

le- IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

WILLIAM L. GROVES and HARROLYN
B. GROVES, husband and wife,

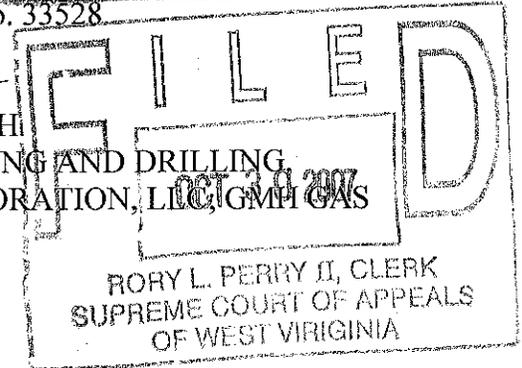
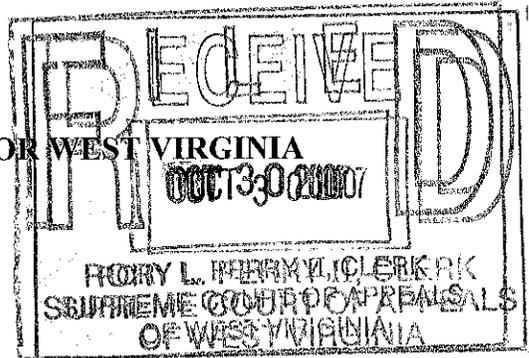
Plaintiffs,

vs.

le- ROY G. HILDRETH AND SON, INC.; ROY G. HILDRETH
JR., individually; NITRO ENERGY, INC.; BNG PRODUCING AND DRILLING
INC.; B & R CONSTRUCTION, INC.; WESTSIDE EXPLORATION, LLC; GMP GAS
CO., INC.; and BOGGS NATURAL GAS, FLP,

Defendants.

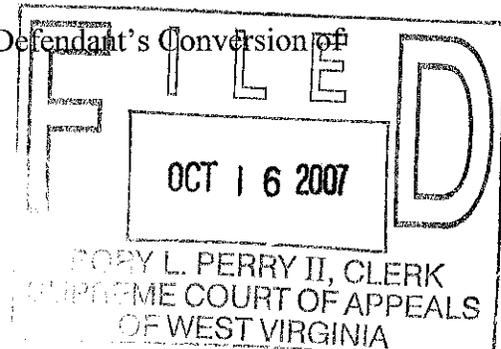
Case No. 33528



APPELLANT NITRO ENERGY'S BRIEF SUPPORTING ITS APPEAL

I.) The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

The above-mentioned lawsuit was initially filed by Plaintiffs on September 1, 2005 in the Circuit Court of Roane County, West Virginia. While Plaintiffs were forced to amend their Complaint with a Supplemental/Amended Complaint on December 8, 2005 the basic allegations and nature of the controversy remained the same. Essentially, Plaintiffs' allegations asserted that Plaintiffs, purchasers of the surface rights to the real estate in question, were likewise entitled to the mineral rights underlying same. Plaintiffs' various requests for relief included an action for ejection and conversion of minerals belonging to Plaintiffs based on their assertion that various Defendants had improperly entered upon Plaintiffs' land without the legal right to do so and removed minerals belonging to Plaintiffs. Plaintiffs' Amended/Supplemented Complaint states, "Plaintiffs request that this Court further Order the above named Defendants to pay damages in an amount not less than \$1,000,000.00 for Defendant's Conversion of Plaintiffs' property."



While all other Defendants responded to the Complaint, your Defendant and now Appellant failed to timely file and serve answer for various excusable reasons. Although Plaintiffs' claims to ownership over the subject mineral rights were later eventually denied through summary judgment rulings, Appellant Nitro had a default judgment order entered against it for \$704,000.00 on September 2, 2006. As the record will reflect, this September 2, 2006 Default Entry was issued with absolutely no findings of fact and conclusions of law that could have credibly supported an award of this amount. (See Exhibit A). Likewise, the Court's Entry does not illustrate how the above-mentioned \$704,000.00 amount was calculated or what evidence supported it. (See Exhibit A). On the 22nd of November, 2006, newly retained counsel for Appellant Nitro Energy filed a Motion To Vacate the previously entered Default Judgment under Rule 60 (b) of the West Virginia Rules of Civil Procedure. Plaintiffs filed a Response to Appellant's Motion to Set Aside the Default Judgment on December 3, 2006. Appellant Nitro Energy filed a Reply to this Response on December 14, 2006. After a brief hearing on the matter on December 13, 2006, the trial Court entered an Order Denying Motion to Vacate Default Judgment on February 20, 2007. (See Exhibit B). Once again, this Order does not illustrate the specific facts and/or conclusions of law upon which the Court relied for its extremely generous judgment. (See Exhibit B). Interestingly, this case was originally brought in Roane County before Judge David Nibert. However, when Plaintiffs' Amd./Supp. Complaint was filed, Roane County Circuit Judge Thomas C. Evans was named as a Defendant. Thereafter, his Co-Circuit Judge Nibert was forced to recuse himself. Judge Nibert was replaced by Senior Status Judge Robert G. Chafin. While this fact may seem insignificant, a review of the relevant transcripts reveals that this change

