

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-449

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HP, INC.,

Petitioner,

v.

Judith Thomas,

Respondent.

Appeal from Memorandum Opinion
of Intermediate Court of Appeals of
West Virginia in No. 23-IC-203

REPLY BRIEF OF PETITIONER HP INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. Petitioner’s Warranty Limitations are not void, and the Circuit Court plainly lacked subject matter jurisdiction to adjudicate Respondent’s claims.....	1
A. The West Virginia Consumer Credit Protection Act is inapplicable.	1
B. The West Virginia Uniform Commercial Code explicitly contemplates the contractual limitation of damages.	2
C. Petitioner’s Warranty Limitations clearly limited Respondent’s recovery to an amount insufficient to meet the statutory amount-in-controversy threshold, thereby depriving the Circuit Court of subject matter jurisdiction.	5
II. The Intermediate Court of Appeals erred in failing to find Petitioner established excusable neglect as a Rule 60(b) ground for setting aside the Circuit Court’s Amended Default Judgment.	7
III. The Intermediate Court of Appeals’ remand of this case to Circuit Court for consideration of punitive damages was not a proper exercise of its discretion, as Respondent is not entitled to any punitive damages.	10
IV. Each Assignment of Error asserted by Petitioner in its appeal to the Intermediate Court of Appeals was properly before the Intermediate Court of Appeals because the Circuit Court’s erroneous rulings were raised by Petitioner in its Rule 60(b) Motion to Vcate and/or Set Aside the November 22, 2022 Amended Final Order for Default Judgment.	12
CONCLUSION.....	15

TABLE OF AUTHORITIES

RULES

W. VA. R. CIV. P. 15(b).....	11
W. VA. R. CIV. P. 55(c).....	14
W. VA. R. CIV. P. 60(b)	14
W. VA. R. CIV. P. 60(b)(4)	7

STATUTES

W. VA. CODE § 46-2-316.....	2
W. VA. CODE § 46-2-316(4)	3
W. VA. CODE § 46-2-719(1)(a).....	3
W. VA. CODE § 46-2-719(1)(b)	3
W. VA. CODE § 46-2-719(3).....	3
W. VA. CODE § 46A-1-101	1
W. VA. CODE § 46A-6-102(2)	1
W. VA. CODE § 46A-6-107	1, 2
W. VA. CODE § 51-2-2(b).....	1, 5

CASES

<i>Any Occasion, LLC v. Florists' Transworld Delivery, Inc.</i> , No. 5:10CV44, 2010 WL 3584411 (N.D. W. Va. Sept. 13, 2010).....	1
<i>Con't Assur. Co. v. Sickels</i> , 252 N.E.2d 439 (Ind. App. Ct. 1969)	8
<i>Crespin v. City of Espanola</i> , No. CIV 11-0913, 2013 WL 2284958 (D.N.M. May 10, 2013)	8
<i>Cyril v. Neighborhood P'ship II Housing Dev. Fund, Inc.</i> , 124 F. App'x 26 (2d Cir. 2005)	8
<i>Davey v. In re Higgs</i> , 637 S.E.2d 350 (W. Va. 2006)	14

