INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners, Defendants Below,

v.

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

JASON HUDSON,

Respondent, Plaintiff Below.

BRIEF OF RESPONDENT JASON HUDSON

Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
ROD SMITH LAW PLLC
108 ½ Capitol Street, Suite 300
Charleston, WV 25301
Telephone: (304) 342-0550
Facsimile: (304) 344-5529
rod@lawwv.com
aurban@lawwv.com

Robert P. Lorea (WVSB #7476)
LOREA LAW OFFICE PLLC
4208 Venable Avenue
Charleston, WV 25304
Telephone: (304) 539-1673
RPL@LoreaLaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes

Rules

Other Authorities

COUNTER STATEMENT OF THE CASE

Petitioners Steak Escape of Kanawha City II, LLC d/b/a Steak Escape ("Steak Escape") and Josh Macleery ("Macleery") discriminated against an employee and then took affirmative, intentional actions to deny him his day in court. Jason Hudson is the Respondent. Mr. Hudson worked as a cook for Steak Escape from April 7, 2022, until he was wrongfully discharged on June 14, 2022. (App. at 000170).

Steak Escape is a limited liability company ("LLC") organized under the laws of West Virginia and registered to do business with the West Virginia Secretary of State ("WVSOS"). Steak Escape was founded on June 6, 1997, and operates a Steak Escape franchise, with its principal place of business located at 3700 MacCorkle Avenue, S.E., Charleston, West Virginia. (App. at 000246). Steak Escape's franchisor is Escape Enterprises LLC ("Escape Enterprises"). Escape Enterprises is not a party to this suit. However, two of its members, Kennard Smith and Mark Turner, are also owners/members of Steak Escape.

Every year since 1997, Steak Escape has filed an annual report with the WVSOS. (App. at 000246). At the time this case was filed, Steak Escape had registered John D. Smallridge, Jr. as its agent for service of process and designated its address for service of process as 1013 ½ Quarrier Street, Charleston, West Virginia 25301. (*Id.*)[1]

Petitioners state in their brief that there is no evidence for the Trial Court to conclude that Steak Escape is a sophisticated entity. Nonetheless, in its first appearance before the Trial Court, Steak Escape represented the following in a pleading, "Steak Escape is a restaurant chain based in

[1] Despite the events in the case at bar, this information remains unchanged on the WVSOC database as of September 5, 2024.

Columbus, Ohio, that operates franchises in more than 23 states and seven countries."[2] (App. at 000197). Steak Escape further represented in that pleading (contrary to the information provided to and on file with the WVSOS) that the 3700 MacCorkle Ave. location was not its principal place of business because "Steak Escape operates at least three franchises within ten miles of that location." (App. at 000197). Additionally, Mr. Hudson later produced to the Trial Court Steak Escape's Franchise disclosure statement evidencing that Steak Escape's parent company, Escape Enterprises, which shares overlapping ownership with Steak Escape, operates franchise locations in approximately 100 cities in 17 different states and in as many as five foreign countries. (App. at 000309-14).

Steak Escape is a member-managed LLC. Steak Escape disclosed to the WVSOS that Petitioner Josh Macleery is an officer and manager of Steak Escape. (App. at 000037-39; App. at 000248.)[3] Steak Escape hired Macleery in 1999. (App. at 000265). Macleery is also the manager of the Steak Escape restaurant, and was the former supervisor of both Mr. Hudson, and Michael Hill, a defendant below.

Mr. Hill worked as a shift supervisor for Steak Escape and was a former supervisor of Mr. Hudson. (App. at 000548). Hill was supervised by Macleery. (App. at 000548).

During the time Mr. Hudson worked for Steak Escape, he began to experience numbness and weakness in his right arm and was eventually diagnosed with an "ulnar nerve palsy." (App. at 000539-40). Mr. Hudson requested reasonable accommodations in the form of time off from work to attend appointments with his neurologist, additional time to complete tasks, and intermittent breaks during times when he was experiencing an acute loss of sensation such that it

[2] In the same document, Steak Escape concedes that the entity it referred to is "Plaintiff's employer."

[3] Steak Escape continues to identify Macleery as an officer and managing member of the LLC.

was temporarily unsafe for him to work with the hot grill or deep fryer. (App. at 000549-50). In response to these requests, the defendants below subjected Mr. Hudson to harsh discrimination. (App. at 000550).

Mr. Hudson testified about this harsh treatment in a damages hearing conducted on October 2, 2023. Among other things, Mr. Hudson testified that he first experienced the symptoms of his ulnar palsy while working his shift at Steak Escape. (App. at 00539-40). His right arm went numb, and he was having difficulty working in the kitchen. (App. at 000542). He was scared and very concerned because this had never happened to him before, and he did not understand what was happening. (App. at 000541). Mr. Hudson asked to leave his shift to go to the emergency room. (App. at 00540). However, Mr. Macleery told Mr. Hudson that he would have to wait until after work. (App. 000540). When Mr. Hudson returned to work again, he explained his diagnosis to Macleery and informed him that he would require follow-up with a neurologist. (App. at 000545).

Mr. Hudson further testified as to how differently he was treated after informing Macleery of his temporary disability. He testified that his employers started "acting different when I told them about it and the accommodations, yes, a little bit. I mean, actually a lot of bit." (App. at 000552). Prior to the condition, Mr. Hudson had never had complaints regarding his work performance and had never been written up. (App. at 000546). After being informed of his medical condition, his supervisors began to nitpick him telling him to "hurry up" and "not my problem" when his condition would adversely affect his work. (App. at 000545). Mr. Hudson testified that his supervisors acted as if they "had some kind of grudge . . . .") (App. at 000546). Supervisors Macleery and Hill would both hassle Mr. Hudson over the condition. (App. at 000546-47). Mr. Hudson was called pejorative names such as "slow" and "retarded." (App. 000547). When Mr. Hudson would request accommodation for his condition, Michael Hill would

tell him to "suck it up" and, as alleged in Plaintiff's Complaint, Steak Escape failed to provide them. (App. 000006).[4] Additionally, supervisors Macleery and Hill would both scream at Mr. Hudson. (App. at 000546-47). This bullying would take place in front of customers and Mr. Hudson's co-workers. (App. at 000548). Mr. Hudson testified that the experience was "very humiliating." (App. at 000548). Mr. Hudson also testified that "they made working miserable. … I have got to work to live. So, I was doing as much as I could, but it made my anxiety very, very bad just trying to go to work just to make a living." (App. at 000550).

Petitioners would also taunt him' telling him to "suck it up" and tell him that his physical conditions were "not my problem." (App. at 00006; 000549-50; 000566; 000569). Ultimately, on June 14, 2022, Macleery fired Mr. Hudson in direct response to a request for help during a time that Mr. Hudson was having difficulty keeping up with his work due to his condition. (App. at 000552). Specifically, Mr. Hudson had been on the line working without any breaks. (*Id.*). Despite dutifully performing his meal preparation duties, his supervisors were yelling at him to hurry up. (*Id.*) At this time, three people were in the back taking a break. (*Id.*) Mr. Hudson simply asked if someone could come up to help him. (*Id.*) Macleery responded by firing him on the spot in front of customers and his fellow co-workers. (App. at 000552). Mr. Hudson's termination came within 30 days of Mr. Hudson reporting his disability and just days before he was to attend a neurologist's exam. (App. at 000007).

[4] Because the defendants below defaulted by failing to file a timely answer, the truth of the factual allegations in the Complaint are deemed admitted as a matter of law. *See, Dickens v. Sahley Realty Co.*, 233 W. Va. 150, 756 S.E.2d 484, 492 n.23 (2014) (citing 10 *Moore's Federal Practice* § 55.32[l][a] & [b] (3rd ed.2008) (recognizing that a defaulting party admits factual basis of claims asserted against it); *See also* Litigation Handbook on West Virginia Rules of Civil Procedure, p. 1275, (Louis J. Palmer, Jr. & Robin Jean Davis eds., 5th ed. 2017) ("It is well established that while a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages").

