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

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

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Petitioners Steak Escape of Kanawha City II, LLC d/b/a Steak Escape (hereinafter "Steak Escape") and Josh Macleery submit this Reply Brief in accordance with Rule 10(g) of the West Virginia Rules of Appellate Procedure for purposes of addressing the faults and inaccuracies contained in the Brief of Respondent Jason Hudson ("Respondent's Brief").

The Brief of Petitioners ("Petitioners' Brief") meticulously outlined the errors of fact and law made by the Trial Court in both its Order denying Petitioners' Motion to Set Aside and Judgment Order. Respondent's Brief bases its arguments on the same unfounded factual conclusions and ill-considered legal theories as the Trial Court's Orders. As thoroughly discussed below, Respondent has cherry-picked record evidence to support his baseless theory that Petitioners purposefully attempted to manipulate legal processes and ignore Respondent's action. In doing so, Respondent has not defeated, and at times utterly failed to address, Petitioners' cogent arguments compelling this Court to vacate the Trial Court's Orders and remand this case for further proceedings.

I. Assignments of Error[1]

As outlined in Petitioner's Brief, and further explained below, the Trial Court committed the following errors in rendering both its Order denying Petitioners' Motion to Set Aside and Judgment Order:

i. The Trial Court committed error by concluding Steak Escape was properly served by Respondent.

ii. The Trial Court committed error by determining there was not good cause to set aside default judgment against Steak Escape and Mr. Macleery in its application of the factors of *Parsons v. McCoy*, 157 W. Va. 183, 202 S.E.2d 632 (1973).

[1] Petitioners' Brief incidentally misnumbered the Assignments of Error. Assignment of Error numbers iv and vii should have been numbered iii and iv, respectively. For consistency, Petitioners reference the original numbering.

iv. The Trial Court committed error by awarding punitive damages and, if such finding was appropriate, by awarding an unreasonable amount of punitive damages.

vii. The Trial Court committed error by awarding an unreasonable amount of attorney's fees.

II. 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 because the case involves issues of fundamental public importance.

III. Steak Escape Was Not Properly Served (Assignment of Error i).

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 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."). As discussed below, Steak Escape was never served by either the Deputy Sheriff or West Virginia Secretary of State. As such, the Trial Court's Orders should be set aside as against Steak Escape.

A. Steak Escape Was Never Served by The Sheriff's Deputy.

Respondent argues that Steak Escape was properly served by the Deputy Sheriff on September 8, 2022, when a Kanawha County Sheriff's Deputy personally handed Mr. Macleery his Summons and Complaint for this action. To support this claim, Respondent asserts Mr. Macleery "refused" service of Steak Escape's Summons and Complaint. Notably, this was not a conclusion the Trial Court made to find Steak Escape had been served and is a new argument to justify the ruling made by Respondent on appeal. In doing so, Respondent completely ignores Mr.

Macleery's affidavit which described Mr. Macleery's interaction with the Deputy that day as follows:

> On September 8, 2022, a Sheriff's Deputy came to the restaurant. The Deputy asked if I was Josh Macleery to which I responded yes. He then handed me papers and said, "This is for you." Thereafter, the Deputy asked if Michael Hill was an employee, to which I confirmed he was. The Deputy then handed me papers and said, "This is for him." The Deputy then asked me about whether this was the address for Steak Escape, to which I informed the deputy that they had the wrong address for the corporation.

(App. 000099).[2] Nothing in the record supports Respondent's unfounded conclusion that Mr. Macleery "refused" Steak Escape's Summons and Complaint or the Deputy otherwise left Steak Escape's Summons and Complaint with Mr. Macleery. (App. 000275). Because the Summons and Complaint were not delivered to Steak Escape, service was not properly effectuated as required by the West Virginia Rules of Civil Procedure. W. Va. R. Civ. P. 4(d) ("service shall be made in the following manner: [u]pon an unincorporated association … by **delivering** a copy of the summons and complaint to any officer, director, or governor thereof").