<i>Desco Corp. v. Harry W. Trushel Const. Co.</i> , 413 S.E.2d 85 (W. Va. 1991)	5
<i>Easterling v. Am. Optical Corp.</i> , 529 S.E.2d 588 (W. Va. 2000)	5
<i>Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP</i> , 746 S.E.2d 568, (W. Va. 2013)	6
<i>Garnes v. Fleming Landfill, Inc.</i> , 413 S.E.2d 897 (W. Va. 1991)	13
<i>Great Divide Ins. Co. v. Carpenter ex rel. Reed</i> , 79 P.3d 599 (Alaska 2003).....	10
<i>Hardwood Group v. LaRocca</i> , 631 S.E.2d 614 (W. Va. 2006).....	13, 14
<i>Hayseeds, Inc. v. State Farm Fire & Cas.</i> , 352 S.E.2d 73 (W. Va. 1986).....	11
<i>Jan-Care Ambulance Serv., Inc. v. Pub. Serv. Comm’n of W. Va.</i> , 522 S.E.2d 912 (W. Va. 1995) 5	
<i>Leshore v. Cnty. Of Worcester</i> , 945 F.2d 471 (1st Cir. 1991).....	8
<i>O’Brien v. Snodgrass</i> , 16 S.E.2d 621 (W. Va. 1941)	10
<i>Rapoport v. Tesoro Alaska Petroleum Co.</i> , 790 P.2d 1374 (Alaska 1990).....	8
<i>State ex rel. Barden & Robeson Corp. v. Hill</i> , 539 S.E.2d 106 (W. Va. 2000)	5
<i>State ex rel. Harper-Adams v. Murray</i> , 680 S.E.2d 101 (W. Va. 2009)	6
<i>Toler v. Shelton</i> , 204 S.E.2d 85, 89 (W. Va. 1974).....	14
<i>United States v. Autumn Ridge Condominium Ass’n, Inc.</i> , 265 F.R.D. 323 (N.D. Ind. 2009)	11
<i>Wal-Mart Stores East, L.P. v. Ankrom</i> 854 S.E.2d 257 (W. Va. Sup. Ct. Nov. 18, 2020).....	11
<i>Warden v. Bank of Mingo</i> , 341 S.E.2d 679 (W. Va. 1985)	11
<i>Wolfe v. Welton</i> , 558 S.E.2d 363 (W. Va. 2001)	2

OTHER AUTHORITIES

BLACK’S LAW DICTIONARY (8th ed. 2005)	9
Louis J. Palmer, Jr. & Robin Jean Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 60(b)(1), 1401 (5th ed. 2017)	14

ARGUMENT

I. Petitioner's Warranty Limitations are not void, and the Circuit Court plainly lacked subject matter jurisdiction to adjudicate Respondent's claims.

Petitioner's third assignment of error is that the Intermediate Court of Appeals erred in finding that the Circuit Court possessed subject matter jurisdiction because, as a matter of law, Respondent's claims, even if meritorious, fell below the jurisdictional threshold of West Virginia Code § 51-2-2. As explained in Petitioner's Opening Brief, the Circuit Court lacked subject matter jurisdiction because the two contracts relevant to Respondent's claims both contained provisions limiting the amount of damages Respondent would be entitled to, and that amount falls far short of the statutory \$7,500.00 jurisdictional amount-in-controversy under W. VA. CODE § 51-2-2(b). In response, Respondent claims that the West Virginia Consumer Credit Protection Act, W. VA. CODE § 46A-1-101, et. seq. (the "WVCCPA"), prohibits Petitioner from limiting remedies available for breach of express or implied warranties. *Resp't's Br.* at 17 (citing W. VA. CODE § 46A-6-107(a)).

A. The West Virginia Consumer Credit Protection Act is inapplicable.

Respondent claims that the WVCCPA applies to her claims in this case for the simple reason that Petitioner is a merchant that sells consumer goods in West Virginia. *Respt's' Br.* at 17. Setting aside that Respondent never pleaded any claims under the WVCCPA, the WVCCPA simply fails to apply to the laptop and ink services that Respondent purchased from Petitioner to operate her law practice.

Under the WVCCPA, a "[c]onsumer transaction [i]s a sale or lease to a natural person or persons for a **personal, family, household or agricultural purpose.**" W. VA. CODE § 46A-6-102(2) (emphasis added); *see also Any Occasion, LLC v. Florists' Transworld Delivery, Inc.*, No. 5:10CV44, 2010 WL 3584411, at *2 (N.D. W. Va. Sept. 13, 2010) (recognizing that the WVCCPA

only applies to “consumer transactions,” and finding that the plaintiffs’ purchase of a computer system “in order . . . to conduct their floral business” did not fall within the purview of the WVCCPA); *Wolfe v. Welton*, 558 S.E.2d 363, 375 (W. Va. 2001) (noting, generally, that the WVCCPA’s warranty exclusion prohibition “applies to sales to consumers in a consumer transaction”).

Respondent’s purchase of her laptop was not a “consumer transaction” protected by the provisions of the WVCCPA. Indeed, Respondent unabashedly represented to the Circuit Court that she used her HP laptop and Instant Ink subscription for business purposes:

In May 2021, the Replacement Laptop suddenly became inoperable. This failure had the catastrophic effect of losing ten years of Plaintiff’s stored data **as well as a legal brief due within days.**

. . .