Mr. Hudson testified as to how humiliating this was, and that he "snuck" through the back of the store so the customers would not see him walking out of the store. (App. at 000552-53). Furthermore, Mr. Hudson was left devastated and fearful of how he would now support himself. (App. at 000553-54). Mr. Hudson testified that he "spiraled into a depression and didn't know what [he] was going to do. [He] felt useless." (App. at 000554). Mr. Hudson further explained that he lived "paycheck to paycheck." As a result, losing even one paycheck put him drastically behind and left him fearful that he would lose his housing. (App. at 000254-55).

Mr. Hudson also testified he had previously battled depression and anxiety but, fortunately, had not required treatment for at least four years before his termination. (App. at 000555-56). He did not require any medication at the time he was hired by Steak Escape. (App. at 000556-57). However, the trauma of these events made him so depressed that he began having thoughts of suicide. (App. at 000557-58). Mr. Hudson's suicidal ideations eventually got so bad that he required mental health treatment and was put on medications to treat his depression. (App. at 000557-59). Even though he found another job approximately three weeks later, at the time of his hearing on October 2, 2023, Mr. Hudson still had trauma and suffered from fears that others might retaliate against him in his new workplace. (App. at 000559-60).

On July 26, 2022, Mr. Hudson's counsel wrote Steak Escape at its principal place of business putting it on notice of Mr. Hudson's potential claim and requesting that it preserve certain categories of evidence for the anticipated litigation. (000401-02). Petitioners did not respond to Mr. Hudson's counsel. However, Macleery testified that he received the letter and immediately forwarded it to Steak Escape's Vice President, Michael Contes, located at 1099 Sullivant Avenue, Columbus, Ohio. Macleery refers to the 1099 Sullivant Avenue address as Steak Escape's "corporate office." (App. at 000267). Macleery testified that at Mr. Contes' direction, he obtained

statements from every employee who worked on the day Mr. Hudson's employment was fired but took no further action to preserve the categories of evidence requested by Mr. Hudson. (*Id.*)

On August 5, 2022, Mr. Hill approached Mr. Hudson at his new place of employment and verbally accosted him. (App. at 00007). Among other things, Mr. Hill urged Mr. Hudson's current supervisor to fire him because he had sought legal counsel concerning his firing by Steak Escape and threatened to "whip [Mr. Hudson's] a**" the next time he saw him as punishment for hiring a lawyer. (*Id*.)

Mr. Hudson filed his Complaint in the Circuit Court of Kanawha County on August 21, 2022. (App. at 000004-13). The Complaint contains allegations consistent with Mr. Hudson's testimony on October 2, 2023, including allegations regarding the taunting of Mr. Hudson and the fact that other employees who had not requested accommodations were not subject to similar harsh treatment at Steak Escape. (App. at 000007).

On September 8, 2022, a deputy with the Kanawha County Sheriff's Department delivered Mr. Hudson's Complaint and Summons directed to Steak Escape, Josh Macleery, and Michael Hill, along with sets of written discovery requests directed towards Defendants Hill and Macleery to Steak Escape's principal place of business located at 3700 MacCorkle Avenue, S.E. and handed them to Macleery. (App. at 000099-000100). Macleery accepted service of the Complaint and Summons directed towards him but attempted to "refuse" service of the Summons to Steak Escape by misrepresenting to the deputy that he did not have authority to accept service for Steak Escape or Hill, despite the fact that he is a disclosed officer of the LLC. (App. at 000181-82). Petitioners later went so far as to repeat this claim in an affidavit to the Trial Court, where Macleery admitted that he was delivered a Summons to Steak Escape but told the process server he could not accept it. (App. at 000099-100). Macleery's statements to the deputy and in his affidavit are contrary

to information Petitioners registered with the WVSOS clearly identifying Macleery as a Managing Officer of the company. (App. at 000037-39; 000248.) Consequently, despite Macleery's attempt to "refuse" service of the Summons, Steak Escape was properly served as of September 8, 2022.

Irrespective of Macleery's comments, the deputy left Mr. Hill's pleadings at the store location but did not leave the Summons directed to Steak Escape even though it had been delivered to Macleery. Steak Escape Area Manager, Robert Brubaker was present at the Kanawha City Steak Escape on September 8, 2022. Macleery informed Mr. Brubaker that he had been served and showed Mr. Brubaker the documents on the same day. (App. at 000269-70).

In addition to the personal service on September 8, 2022, Mr. Hudson made an additional effort to serve the Complaint and Summons on Steak Escape by mailing the same to the WVSOS. (App. at 000035). The WVSOS received the Complaint and Summons on September 12, 2022. (*Id.*). The WVSOS attempted to deliver the Summons and Complaint by certified mail, to the address Steak Escape provided as the address for service of process. (App. at 0000036). The post office made three unsuccessful attempts to deliver the package to the registered agent at the registered address. (*Id.*). After the third attempt, the package was returned to the WVSOS marked "Not Deliverable" and returned to the WVSOS on October 31, 2022. (App. at 000035-36).

Pursuant to the West Virginia Rules of Civil Procedure, Defendants' Answers to the Complaint were due on September 28, 2022, if counting twenty days from personal service at the principal place of business,[5] or on October 12, 2022, if counting thirty days from the date the Complaint and Summons were returned to the WVSOS.

[5] Pursuant to Rule 12(b)(1), "[a] defendant shall serve an answer within 20 days after the service of the summons, unless before the expiration of that period the defendant files with the court and serves on the plaintiff a notice that the defendant has a bona fide defense …"

On September 26, 2022, Mr. Hudson's counsel received a packet of documents that appeared to be served by the defendant below, Michael Hill, acting *pro se*. (App. at 000356-000404). The collection of documents appeared to be responses to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admissions to Defendant Hill. However, Defendant Hill did not file a responsive pleading to the Complaint. These documents were mailed in an envelope marked with the name "Steak Escape" from the address Steak Escape provided to the Secretary of State as its mailing address, 1099 Sullivant Avenue, Columbus, OH 43223. (App. at 000356). Steak Escape later testified that these materials were assembled by Steak Escape at its Columbus, Ohio offices at the direction of its top-level executives. (App. at 000251-52).

Mr. Hudson moved for a default judgment on December 22, 2023, and attempted to serve Petitioners with his Motion and Memorandum of Law. (App. at 000014-77). Among other things, Mr. Hudson mailed copies of the Motion and Memorandum of Law to Petitioner Steak Escape's principal place of business, 3700 MacCorkle Avenue, S.E., where Macleery and Steak Escape had received the evidence preservation letter. (App. at 00020; 000031). Steak Escape's policies and procedures would have required the pleadings to be forwarded to Steak Escape's corporate offices. (App. at 000270). Steak Escape admits that the Motion for Default Judgment and Supporting Memorandum were ultimately received at its Columbus, Ohio offices. (App. at 000254). Steak Escape contends that this was due to an "over-achieving mail clerk" who delivered the envelope despite Mr. Hudson's counsel misaddressing it to "1199" Sullivant Avenue. (App. at 000255).

None of the Defendants below filed a response to Plaintiff's Motion for Default Judgment. (App. at 000081). On January 10, 2023, the Court entered its Order finding Petitioners in Default and, among other things, ordered the Plaintiff to return for a hearing to present evidence of

damages. (App. at 000078-82). The Court's Order directed the Circuit Clerk to mail a copy of the order to the address designated as Steak Escape's principal place of business, 3700 MacCorkle Avenue, S.E., Charleston, West Virginia 25304.

Mr. Hudson's Counsel made additional attempts to provide Defendants with notice of the proceedings. On January 20, 2023, Mr. Hudson's counsel telephoned Steak Escape at the 3700 MacCorkle location and spoke directly with Macleery. (App. at 000161). Plaintiff's counsel informed Mr. Macleery of the Court's ruling and attempted to cooperatively schedule the next hearing. (App. at 000177-78). Defendant Macleery rebuked Plaintiff's counsel's attempts to include Defendants in scheduling the hearing. (App. at 000162). That same day, counsel for Mr. Hudson served notice that a hearing for the purposes of establishing damages would be held on March 3, 2023, by mailing a copy of the Notice to the 3700 MacCorkle Avenue, S.E., Charleston WV 25304 address, and to the 1099 Sullivant Avenue, Columbus, Ohio 43223 address. (App. at 000083-88). Defendants below raised no claim that they failed to receive sufficient Notice of the March 3, 2023 hearing date.