Even if the Deputy had, Mr. Macleery was not a designated agent authorized to accept service on behalf of Steak Escape. Petitioners submitted various evidence showing Mr. Macleery's inclusion as an Officer ("Manager") on Steak Escape's filings with the Secretary of State was erroneous. *See* (App. 000038). Steak Escape relies on an independent contractor, Lauren Fix, to submit the Company's filings with the Secretary of State. (App. 000406). Ms. Fix submitted an affidavit attesting that she selected "manager-managed LLC and listed Mr. Macleery in the Manager section because he manages the store. There was no intent to indicate that Mr. Macleery is an officer of the company in any legal sense." (App. 000406-000407). Mr. Macleery also

[2] Curiously, Respondent cites to this passage to support his conclusion that Mr. Macleery "refused" delivery. However, Mr. Macleery merely responded to the Deputy's question by informing him that the restaurant was not Steak Escape's corporate address.

submitted an affidavit explicitly stating, "I am not a corporate officer for Steak Escape." (App. 00099). Thus, there is no indication that Mr. Macleery is, in reality, an officer of Steak Escape or was otherwise authorized to accept service on the Company's behalf.

These affidavits are supported by Mr. Macleery's testimony regarding his role at Steak Escape. Mr. Macleery testified that he is employed as "Store Manager" at Steak Escape's McCorkle Avenue restaurant. (App. 000259). In this role, Mr. Macleery is responsible for managing the day-to-day operations of the restaurant while Steak Escape policies and rules are created by "the corporate office." (App. 000262). Mr. Macleery clearly plays no role in Steak Escape's corporate activities in such a way expected of a manager in a manager-managed LLC.

B. Steak Escape Was Never Served by The West Virginia Secretary of State.

Respondent has also not adequately addressed the Secretary of State's failure to serve Steak Escape. Respondent, like the Trial Court, ignores the plain reading of West Virginia's service of process rules that "service or acceptance of process or notice is sufficient if … 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 … showing the stamp of the United States Postal Service that delivery has been refused …." W. Va. Code § 31D-5-504(c). It is uncontested that the Secretary of State's mailing to Steak Escape did not contain the stamp of the United States Postal Service that delivery had been refused but was instead labelled "NOT DELIVERABLE AS ADDRESSED." (App. 000525). Notably, Respondent's brief omits this point.

Respondent baselessly asserts, and the Trial Court erroneously concluded, the address provided by Steak Escape to the Secretary of State, Quarrier Street, was "not accurate and/or

reliable" unnecessarily confusing the issue. A review of the record, however, clearly shows that Steak Escape listed a valid address in its annual filings.[3]

Steak Escape's 30(b)(7) witness testified that the address accurately reflected an office maintained by Steak Escape partner, John Smallridge. (App. 000246). Mr. Smallridge subsequently submitted an affidavit stating, "Several of my businesses list [Quarrier Street] as the Notice of Process Address with the West Virginia Secretary of State," and "mail is regularly received at this address." (App. 000466). To corroborate these assertions, Mr. Smallridge attached several pieces of mail that were received at the address previously, as directed by the Trial Court. (App. 000467-000470). Notably, Respondent's Brief does not consider Mr. Smallridge's affidavit and both Respondent and the Trial Court repeatedly disregard this evidence.

To support the alleged conspiracy, Respondent notes that Mr. Macleery testified that he believed the Quarrier Street address had been "shut down" for years. (App. 000266). However, Respondent failed to cite Mr. Macleery's affidavit which subsequently clarified that:

> During my deposition on June 13, 2023, I discussed speaking to John Kizer about John Smallridge's office closing. Upon further reflection, I believe that Mr. Kizer and I were discussing the office Mr. Smallridge had on Capital Street and **not** the Quarrier Street address that was mentioned in the deposition."