in judges played a major role in Judge Chafin's failure to set aside the default judgment previously entered by Judge Nibert. For instance, in the transcript from the hearing on Appellant Nitro's Motion to Set Aside the Default Judgment verdict and award, Judge Chafin states, "I did not enter the Order for Default Judgment, that was entered by a judge before I got into this matter, as well as I can recall." (See Exhibit C, g. 17).

This Order (Entered February 20, 2007) Denying Defendant's Motion to Vacate Default Judgment, which allowed the above-mentioned \$704,000.00 Default Judgment Award to stand upon the basis that Appellant Nitro Energy had converted minerals from Plaintiffs' land and that the mineral rights underneath said land belonged to Plaintiffs, was entered despite the fact that this same lower court had previously entered a December 13, 2006 Order granting Summary Judgment to the Hildreth Defendants stating explicitly that Plaintiffs were not entitled to nor had ever owned the minerals underneath their realty under any theory advanced in Plaintiffs' Initial Complaint. (See Feb. 20th Order Attached as Exhibit B and December 13, 2006 Order Granting Summary Judgment Against Plaintiffs Attached as Exhibit D). While Plaintiffs did file Motions challenging this December 13, 2006 Summary Judgment Award, the lower court did enter a February 20th, 2007 Order separate and apart from the above-mentioned Order Denying Appellant's Motion for Summary Judgment which stated, "All Motions to alter or Amend the said summary judgment Order of Dec. 13, 2006, be and are hereby denied." (See Attachment E). Thus, the lower court's final denial of Defendant Nitro Energy's Motion to Vacate the Default Judgment in question, essentially allowed Plaintiffs to secure a \$704,000.00 verdict against Appellant Nitro Energy for converting minerals belonging to Plaintiffs, this despite the fact that the same lower court had

previously ruled and decided that Plaintiffs had no valid claim to the ownership of the minerals in question. This makes it extremely difficult to understand how the Plaintiffs were damaged by loss of minerals they did not own!

Going further, as a review of Plaintiffs' Amd./Supp. Complaint will verify, such Complaint, although obscurely alleging tortious transfer of certain oil and gas leasehold interests by the appellant which plaintiff alleged to have occurred more than two years prior to the filing of their suit (which claims would be barred by the two year statute on torts in this State), such Amd.Supp. Complaint does not even remotely allege any **removal of such minerals** from Plaintiffs' land by Appellant Nitro Energy, Inc. Instead, the Amd./Supp. Complaint states only that Appellant Nitro Energy was assigned an interest in the subject minerals within approximately one year without extracting any minerals from the land, which was prior to the filing of Plaintiffs' Complaint. (See Plaintiffs' Amd./Supp. Complaint). This makes it even more difficult to imagine on what legal basis or justification Nitro was even included as a Defendant. Finally, Respondent's Response to Appellant's Notice of Appeal does correctly state that Respondent's were assigned several oil and gas leases encompassing the subject property, these same leases being recorded on October 26, 2005. (See Exhibit 3, of Respondent's Response). However, Respondents (Plaintiffs below) filed their original lawsuit advancing several radical theories claiming ownership of the subject minerals on September 1, 2005, rather than alleging tortious interference with any leasehold title which they might have obtained by settlement after the filing of the subject suit. As these two dates exhibit, Respondent's held absolutely zero interest in the subject oil and gas lease on the date of their filing the initial complaint. As Respondent's Response to

Petitioner's Petition for Appeal plainly admits, "On or about October 21, 2005, Defendant Westside Exploration, LLC, quitclaimed, surrendered, and released a lease of the oil and gas tract that is the subject of this action to Respondents." (See Pg. 2 of Respondent's Response). In exchange for Westside Exploration's agreement to assign these leases to Respondents, that Court dismissed Defendant Westside Exploration from the litigation. (See Respondent's Response, Pg. 2).