Steak Escape later testified that it retained counsel "in the tail end of January when we received notification of the default judgment." (App. at 000251). However, Steak Escape did not take any action on the default judgment until March 1, 2023, when it filed its *Emergency Defendants Motion to Set Aside Default Judgment*. (App. at 000176). Petitioners' counsel telephoned Mr. Hudson's counsel on March 1, to warn that they would be filing an emergency motion. Contrary to Steak Escape's later testimony, at that point, Steak Escape's counsel claimed that they were not hired until February 28, 2023. (App. at 000178).

The Petitioners served their emergency motion by emailing it to opposing counsel at 8:00 p.m. on March 1, 2023. Petitioners attempted to deliver a copy of this motion to the Court via

UPS, but it did not arrive prior to the hearing on Petitioners' motion. (App. at 000176). The Court conducted a hearing on March 3, 2023, which was converted to a hearing on Petitioners' motion to set aside the default judgments. (App. at 000172-205).

At the March 3 hearing, the Court inquired about the accuracy of the information provided by Steak Escape to the West Virginia Secretary of State inasmuch as the West Virginia Secretary of State was unable to deliver the Complaint and Summons to the address designated by Steak Escape for receiving service of process. (App. at 000187-188). Additionally, Steak Escape disputed the designation of Macleery as a corporate officer. (App. 000099-100). Among other things, the Court ruled that Plaintiff should be permitted to take depositions of Steak Escape and Josh Macleery that were limited in scope to the issues of service before the Court. (App. at 000199). The parties were ordered to return for a second hearing on May 10, 2023, after completing the depositions. (App. at 000206-08). The parties returned for a second hearing as scheduled on May 10, 2023. However, the depositions had yet to be completed. The hearing was thus continued to June 23, 2023, to facilitate the Court-ordered depositions. (App. at 000224-25).

Steak Escape's designated 30(b)(7) representative and Macleery were both deposed on June 13, 2023. The transcripts from these depositions were provided to the Court and were considered by the Court in making its rulings. We now know that Steak Escape's top executives had a meeting regarding the Complaints served by Mr. Hudson and made a tactical decision that the only appearance in this case would be made by the lowest employee named as a defendant. (App. at 000251-52). It would not hire Mr. Hill a lawyer. (*Id.*). It would instead answer the discovery directed to Mr. Hill but would not respond to the Complaint. (*Id.*).

As to the information Steak Escape registered with the WVSOS, Steak Escape admitted that it could not answer one way or another if it actually operated an address at the location it had

designated for receiving service of process—the address to which the WVSOS attempted service on behalf of Mr. Hudson. (App. at 000247). Furthermore, Steak Escape could not clarify if the WVSOS's mailing of the Complaint and Summons was returned because Steak Escape had no office at the address it provided, or alternatively, if Mr. Smallridge simply refused to accept its delivery. (App. at 000253). Steak Escape also testified that its designated agent for service of process was "the least communicative of their partners." (*Id.*).

After the deposition, Steak Escape produced an affidavit from Laurin Fix, an independent contractor for Steak Escape whose duties included filing Steak Escape's annual reports to the WVSOS. (App. at 000406). Among other things, Ms. Fix was also equivocal regarding whether or not the registered address was accurate. "As far as I know, the Quarrier Street address is an accurate address. I cannot comment on why any particular piece of mail was not delivered." (*Id.*).

On September 18, 2023, the trial court entered an Order denying Petitioners' motion to set aside default judgments against Steak Escape and Macleery and granting the motion to set aside judgment against Michael Hill. (App. at 000519-530). On October 2, 2023, the Trial Court conducted a hearing to establish Mr. Hudson's damages. Mr. Hudson testified on his own behalf regarding his experiences at Steak Escape, including, but not limited to, the circumstances surrounding his medical condition, his termination from Steak Escape, and the emotional trauma and lost wages resulting from the termination of his employment. Petitioners' counsel did not present any witnesses or evidence on behalf of the defense. On March 21, 2024, the trial court entered its Judgment Order awarding damages to Mr. Hudson.

SUMMARY OF ARGUMENT

I. The Trial Court did not abuse its discretion when finding that both Steak Escape was properly served. Petitioners admit that Josh Macleery was properly served when a Kanawha

County Deputy Sheriff delivered the Complaints and Summonses to Steak Escape's principal place of business on September 8, 2022. (App. at 000189; 000099-000100). Macleery is registered with the WVSOS as an officer of Steak Escape. (App. at 000037-39; App. at 000248). Rule 4(d)(9) of the West Virginia Rules of Civil Procedure provides that an LLC may be served by delivering a copy of the summons and complaint to any officer of the company. Steak Escape admitted that it had received a copy of the Complaint delivered to Macleery and also admitted that it had no confusion or misunderstanding that a lawsuit had been filed in the Circuit Court of Kanawha County and was moving forward. (App. at 000524). What Macleery chose to do with the summons at the time of delivery has no bearing on the case.

Alternatively, although it was unnecessary, Respondents also achieved service over Steak Escape by delivering the Summons and Complaint to the WVSOS. The information Steak Escape registered with the WVSOS for service of process was false. The Trial Court was correct to find that there was no evidence that Steak Escape could actually receive certified mail at this location. (App. at 000526; 000529). The Trial Court did not abuse its discretion in finding that Steak Escape had been served because it was aware of its obligation to answer the Complaint and of its duty to provide accurate information to the WVSOS for the purpose of service. (App. at 000529).

II. The Court did not abuse its discretion in denying Petitioners' motion to set aside the default judgments. The trial court properly considered the factors set forth in *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979). The Supreme Court of Appeals of West Virginia has "noted that any evidence of intransigence on the part of the defaulting party should be weighed heavily against him in the determining of the propriety of a default judgment." *Lee v. Gentlemen's Club,* 208 W. Va. 564, 568, 542 S.E.2d 78, 81 (2000) (citation omitted). Here, there is ample evidence of intransigence by Petitioners, including that

Macleery and Steak Escape conspired with an intentional strategy not to answer the Complaints and instead only to answer discovery directed at its lowest ranking employee, attempting to give the appearance that he was acting alone. (App. at 000251-52).

III. The damages awards were proper. The evidence below supported the Trial Court's decision that Petitioners' conduct entitled the Respondent to punitive damages. Although the Trial Court did not cite West Virginia Code § 55-7-29(a), the Trial Court made express findings exceeding the statutory threshold for an award of punitive damages, and those findings were justified by the evidence of record. The Trial Court's award of $50,000 in punitive damages was also appropriate. That amount is less than a 4:1 ratio when compared to compensatory damages. Considering the egregiousness of the misconduct, that ratio is conservative.

The Trial Court likewise did not abuse its discretion in awarding attorneys' fees and costs. Petitioner's fail to make any substantive arguments based on case law regarding this issue and disregarded the factors set forth in *Shafer v. Kings Tire Serv.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004). Respondent's counsel zealously represented him in obtaining default judgment and overcame obstacles presented by Petitioners' failure to answer and efforts to overturn the default entered in this matter. All of the time expended was required to obtain the outcome achieved for Petitioner. The Trial Court did not err in its award of attorney's fees and costs.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 (a) of West Virginia Rules of Appellate Procedure, Respondent asserts that the issues relating to this appeal are authoritatively decided. Respondent requests oral argument as it will aid the resolution of this appeal pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

West Virginia Appellate Courts review issues of default judgment under an abuse of discretion standard. *HP, Inc. v. Thomas,* 23-ICA-203 (W. Va. I.C.A. June 13, 2024). A Circuit Court's ruling on a default judgment will not be disturbed unless there is a showing of an abuse of discretion. *Id.* All presumptions are in favor of the trial court's decision to render an order of default unless the petitioner can show that there was an error. *Id.*

An award of punitive damages is reviewed using a *de novo* standard of review. *Quicken Loans, Inc. v. Brown,* 236 W. Va. 12, 34, 777 S.E.2d 581, 603 (2014). The term *de novo* means anew. *Kapitus Servicing, Inc. v. Timberline Four Seasons Utils.,* 23-ICA-22 (W. Va. I.C.A. Oct. 30, 2023). In other words, an appellate court will review the circuit court's ruling in the same way that the circuit court made the ruling, as though the ruling was never made. *Id.*

An award of attorneys' fees and costs is reviewed pursuant to an abuse of discretion standard. *Sanson v. Brandywine Homes, Inc.,* 215 W. Va. 307, 310, 599 S.E.2d 730, 733 (2004) (per curium); *Cit Bank v. Coffman,* 22-ICA-330 (W. Va. I.C.A. June 11, 2024).