(App. 000409). Respondent and the Trial Court also rely on the one off-hand comment made by Steak Escape's 30(b)(7) witness that Mr. Smallridge is the "least responsive" partner. (App. 000246). What Respondent and the Trial Court failed to consider was that Steak Escape selected the Quarrier Street address because West Virginia LLCs are required to maintain a "designated

[3] Because the evidence clearly establishes that Steak Escape's usage of the Quarrier Street address was not "false, inaccurate, and/or misleading," Respondent's attempt to distinguish *State ex rel. Monster Tree Serv. v. Cramer*, 244 W. Va. 355, 853 S.E.2d 595 (2020) is unavailing. As such, Steak Escape's "actual notice" of the lawsuit cannot defeat the deficiencies in service. *Id.* at 366.

office" within the state and the Quarrier Street address is already owned and regularly maintained by one of its partners.

In addition, Respondent and the Trial Court penalize Steak Escape for not being able to answer why the Secretary of State's mailing was returned as not deliverable. The Trial Court requested, and Petitioners provided, evidence that "there is a mailbox … and a person who can accept service" at the Quarrier Street address. (App. 000456; 000468-000470). When Steak Escape provided this information, that evidence was completely disregarded. Petitioners cannot speak for the Postal Service, and there is no basis under the law for punishing them because a particular piece of mail was not delivered. Such a finding only exacerbates the clear and undeniable error of the Trial Court.

III. The Trial Court Erred in Its Application of The *Parsons* Factors (Assignment of Error ii).

Respondent asserts that "the record is replete with evidence supporting each of [the *Parsons*] factors." Like Respondent's previous arguments however, such supporting evidence is based upon groundless assumptions not substantiated by the record.

A. There is no prejudice suffered by Respondent from the delay.

Respondent asserts that he has been "severely" prejudiced from Petitioner's delay in answering because one witness is no longer employed by Steak Escape and the memories of potential witnesses may have eroded. However, these arguments do not substantively address those asserted in Petitioners' Brief. Respondent is already in possession of witness statements recorded just weeks after his termination by each individual identified as having discoverable information. These statements, along with the many documents sent in response to Respondent's Interrogatories, may be used to refresh witness recollection, for impeachment, or as substantive

evidence. In addition, the Company retained contact information for the one witness no longer employed.[4]

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

In response to this factor, Respondent argues, without citing any authority, that because Petitioners did not assert material issues of fact and meritorious defenses until after default, they "should now have to live with that decision." Such argument is a clear distraction from the purposes and considerations of this factor. Because Petitioners have asserted material issues of fact and meritorious defenses in their Answer, as discussed in Petitioners' Brief, this factor weighs heavily in favor of deciding on the case on the merits. *See* (App. 000138-000147).

C. Petitioners' interests significantly outweigh those of Respondent.

Respondent's only argument for his interests at stake is "obtaining finality." In essence, Respondent asserts his interest in "the delay of justice" outweighs Petitioners' interests of paying a damages award of $132,704.80. (App. 000643). Notably, Respondent completely disregards the authority cited in Petitioners' Brief holding 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. In addition, Respondent failed to mention he gained employment three weeks later with a **higher** salary than at Steak Escape. (App. 000561-000563).

D. The Court and Respondent erred in assessing Petitioners' intransigence.

Respondent's Brief omits the complete standard of intransigence. While the West Virginia Supreme Court of Appeals has noted that "any degree of intransigence" should "weigh heavily against" the defaulting party, *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 473,

[4] At the time Petitioners filed the Motion to Set Aside, the case was still well within the statue of limitations to bring a claim under the WVHRA.

256 S.E.2d 632, 763 (1979), the Court thereafter explained "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 v. Larocco*, 219 W.Va. 56, 65, 631 S.E.2d 614, 623 (1991) (internal quotations and citations omitted). A review of the uncontested facts on record shows Petitioners' conduct can be classified as nothing more than excusable neglect.

As an initial matter, Respondent' comparison of the instant case to *Lee v. Gentlemen's Club*, 208 W. Va. 564, 568, 542 S.E.2d 78, 81 (2000) in inapposite. Unlike the defendant in *Lee*, Petitioners did not "intentionally avoid[] two previous communications concerning the incident." *Id.* at 568. Instead, Petitioners believed they had satisfied all obligations in the matter by replying to the Interrogatories attached to the Summons and Complaint. (App. 000324-25). Petitioners thereafter received **no** communications from Respondents until late January because Respondent misaddressed the default documents, another material fact omitted from Respondent's Brief. (App. 000246; 000254). Thus, unlike *Lee*, Petitioners did **not** intentionally avoid communications concerning the incident, but instead received no communications at the fault of Respondent.