Plaintiff advised HP representatives from the outset that, with the disastrous failure of two new HP laptops, **and her daily reliance upon a computer for business purposes**, that she could no longer afford to rely on a HP product and was seeking a purchase price refund, a remedy available under the Extended Warranty.

JA000069 (emphasis added). Because the purchase of the laptop and ink services were not consumer transactions, the limitation on warranties under W. VA. CODE § 46A-6-107(a) simply fail to apply. W. VA. CODE § 46A-6-107. Consequently, the HP laptop Respondent purchased is not, under the facts of this case, subject to the WVCCPA’s provisions prohibiting the exclusion of warranties or the limitation of remedies.

B. The West Virginia Uniform Commercial Code explicitly contemplates the contractual limitation of damages.

Where the special provisions of the WVCCPA are inapplicable, the general provisions governing the sales of goods under the West Virginia Uniform Commercial Code (“WVUCC”) apply. Specifically, W. VA. CODE § 46-2-316 contemplates the exclusion and modification of

express and implied warranties, and, relevant here, provides for the limitation of remedies for breach of warranty in accordance with the WVUCC's provisions on liquidation or limitation of damages and on contractual modification of remedy. W. VA. CODE § 46-2-316(4).

Indeed, the WVUCC provides that:

the agreement may provide for remedies in addition to or in substitution for those provided in [the WVUCC] and may limit or alter the measure of damages recoverable under [the WVUCC], **as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts[.]**

W. VA. CODE § 46-2-719(1)(a) (emphasis added). Additionally, "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."

W. VA. CODE § 46-2-719(1)(b). Finally, this provision of the WVUCC provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable . . . [L]imitation of damages where the loss is commercial is not [prima facie unconscionable]." W. VA. CODE § 46-2-719(3).

Both the HP Services Agreement and the HP Instant Ink Services Agreement provide that the limited remedies set forth therein were Respondent's **"SOLE AND EXCLUSIVE REMEDIES."** JA000154 (emphasis added). Under the HP Services Agreement, Respondent's remedies were limited to either the cost of repair or replacement value of the laptop, and consequential and special damages were expressly excluded.

THE TOTAL AMOUNT THAT HP WILL PAY FOR REPAIRS OR REPLACEMENT MADE IN CONNECTION WITH ALL CLAIMS ON ANY COVERED PRODUCT SHALL NOT EXCEED THE PURCHASE PRICE OF THE COVERED PRODUCT EXCLUDING TAX AND SHIPPING . . .

FOR ANY BREACH OF THIS AGREEMENT BY US, YOUR REMEDY AND OUR LIABILITY WILL BE LIMITED TO A REFUND OF THE PRICE PAID FOR THIS AGREEMENT BY YOUR OR THE HP PRODUCTS AT ISSUE . . . FOR OTHER DIRECT

DAMAGES FOR ANY CLAIM BASED ON A MATERIAL BREACH OF SUPPORT SERVICES UP TO A MAXIMUM OF THE SUPPORT CHARGES YOU PAID FOR THIS AGREEMENT FOR THE HP PRODUCTS AT ISSUE. THE REMEDIES PROVIDED IN THIS AGREEMENT ARE YOUR SOLE AND EXCLUSIVE REMEDIES. EXCEPT AS INDICATED ABOVE, IN NO EVENT WILL WE . . . BE LIABLE FOR LOSS OF DATA OR FOR DIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL (INCLUDING DOWNTIME COSTS OR LOST PROFIT), OR OTHER DAMAGES WHETHER BASED IN CONTRACT, TORT, OR OTHERWISE.

JA000154. Similarly, the HP Instant Ink Services Agreement also contained a limitation of liabilities and remedies clause.