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion in Finding That Steak Escape Had Been Properly Served (Assignment of Error i).

The Trial Court did not abuse its discretion in finding that Respondent met his procedural requirements to properly serve Petitioners with the Complaint and Summons.

A. Petitioners Admitted that Josh Macleery, an Officer of Steak Escape, Accepted Service of the Complaint and Summons.

Personal service upon Steak Escape was first accomplished on September 8, 2022, when a Kanawha County Sheriff's Deputy personally handed the Complaint and Summons to Petitioner Macleery, a registered officer, at Steak Escape's place of business. (App. at 000269). Petitioners

do not dispute proper service upon Josh Macleery. (App. at 000189). Because Steak Escape identified and disclosed Macleery as a company officer to the West Virginia Secretary of State, Mr. Hudson can serve Steak Escape by delivering him the Complaint and Summons. The fact that Mr. Hudson attempted to "refuse" the Summons does not mean that Steak Escape was not served.

West Virginia's Uniform Limited Liability Company Act makes clear that it "does not affect the right to serve process, notice or demand in any manner otherwise provided by law." W.Va. Code §31B-1-111(e). Thus, even LLC may be served through any manner provided under the West Virginia Rules of Civil Procedure. For purposes of Rule 4, an LLC is an unincorporated association. *See Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 699-700 (4th Cir. 2010) (For purposes of determining subject matter jurisdiction under the Class Action Fairness Act of 2005, ***a limited liability company is an "unincorporated association***.") (emphasis added); *Hunt v. Brooks Run Mining Co.*, Civil Action No. 1:13-0433, at *4 (S.D.W. Va. Sep. 10, 2013) ("For purposes of diversity jurisdiction, an unincorporated association, ***such as a limited liability company***, is deemed to be a citizen of each state in which its members are citizens.") (emphasis added). *See also Hawkins v. i-TV Digitalis Tavkozlesi zrt.,* 935 F.3d 211 (4th Cir. 2019) (treating LLCs as unincorporated associations); *Sunbelt Rental, Inc. v. Perdomo Nat'l Wrecking Co.,* Civil Action No. 1:20-cv-758 (E.D. Va. Oct. 2, 2020) (personal service of LLC's registered agent was proper service under Rule 4(h)); *Finley v. Sagenet L.L.C.,* Docket No. 3:09-cv-123 (W.D.N.C. Jun.29, 2009) (LLC is covered by Rule 4(h) that encompasses unincorporated associations.

As acknowledged by Petitioners in their brief, service may also be accomplished by personally serving the company's officers. (Petitioners' Brief, at 11). Rule 4(d)(9) of the West Virginia Rules of Civil Procedure sets forth the method for serving an unincorporated association such as Steak Escape. That Rule provides: "*Unincorporated Associations.* - Upon an

unincorporated association which is subject to suit under a common name, **by delivering a copy of the summons and complaint to any officer**, director, or governor thereof . . . ." *See also Ballard v. PNC Financial Services Group, Inc.*, 620 F.Supp.2d 733 (S.D.W. Va. 2009) (holding that corporation was properly served by delivery of summons and complaint to its principal place of business where corporation had actual notice of Complaint).

In the case at bar, the Trial Court properly considered evidence that Steak Escape is a member-managed LLC, and that Petitioners registered Josh Macleery as a company officer, "Manager," in its filings with the Secretary of State. (App. at 000037-39; 000247). Macleery admits that he accepted the Complaint, along with the Summons directed to him individually. Despite being a designated officer of the company, Macleery attempted to "refuse" service of the Complaint and Summons on behalf of Steak Escape. (App. at 000099-100). Macleery's refusal to accept delivery of one of the complaints and summonses (but acceptance of another) does not insulate Steak Escape from service of process, because Macleery is a "company officer, director, or governor," that may be served under W. Va. Rule of Civ. Pro. 4(d)(9). The Trial Court properly concluded that Steak Escape was served because its Company Officer and Manager, Petitioner Macleery, was served. *Id.*

B. Service was Effectuated on Steak Escape Through the WVSOS.

Mr. Hudson was not required to attempt service on Steak Escape again through any other means after the pleadings were personally delivered to Macleery on September 8, 2022. However, it was undisputed below that the WVSOS attempted delivery of the Complaint and Summons to the address Petitioners provided for service of process by Steak Escape, 1013 ½ Quarrier Street, Charleston, West Virginia, 25301, addressed to the agent listed for service of process, John D. Smallridge, Jr. (App. at 000246). Petitioners admitted that the public should be able to rely on

the information that they supply to the West Virginia Secretary of State. (*Id.*). Despite acknowledging its requirements under the law, the evidence below was that Steak Escape did not provide accurate information for accepting service via registered mail.

To clarify the issues surrounding the issue of service, specifically, the information Petitioners registered with the WVSOS, the Trial Court ordered that Mr. Hudson be permitted to take a Rule 30(b)(7) deposition of Petitioner's designated representative and of Josh Macleery. (App.at 000206-08). Petitioners' representative testified that he could not answer one way or another if the information it had supplied to the WVSOS was accurate.

> Q: Okay. There is an address listed for notice of process address, and that says John D. Smallridge, Junior, 1013 ½ Quarrier Street, Charleston, West Virginia 25301. Is that information accurate?
>
> A: My understanding – that, I don't have full information on. Our information was it looked like that was an office for Mr. Smallridge.
>
> Q: Okay. And this may be obvious, but the reason why the West Virginia Secretary of State lists 1013 ½ Quarrier Street address as an address for notice of process address is because at some point the Steak Escape of Kanawha City supplied that information to the West Virginia Secretary of State. Am I correct in that understanding?
>
> A: That is my understanding as well.
>
> Q: Now, you said at one point they had an office there, or Mr. Smallridge had an office there. That suggests to me that there is a point when he didn't have an office there, so can you explain that answer to me?
>
> A: Unfortunately, that's information that I don't have. He is the least responsive of the partners, so if that information has changed, he did not update with us.

(App. at 000246-247).

. . . . . .

> Q: Can you answer one way or another today if Mr. Smallridge has an office located at 1013 ½ Quarrier Street, Charleston, West Virginia, 25301?

A: I cannot confirm that that's currently. He has not updated that information, so it's still the information we have.

Q: So your information is that's correct, and you don't have any – sitting here today, you don't have any reason to dispute the information that's contained on the West Virginia Secretary of State's information database.

A: I'd say at this point I couldn't go either way.

Q: That's what you're here to testify about today.

A: At one point that was absolutely correct.

Q: At one point its absolutely correct. Sitting here today, you can't tell me one way or another if it's correct. Right?

A: Not at that particular address. You are correct.

Q: And you cannot say definitively that it's incorrect, can you?

A: Also true.

(*Id.*).

Macleery testified about the false nature of the address Petitioners registered with the WVSOS and that the office at 1013 ½ Quarrier Street had been "shut down" years before the events of this case. (App. at 000266).

Despite Petitioner's 30(b)(7) representative claiming a lack of knowledge regarding the accuracy of this address, and contrary to Macleery's testimony that the office had been "shut down," Petitioners nevertheless supplied this address to the WVSOS each year in its annual filings.

