trial Court gave Steak Escape no meaningful opportunity to provide the information it had requested to make an appropriate determination. App. 000456.

Further, Steak Escape provided ample evidence that it *could* receive mail at the 1013 ½ Quarrier Street address. Prior to the June 23 hearing, Steak Escape's 30(b)(7) witness testified at deposition that the 1013 ½ Quarrier Street address belonged to, John Smallridge, a partner of Steak Escape who maintained an office there. App. 000246. While the 30(b)(7) witness could not confirm this information for certain, John Smallridge subsequently submitted an affidavit corroborating the witness's testimony. App. 000466. In his affidavit, Smallridge stated, *inter alia*, that "[s]everal of [his] businesses list 1013 ½ Quarrier Street Charleston, WV 25301 as the Notice of Process Address with the West Virginia Secretary of State," and "mail is regularly received at

this address." App. 000466. Smallridge also attached to his affidavit several pieces of mail that were received at the address recently. App. 000466.

The Trial Court nonetheless disregarded this information because none of the mail that had been received at 1013 ½ Quarrier Street attached to the affidavit was addressed to Steak Escape or any other affiliated name. App. 000526. This is clear error. The Court asked Steak Escape to provide "someone to tell [the Court] physically that there is a mailbox there and a person who can accept service." App. 000456. Only once Steak Escape provided an affidavit from an affiant who furnished that exact information did the Court state such evidence is insufficient.

Without proper service, Steak Escape cannot have defaulted on the complaint and therefore, the default judgment against it should be set aside. *State ex rel. Farber*, 213 W. Va. at 667, 584 S.E.2d at 523 ("This Court has consistently held that default judgments entered upon defective service of process are void."). A void judgment is a nullity and can be attacked in any court at any time. *Tudor's Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 403, 229 W. Va. 396 (2012). Furthermore, the West Virginia Supreme Court has rejected the idea that deficiencies in service can be excused by claiming a defendant had "actual notice" of a lawsuit. *See State ex rel. Monster Tree Serv.*, 244 W. Va. at 366, 853 S.E.2d at 606 (rejecting the plaintiff's argument that the defendant had actual notice and stating, "we are not at liberty to ignore the plain and ambiguous language of our West Virginia statute."). Thus, the Trial Court erred in Denying Steak Escape's Motion to Set Aside based upon improper service of process.

III. The Trial Court Erred by Denying Petitioners' Motion to Set Aside for Good Cause Based on the *Parsons* Factors.

When examining whether there is good cause to set aside a default judgment, courts should examine, "(1) [t]he 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*, 157 W. Va. 183, 202 S.E.2d 632. "Good cause" requires not only considering the *Parsons* factors, but also a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied. Syl. Pt. 5, *Hardwood Group v. Larocco*, 219 W. Va. 56, 62-63, 631 S.E.2d 614, 620-21 (2006). Under Rule 60(b), the court may relieve a party a final judgment, order, or proceeding for, *inter alia*, "(1) mistake, inadvertence, surprise, unavoidable cause or excusable neglect; … (4) the judgment is void; … or (6) any other reason that justifies relief." W. Va. R. Civ. P. 60(b).

While the Trial Court all but concedes that Petitioners meet the first three *Parsons* factors because it failed to address them in its Order, each will be addressed in turn.

a. There is no prejudice suffered by Respondent from the delay in answering.

Respondent argued that the default being set aside could be detrimental to his case because the population in West Virginia is transient and potential witnesses *could have* moved out of the state where they could not be found. However, this argument is moot.[1] The two managers named as individual defendants, who Respondent alleged discriminated against him are still working at Steak Escape and available to participate in the case. Both individual defendants and a third witness recorded statements about Respondent's allegations in response to the Interrogatories enclosed with the summons and Complaint. The third witness left her employ with Steak Escape, but the Company retained contact information for her. Thus, every witness is still available, and Respondent can still depose and seek information from them. Further, Petitioners provided many documents in their Interrogatory responses with most of, if not all, the relevant documentation relating to Respondent's termination. Accordingly, there is no significant prejudice to Respondent.