To summarize the above, it should be reiterated that the only interest in the subject oil and gas to which Respondent's can claim title were provided to them as a concession for releasing a party to this lawsuit after the instigation of this lawsuit. In other words, Respondent's instigated a basically futile (as evidenced by the grant of summary judgment on Dec. 13, 2006) lawsuit alleging several theories of entitlement to the mineral rights underlying the subject property that the Court later determined were meritless. After the lawsuit had been instigated, Westside Exploration assigned several leases encompassing the oil and gas under the subject realty to Respondents in return for Respondent's agreement to dismiss Westside from the suit. During the August 22, 2006 damages hearing during which Judge Chafin agreed to allow default damages to be awarded to Respondents in the amount of \$704,000.00, it is clear upon reading the transcript that these damages were predicated upon conversion of minerals that Respondent's did not even remotely hold interest in until an agreement was made after the Initial Complaint was filed. This is fully evidenced by Respondent's own question to her own expert witness during the hearing in which she asks, "Could you describe how you calculated the reserves for the oil and gas lease, the 158 acres that we have?" (See Exhibit F, pg. 6, line 21-22). Judge Chafin, understandably confused by the complicated

set of facts, a confusion which was magnified by the fact that he was assigned to preside over this matter only after the recusal of Judge Nibert, thus erroneously predicated the \$704,000.00 default judgment award on the conversion of Respondents' leasehold rights. This decision was made despite the fact that the subject leasehold was not assigned to Respondents until after lawsuit was filed and despite the fact that this leasehold was merely assigned as a concession for Respondent's agreement to dismiss Westside Exploration from the suit. It should be reiterated that in Respondent's Initial Complaint nor their Amended Complaint that no removal of minerals was alleged against Appellant Nitro Energy. How a presiding Circuit Court Judge can allow a \$704,000.00 Default Judgment award to stand despite unequivocal evidence that Respondents held no interest in the mineral underlying the subject realty until after being assigned a leasehold as a concession for agreeing to dismiss a party from the suit and without a single iota of facts alleging removal of minerals or mining activities on behalf of the Defendant's is a complete mystery?

It is the February 20, 2007 Order Denying Appellant Nitro Energy's Motion to Vacate Default Judgment that is the subject of the present Petition for Appeal. In this February 20, 2007 Order, the lower court hastily and without factual reinforcement or specific findings states, "Having Considered the *Parsons* Factors" and "Having further performed the *Hardwood* analysis, this Court holds that the grant of final default Judgment and the award to Plaintiffs is reasonable and proper." (Exhibit B). While Judge Chafin does state that the Hardwood Analysis was undertaken by the Court, as will be shown below, under the set of facts presented in the instant case, this analysis constituted a complete abuse of discretion. During said hearing Judge Chafin states,

“Now, the second issue would be one – it’s a- is there any reason for setting aside the order for damages that was entered in the matter and that’s a much, much closer, closer call in this thing. But I’m going to deny the motion to set aside the default judgment.” (See Exhibit C, pg. 17, lines 16-21). This statement evidences that Judge Chafin, himself, appeared to be seriously questioning the validity of the default judgment award. This being the case, a decision to uphold this speculative award should certainly have been based upon further analysis and/or explanation other than, “But I’m going to deny the motion to set aside the default judgment.” (See Exhibit C, pg. 17, lines 16-21).

As will be shown below, Defendant Nitro Energy’s failure to timely Answer the present lawsuit was certainly excusable in light of the facts and circumstances of the present controversy. Further, the lower court’s refusal to vacate its previously entered Default Judgment despite previously ruling that Plaintiffs’ claims against the other Defendants were without merit, was a clear abuse of discretion under the *Parsons* and *Hardwood* Analysis. Allowing this decision to stand will facilitate the unconscionable result of allowing Plaintiffs to recover \$704,000.00 for conversion of minerals rights which Plaintiffs never owned. Such a result would certainly result in a manifest injustice to Appellant Nitro Energy and to the entire system of justice.

II. Statement of Facts of the Case Relevant To This Petition

A.) Background Facts of Events Leading Up To The Present Lawsuit.