Because even Petitioners did not know if the address was correct, and the agent Steak Escape identified was "the least responsive" of its partners, it comes as no surprise that the post office's three attempts at delivering a certified letter to this person, at this address, were unsuccessful. (App. at 000246-47). Petitioners could not explain why delivery could not be made

at the address it registered with the WVSOS and left open the possibility that Mr. Smallridge simply refused to sign for the package.

> Q: Do you know if Mr. Smallridge just refused to accept service, refused to sign for it?
>
> A: I do not.
>
> Q: You can't answer that one way or another?
>
> A: That's correct.
>
> Q: You do not even know, sitting here today, you do not even know if Mr. Smallridge actually has an office located at that address. Is that correct?
>
> A: That is correct. He is the least communicative of the partners.

(App. at 000253).

What is true and undeniable, is that the information Petitioners registered each year with the WVSOS was ***not*** an accurate and/or reliable address for Petitioners to receive service of legal documents. The importance of supplying truthful information to the WVSOS cannot be understated.[6] *See generally* W. Va. Code § 31B-1-211.

In light of the evidence produced before the Trial Court, it did not abuse its discretion in finding Petitioner Steak Escape had been appropriately served. The Trial Court properly noted that Petitioner Steak Escape did not provide satisfactory evidence that it could be reached at the address it provided to the WVSOS. Litigants should be permitted to trust the information that a business registers with the WVSOS and that businesses are following state law. W. Va. Code § 31B-1-211. Moreover, an LLC registered to do business in West Virginia should not be permitted

[6] Under West Virginia law, knowingly providing false information to the WVSOS is a misdemeanor that can result in up to one year in jail. *See* W. Va. Code § 31B-1-114.

to evade court jurisdiction simply by registering false and/or inaccurate information with the WVSOS when it has a clear duty to provide accurate information.

Petitioners cite to *State ex rel. Monster Tree Serv. v. Cramer*, 244 W. Va. 355, 853 S.E.2d 595 (2020), as justification to reverse the Trial Court's Order. However, *Monster Tree* is distinguishable as it involved an attempt to achieve longarm jurisdiction over a foreign LLC that was ***not*** registered with the WVSOS. In *Monster Tree*, there was no indication that the defendant had registered false, inaccurate, and/or misleading information with the WVSOS regarding service of process, unlike here. The *Monster Tree* plaintiff had no justified reliance on the public information registered with the WVSOS. However, in the case at bar there are prevailing public interests to assure that the public may rely on the information an LLC registers with the WVSOS and preventing a business from circumventing the law through misinformation to a state agency.

Steak Escape's testimony provided ample evidence for the Trial Court to correctly conclude that Mr. Hudson had achieved service over Steak Escape. Among other things, Petitioners acted consistent with service on September 8, 202, assembled its executive team to review the Complaint, and made decisions as to how it would respond to the pending lawsuit. There was no abuse of discretion and the trial court's decision should be affirmed.

II. The Court Did Not Err in Denying Petitioners' Motion to Set Aside the Default Judgment for Good Cause (Assignment of Error ii).

The trial court did not abuse its discretion in denying Petitioners' motion to set aside the default judgments. In declining to set aside the default judgment, the trial court properly considered the following factors set forth in Syl. Pt. 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979):

> In determining whether a default judgment should be … vacated upon a Rule 60(b) motion, the trial court should consider (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and

> meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.

As set forth below, and as the Trial Court found, the record is replete with evidence supporting each of these factors.

A. The Trial Court had Ample Evidence of Intransigence by the Petitioners.

The Supreme Court of Appeals of West Virginia has "noted that any evidence of intransigence on the part of the defaulting party should be weighed heavily against him in the determining of the propriety of a default judgment." *Lee v. Gentlemen's Club,* 208 W. Va. 564, 568, 542 S.E.2d 78, 81 (2000) (citing *Hinerman v. Levin*, 172 W. Va. 777, 782, 310 S.E.2d 843, 849 (1983); *see also Hardwood Group, v. LaRocco*¸ 219 W. Va. 56, 631 S.E.2d 614 (2006) (finding that multiple opportunities afforded Defendant for a response prior to entry of default judgment was evidence of significant intransigence).

In *Lee*, the Court placed great weight on the fact that the defendant was aware of the harm done to the plaintiff and had "intentionally avoided two previous communications concerning the incident." *Id.* at 568. The Court found that the defendant acted unreasonably in attempting to ignore the injury to the Plaintiff and that failing to uphold a default judgment under the circumstances would encourage businesses to ignore injured parties hoping that the matter will go away. *Id.* at 569.

Petitioners' conduct in this case far exceeds the intransigence found in *Lee.* There was ample evidence that this was not simply a case where Petitioners failed to timely respond to Mr. Hudson's Complaint due to inadvertence or excusable neglect. Rather, this was a result of intentional—and poorly calculated—decisions by the Petitioners.

Among other things, the trial court properly considered Macleery's testimony that he notified both his area manager, Robert Brubaker, and also Steak Escape's Vice President/Director of Operations, Michael Contes, about the lawsuit on September 8, 2022. (App. at 000269). The Trial Court correctly concluded that Petitioners were on notice of Mr. Hudson's lawsuit as early as September 8, 2022.

> Q: Was there any confusion or misunderstanding or doubt that a lawsuit had been filed in the Circuit Court of Kanawha County?
>
> A: No, there was no doubt that it was moving forward.

(App. at 000252).

It is important to note—for credibility determinations made by the Trial Court— that Petitioners initially represented to the Trial Court that Macleery's failure to answer the Complaint was solely because he was an uninformed individual acting on his own behalf. (App. at 000191-92; 000195-97). The Trial Court correctly questioned the veracity of these assertions through the following inquiry of Petitioners: "Why in the world would a manager of a restaurant such as Steak Escape not pick up the phone and have any kind of protocol to say, 'We have been sued and I have to answer all of these things?' I mean, really? It doesn't make any sense." (App. at 000196). The Petitioners failed to respond to this question.

Later, Steak Escape's designated corporate representative provided testimony directly contradicting the Petitioners' earlier representations to the Trial Court. Among other things, Steak Escape testified that its first action upon learning of the Complaint was to involve its owner, Kennard Smith. (App. at 000251). Kennard Smith is an owner of Steak Escape and an owner of its parent company, Escape Enterprises, a sophisticated entity operating in multiple states and internationally. (App. at 000309-14). Steak Escape then assembled a group, which in addition to Kennard Smith, included Defendant Hill; Defendant Macleery; Area Manager Brubaker; Vice

President/Director of Operations Michael Contes; and Dirk Algrhim, Escape Enterprises' current Director of Operations and Supply Chain. (App. at 000251). Together, this team decided what they thought would be the best strategy for responding to Mr. Hudson's claims. (*Id.*).

Contrary to Petitioners' representations, Macleery was not alone in making this decision. Shockingly, Petitioners assembled their highest-ranking members and made an intentional decision that the only person who would respond to the pleadings would be the lowest employee named in the suit—Mr. Hill. In what can only be described as an intentional and calculated attempt at obfuscation, Steak Escape would answer certain interrogatories directed to Mr. Hill individually but would not answer the Complaint.

> Q: Do you know what action, if any, you took meaning Steak Escape of Kanawha City took upon receiving notice of Mr. Macleery of service of a Complaint and Summons?
>
> A: At that point Mr. Macleery mailed a copy of the Complaint to Mr. Brubaker here at the corporate office. At that point we assisted Mr. Macleery and Mr. Hill in filling out the interrogatories, and then we mailed it back to you from here.
>
> Q: We'll ask more about that later. Who decided that that was how this particular Complaint should be handled?
>
> A: The first thing that happened was we got Ken involved, and then as a group we decided the best moves for moving forward. For this case, Michael [Contes], myself [Dirk Ahlgrim], and Robert were all involved. Robert being the point person for Steak Escape of Kanawha City gathered the information and sent it certified mail back to you.

(App. at 000251) (emphasis added).

> Q: Okay. So that was Mr. Ahlgrim, Mr. Contes, Mr. Brubaker, Mr. Macleery, and Mr. Hill were all involved in formulating the response that was sent by certified mail to this law firm. Is that correct?
>
> A: And Mr. Smith.
>
> Q: And Mr. Smith, Ken Smith.
>
> A: Yes.