[1] With its Motion to Set Aside, Petitioner also filed an Answer. Notably, the Trial Court did not issue its Judgment Order until over a year after Petitioner filed its Motion to Set Aside.

b. Petitioners maintain and have previously asserted material issues of fact and meritorious defenses.

Petitioners provided an Answer with its Motion to Set Aside that shows Petitioners have significant defenses to Respondent's claims, both on the merits and procedurally. Specifically, Petitioners assert that Respondent was terminated for legitimate reasons, Petitioners did not discriminate against Respondent, and the WHRA may not apply due to the number of employees Steak Escape has in West Virginia. This factor thus weighs heavily in favor of deciding the case on the merits. *See Prima Mktg., LLC v. Hensley*, No. 14-0275, 2015 W. Va. LEXIS 135 at *9 (W. Va. Feb. 27, 2015) (finding the petitioner satisfied the meritorious defense requirement because "in its motion to set aside default judgment, petitioner disputes the material allegations of the plaintiff's complaint and argues that it is not liable for petitioner's alleged injuries and damages" even though the petitioner never filed an answer).

c. The interests at stake for Petitioners are significant.

Petitioners have significant interests setting aside the devastating financial effects the default judgment would have and the reputational interests that will be harmed. The Trial Court awarded a total damages award of $132,704.80 against Petitioners. App. 000643. The award of such a large amount of damages on a default judgment "must be seriously and carefully considered." *State ex rel. Monster Tree Serv., Inc.*, 244 W. Va. at 366, 853 S.E.2d at 606. Damage awards significantly less than the one ordered by the Trial Court have been found "significant." *See Arbuckle v. Smith*, No. 17-0239, 2018 W. Va. LEXIS 222, at *9 (W. Va. Mar. 23, 2018) (memorandum decision) (finding a default judgment in the amount of $51,423.95 "constitute[s] a significant amount"); *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 473, 256 S.E.2d 758, 763 (1979) (finding that "monetary damages in the amount of $35,000 … is not an insignificant claim"). Macleery is merely a store manager and compelling him to pay such award

without any determination on the merits would be against the interests of justice. Further, such a decision could cause immense reputational and financial harm against Steak Escape, which is simply a small franchisee.

d. The Court erred in assessing Petitioners' degree of intransigence.

The Trial Court's opinion in its September 18 Order that "Defendants have demonstrated complete intransigence" and that the series of events "was not excusable mistake made by unsophisticated parties who did not know any better, but rather an intransigent course of conduct by a sophisticated corporate entity that was ill-designed to avoid fully participating in the lawsuit" is against the weight of evidence and clear error as against both Petitioners. App. 000522.

The West Virginia Supreme Court of Appeals has noted that "any degree of intransigence" should "weigh heavily against" the defaulting party. *Parsons*, 163 W.Va. at 473, 256 S.E.2d at 763. Thereafter, the Court found that "the stronger the excusable neglect or good cause shown, the more appropriate it is to give relief against the default judgment." Syl. Pt. 1, *Hardwood Group*, 219 W.Va. at 65, 631 S.E.2d at 623 (internal quotations and citations omitted). Moreover, "[a]lthough this [C]ourt is quite willing to review default judgments and to overturn them in cases where good cause is shown, a demonstration of such good cause is a necessary predicate to our overruling a lower court's exercise of discretion." *Id.* at 65-66, 631 S.E.2d at 623-24 (internal quotations and citations omitted).

1. Steak Escape was not intransigent.

In essence, the Trial Court based its opinion that Steak Escape was intransigent based upon Petitioners being "fully aware of their obligations to participate in the lawsuit" and Petitioners' "extensive series of delays was not an excusable mistake made by unsophisticated parties who did not know any better." App. 000528**.** However, as described below, each of these findings are baseless and clear error.