IF YOU ARE IN ANY WAY DISSATISFIED WITH THE SERVICE OR ANY PART THEREOF INCLUDING, BUT NOT LIMITED TO, A SERVICE PLAN, PROMOTION OR THE SITE, TO THE FULLEST EXTENT PERMITTED BY LAW, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE SERVICE AND/OR THE APPLICABLE HP SERVICE PLAN . . . WITHOUT LIMITING THE FOREGOING, TO THE EXTENT HP, ITS SUCCESSORS, OR AFFILIATES ARE HELD LEGALLY LIABLE TO YOU, HP'S, ITS SUCCESSORS', AND AFFILIATES' AGGREGATE MAXIMUM LIABILITY TO YOU IS LIMITED TO THE AMOUNT OF YOUR MONTHLY FEE PAID BY YOU TO HP FOR THE SERVICE AND/OR A SERVICE PLAN FOR THE ONE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH YOUR CLAIM AROSE OR SUCH AMOUNT AS IS THE MINIMUM AMOUNT ALLOWABLE AS SUCH A LIMIT ON LIABILITY. TO THE FULLEST EXTENT PERMITTED BY LAW, THE REMEDIES PROVIDED IN THIS AGREEMENT ARE YOUR SOLE AND EXCLUSIVE REMEDIES.

JA000163 (emphasis added).

These remedy limitation provisions are valid and cognizable under the WVUCC. The remedy limitation provisions plainly limited Respondent to the recovery of either replacement or repair costs of the laptop and the subscription fee for the HP Instant Ink service. The value of the laptop was indisputably just \$1,527.98, and the value of the HP Instant Ink services paid for by Respondent was just \$213.92.

C. Petitioner’s Warranty Limitations clearly limited Respondent’s recovery to an amount insufficient to meet the statutory amount-in-controversy threshold, thereby depriving the Circuit Court of subject matter jurisdiction.

Subject matter jurisdiction may never be waived, *see State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 111 (W. Va. 2000), and, as a matter of law, may be raised for the first time on appeal, *see Easterling v. Am. Optical Corp.*, 529 S.E.2d 588, 587 (W. Va. 2000) (citing *Jan-Care Ambulance Serv., Inc. v. Pub. Serv. Comm’n of W. Va.*, 522 S.E.2d 912, 918 n.4 (W. Va. 1995)). The West Virginia Legislature has limited the subject matter jurisdiction of circuit courts to preside over civil actions involving an amount-in-controversy, excluding interest, exceeding \$7,500.00. W. VA. CODE § 51-2-2(b). This dispute involves a laptop valued at just \$1,527.98 and an instant ink service for which Respondent paid just \$213.92. JA000154; JA000163.

As held by this Court, “Our rule for damages as a result of a breach of contract is that recovery may be obtained for those damages which either arise naturally from the breach or may reasonably have been within the contemplation of the parties at the time they made the contract. *Desco Corp. v. Harry W. Trushel Const. Co.*, 413 S.E.2d 85, 89 (W. Va. 1991). Respondent’s claims are solely based in contract, citing breach of the warranty in the HP Services Agreement and the breach of the HP Instant Ink Services Agreement as the causes of action. JA000028. Despite Respondent alleging that Petitioner made a misrepresentation regarding the alleged loss of rollover printing pages, at base, Respondent is arguing that Petitioner failed to abide by the HP Instant Ink Service Agreement, which is the source of her alleged damages. JA000028.

As held by this Court, under the “gist of the action doctrine”, recovery in tort is barred when any of the following factors is demonstrated:

- (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where

the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP, 746 S.E.2d 568, 577 (W. Va. 2013). Petitioner's alleged liability arises solely from the HP Services Agreement and HP Instant Ink Services Agreement, Petitioner's alleged duties breached were grounded in these agreements, and Petitioner's alleged liability stems solely from these agreements. Respondent's claims sound in contract, meaning the damages available are solely contractual in nature.

Therefore, the only damages Respondent can recover are those that arise naturally from the contract or were reasonably within the contemplation of the parties. As evidenced by the Services Agreements, which include the valid limitations of liability, the only damages arising from the contracts and reasonably within the contemplation of the parties are: (1) the value of the laptop (\$1,527.98); and (2) the value of the Instant Ink services for which Respondent paid (\$213.92). The damages available for Respondent to recover cannot exceed the aggregate of these amounts.