1. Steak Escape was not intransigent.

Respondent's theory of intransigence against Steak Escape relies entirely on his unfounded assertion that Steak Escape strategically avoided its pleading obligations and ignored opportunities to cure default. While the facts show this was not the case, the theory is also illogical. There is not strategic benefit for a defendant to fail to answer a complaint while responding to interrogatories sent with the complaint. Yet, this is the conduct at the heart of Respondent's claim that Petitioners were intransigent. If Steak Escape was a such sophisticated entity as repeatedly alleged by the Trial Court and Respondent, they would not have taken such ill-advised and unwise action leading them to a Default Judgment. *See* (App. 000429; 000528-000529).

Regardless, the facts clearly show that instead of an invidious attempt to circumvent the legal system, Steak Escape, believing it was complying, made a genuine attempt to provide information to counsel of a former employee. Respondent's assertion that the information received "appeared to be served by the defendant below, Michael Hill, acting *pro se*" is not supported by the record. This last-ditch contention is premised solely on the fact that Petitioners only attached the summons addressed to Mr. Hill in the documents they supplied to Respondent. But Petitioners' responses to the interrogatories, which were also included in the mailing, clearly refute this point. Petitioners supplied information for both Mr. Hill **and** Mr. Macleery in each applicable response. (App. 000374-000379; 000404). This distortion of the facts further elucidates that Respondent's and the Trial Court's theory is pure conjecture.

In addition, the evidence conclusively establishes that the individuals who decided Steak Escape's response to the Complaint had **no** recent litigation experience. The last claim brought against Steak Escape was "at least ten or more" years ago and, since then, Company management had significant turnover. (App. 000259-000260) (Mr. Macleery testified he went through about five area supervisors in the past ten years).

While the instruction that Petitioners were "hereby summoned and required to serve upon [Respondent] an answer to the complaint filed against you in the above styled civil action" (App. 000033) may be "clear" to an attorney, it was not to Petitioners. Petitioners instead believed that the only thing it needed to do was answer the Interrogatories attached to the Summons and Complaint. (App. 000353). An answer Petitioners **provided** to Respondent. The record shows this was not intransigence, but a genuine attempt to comply with what was believed to be the obligations at the time. Taken wholistically, a finding that Steak Escape engaged in a plot to circumvent the legal process is clear error and, as such, any finding of intransigence is baseless.

2. Respondent failed to address Mr. Macleery's lack of intransigence.

Respondent does not even contest the arguments asserted by Petitioners regarding Mr. Macleery's lack of intransigence, individually. Perhaps, this is because there is no basis to do so. Two supervisors of Mr. Macleery informed him that the Company would "take care of" his obligations related to the lawsuit. (App. 000267; 000269). Mr. Macleery had no reason to doubt these comments because the Company said the same in the lawsuit ten years prior and did handle the obligations. (App. 000259-000260). Furthermore, Respondent's attempt to rope Mr. Macleery into the alleged tactical decisions made by Steak Escape is unavailing. There is no evidence that Mr. Macleery participated in any strategic decisions. Mr. Macleery merely assisted the group by collecting the information necessary to respond to the Interrogatories, which Macleery believed was all he needed to do with respect to the lawsuit. (App. 000275). There is simply no evidence of intransigence on Macleery's part.[5]

IV. The Damages Award Was Improper (Assignments of Error iv and vii).

A. The punitive damages award was improper.

Respondent is not entitled to punitive damages because the default judgment should be set aside, but even if it is not, the Trial Court's award of punitive damages was in error. The Court will review *de novo* an award of punitive damages. Syl. pt. 16, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 185, 680 S.E.2d 791, 816 (2009). Like the Trial Court's Order, the arguments asserted by Respondent are unsupported by the record and misconstrue the facts.

[5] Mr. Macleery states that when Respondent's attorney called him after default was entered, Macleery told him that the corporate office was taking care of it. (App. 000409).