It is plain error based on the record to opine Petitioners were fully aware of their obligations to participate in the lawsuit. Steak Escape's 30(b)(7) witness's deposition testimony makes clear that the Company believed it had satisfied its obligations for the matter when it responded to the Interrogatories which accompanied the summons and Complaint:

> Q: And was it Steak Escape of Kanawha City's understanding that by answering those questions, it was fulfilling the current obligations it had in the matter?
>
> A: That was absolutely our understanding.
>
> Q: And the understanding of the organization that there was nothing else you needed to do other than answer those questions at this time?
>
> A: That was our understanding.
>
> Q: So you made arrangements to ensure that [Respondent's counsel] received answers to those questions in a timely manner?
>
> A: Yes, we did.

App. 000254. As noted above, Steak Escape believed it had satisfied its obligations in the matter until it had received the notice of default months later. App. 000254.

The Court attempted to circumvent this testimony by finding that Steak Escape is a "well-established company" and a "sophisticated corporate entity." Tellingly, however, the Court failed to cite to the record to support these findings. Perhaps this is because no facts on the record probe the scope of Steak Escape's operations. Meanwhile, the Court made generalized statements regarding Steak Escape's sophistication as an entity. For example, during the first hearing, the Court commented regarding Steak Escape's filings with the Secretary of State, "I am also frankly not understanding why a *company of this nature* didn't seem to have something in place, more than this or maybe they did and just didn't bother." App. 000188 (emphasis added).

At the same time, Respondent made equally baseless and conclusory comments about Steak Escape. At the March 3 hearing, Respondents stated "[Steak Escape] is a sophisticated entity.

They know how to hire counsel obviously, and this isn't the first time they have been sued." App. 000179. Then, at the June 23 hearing, Respondents again argued without any basis, "Escape Enterprises is a sophisticated entity. Ken Smith is a sophisticated individual. Steak Escape is a sophisticated entity." The only basis Respondent noted to substantiate these claims is Steak Escape's prior involvement in an employment-related lawsuit. However, Petitioner Macleery testified that this lawsuit occurred "at least ten or more" years ago. App. 000259. Further, when asked who communicated with Macleery from the corporate office regarding this prior lawsuit Macleery replied, "I really can't remember. I done went through like five [area supervisors], I think." App. 000260. Steak Escape's 30(b)(7) witness corroborated this testimony by stating the lawsuit from 2013 is "the only one that [he's] aware of" and Steak Escape has not been sued "in the last five years." App. 000253-000254. Thus, the Court's finding that Steak Escape was a sophisticated entity is clear error because there was no basis to make such determination on the record.]

Moreover, both the Trial Court and Respondent place significant emphasis on whether Steak Escape could receive mail at the 1013 ½ Quarrier Street address provided to the Secretary of State. Notably, however, Respondents have not provided *any* evidence that the 1013 ½ Quarrier Street address was improper. On the other hand, the 30(b)(7) witness testified that the address was accurate; the partner maintaining the address, John Smallridge, submitted an affidavit stating the address was accurate and currently maintained; and Mr. Smallridge submitted various letters received at the address recently. App. 000246; 000466. The Trial Court ignored all this evidence solely because Mr. Smallridge could not provide a letter addressed to Steak Escape received at 1013 ½ Quarrier Street. In essence, the Trial Court penalized Steak Escape for its inability to produce a letter addressed to a location that is not its corporate office with just days of notice. Steak Escape provided the Secretary of State the 1013 ½ Quarrier Street address because it is

headquartered in Ohio and West Virginia LLCs are required to maintain a "designated office" within the state for purposes of receiving mailings such as service of process. *West Virginia Articles of Organization of Limited Liability Company*, W. VA. SEC'Y OF ST. BUS. & LICENSING DIV., (rev. November 1, 2022), https://sos.wv.gov/FormSearch/Business/Limited-Liability-Company/lld-1.pdf. The Trial Court's complete disregard of two sets of sworn testimony providing that Steak Escape *can* receive mail at this address is clear error and an abuse of discretion.