Regardless of Petitioner's failure to respond to the Complaint, under Rule 55 of the West Virginia Rules of Civil Procedure, prior to entering default, the Circuit Court was obligated to both assess its jurisdiction and Respondent's purported damages. *See, e.g., syl. pt. 4, State ex rel. Harper-Adams v. Murray*, 680 S.E.2d 101 (W. Va. 2009). Respondent affixed the HP Services Agreement to her Motion for Default for the Circuit Court's review. [J.A. at p. 53.] If assessed, under no circumstances would Respondent stand to recover any amount exceeding \$7,500, exclusive of interest to invoke the jurisdiction of the Circuit Court.

Because Respondent lacks the ability to pursue potential damages in an amount above the Circuit Court's jurisdictional threshold, the Amended Default Judgment was void *ab initio* and good cause exists for this Court to vacate and/or set aside the Circuit Court's Order upholding its award of default judgment. *See W. VA. R. CIV. P. 60(b)* ("On motion and upon such terms as are

just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void”).

II. The Intermediate Court of Appeals erred in failing to find Petitioner established excusable neglect as a Rule 60(b) ground for setting aside the Circuit Court’s Amended Default Judgment.

In addition to lack of subject matter jurisdiction, Petitioner established another ground under Rule 60(b) for setting aside the Circuit Court’s default judgment: excusable neglect. The Intermediate Court of Appeals agreed with Petitioner that the *Hardwood Group* factors support setting aside the Amended Default Judgment. JA00004. The Intermediate Court of Appeals explained that Respondent would not be prejudiced by setting aside the Amended Default Judgment, that numerous issues of fact and the presence of meritorious defenses favored setting aside the Amended Default Judgment, that Respondent’s claims implicated significant stakes, and the Petitioner was “moderately, but not severely, intransigent.” JA000004-6.

Despite finding that each of these four factors weighed in favor of setting aside the Amended Default Judgment, the Intermediate Court of Appeals declined to do so because it did not believe that Petitioner had established a Rule 60(b) ground separate and apart from the *Hardwood Group* factors. JA000006. As explained above, the Amended Default Judgment was void for lack of subject matter jurisdiction. The voidness of the Amended Default Judgment implicates Rule 60(b)(4), and it should have been set aside on that ground.

Petitioner still maintains that the unexpected leave of absence of Mr. Chatfield, the person who oversaw Petitioner’s Executive Customer Relations Division, where the Summons and Complaint were routed, constitutes excusable neglect. Respondent disagrees, indicating “these circumstances do not constitute excusable neglect but rather the failure of HP, a multinational corporation with 54,000 employees, over 200 of which are attorneys, to establish procedures and

employee training for all employees that ensures legal process is immediately sent to the Legal Department.” *Resp’t’s Br.* at 19.

Many courts, in a variety of jurisdictions, have found that the sudden illness of the responding party and/or his or her counsel constitutes excusable neglect. *See, e.g., Cyril v. Neighborhood P’ship II Housing Dev. Fund, Inc.*, 124 F. App’x 26 (2d Cir. 2005); *Leshore v. Cnty. Of Worcester*, 945 F.2d 471 (1st Cir. 1991) (affirming the setting aside of a default based on illness of the county attorney in failing to respond); *Crespin v. City of Espanola*, No. CIV 11-0913, 2013 WL 2284958, at *8 (D.N.M. May 10, 2013) (“The Court concludes that Crespin’s evidence that his counsel was suffering from serious health difficulties demonstrates excusable neglect”); *Rapoport v. Tesoro Alaska Petroleum Co.*, 790 P.2d 1374, 1377 (Alaska 1990) (“Genuine and severe medical disability generally suffices as excusable neglect.”); *Con’t Assur. Co. v. Sickels*, 252 N.E.2d 439, 441 (Ind. App. Ct. 1969) (“The following facts have been held to constitute excusable neglect . . . sickness of party, or illness of member of family.”).

In *Sickels*, the defendant-appellant received a copy of plaintiff-appellees’ complaint and summons on November 17, 1967. *Sickels*, 252 N.E.2d at 441. While the defendant had a procedure to relay complaints and summonses to defendant’s counsel. *Id.* However, through mistake, the plaintiff’s complaint and summons were not sent to counsel, but instead were paperclipped to another set of legal proceedings and left in a drawer. *Id.* Therefore, defendant’s counsel did not become aware of the complaint and summons until December 5, 1967, when defendant received the notice of default judgment. *Id.* The Appellate Court of Indiana held that such facts constituted excusable neglect. *Id.* In a similar fashion, Petitioner received Respondent’s complaint and summons, yet such was not sent to the legal department due to the sudden illness of the recipient of the complaint and summons.