Q: And Ken Smith is the owner of both Steak Escape of Kanawha City and an owner of Escape Enterprises?

A: Yes, part of the ownership of both.

(App. at 252).

The trial court correctly considered evidence that these were sophisticated Defendants who met as a group with its highest levels of management and made a deliberate decision to forego filing an Answer to the Complaints, and where the only appearance would be by Mr. Hill, purporting to be acting *pro se* without the benefit of counsel. (App. at 000251).

However, these decisions were not attributable to Steak Escape alone. The evidence before the trial court was that Macleery participated in the meetings where this strategy was decided. (App. at 000251). Moreover, Macleery cannot now convincingly argue that he had cause to believe that his duty to respond was satisfied by answering the interrogatories served on Michael Hill. As the trial court correctly noted in its Order Granting Default Judgment, the Summons served on Macleery provided clear instruction:

To the above-named Defendant:

> IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon **Robert P. Lorea, 108 1/2 Capitol Street, Suite 300, Charleston, WV 25301** Plaintiff's attorney, an answer to the complaint filed against you in the above styled civil action. . . . You are required to serve your answer within **30** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

(App. at 000520). (Emphasis added). These clear instructions informed Mr. Macleery that he was required to file an answer and that, if he chose not to do so, judgment by default would be taken

against him. Additionally, there was evidence that Steak Escape and Macleery had both been sued before in the Circuit Court of Kanawha County. (App. at 000253; 000259). As such, they were familiar with the requirement of responding to a Complaint.

Nevertheless, the intransigence continued through Steak Escape's failure to comply with state law requiring it to provide the WVSOS with an accurate address and agent to receive service of process. Even during the pendency of its *Emergency Defendants' Motion To Set Aside Default*, Steak Escape could not make any representations as to why certified mail could not be received at the address it had provided to the WVSOS. (App. at 000188-89). The Court went so far as to Order Steak Escape to produce a Rule 30(b)(7) representative for deposition on issues of service raised in the pending motions, and yet Steak Escape could not answer one way or another regarding the address it designated to the WVSOS for receiving service of process. (App. at 000199-200).

Following that clear, strategic decision not to file answers, the Petitioners ignored additional opportunities to cure their default. Mr. Hudson was not required to serve any Defendant below with his Motion for Default Judgment because none had entered an appearance. However, on December 14, 2022, Mr. Hudson still mailed a copy of his motion for default judgment and supporting memorandum of law to Petitioners' principal place of business, 3700 MacCorkle Avenue S.E., Charleston, WV 25304. (App. at 000020-21). Mr. Hudson's Motion fully informed the Petitioners regarding the allegations in the Complaint as well as Mr. Hudson's contentions regarding their failure to Answer. Pursuant to Steak Escape's policies and procedures, legal documents and notices received at the restaurant should have been forwarded to Steak Escape's corporate office. (App. at 000270). Nevertheless, Petitioners did not respond to the Motion.

On January 10, 2023, the Trial Court properly entered its Order Granting Plaintiff's Motion for Default Judgment. (App. at 000078-82). The Trial Court directed the Circuit Clerk to mail a

copy of the Order to Steak Escape at its principal place of business, 3700 MacCorkle Avenue S.E., Charleston, WV 25304. (App. at 000082). Still, Petitioners took no action to cure the default. On January 20, 2023, Mr. Hudson's Counsel went so far as to telephone Petitioner Macleery. (App. at 000177-78). Mr. Hudson's counsel informed Defendant Macleery of the Court's Order and attempted to cooperate with the Petitioner to schedule the Court's next hearing. (App. at 000161-63). Macleery acknowledged that he was aware of the proceedings but otherwise rebuffed this communication from Counsel. (App. at 000162). More importantly, Petitioners did not subsequently attempt to cure the default.

Also on January 20, 2023, Mr. Hudson's counsel served Defendants with a Notice of Hearing for the March 3, 2023 hearing. Plaintiff's counsel served the Notice in the manner proscribed in the Trial Court's Order, by mailing it to 3700 MacCorkle Avenue S.E., Charleston, WV 25304. (App. at 000087). Steak Escape admitted that it retained counsel at "the tail end" of January. (App. at 000251). Nevertheless, Petitioners still did not respond timely to the Notice. It was not until March 1, 2023, that Petitioner's Counsel finally contacted Mr. Hudson's Counsel about the case. (App. at 000176). Petitioners then entered their first appearance in the case on March 1, 2023, two days before the hearing by emailing a pleading to Mr. Hudson's counsel after the close of business at 8:00 p.m. (App. at 000176).

The shocking degree of intransigence exhibited by Steak Escape and Macleery is sufficient by itself for the Trial Court to deny setting aside the default judgment. However, the evidence before the Trial Court was that the remaining factors set forth in Syl. Pt. 3 of *Parsons* further supported the trial court's denial of Petitioners' Motion to Set Aside the Default Judgments.

B. Mr. Hudson Was Severely Prejudiced by Petitioner's Conduct.

Petitioners incorrectly assert that Mr. Hudson suffered no prejudice as a result of Petitioners' conduct. In employment cases, especially those arising in the fast food industry, plaintiffs experience great prejudice through unwarranted delays. Mr. Hudson's employment was terminated on June 14, 2022. (App. at 000170). 288 days passed between Macleery accepting service of the Complaint on September 8, 2022, and the Court's hearing on June 23, 2023. At this hearing, Petitioners informed the Court that at least one of the three employees providing statements to Macleery was no longer employed by Steak Escape. This is not surprising given the high turnover of employees in fast food restaurants. This is even more true for the non-management employees who witnessed the discrimination against Mr. Hudson.

Petitioners' arguments also do not account for the eroding memories of potential witnesses, regardless of whether they are available for deposition. Over two years have now passed since Mr. Hudson's termination. Additionally, Mr. Hudson incurred substantial attorney time and cost in unnecessarily litigating these issues, all of which would have been avoided had the Petitioners not decided to ignore the Complaints. This prejudice cannot be cured simply by the Petitioners now serving an untimely Answer years later.

C. The potential for material issues of fact provides no cause to set aside the default judgment.

Similarly, there are no material issues of fact that support setting aside the default judgments. However, even if there were, they would only exasperate the harm suffered by Mr. Hudson and underscore the unfair challenges Petitioners caused by their tactical decisions. Furthermore, material issues of fact would not outweigh the high degree of intransigence by the Petitioners.

The Court should not be persuaded by the single authority Petitioners cite for this proposition, *Prima Mktg., LLC v. Hensley*, No. 14-0275 (W. Va. Feb. 27, 2015). *Prima Marketing* is distinguishable from the case at bar. In *Prima Marketing*, a defendant company had filed a notice with the WVSOS to change its agent and address registered for service of process. *Id.* at *2. Unbeknownst to the defendant, the WVSOS failed to act on the change notice and still listed the prior information for service of process. *Id.* The plaintiff attempted service through the WVSOS at the old address and agent listed in the WVSOS database. *Id.* The Defendant received no notice of the Complaint because it had been delivered to the former agent. *Id.* One year later, the plaintiff moved for default, and the trial court entered a default judgment the following day without giving the defendant an opportunity to respond. *Id.* *2. The defendant had no knowledge of the complaint prior to the default judgment but promptly moved to set aside the default 10 days after judgment was entered. In other words, the defendant did not lay in wait and tactically decide not to file an answer setting forth denials and defenses.

Here, Petitioners had extensive knowledge of the Complaint, and the allegations against them, and yet made an intentional decision not to respond to it. Moreover, unlike this case, where Steak Escape made no efforts to ensure that the information it filed with the WVSOS was correct, Prima Marketing had submitted the proper paperwork to change its agent for service of process, and it was the WVSOS's mistake that prevented the information from being updated. As such, the trial court entered default judgment without finding intransigence on the part of the defendant. *Id.* at *5. Under the unique facts of that case, the Appellate Court found that the potential for material issues of fact and potential defenses warranted setting aside the default judgment. However, *Prima Mktg.* provides no support for a decision that the trial court abused its discretion in the case at bar. The only thing to be taken away from the *Prima Mktg.* is the fact that even where the

misinformation was due to no fault of the defendant, the Complaint was deemed served via delivery to the WVSOS because the Plaintiff relied on the information on file with the WVSOS.