The Court also erred in opining Steak Escape's conduct amounted to an extensive series of delays and was not an excusable mistake. A review of the timeline set out in the record makes clear that Steak Escape's conduct is merely excusable mistake per W. Va. R. Civ. P. 60(b). Macleery was given the summons and complaint by the sheriff on September 8, 2022. App. 000269. The sheriff did not leave the summons and complaint for Steak Escape with Macleery. App. 000275. Because service was not effectuated, the Secretary of State mailed the documents to Steak Escape's designated address, 1013 ½ Quarrier Street. App. 000253. This mailing was not completed and returned to sender, filed November 22, 2022. App. 000187. Nonetheless, Macleery notified Steak Escape of the action and the Company submitted a response to the Interrogatories enclosed with the summons and Complaint within 30 days of Macleery's receipt. App. 000192. Steak Escape's 30(b)(7) witness testified that, in submitting the answers to Interrogatories, the Company believed it had satisfied all its obligations for the matter at the time. App. 000254. Respondent filed his Motion for Default Judgment on December 14, 2022, but Steak Escape never received this document because Respondent incorrectly addressed it. App. 000254-000255. The Court thereafter entered a Notice of Default Judgment on January 10, 2023, sending notice to the same incorrect address as Respondent's Motion for Default Judgment. App. 000254-000255. Defendants only received the Notice of Default Judgment at the very end of January due

to an over-achieving mail carrier's due diligence. App. 000255. Once the Company received the Notice of Default Judgment, Steak Escape began the "*process*" of retaining counsel. App. 000251 (emphasis added). The Trial Court mistook this testimony to mean counsel was retained immediately at the end of January as well. *See* App. 000528. However, Steak Escape retained counsel towards the end of February because it took time to carefully select counsel—a decision being made for the first time in over ten years—to rectify the Company's excusable neglect. The emergency motion was then submitted immediately after. It is clear error to opine Steak Escape's actions were "an intransigent course of conduct by a sophisticated entity that was ill-designed to avoid participating in a lawsuit against them" based upon the undisputed facts of this case.

The Court and Respondent also do not have clean hands in expediting this case. As noted above, Respondent and the Court failed to properly address the Motion for Default Judgment and Notice of Default Judgment, respectively. Further, after the initial conference on March 3, 2023, the Court ordered limited discovery be taken regarding the questions of service with another conference scheduled for May 10, 2023. At the May 10 conference, Respondent admitted that they failed to serve any request for discovery or notices of deposition for anyone. To justify these actions, Respondent stated "it is just something we haven't been able to accomplish yet with our schedule." App. 000213. Instead of pressuring Respondent to expeditiously complete this limited discovery, the Court ordered another conference be held almost two months later noting, "if you all still feel like discovery would be of some sort of benefit or everybody agrees we should move this to a later time, it matters not to me." App. 000214. While the Court and Respondent claimed initially to be worried about the prejudice to be suffered by Respondent due to Petitioners' actions, there was little effort to settle the motion to set aside expeditiously.

It is also worth noting the Trial Court's predisposition to Petitioners' actions prior to full and fair hearing. At the first conference, the Court opened by making the following ostensibly

predisposed comment "Well, we are getting started a little late here because, of course, we have had some extremely late filings in this matter." Later in the hearing, the Court stated, "I am also frankly not understanding why a company of this nature didn't seem to have something more than this or *maybe they did and just didn't bother*." App. 000188 (emphasis added). These comments show a disposition of fault on part of Petitioners before any fair chance to assert their arguments in defense.