“Excusable neglect” is defined as by Black’s Law Dictionary as:

A failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident or because of the reliance on the care and vigilance of the party’s counsel or on a promise made by the adverse party.

Excusable neglect, BLACK’S LAW DICTIONARY (8th ed. 2005). Mr. Chatfield’s sudden, unexpected, and unavoidable illness resulted in Petitioner not receiving notice of this action until the entry of default. This is, by definition, excusable neglect.

Petitioner understands that it is a large company. However, companies are made up of individuals which can get sick and make mistakes. Petitioner missed Respondent’s Complaint because the person it was sent to was ill and absent. JA000161-62 Like in *Sickels*, when HP learned of the action, HP immediately responded. JA000129, 164-65.

Petitioner is mindful that some degree of neglect resulted in its failing to timely respond to Respondent’s Complaint. That said, when viewed together with each of the *Hardwood Group* factors, each of which the Intermediate Court of Appeals agreed supported setting aside the Amended Default Judgment, Petitioner’s neglect was excusable, and the Intermediate Court of Appeals should have set aside the Amended Default Judgment in its entirety. This Court should reverse the Intermediate Court of Appeals’ error in refusing to do so.

Respondent now attempts to introduce new evidence, never before on the record, to support her argument that Petitioner cannot establish excusable neglect. Respondent points to a purported set of Petitioner’s policies and procedures, “*HP Standards of Business Conduct*”, as some form of proof that Petitioner should not have missed Respondent’s Complaint. Respondent currently seeks this Court to take judicial notice of these purported policies as adjudicative fact. *Resp’t’s Mot. for Judicial Notice of Adjudicative Fact*. As discussed in *Petitioner’s Response in Opposition to*

Respondent's Motion for Judicial Notice of Adjudicative Fact, this document is inadmissible hearsay that has no relevancy to this case. Petitioner refers to its *Response in Opposition to Respondent's Motion for Judicial Notice of Adjudicative Fact* for the arguments against the consideration of this document.

III. The Intermediate Court of Appeals' remand of this case to Circuit Court for consideration of punitive damages was not a proper exercise of its discretion, as Respondent is not entitled to any punitive damages.

Despite the Intermediate Court of Appeals' finding that the Circuit Court's Amended Default Judgment failed to set forth its award of punitive damages pursuant to the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) and acknowledging that Respondent "did not expressly seek [punitive damages] in her [C]omplaint," and that Respondent "never sought to amend," the Intermediate Court of Appeals remanded the issue of punitive damages to the Circuit Court for further consideration. JA000007-8. This was error.

Respondent argues that she requested punitive damages in her *Motion for Default Judgment*. That may be so, but Respondent failed to plead punitive damages, or the factual underpinnings for punitive damages, in her Complaint. This Court has explained before that, although "punitive damages need not be pleaded *eo nomine*," a complaint "must allege that the tort pleaded was done maliciously, wantonly, willfully, or with like animus or show facts from which it may be deduced that the act complained of was so done." *O'Brien v. Snodgrass*, 16 S.E.2d 621 (W. Va. 1941), *corrected on other grounds by Ennis v. Brawley*, 41 S.E.2d 680, 685 (W. Va. 1946). Other jurisdictions have so recognized. *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 611-12 (Alaska 2003) ("[A]lthough punitive damages need not be pled in a complaint, the complaint should, at a minimum, allege conduct that meets the legal standard for the award of punitive damages."); *United States v. Autumn Ridge Condominium Ass'n, Inc.*, 265 F.R.D. 323,

326 (N.D. Ind. 2009) (“[A] plaintiff may recover punitive damages, even where it fails to specifically request the damages, if sufficient facts supporting such an award are alleged in the complaint.”).