Petitioners decided to withhold any "meritorious issue of fact and meritorious defenses" until after a default judgment was entered. They should now have to live with that decision.

D. Mr. Hudson also has significant interests at stake, which Support Affirming the Decision Not to Set Aside the Default.

Finally, the significance of the interests at stake also weighed against setting aside the default judgments. This factor required the Trial Court to consider not only the importance of this case to the Petitioners but also the importance of the case to Mr. Hudson. The importance of these interests only makes Petitioners' tactical decision to ignore serving a timely Answer to the Complaints more inexcusable.

Worth noting, on appeal, Petitioners focus only on how the damages ultimately awarded by the Court might impact Mr. Macleery. However, Mr. Hudson has had justice substantially delayed as a result of Petitioner's intransigence. For two years now, he has been forced to delay his efforts to obtain justice against the Petitioners. He certainly has a significant interest in obtaining finality, which supports affirming the Trial Court's decision not to set aside the default.

For all of the above reasons, the Trial Court did not abuse its discretion in denying Petitioners' motion to set aside the default, and its ruling should be affirmed on appeal.

III. The Damage Awards are Proper (Assignments of Errors iv and vii)[7].

A. The Trial Court's Award of Punitive Damages was Proper.

The Trial Court did not err by awarding punitive damages of $50,000. After considering the testimony of Mr. Hudson, the Trial Court awarded punitive damages of $50,000 based on

[7] The Petitioner's brief does not have Assignments of Error Nos. iii, v, or vi.

findings that Defendants acted with "clear intent" and that their conduct "without a doubt . . . cross[ed] the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm." (App. at 000638; 000640). Petitioners appeal the award of punitive damages contending that the Trial Court erred in finding that (1) Petitioners' conduct does not entitle Mr. Hudson to punitive damages and (2) the amount of punitive damages is not supported by the evidence. As explained below, the Trial Court appropriately found that Mr. Hudson was entitled to punitive damages, and the $50,000 punitive damages award was appropriate.

1. The Evidence Supported the Trial Court's Decision that Petitioner's Conduct Entitled Mr. Hudson to Punitive Damages.

Petitioners contend that the Trial Court failed to make a threshold determination of whether Mr. Hudson is entitled to punitive damages and, therefore, the award of punitive damages must be overturned. Petitioners also argue that the Trial Court erred by failing to cite West Virginia's punitive damages statute, W. Va. Code § 55-7-29. Because the Trial Court made a determination that punitive damages are warranted, and the evidence supports the Trial Court's express finding that Defendants acted with "clear intent" and that their conduct "without a doubt . . . cross[ed] the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm," the evidence supports the Trial Court's decision to award punitive damages. (App. at 000640).

In West Virginia, courts consider a two-step analysis when evaluating punitive damages. First, a court must determine "whether the conduct of an actor toward another person entitles a person to a punitive damages award." *Perrine v. E.I. Du Pont De Nemours & Co.*, 225 W. Va. 482, 549, 649 S.E.2d 815 (2010) (citing *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). West Virginia law permits punitive damages "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." W. Va. Code § 55-7-29(a).

Review of the Trial Court's award of punitive damages is *de novo. Quicken Loans, Inc. v. Brown,* 236 W. Va. 12, 34, 777 S.E.2d 581, 603 (2014).

In this case, although the Trial Court did not cite West Virginia Code § 55-7-29(a), the Trial Court made express findings exceeding the statutory threshold for an award of punitive damages, and those findings were justified by the evidence of record.

As set forth in the Counter Statement, both Petitioner McCleary and Defendant Hill are supervisors. (App. at 000537). Therefore, their conduct is imputed to Steak Escape. *Hanlon v. Chambers,* 195 W. Va. 99, 108, 464 S.E.2d 741 (1995). When Mr. Hudson first learned of his ulnar nerve palsy condition, he informed Defendant McCleary of his diagnosis, that he would need certain accommodations, including time off from work, and that he would have to follow up with a neurologist. (App. at 000543-000544). Following Mr. Hudson's diagnosis and conveying information about his disability to Petitioners, supervisors McCleary and Hill began "nitpicking" Mr. Hudson and telling him that he was "slow." (App. at 000545). Mr. Hudson would tell Petitioners, "I can't feel anything, but I can get it done." (App. at 000545). Petitioner Hill would tell him to "suck it up," and others would tell him, "Not my problem." (App. at 000006 ¶ 15; 000545). In front of customers, Petitioners McCleary and Hill would yell at him to hurry up. (App. at 000547).

Employees called Mr. Hudson "retarded" and "slow." *(Id.*). Petitioners now run from these pejorative statements and assert that they cannot support a claim for punitive damages. However, Mr. Hudson testified that Petitioner Macleery was aware of the comments made by Mr.

Hill and others. (App. at 000576). Consequently, Petitioner Steak Escape was also aware that such comments were being made in the workplace.

Based on this evidence, and other evidence, the Trial Court found that "generally humiliating [Mr. Hudson] in front of customers and co-workers, regularly criticizing and scolding [him] for failing to work fast enough for their expectations . . . and consciously maliciously, and willfully ordering Mr. Hudson to "suck it up" . . . is without a doubt, crossing the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm." (App. at 000637-38). This finding—based on the evidence of record—far exceeds the punitive damages threshold set forth in W. Va. Code § 55-7-29. It also demonstrates a clear acknowledgment of the willful disregard of Mr. Hudson's rights under the WVHRA by management, which is also supported by the evidence of record. *See Haynes v. Rhone-Poulenc, Inc.,* 206 W. Va. 18, 38, 521 S.E.2d 331, n. 21 (1999) (malice and/or reckless indifference to a protected right would authorize an award of punitive damages); s*ee also CSX Transportation, Inc. v. Smith,* 229 W. Va. 316, 729 S.E.2d 151,175 (2012)

2. The Punitive Damages Award of $50,000 is Supported by the Evidence.

Based on the evidence of record, the Trial Court awarded $50,000 in punitive damages. Petitioners challenge this award of damages asserting that if this Court finds that an award of punitive damages is appropriate, it should substantially reduce the award. As explained below, the award of $50,000 is justified given the egregiousness of the Petitioner's conduct.

West Virginia Code § 55-7-29 provides, in pertinent part, "The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater." Petitioners take issue with the Court's failure to cite to this statutory cap, but this omission has no bearing on the amount of

punitive damages awarded by the Trial Court. Because the Court's award of $50,000 is only ten percent of the $500,000 statutory maximum, the statutory limit for punitive damages is not at issue in this case.

In *Jordan v. Jenkins*, 245 W. Va. 532, 859 S.E. 2d 700 (2021), the Supreme Court of Appeals of West Virginia clarified that, even after the codification of W. Va. Code § 55-7-29, courts must evaluate awards of punitive damages to determine if they are excessive. In *Jenkins*, the Court held that in undertaking a review of an award of punitive damages, a trial court must consider the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 186 W Va. 656, 413 S.E.2d 897 (1991), and *TXO Production Corp. v. Allied Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). The Trial Court correctly cited to and relied on the holdings of those cases in determining the appropriateness of its award of punitive damages.

In *Garnes*, the Court directed that the trier of fact should consider the following principles in determining the amount of punitive damages to award: (1) punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that actually occurred; (2) the reprehensibility of the defendant's conduct including "how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, . . . and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him; (3) if the defendant profited from his wrongful conduct; (4) as a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages; and (5) the financial position of the defendant. *Id.* at 688.

Garnes further instructs a trial court to consider the following factors in a review of a punitive damages award: (1) the cost of litigation; (2) any criminal sanctions imposed; (3) other civil actions against the same defendant; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. *Id.* at 689.

The Trial Court appropriately considered and applied the *Garnes* factors in determining its award of punitive damages. Some of those factors are evaluated below.

i. The Award of Punitive Damages Bears a Reasonable Relationship to the Harm that is Likely to Occur as Well as the Harm that Actually Occurred.