1. The record clearly does not entitle Respondent to punitive damages.

Instead of providing a substantive response to any of the arguments asserted by Petitioners, Respondent resorts to the same baseless assumptions as the Trial Court in its Judgment Order. In doing so, Respondent cannot show his entitlement to punitive damages "by clear and convincing evidence." *Jordan v. Jenkins*, 245 W. Va. 532, 555, 859 S.E.2d 700, 724 (2021).

Both the Trial Court and Respondent rely heavily on Respondent's testimony from the October 2, 2023 damages hearing to support the punitive damages award. However, Respondent largely references the purported actors by pronouns; thus, it is unclear who began "nitpicking" Respondent and telling him that he was "slow," "retarded," and to "suck it up" without unestablished assumptions, even in context. For example:

> Q. Did **the folks at Steak Escape** treat you any differently in the workplace after you came back and told them about this condition that you were dealing with?
>
> A. Yes.
>
> Q. And how did **they** treat you differently?
>
> A. **They** stated nitpicking and saying I was slow. …
>
> * * *
>
> Q. After you told your employers about the physical condition that you were experiencing, did you feel like you were being hassled at work afterwards?
>
> A. Yes. I felt like **they** had some kind of grudge even.
>
> * * *
>
> Q. Did **anyone** ever, you know, call you names … after you told them about the condition?
>
> A. Yes.
>
> Q. What were some of the names **they** would call you?

A. Slow, retarded, you know.

Q. Would **they** generally speak harshly to you now … after you told them about the medical condition?

A. Yes, **they** did.

(App. 000545-000547) (emphasis added). On cross-examination, Respondent's answers were just as vague:

Q. … [Y]ou mentioned there was one instance where Mr. Macleery said something to you about being slow. Is that correct?

A. Yes.

Q. And then there was a different instance where Mr. Hill said something to you about being slow. Is that correct?

A. Yes.

Q. And is it those two instances, the only two times **someone** said anything about you being slow?

A. No.

Q. What were the other instances?

A. Like on the grill, pretty much **they** were all saying, "You are slow. Hurry up." **They** talked about my arm. I began saying, "Give me another second or two or a minute and I will have it done." Each time **they** would be talking, "Not my problem," and this and that.

(App. 000568-000569). The only specific reference to the acts of Mr. Macleery and Mr. Hill were the generalized statements that they said something about being slow. (App. 000546-000547; 000568-000569). Based upon the plain reading of Respondent's testimony these comments are the only ones which may be fairly attributed to Mr. Macleery and Mr. Hill.[6] These comments do

[6] Respondent cites to *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741 (1995) for the proposition that the conduct of Mr. Macleery and Mr. Hudson is imputed to Steak Escape due to their supervisory status. However, *Hanlon* and its progeny have only been applied to the fourth element of a sexual harassment claim brought under the WVHRA, that the harassment was "imputable on some factual basis to the employer." 195 W. Va. at 108, 464 S.E.2d

not show "actual malice" or an "indifference to [Respondent's] health, safety, and welfare." W.Va Code § 55-7-29.

Even if all the comments relied upon by the Trial Court and Respondent are attributed to Petitioners, they still fall woefully short of supporting punitive damages. Without any citation to case law, Respondent declares Petitioners' conduct "far exceeds the punitive damages threshold set forth in W. Va. Code § 55-7-29." Notably, however, Respondent refused to distinguish the evidence on record from the litany of cases cited in Petitioners' Brief, perhaps because there is no way to do so. Petitioners did not engage in surveillance efforts to determine the truthfulness of Respondent's condition, require Respondent to engage in "strenuous physical effort" immediately upon his return from medical leave, or repeatedly call Respondent to coerce him into releasing potential claims. *See W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 W. Va. LEXIS 183, at *43-47 (W. Va. June 15, 2011); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 191, 680 S.E.2d 791, 823 (2009); *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 604-05, 490 S.E.2d 678, 691-92 (1997). Yet Respondent and the Trial Court assert two managers yelling at a fast-food employee to work faster (assuming *arguendo* that occurred) rises to that level of malice or wanton conduct.