As stated above, the Plaintiffs’ initial Complaint in regards to its allegations against Appellant Nitro Energy, along with Defendants Roy G. Hildreth and Son, Inc., Roy G. Hildreth, Jr. and GMH Gas Co., Inc., alleged that the above-named Defendants were trespassers in regards to the minerals underlying Plaintiffs’ surface realty. (See

Plaintiffs' Amd./Supp. Compl.). The Complaint requested the ejection of the above-named Defendants and also sought "not less than \$1,000,000.00" in damages allegedly owed to Plaintiffs as a result of these Defendants' wrongful exercise of dominion over minerals belonging to Plaintiffs, despite express language in Plaintiffs' deed reserving all oil, gas and minerals. This same reservation language is found in deeds pertaining to the subject realty as far back as 1931, as is expressly admitted in Plaintiffs' Amended/Supplemental Complaint. (See Plaintiffs' Amended and Supplemental Complaint, pgs. 2-3). Despite this express language reserving the mineral interests underlying said realty, Plaintiffs asserted an array of strange theories that purportedly entitled them to reassert ownership of such mineral interests. As stated above, the lower court ruled on December 13, 2006, over two months prior to the lower court's February 20, 2007 final denial of Appellant Nitro Energy's Motion to Vacate the Previously entered Default Judgment, that no material fact existed as to any of Plaintiffs' random and specious theories of entitlement to said minerals and denied their claim, thus disposing of Plaintiffs' claims relating to ejectment and conversion of said minerals through summary judgment. As shown above, the only interest Respondents ever held in the subject minerals were leasehold interests that were not assigned to Respondent until the filing of their initial Complaint.

Casting further doubt on the question of whether the trial court abused its discretion in failing to set aside the previously entered Default Judgment award of \$704,000.00 is the fact that Plaintiffs' Amended/Supplemental Complaint does not allege any removal of minerals on the subject realty by Appellant Nitro Energy. According to Plaintiffs' Own Complaint, Defendant Roy G. Hildreth, Jr., purchased the subject mineral

rights at a "November 1996 Roane County Tax Sale." (See Plaintiffs' Amended/Supp. Compl. pg. 4). In regards to Plaintiffs' claim against Appellant Nitro Energy for ejection, the Complaint states:

- 17.) On or about January 16, 2002, Defendant Roy G. Hildreth, Jr., leased "certain oil and gas interests with leasehold interests" within the boundaries of Plaintiffs' property to Defendant Nitro, a Michigan Corporation....
- 18.) On or about November 29, 2002, Defendant Nitro assigned "a 0.3125% of 100% Overriding Royalty" in Plaintiffs' Property to BNG Producing and Drilling, Inc., for \$1 and other good and valuable consideration, thereby adversely possessing the mineral interests in Plaintiffs' property not reflected in Defendant Hildreth's tax deeds....
- 19.) On or about November 29, 2002, Defendant Nitro assigned another "0.3125% of 100% Overriding Royalty" in Plaintiffs' property to B&R Construction.....thereby adversely possessing the mineral interests in Plaintiffs' property not reflected in Defendant Hildreth's tax deeds by wrongfully claiming some interest therein.
- 20.) On or about March 5, 2003, Defendant Nitro Energy assigned "all right, title and interest to and in the Oil and Gas Leases" in Plaintiffs' property to Westside Exploration, LLC, a Michigan Corporation.....thereby adversely possessing the oil, gas and mineral interests in Plaintiffs' property no reflected in Defendant Hildreth's tax deeds by wrongfully claiming title thereto and unlawfully exercising acts of ownership thereon."

(See Plaintiffs' Amd./Supp. Complaint, pg. 9). Other than this action for ejection, the only other claim asserted in Plaintiffs' Amd./Supp. Complaint against Appellant Nitro Energy is an action for conversion of Plaintiffs' mineral interests and a claim for tortious interference. Plaintiffs, in regards to this claim for conversion, reiterated the various grants outlined above through which Appellant Nitro Energy acquired and disposed of its mineral interests in the subject property and concluded that by receiving what Plaintiff asserted was an invalid grant of entitlement to the subject minerals and then reassigning the same, "Defendant Nitro committed tortious conversion by wrongfully exercising domain over Plaintiffs' mineral interests." (See. Plaintiffs' Amd./Supp. Complaint, pgs. 10-11).