Petitioners take issue with the fact that no evidence was adduced showing that Petitioners were aware of the potential harm that could have been caused by the conduct towards Mr. Hudson. However, given the mean-spirited and cruel nature of the comments made and the conduct taken towards Mr. Hudson, it was likely that he would suffer harm. Whether Petitioners would be willing to admit that they could foresee harm is irrelevant to the Court's evaluation.

Notably, Petitioners failed to address the harm that Mr. Hudson actually suffered as a result of Petitioners' conduct, which the Court must consider in the appropriateness of the punitive damages award. Here, as a result of the harassment and discrimination, Mr. Hudson suffered heightened anxiety requiring him to take medications, he was humiliated, and he became so depressed that he suffered from suicidal ideations. (App. at 000556-57). The profound and real psychological harm suffered by Mr. Hudson justifies the award of punitive damages.

ii. The Reprehensibility of the Defendant's Conduct

The Trial Court addressed this factor at length, specifically addressing the mean-spirited nature of the comments made and condoned by supervisory employees, including Petitioner Macleery and Defendant Hill. As noted, when Mr. Hudson discussed his limitations, Supervisor

Hill told him to "suck it up." (App. at 000006). Both Petitioner Macleery and Supervisor Hill were, in the least, present when Mr. Hudson was called a "retard." (App. at 000576). This conduct, and the other conduct identified herein, is reprehensible and justifies the award of punitive damages.

iii. The Punitive Damages Bear a Reasonable Relationship to the Compensatory Damages.

In evaluating whether an award of punitive damages is appropriate, courts consider the ratio of the compensatory damages compared to the punitive damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), the Supreme Court of Appeals of West Virginia considered this issue and found, "In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . ., we hold that the outer limit of punitive damages is *roughly* five to one." *Id.* at 476. The Court further observed, "This is not necessarily the case, however when compensatory damages are minimal." *Id*. In such cases, punitive damages in a ratio much greater than five to one were entirely appropriate. Additionally, "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant." *Id.*

As an initial matter, considering the evidence of wrongdoing in the record, the ratio of compensatory damages to punitive damages is far below the threshold that should cause any concern regarding a disproportionate award of punitive damage. The Court awarded $15,400 in compensatory damages. Therefore, the award of $50,000 in punitive damages is less than four times the amount of compensatory damages awarded (only approximately 325% of the compensatory damages). This is considerably less than 5:1 ratio that *TXO* cautioned is the "outer limit" if a defendant's conduct is only "really stupid" and does not cross the line to "really mean."

In this case, based on the evidence of record set forth above, the Trial Court found that Petitioners' conduct, "without a doubt, cross[ed] the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm." Given the nature of the conduct condoned and engaged in by supervisors, the Trial Court's conclusion regarding this issue was correct, and a ratio of less than 4:1 is conservative given the guidance in *TXO*.

Each of these three *Garnes* factors strongly supports the Trial Court's punitive damages award of $50,000.[8]

As noted, *Garnes* also requires this Court to consider (1) the cost of litigation; (2) any criminal sanctions imposed; (3) other civil actions against the same defendant; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. Of these factors, the cost of litigation and the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed are important considerations. The Trial Court also appropriately considered that Petitioners had made no offers of settlement, much less fair offers of settlement.

Because of Petitioners' intransigence at every turn, Mr. Hudson's counsel had no choice but to incur substantial fees and costs. By the end of the damages hearing, Mr. Hudson had incurred $67,304.80 in fees and costs. These substantial costs were incurred before the parties had an opportunity to engage in formal discovery of substantive issues. Undoubtedly, Petitioner's counsel likewise incurred substantial costs drafting the numerous motions and pleadings filed with the Court. These unnecessary costs justify the award of punitive damages.

[8] The parties did not have an opportunity to engage in discovery regarding Petitioners' financial worth or other civil actions in which they were named as defendants.

Additionally, the punitive damages award sends a strong message to Petitioners and other similarly situated parties to engage in fair and reasonable settlement discussions when a clear wrong has been committed. Most of the costs incurred in this case were incurred after default had been entered. Therefore, liability had already been established. This factor likewise supports upholding the Trial Court's award of punitive damages.

The Trial Court also appropriately considered the Petitioner's intransigence and obfuscation as evidence of their attempt to conceal or cover up their actions or the harm caused by them. Undoubtedly, their concerted effort by "higher ups" to only respond for one defendant and not address liability issues in a timely manner was an attempt to prevent the disclosure of their conduct towards Mr. Hudson and permit him to obtain justice.

Through the lens of *de novo* review, the Trial Court's conservative award of punitive damages (less than a four-to-one ratio) was justified, given the egregious nature of the established conduct.

B. Attorney Fees and Costs Award in this Matter are Reasonable.

Petitioners assert that the award of attorneys' fees and costs are unreasonable because "[t]he fees award were largely generated by discovery ordered by the Trial Court, which the Trial Court largely chose to disregard in determining it would not set aside the default judgment." This conclusory statement, wholly lacking in substantive analysis, does not justify overturning the award of attorneys' fees.

An award of attorneys' fees and costs is reviewed using an abuse of discretion standard. *Shafer v. Kings Tire Serv.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004). In determining an appropriate attorneys' fee, a court must consider (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.*

However, in arguing that the fee awarded is unreasonable, Petitioners disregard these factors and, essentially, argue that Mr. Hudson should not be awarded attorneys' fees for the time his attorneys were required to spend as a result of Petitioners' intransigence. That argument is wholly lacking in merit and simply not true. Regardless, it does not serve as a basis to overturn an award of attorneys' fees and costs.

Mr. Hudson's counsel zealously represented him in obtaining default judgment and overcame obstacles presented by Petitioners' failure to answer and efforts to overturn the default entered in this matter. All of the time expended was required to obtain the outcome achieved for Petitioner.

Petitioner does not address the novelty and difficulty of the questions presented; the skills required; whether other lawyers would accept the case; the customary fee; whether the fee is fixed or contingent; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; or awards in similar cases. Therefore, any arguments relating to those issues are waived.

Petitioners have failed to show that the Trial Court abused its discretion in its award of attorneys' fees and costs. Accordingly, the award of attorneys' fees should be affirmed.

CONCLUSION

For the reasons stated above, Respondent Jason Hudson respectfully requests this Court affirm the Trial Court's Order Granting Default Judgment against Petitioners and Deny

Petitioner's Respective Motions to Set Aside Default Judgment and to remand this case back to the Trial Court for further proceeding. Mr. Hudson also requests his attorney fees and costs associated with this appeal.

/s/ Rodney A. Smith
Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
ROD SMITH LAW PLLC
108 ½ Capitol Street, Suite 300
Charleston, WV 25301
Telephone: (304) 342-0550
Facsimile: (304) 344-5529
rod@lawwv.com
aurban@lawwv.com

Robert P. Lorea (WVSB #7476)
LOREA LAW OFFICE PLLC
4208 Venable Avenue
Charleston, WV 25304
Telephone: (304) 539-1673
RPL@LoreaLaw.com

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v. **NO.: 24-ICA-173**

JASON HUDSON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Jason Hudson, does hereby certify that on this 5th day of September 2024, that a true copy of the foregoing ***Brief of Respondent Jason Hudson*** was served on the Petitioners through the Court's electronic filing system, email, and by depositing the same to them in the U.S. Mail, postage prepaid, sealed in an envelope to the following address:

Andrew F. Maunz
JACKSON LEWIS, P.C.
1001 Liberty Avenue, Suite 1000
Pittsburgh, PA 15222

/s/ Rodney A. Smith
Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
ROD SMITH LAW PLLC
108 ½ Capitol Street, Suite 300
Charleston, WV 25301
Telephone: (304) 342-0550
Facsimile: (304) 344-5529
rod@lawwv.com
aurban@lawwv.com

Robert P. Lorea (WVSB #7476)
LOREA LAW OFFICE PLLC
4208 Venable Avenue
Charleston, WV 25304
Telephone: (304) 539-1673
RPL@LoreaLaw.com