2. Macleery was not intransigent.

Any finding that Petitioner Macleery was intransigent is against the weight of evidence and clear error. Macleery notified not just one, but two Steak Escape superiors of his receipt of the summons and Complaint from the sheriff the day it was received. App. 000267; 000269. Both individuals informed Macleery that the corporate office would "take care of it." App. 000267; 000269. Macleery also had no reason to doubt these comments. In fact, in the prior lawsuit against Steak Escape which also named Macleery, Steak Escape made the exact same promise that they would "take care of it" and followed through. App. 000259-000260. The only involvement Macleery had in the matter after his receipt of the summons and Complaint was assisting the corporate office in answering the Interrogatories. App. 000275. Based on the clear and undisputed facts of the record, any finding of intransigence is clear error.

Most troubling, the Court in its Order did not even address Macleery's intransigence personally. Notably, the only time he is mentioned in the Order's Conclusions of Law is to support the Court's findings against Steak Escape and lower Defendant Hill. Paragraph 34 of the Order only addresses the intransigence of Steak Escape and does not mention the facts or circumstances regarding Macleery personally. The Court's wholesale failure to make any Conclusions of Law regarding Macleery is clear error.

IV. The Damage Award Is Improper.

The Trial Court ordered judgment against Petitioners for compensatory damages, punitive damages, and attorney fees and costs. App. 000643. In doing so, the Court committed two errors: (1) the Court failed to cite to the correct standard for awarding punitive damages, and (2) the award for attorney fees and costs should be reduced insofar as they are not reasonable. If the Court upholds the trial court's decision not to set aside the default judgment, the punitive damages and attorney fee awards should be eliminated or reduced for the reasons articulated below.

a. The Trial Court's award of punitive damages was improper.

West Virginia punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Syl. pt. 7, *Alkire*, 197 W. Va. at 131, 475 S.E.2d at 131. Therefore, the first consideration is whether the conduct at issue herein is sufficient to expose Petitioner to punitive damages for its actions toward Respondent. *See Constellium Rolled Prods. Ravenswood, LLC*, 235 W. Va. at 549, 775 S.E.2d at 99.

In contravention of these well-settled principles, the Trial Court only applied the factor test of *Garnes*, 186 W. Va. 656, 413 S.E.2d 897. *See* App. 000635. In doing so, the Court made no initial determination whether the conduct of Petitioners as alleged in Respondent's Complaint warrants the Court to award punitive damages. This is clear error of law and a proper analysis, as outlined below, necessitates overturning the punitive damages award.

The question of whether the Petitioners' conduct toward the Respondents entitled the Respondents to punitive damages was originally governed by syllabus point 4 of *Mayer v. Frobe*,

which states, “In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.” 40 W. Va. 246, 22 S.E. 58 (1895); *See also* Syl. pt. 4, *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 691, 289 S.E.2d 692, 703 (1982) (“Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.”) (internal citations omitted); Syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912) ("To sustain a claim for punitive damages, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages.").

Further, West Virginia Code § 55-7-29(a) recently amended the standard to award punitive damages and now requires that it be proved “by clear and convincing evidence.” *Jordan v. Jenkins*, 245 W. Va. 532, 555, 859 S.E.2d 700, 724 (2021). Given this modification the West Virginia Supreme Court of Appeals now holds that, pursuant to West Virginia Code § 55-7-29(a), an award of punitive damages may only occur in a civil action against a defendant if “a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.” *Id.* Given this standard, the trial court erred in awarding punitive damages, and it did not even cite W. Va. Code § 55-7-29 in its award of punitive damages.

i. Petitioners' conduct does not entitle Respondent to punitive damages.