Other than these counts for ejection, interference and conversion, Appellant Nitro Energy is not otherwise mentioned in the Complaint. Further, nothing in Plaintiffs' Complaint states that Appellant Nitro Energy ever removed minerals from the subject property. Keeping in mind that Plaintiffs' Complaint sought "not less than \$1,000,000.00" for conversion of these mineral rights, it is hard to fathom how the trial Court decided that Appellant Nitro Energy should be liable for \$704,000.00 when this decision is viewed alongside the fact that Appellant Nitro never removed any minerals from the subject property. By merely having mineral rights assigned to it by Hildreth and then assigning these same rights onto other parties, how Appellant Nitro could be liable to Plaintiffs for this large sum of money, let alone any sum of money, is to say the least, somewhat mysterious? When viewed in light of the fact that the lower court had previously determined that Plaintiffs' claims to the minerals were meritless, the lower court's failure to set aside this default judgment was a clear abuse of discretion, as will be further outlined below.

B.) Facts Relating To Nitro Energy's Failure To Timely Answer.

William Boss, a Principal for Defendant Westside Energy, LLC, entered into a joint venture with Appellant Nitro Energy throughout which this joint venture acquired various oil and gas leases in and around West Virginia. One such lease that the joint venture acquired was the lease in question acquired by Appellant Nitro Energy from the Hildreth Defendants that involved the subject realty. As shown above and fully admitted in Plaintiffs' Amd./Supp. Complaint, Defendant Nitro Energy had assigned all interest in the subject mineral rights nearly two years prior to the filing of the present lawsuit and had extracted no minerals from the realty. Nonetheless, Mr. Boss contacted the

principals of Nitro Energy, Inc. and informed them that Mr. Boss had retained an Oil and Gas Attorney in Pennsylvania that was licensed in West Virginia, Shawn Cassidy, and that Mr. Cassidy would be providing an Answer on behalf of both Defendant Westside Exploration and Appellant Nitro Energy, being that the two were partners in a joint venture involving the subject mineral interests. It was certainly excusable and understandable for Appellant Nitro Energy to feel comfortable that Mr. Boss would protect its interests in light of their joint venture. Indeed, as partners of a joint venture involving the subject realty, Mr. Boss's company's interests (Westside Exploration), would certainly be aligned with, if not exactly the same as, those of Appellant Nitro Energy.

By some miscommunication on the part of either Mr. Boss or Attorney Cassidy, although Attorney Cassidy answered on behalf of Westside Exploration, LLC, an Answer was not provided on behalf of Appellant Nitro Energy. As evidenced by competing Affidavits filed by both gentlemen, Mr. Boss felt that he had effectively relayed his intent that an Answer for Appellant Nitro be provided and Attorney Cassidy felt that the same had not been specifically mentioned. In their response to Appellant Nitro Energy's Motion to Vacate Default Judgment, Plaintiffs present an Affidavit from Attorney Cassidy which states he did not receive instructions from Mr. Boss to Answer on behalf of Nitro. Regardless of who is at fault for this miscommunication, it resulted in the manifest injustice of Plaintiffs being awarded \$704,000.00 in damages for conversion of minerals that they were found never to have owned. As discussed above, even if it is true that Mr. Boss somehow failed to communicate effectively his intention that an Answer be filed on behalf of Defendant Nitro Energy, the facts of the case and the alignment of

these two parties in regards to the subject realty make this reliance upon Mr. Boss' representation that this Answer would be filed on Appellant Nitro's behalf understandable.

Further justification for Appellant Nitro Energy's failure to timely enter the subject lawsuit stems from its association with Westside Exploration, LLC. As discussed above, Westside Exploration and Nitro Energy had entered into a joint venture involving various oil and gas leases in West Virginia, one of which encompassed the subject realty. Plaintiffs' initial Complaint (filed September 1, 2005), which was dismissed and re-filed as amended on December 8, 2005, named Westside Exploration as a Defendant along with Appellant Nitro Energy. However, by the time Plaintiffs were forced to file an Amd./Supp. Complaint on December 8, 2005, an agreement had been reached through which Westside Exploration was dismissed from the suit. However, for some unknown reason, Appellant Nitro Energy remained a named Defendant. This further shows that there was no intentional intransigence on behalf of Appellant Nitro. Not only was Appellant Nitro assured by its joint venture partner that shared the same or similar interests in the subject controversy that an Answer would be filed on its behalf, it mistakenly assumed that because these entities shared similar interests and that Westside (its partner) had been excused from the lawsuit, it would naturally follow that Appellant Nitro would likewise have been excused.