Respondent did not plead punitive damages in name and did not plead the required facts for punitive damages. Further, Respondent’s own causes of action, which are based in contract, do not allow for punitive damages. This Court has recognized that, “[g]enerally, punitive damages are unavailable in an action for breach of contract unless the conduct of the defendant constitutes an independent, intentional tort.” *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80 (W. Va. 1986); *Warden v. Bank of Mingo*, 341 S.E.2d 679, 684 (W. Va. 1985) (“Punitive damages are allowed only where there has been malice, fraud, oppression, or gross negligence . . . [P]unitive damages are generally unavailable in pure contract actions.”).

Respondent asserts *Wal-Mart Stores East, L.P. v. Ankrom* 854 S.E.2d 257 n.24 (W. Va. Sup. Ct. Nov. 18, 2020), and Justice Jenkins concurrence in part, for the proposition that she did not need to plead punitive damages in her Complaint to receive them. Justice Jenkins concurrence in part related to the failure of the lower court to instruct the jury on intervening cause, which prevented the jury from effectively considering intervening cause as a defense. *Wal-Mart Stores East, L.P.*, 854 S.E.2d at 280-85. It has nothing to do with complaints or punitive damages.

Respondent also forwards W. VA. R. CIV. P. 15(b) as support for the ability of the Circuit Court to consider punitive damages on remand. As stated by Rule 15(b), “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” W. VA. R. CIV. P. 15(b). This case was not tried, and punitive damages were not tried by the express or implied consent of Petitioner. Therefore, it is inappropriate for the Circuit Court to consider punitive damages, and it was error

for the Intermediate Court of Appeals to remand the issues of punitive damages to the Circuit Court.

At base, Respondent is not entitled to punitive damages. Respondent did not plead punitive damages or the facts for punitive damages. Respondent's claims sound in contract, not tort, meaning it is inappropriate for punitive damages in this action. The Intermediate Court of Appeals should have vacated the finding of punitive damages and not have remanded the issue to the Circuit Court for further consideration.

IV. Each Assignment of Error asserted by Petitioner in its appeal to the Intermediate Court of Appeals was properly before the Intermediate Court of Appeals because the Circuit Court's erroneous rulings were raised by Petitioner in its Rule 60(b) Motion to Vacate and/or Set Aside the November 22, 2022 Amended Final Order for Default Judgment.

Respondent argues that the Intermediate Court of Appeals used the improper scope of review on appeal. *Resp't's Br.* at 14. Respondent argues that the Intermediate Court of Appeals' review of the Circuit Court's award of punitive damages and attorney's fees constituted a "consideration of the underlying default judgment," rather than a review of "the lower court's denial of the Rule 60(b) motion to vacate," which Respondent suggests is prohibited. *Resp't's Br.* at 14. Despite Respondent's objection to the scope of review, Respondent did not file a cross-appeal to challenge the validity of the Intermediate Court of Appeals' scope of review on appeal, meaning this issue is entirely inappropriate for this Court to consider at this juncture. Even if this issue was reviewable, Respondent's arguments as to the scope of review lack merit. Petitioner challenged the recoverability of punitive damages and attorney's fees as good cause to vacate and/or set aside the Circuit Court's November 22, 2022 Amended Final Order for Default Judgment in its Rule 60(b) Motion. *See* JA000144 ("[T]he Amended Default Judgment mistakenly awarded Plaintiff attorneys' fees of \$8,800.00" and "fails to set forth this Court's award of punitive

damages pursuant to the factors of *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).”).

Petitioner argued below that these plain legal errors supported a finding of good cause to vacate and/or set aside the Amended Default Judgment, specifically under the second factor for assessing good cause under *Hardwood Group v. LaRocca*, 631 S.E.2d 614 (W. Va. 2006) – that is, whether any material issues of fact or meritorious defenses were present. Petitioner properly raised these issues and directed the Circuit Court to legal authorities establishing that *pro se* litigants are not entitled to an award of attorney’s fees, *see* JA000144, and legal authorities establishing that the Circuit Court’s award of punitive damages erroneously failed to account for the *Garnes* factors, *see* JA 000144-45.

These meritorious defenses were raised by Petitioner in support of the second *Hardwood Group* factor – that is, whether any meritorious defenses were present. On appeal to the Intermediate Court of Appeals, Petitioner argued the same, that is, that the Circuit Court’s legal errors in awarding Respondent attorney’s fees and punitive damages support a finding of good cause to set aside and/or vacate the Circuit Court’s Amended Default Judgment. JA000291 (“[T]he Circuit Court’s Amended Default Judgment should have been set aside because it erroneously awarded Respondent, a *pro se* litigant, attorney’s fees, as well as punitive damages without setting forth sufficient grounds for making an award of punitive damages.”).