In his Complaint, Respondent alleges Petitioners refused to allow Respondent time off work to attend medical appointments or additional time to complete tasks stating Respondent should "suck it up," accusing Respondent of being "too slow" at grilling and assembling sandwiches and retaliated against Respondent for requesting medically related time off. App. 000006-000007. In the damages hearing, Respondent admitted to never providing any documentation that described his specific limitations, that Petitioners never refused Respondent's requests for time off, and that it is important for Respondent to complete his tasks expeditiously. App. 000568-000569; 000571. This conduct falls substantially short of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud. *See, e.g.*, *Constellium Rolled Prods. Ravenswood, LLC*, 235 W. Va. at 547-548, 775 S.E.2d at 99-100 (finding the circuit court erred in denying the petitioners' motion for judgment as a matter of law on the issue of punitive damages where the petitioners posted a comment card containing the term "bitch" and three comment cards characterizing the respondents as "lazy," and failed to undertake any investigation because such conduct "simply fails to indicate the kind of repeated and continuing wrongdoing by the employer that demonstrates the employer's criminal indifference to the rights of women in the workplace recognized by the Human Rights Act").

The Circuit Court's finding that Petitioners acted "maliciously" is clear error. *See* App. 000632;000637-000638. The West Virginia State Court of Appeals has said that "[t]he foundation of the inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual." *Addair*, 156 W. Va. at 603, 195 S.E.2d at 746. Because Respondent claimed discrimination based on disability in violation of the Human Rights Act, in order to receive punitive damages Respondent had to demonstrate that Petitioners showed a disregard of his rights

as disabled under the law. *See Constellium Rolled Prods. Ravenswood, LLC*, 235 W. Va. at 547, 775 S.E.2d at 99.

In finding malicious conduct, the Circuit Court plainly failed to make any finding that Petitioners had disregarded Respondent's rights under the WVHRA. Even if it had, any such finding would be inappropriate and misplaced. At the damages hearing, Respondent noted that he requested two accommodations, time to attend medical appointments and extra time to complete tasks. App. 000549-000550**.** As noted above, Respondent admitted at this same hearing that Petitioners never refused Respondent's requests for medically-related time off. App. 000571. He also admitted that although fellow employees called Petitioner "slow" and to "hurry up," it is important that he complete his tasks in a timely manner. App. 000569**.** Further, Respondent admitted that he never provided Petitioners any medical documentation that described his limitations. App. 000568. Thus, there is no indication that Petitioners disregarded Respondent's rights under the WVHRA. In fact, the opposite is true. Petitioners gave Respondent the opportunity to attend medical appointments.

It is also well settled that "[t]he mere existence of a retaliatory discharge will not automatically give rise to the right to punitive damages." *Harless*, 169 W. Va. at 693, 289 S.E.2d at 704. The plaintiff must prove "further egregious conduct on the part of the employer." *Id.*, 169 W. Va. at 692-93, 289 S.E.2d at 703. No such further egregious conduct on the part of Petitioners exists. Although Respondent alleges retaliation for requesting an accommodation, Petitioners gave Respondent the opportunity to complete his tasks and attend medical appointments.

Lastly, Petitioners' conduct does not rise to the level of previous cases where punitive damages awards were sustained. *See W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 W. Va. LEXIS 183, at *43-47 (W. Va. June 15, 2011) (finding sufficient evidence to sustain punitive damages award where the petitioners terminated the respondent without finding he had violated

any company policy or acted negligently, the respondent was given more severe punishment for similar misconduct than another employee, for months after his termination the respondent was repeatedly called by the petitioners to attempt to persuade the respondent to sign a release of all claims, and the petitioners alleged reasons for termination were found to be malicious and unsubstantiated); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 191, 680 S.E.2d 791, 823 (2009) (sustaining punitive damages award for the petitioner's "egregious" conduct where the petitioner surveilled the respondent because it doubted the legitimacy of his workers' compensation claim both while he was off from work and after he returned and the respondent's first instance of alleged misconduct ultimately resulted in termination "all because he missed work because he was recovering from an injury he had sustained while performing [the petitioner's] work"); *Vandevender* 200 W. Va. at 604-05, 490 S.E.2d at 691-92 (upholding punitive damages award where the appellants pretended to be unaware of any work restrictions when the appellee returned to work, directed appellee to engage in strenuous physical work immediately upon return, and surveilled appellee both during her return to work and on subsequent visits to appellant's store).