III. Assignments of Error

- A. The Lower Court Abused Its Discretion By Denying Appellant's Motion to Vacate Summary Judgment Under the Standard Applied By West Virginia Law Under Rule 60 (B) of the West Virginia Rules of Civil Procedure.

- B. The Lower Court Abused Its Discretion By Rendering a Default Judgment Award to Plaintiffs In An Amount That Was Speculative, Premature, Erroneous, Arbitrary and Capricious.
- C. The Lower Court Abused Its Discretion By Failing To Delineate Within Its Various Orders The Facts And Conclusions Of Law Upon Which It Based Its Default Judgment Rulings.
- D. The Lower Court Abused Its Discretion and Allowed A Manifest Injustice To Rest Upon Appellant Nitro Energy By Awarding Plaintiffs \$704,000.00 in Damages for the Conversion of Mineral Rights To Which the Lower Court Had Previously Decided Were Not Owned By Plaintiffs.

IV. POINTS AND AUTHORITIES RELIED UPON

- 1.) West Virginia R.C.P. Rule 60 (B).
- 2.) West Virginia R.C.P. Rule 55.
- 3.) *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E. 2d 8, (1972).
- 4.) *Hardwood Group v. Claire*, 631 S.E. 2d 614, 2006 W.Va. Lexis 5, (2006).
- 5.) Syllabus point 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. at 471, 256 S.E. 2d 758, (1959).
- 6.) World Book Dictionary, Doubleday and Company, Inc., 1979.
- 7.) *DeLapp v. DeLapp*, 584 S.E. 2d 899, 2003, per curium opinion.
- 8.) *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E. 2d 786, (1998).

V. DISCUSSION OF LAW

- A. The Lower Court Abused Its Discretion By Denying Appellant's Motion for Summary Judgment Under West Virginia Law As Applied To Rule 60 (B).

This Court has consistently held that “Rule 55(c) and subdivision (b) of this rule (W.Va.R.C.P. 60) dealing with the setting aside of default judgments, should be liberally construed in order to provide relief from onerous consequences of default judgments and accomplish justice where merited. *If any doubt exists as to whether the relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W.Va. 875, 190 S.E. 2d 8, (1972), (Emphasis added).* As a preliminary matter, it should also be stated that this Court expressly held in *McDaniel* that “A default Judgment suffered by reason of a misunderstanding as to appearance and representation by counsel may be vacated.” *McDaniel, 155 W.Va. 875.* As the record will reflect, the lower court’s Orders which granted default judgment against Appellant Nitro Energy were essentially devoid of any findings of fact and conclusions of law that were utilized in reaching the decision. Thus, not only did the trial court abuse its discretion in failing to properly outline the analysis it undertook to reach the subject decision in the respective Orders, but it likewise abused its discretion by failing to specifically delineate the grounds upon which the denial was based.

When determining whether a default judgment should stand upon a motion to vacate default judgment under Rule 60 (b) under West Virginia law, a trial court, as dictated by this court, must undertake a two part analysis wherein it first reviews whether a party has satisfied the “good cause” standard for setting aside an entry of default under Rule 55 (c) by balancing the five factors set forth in *Parsons* and then must determine whether a ground for reversing a final Order under Rule 60 (b) has also been shown. See *Hardwood Group v. Claire, 631 S.E. 2d 614, 2006 W.Va. Lexis 5, 2006* and Syllabus

point 3 of *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. at 471, 256 S.E. 2d 758, (1959).

i.) Essentially All Five Factors of the “Good Cause” Standard For Setting Aside A Default Judgment Weigh In Appellant Nitro Energy’s Favor.

When dealing with the first prong of the test outlined above in deciding whether a party has met the “good cause” standard under Rule 55 (c) 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; 4) the degree of intransigence on the part of the defaulting party; and 5) the reason for the defaulting party’s failure to timely file an answer. *Syllabus point 3 of Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. at 471, 256 S.E. 2d 758, (1959).

While Counsel for Appellant is fully aware that a trial court’s ruling on a Rule 60 (b) Motion to Vacate a Default Judgment will not be disturbed unless an abuse of discretion is illustrated, when the above-factors are applied to the facts and record of the present controversy, it is clear that the lower court did, in fact, abuse its discretion if refusing to vacate the judgment.