Respondent claims that she “disagrees with the expansive scope of review urged by [Petitioner],” and directs this Court to a string cite of decisions she claims “provides that appellate review is limited to the lower court’s denial of a Rule 60(b) motion to vacate, and consideration of the underlying default judgment is prohibited.” *Resp’t’s Br.* At 14. While true that “[a]n appeal of the denial of a Rule 60(b) motion . . . brings to consideration for review only the order of denial

itself and not the substance supporting the underlying judgment nor the final judgment order,” *see Toler v. Shelton*, 204 S.E.2d 85, 89 (W. Va. 1974), Petitioner did not seek review of the substance supporting the underlying judgment and final judgment order in its appeal to the Intermediate Court of Appeals. Rather, Petitioner sought review of the Circuit Court’s denial of its Rule 60(b) Motion to Set Aside the Amended Default Judgment.

Rule 60(b) permitted the Circuit Court to “relieve [Petitioner] . . . from a final judgment . . .” *See* W. VA. R. CIV. P. 60(b). Rule 60(b)(1) explicitly authorized the Circuit Court to correct legal substantive mistakes in its final order. *See* Louis J. Palmer, Jr. & Robin Jean Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 60(b)(1), 1401 (5th ed. 2017). And, this Court has instructed circuit courts to construe Rule 60(b) “liberally [] for the purpose of accomplishing justice,” and has explained that Rule 60(b) “was designed to facilitate the desirable legal objective that cases are to be decided on their merits.” *See Davey v. In re Higgs*, 637 S.E.2d 350, 353 (W. Va. 2006).

Relatedly, Rule 55(c) authorized the Circuit Court to, “[f]or good cause shown . . . set aside entry of default [judgment] . . . in accordance with Rule 60(b).” *See* W. VA. R. CIV. P. 55(c). Good cause is to be assessed by examining the following four factors:

(1) the degree of prejudice suffered by the plaintiff from the delay in answering; **(2) the presence of the material issues of fact and meritorious defenses**; (3) the significance of the interest at stake; and (4) the degree of intransigence on the part of the defaulting party.

Syl. pt. 3, *Hardwood Group*, 631 S.E.2d 614 (emphasis added).

In support of its Rule 60(b) Motion to Set Aside, Petitioner raised numerous meritorious defenses, including, *inter alia*, that Respondent was not – and could not have been – entitled to attorney’s fees, that Respondent was not entitled to an award of punitive damages, and that the Circuit Court was deprived of subject matter jurisdiction. These meritorious defenses – which

comprised the substance of the appeal to the Intermediate Court of Appeals – are directly tailored to establishing the second *Hardwood Group* factor, and are sufficient grounds for a finding of good cause to set aside the Amended Default Judgment. Accordingly, the Circuit Court’s errors in awarding Respondent attorney’s fees and punitive damages were properly before the Intermediate Court of Appeals on appeal. The Intermediate Court of Appeals properly considered these sources of error for the appeal. As a result, it is proper for this Court to review the Intermediate Court of Appeals’ decision to remand the issue of punitive damages to the Circuit Court for error.

CONCLUSION

This Court should reverse, in part, the Intermediate Court of Appeals’ Memorandum Decision to the extent it affirmed the Circuit Court’s Order denying Petitioner’s Motion to Set Aside and vacate and/or set aside the Circuit Court’s Amended Default Judgment. Alternatively, at a minimum, this Court should reverse the Intermediate Court of Appeals’ Memorandum Decision to the extent it remanded the issue of punitive damages back to the Circuit Court for further consideration.

Respectfully submitted by,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-449

HP, INC.,

Petitioner,

v.

Judith Thomas,

Respondent.

Appeal from Memorandum Opinion
of Intermediate Court of Appeals of
West Virginia in No. 23-IC-203

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **22nd day of January 2025**, the foregoing ***Reply Brief of Petitioner HP Inc.***, was served using the CM/ECF system, which will send notification of such filing to all parties of record.

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