Respondent does not allege any conduct like that of the above decisions. Petitioners did not engage in surveillance efforts to determine the truthfulness of Respondent's condition. Petitioners vehemently deny, and Macleery contested under oath, Respondent's allegation that Hill appeared at Respondent's new place of employment berating him regarding the lawsuit. App. 000271. Further, Respondent provided no corroborating evidence to support this claim and refute Petitioners' denial. Petitioners did not disregard Respondent's restrictions when he returned to work. Petitioners allowed Respondent time to attend medical appointments. App. 000571. Also, the nature of Respondent's role, as he admits, is to prepare orders quickly. App. 000569. Each comment Respondent complains of directly relate to his work performance, i.e., being too slow for

the fast-paced nature of the job. The one comment of which the Trial Court places substantial reliance is Respondent allegedly being called "retard." App. 00063. However, Respondent failed to say who made this comment, how often it was made, when it was made, in what context it was made, or any other circumstances relating to this event. *See* App. 000547. This one isolated comment, without any context, is insufficient to establish punitive damages award. *See Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983) ("The usual meaning assigned to 'wilful,' 'wanton' or 'reckless' … is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."); *see also Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 652, 600 S.E.2d 346, 364 (W. Va. 2004) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

Accordingly, Petitioners' conduct does not entitle Respondent to punitive damages and the award is clear error.

ii. The Amount of Punitive Damages is not Supported by the Evidence.

If this Court should determine that punitive damages are warranted in this case, which it should not, such award should be substantially reduced. If the Appellate Court determines that "a punitive damage award is justified," it is mandated to conduct "a review … to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991)." Syl. pt. 7, in part, *Alkire*, 197 W. Va. at 131, 475 S.E.2d at 131. When reviewing an award of punitive damages in accordance with *Garnes*, the Court "will review de novo the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award." Syl. pt. 16, *Peters*, 224 W. Va. 160, 185, 680 S.E.2d 791, 816. To

determine whether a punitive damages award is excessive under *Garnes*, the court must weigh seven factors:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater; (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility; (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss; (4) The financial position of the defendant would be relevant; (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial; (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award; and (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Syl. Pt. 3, *Garnes*, 186 W. Va. 656, 413 S.E.2d 897. Further, when a trial court reviews an award of punitive damages, "the court should, at a minimum, consider the following additional factors:

> (1) The costs of the litigation; (2) Any criminal sanctions imposed on the defendant for his conduct; (3) Any other civil actions against the same defendant, based on the same conduct; and (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Id. at Syl. Pt. 4, in part. While the Circuit Court applied these standards, it failed to address multiple points which necessitate reducing any award of punitive damages.[2]

[2] Since these decisions were issued, a statutory cap on punitive damages was issued via W.Va. Code § 55-7-29. Despite this cap being in place, the West Virginia Supreme Court has made it clear that trial courts are still obligated to conduct an analysis of reasonableness as articulated in *Garnes* and *TXO*. *See Jordan v. Jenkins*, 245 W.Va. 532, 559, 859 S.E..2d 700 (2021)

The Trial Court's opinion that punitive damages bear a reasonable relationship to the harm caused to Respondent is based off misunderstandings of the facts. *See* App. 000632. First, the Court's finding that Petitioners called a "disabled subordinate" a "retard" is unsupported by the record. This fact was elucidated during the damages hearing in the following course of questioning:

> Q: Did *anyone* ever, you know, call you names or things of that nature after you told them about the physical condition?
>
> A: Yes.
>
> Q: What were some of the names that they would call you?
>
> A: Slow, retarded, you know.