First of all, when speaking to the issue of prejudice to the plaintiff from the delay in answering, this prong of the “good cause” test should have been heavily weighed in favor of the Appellant. Plaintiffs admit in their Complaint that Appellant never extracted minerals from the subject realty. The primary Defendant Plaintiffs sought to attack were the Hildreth Defendants in that the Hildreth Defendants granted Appellant Nitro Energy its interest in the minerals after acquiring the same from a 1996 tax sale. Thus, as the party purchasing the right to the subject minerals and then leasing out the same to the co-Defendants, the Hildreth Defendants would have been ultimately liable had the Plaintiffs’

claim to entitlement to the minerals been even remotely valid or recognizable. Further, in light of the fact that the lower court had, as described above and reflected in the record, already decided on the Hildreth Defendant's Motion for Summary Judgment that Plaintiffs' claims to ownership of the subject minerals were invalid and completely meritless, the amount of resulting prejudice stemming from Appellant Nitro's failure to answer was excusable neglect at best.

When dealing with the presence of material issues of fact and meritorious defenses, the second prong of the "good cause" analysis, the trial court would certainly have been expected to weigh this factor exclusively in favor of Appellant Nitro Energy. Plaintiffs' Complaint asserted several specious theories to Plaintiffs' entitlement to the subject minerals that were each summarily dismissed upon the Hildreth Defendant's Motion for Summary Judgment. Further, the very fact that the deed granting Plaintiff their surface rights and all preceding deeds tracing back to the 1930's expressly reserve all mineral rights from the conveyance, evidence that Appellant Nitro certainly had meritorious defenses if the default were set aside. While normally a Defendant in Appellant Nitro's situation would argue that material issues of fact existed which should have precluded the granting of default, the opposite is true in this case. In reality, no material issues of fact existed as to the validity of Plaintiff's claims against Appellant Nitro. For this reason, this prong of the "good cause" test outlined could not reasonably have been weighed in any party's favor other than Appellant Nitro Energy.

When analyzing the significance of the interests at stake as required by West Virginia Law, the mineral rights in question are certainly important, at least from a monetary standpoint. The mere mention of oil and/or natural gas in today's economy

brings up images of wealth and power. However, the interests at stake in regards to the trial court's refusal to set aside the subject default judgment certainly weigh heavily in the favor of Appellants. Plaintiffs were, to put it quite honestly, taking a "shot in the dark" at attempting to divest the various Defendants of their mineral rights. Appellant, on the other hand, had owned and assigned the subject minerals to several parties, and although Appellant did not own any of the subject mineral rights at the time the lawsuit was commenced, would have been liable to other parties for breach of warranty and various other bases if they had wrongfully sold interests which did not belong to them. Thus, Appellant certainly had more at interest in the present dispute than Plaintiffs futile attempt of retaking control of the minerals despite express language severing the same dating back to the 1930's. This is especially true in light of the fact that each of Plaintiffs' claims as to ownership of the minerals were disposed of on summary judgment.

As for the fourth prong of the "good cause" test outlined above, the Appellant's actions in failing to Answer do not rise to the level of intransigence as applied to the test. In fact, the trial court seemed to misconstrue the meaning of this word in denying Appellant Nitro's Motion to Vacate. **World Book Dictionary, Doubleday and Company, Inc., 1979**, defines intransigence as "uncompromising hostility." Under the plain meaning of the word, a disrespectful attitude or some type of antagonistic or at least disrespectful behavior on the part of the defaulting party would need to be exhibited to weigh this factor against a party in default. As shown above, Appellant's failure to answer the subject Complaint was based upon a good faith belief that its interests were being protected and that an Attorney was actually handling the matter for them. Because

Appellant Nitro Energy's interest in the subject controversy was aligned with if not a mirror image of the interests of Westside Exploration, Appellant Nitro was certainly not acting hostile or disrespectful in wrongfully believing that it too had been dismissed from the suit. Likewise, there was no hostile or disrespectful behavior being exhibited by Appellants in trusting representations by its joint venture partner that legal representation had been secured for both parties. Therefore, the level of Defendant's intransigence should certainly not be held against it if the express meaning of the word is applied correctly.

Finally, the reason for the Appellant's delay, which is the fifth factor to be examined under the "good cause" test, has been fully outlined above. Not only was Appellant assured by its joint venture partner Westside Exploration that its interests were being legally protected by counsel, but Westside, who shared similar if not identical interests to that of Appellant Nitro was dismissed from the suit before the Plaintiffs' Supp./Amd. Complaint was filed. This strange set of facts makes Appellant's failure to enter more understandable. In *McDaniel v. Romano*, 155 W.Va. 875m 190 S.E. 2d 8, (1972), this Court held that "A default judgment suffered by reason of a misunderstanding as to appearance and representation of counsel may be vacated." This ruling is directly applicable to the facts of the present case.