In addition, the decisions cited by Respondent to support his claim that the record "demonstrates a clear acknowledgment of the willful disregard of [Respondent's] rights under the WVHRA by management" are distinguishable. Petitioners did not discriminatorily refuse to protect Respondent's position while on protected leave as in *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 38, 521 S.E.2d 331, n.21 (1999) nor ignore Respondent's complaints, transfer Respondent into the supervisory territory of Respondent's alleged harasser(s) or require

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at 750 ("an employer … may not be liable in a case of **co-worker harassment** where the employer had neither knowledge of the misconduct nor reason to know of it.") (emphasis added).

Respondent to accept lower pay and rank to avoid his alleged harasser as in *CSX Transportation, Inc. v. Smith*, 229 W. Va. 316, 729 S.E.2d 151, 175 (2012). The facts of these decisions either involve significantly more egregious conduct than alleged here or are readily distinguishable. Thus, if anything, these decisions support setting aside the award of punitive damages.

2. The amount of punitive damages is not supported by the record.

Respondent's attempts to mischaracterize Petitioners' arguments regarding the proper award of punitive damages, if any, are unpersuasive. First, Petitioners do not argue their "aware[ness]" of Respondent's potential harm plays any role in the analysis.[7] Instead, Petitioners take issue with the facts and unfounded conclusions that the Trial Court relied upon to determine whether the punitive damages award bears a reasonable relationship to the harm caused from **Petitioners'** conduct. Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) (Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the **defendant's** conduct") (emphasis added). Petitioners assert there is insufficient evidence for the Trial Court to conclude Petitioners conduct caused the harm alleged by Respondent. Notably, Respondent testified that he had mental health issues predating his employment at Steak Escape. (App. 000572). Petitioners were afforded no meaningful opportunity to determine whether Respondent's alleged "heightened anxiety" was actually caused by any conduct engaged in by Petitioners. Thus, both Respondent and the Trial Court are missing that necessary predicate for the reasonable relationship *Garnes* factor.

Second, Respondent cites to the Trial Court's analysis of another *Garnes* factor for "the degree of reprehensibility of the **defendant's** conduct." Syl. Pt. 3, *Garnes*, 186 W. Va. at 656,

[7] Petitioners only address this point in their Brief to refute the Trial Court's erroneous finding that "based on the evidence and testimony presented and that facts that have been deemed admitted, that Defendants were aware their actions were causing or likely to cause harm" regarding the second *Garnes* factor, not the first.

413 S.E.2d at 897 (emphasis added). However, as repeatedly noted both above and in Petitioners' Brief, the Trial Court's findings of fact were not based on the record but from unreasonable and unsupported assumptions which have not been established. Respondent's continued citation to the Judgment Order and out of context quotations from the record have not addressed this glaring flaw in both his and the Trial Court's arguments.

Third, Petitioners assert the punitive damages award does not bear a reasonable relationship to the compensatory damages because Respondent has not adequately alleged that Petitioners engaged in any "evil acts." *See TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Again, Respondent cites to the Trial Court's baseless finding 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." (App. 000637). However, Respondent cannot point to any alleged acts by Petitioners other than hassling Respondent over this physical condition and screaming at him to hurry up. (App. 000546-000547). Respondent's conclusory and unexplained assertion of being "hassled" coupled with being yelled at for not performing his job satisfactorily are insufficient to support punitive damages generally, let alone at a ratio of about 3 to 1 to compensatory damages.

B. The award of attorney's fees should be reduced.

Petitioners' arguments regarding the reduction in attorneys' fees is not grounded in the efforts of counsel. Instead, Petitioners argue the substantial amount of attorneys' fees was the product of discovery ordered by the Trial Court and the evidence produced in such discovery was largely disregarded. Furthermore, such award is premature due to the good cause to set aside the default.

V. Conclusion

For these reasons and those asserted in Petitioners' Brief, Petitioners respectfully request that this Court vacate the Trial Court's Order Denying Petitioners' 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: September 25, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2024, the foregoing Reply Brief of Petitioners 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
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