App. 000547 (emphasis added). Nowhere is it established who made this statement, in what context, or even whether Petitioners knew that it was made. The Court correctly noted that Respondent was scheduled to work on days where he had medical appointments but failed to give any credence to the fact that Petitioners granted Respondent time to go to all his medical appointments. App. 000571. The Trial Court also noted that Respondent was "criticiz[ed] and scold[ed]" for failing to work fast enough but did not recognize Respondent's admission that he understood that to be the demands of the role. App. 000569. Thus, there is no reasonable relationship to the harm caused, nonetheless one which justifies a punitive damages award in the amount given. Syl. pt. 15, *TXO Production Corp.*, 187 W. Va. 457, 419 S.E.2d 870 ("The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.").

Next, the Court found "based on the evidence and testimony presented and the facts that have been deemed admitted, that Defendants were aware their actions were causing or were likely to cause harm" without any citation to such evidence or testimony. Perhaps, this is because no such admissions were made. The deposition testimony of Macleery and Steak Escape's 30(b)(7) witness were limited to issues of service of process. App. 000199. These witnesses were not questioned regarding their awareness of the alleged actions against Respondent. Thus, this finding is clear error.

The Court then accuses Petitioners of covering up their actions through their answering of Interrogatories enclosed with the Summons and Complaint and its resulting "extensive series of delays." As discussed above, this finding is unfounded and little credit was given to the testimonies of Macleery and the 30(b)(7) witness explaining Petitioner's actions. As evidence refuting this testimony, the Court cited to a previous matter in which Petitioners were alleged to have unlawfully discriminated against another individual. The Court failed to take recognition that this matter was settled *over ten years ago*. Essentially, the Court opined that this one lawsuit that occurred over a decade ago instills a longstanding understanding of response obligations to a complaint. However, there has been significant turnover at Steak Escape since that lawsuit. Macleery testified that since the previous lawsuit, there have been *five* different area supervisors. App. 000260. Further, Escape Enterprises' 30(b)(7) witness—director of operations and supply chain—was not working for the Company while the matter was active. Thus, at least two of the four individuals involved in the decision to respond to the Interrogatories played no role in the previous lawsuit, and no facts establish the role either Contes or Smith played in responding to the previous suit as well. Thus, it was error for the Court to opine the previous lawsuit requires a finding that Petitioners were intransigent for purposes of awarding punitive damages.

b. Attorney Fees and Costs Should Be Reduced Insofar as They Are Not Reasonable.

On appeal, an award of attorney fees and costs is reviewed on an abuse of discretion standard. *Shafer v. Kings Tire Serv.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004). Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. Syl. pt. 4 *Aetna Casualty & Surety Company v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.*

Based on the circumstances of this case, the fee award issued by the Trial Court is not reasonable. The fees awarded were largely generated by discovery ordered by the Trial Court, which the Trial Court largely choose to disregard in determining it would not set aside the default judgment. Furthermore, as discussed above, the default judgment is void in the first place due to lack of service of Steak Escape. Under the circumstances, it is not reasonable for the attorneys to have been awarded $67,304.80 in fees.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court vacate the Trial Court's Order Granting Default Judgment against Petitioners and Denying Petitioners' Respective Motions

to Set Aside Default Judgment and remand this case back to the Trial Court for further proceedings consistent with its rulings.

Respectfully submitted,

JACKSON LEWIS P.C.

Dated: July 22, 2024

By: */s/ Andrew Maunz*

Andrew F. Maunz, Esq.
WV ID No. 14012
andrew.maunz@jacksonlewis.com
1001 Liberty Avenue, Suite 1000
Pittsburgh, PA 15222
(412) 232-0404
(412) 232-3441 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, the foregoing Petitioners' Brief was filed with the Intermediate Court of Appeals through the Court's electronic filing system and through this system, Respondent's counsel of record received notification of the filing and access to the Brief.

/s/ Andrew F. Maunz
Andrew F. Maunz, Esq.
WV ID No. 14012