As shown above, essentially all five of the "good cause" test factors that should have been balanced weigh in favor of Appellant Nitro Energy. By failing to set aside the previously entered default judgment despite each of these factors weighing heavily in favor of Appellant, the trial court abused its discretion. This is especially true in light of the fact that the lower Court denied Appellant's Motion to Vacate despite a prior decision

by the lower court that each of Plaintiffs' claims against Appellant were not legally sustainable.

ii.) The Trial Court Abused Its Discretion By Ignoring Several Grounds Applicable To Appellant Nitro Energy's Situation Upon Which It Should Have Reversed Its Default Judgment Order Under Rule 60(b).

According to the West Virginia Rules of Civil Procedure Rule 60 (b), a court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons;

"1) mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); 3) Fraud, misrepresentation, or other misconduct of the an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable to that the judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment."

See W.Va.R.C.P. 60 (b), (bold added to sections Appellant asserts were ignored by the trial court). As stated above, the Courts of West Virginia have consistently held that Rules 55(c) and Subdivision (b) of rule 60 should be liberally construed to further the interests of justice where merited. *McDaniel*, 155 W.Va. 875, (1972).

a.) Mistake and Excusable Neglect

When dealing with the Rule 60 (b) (1) section dealing with mistake, inadvertence and excusable neglect, this Court has indicated in per curium opinions that it follows the United States Supreme Court's direction in holding that "excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence" and also states that "the determination of excusable neglect is

an equitable one that must account for all relevant circumstances surrounding the party's omission." See *DeLapp v. DeLapp*, 584 S.E. 2d 899, 2003, per curium opinion.

Aside from the obvious equitable considerations that arise from the fact that if the lower court's judgment is allowed to stand Plaintiffs will be unjustly enriched in the amount of \$704,000.00 for the conversion of mineral rights which they never owned, the actions of Appellant in failing to timely answer certainly fall within the situations recognized by this Court in finding mistake or excusable neglect. As stated above, this Court has expressly held in the past that "A default judgment suffered by reason of a misunderstanding as to appearance and representation by counsel may be vacated." *McDaniel*, 155 W.Va. 875. In the instant case, Appellant's negligent actions in failing to timely answer were due to a mistaken belief that an Attorney was, indeed representing its interests. This, coupled with the unique circumstance of Westside Exploration (Plaintiffs' mineral interest partner in regards to the subject realty) being released from the present suit prior to the filing of Plaintiffs' Amd./Supp. Complaint, further evidences the excusable nature of Appellant's negligence.

b.) Appellant Is Likewise Entitled To Relief Under Rule 60 (b) (5).

Not only did the trial court abuse its discretion in failing to find excusable neglect in Appellant's actions, it likewise abused its discretion in failing to reverse the lower court's decision under Rule 60 (b) (5), which states a previous decision may be overturned if the judgment contested has been satisfied, released, or discharged, or *a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.* See W.Va. Rules of Civ. Procedure Rule 60 (B) (5), Emphasis Added. If there were ever a

situation in which a legal rule or statement taken from case law fit perfectly within a present set of facts, this would be the prime example. The trial court's upholding of the \$704,000.00 default judgment award despite the fact that it had previously decided that Plaintiffs were not valid owners of the subject minerals certainly makes this a situation where "it is no longer equitable that the judgment should have prospective application." Even if this Court is loathsome to substitute its opinion for that of the trial court, the fact that the lower court had previously found that all claims against Appellant were essentially moot due to Plaintiffs' complete lack of ownership over the subject minerals, it was certainly an abuse of discretion that this \$704,000.00 award was allowed to stand or remain. Any other ruling would and has resulted in a manifest injustice against Appellant.

Going further, not only would it be a gross injustice if Plaintiffs are unjustly enriched in the amount of \$704,000.00, but an analogy can be made to the section of Rule 60 (B) (5) which states a Default Judgment may be reversed if "the judgment has been satisfied, released or discharged." Recognizing that the lower court's Rule 60 (B) denial was final, Counsel for Appellant indulges the Court to reason by analogy. In a remote sense, this judgment was "satisfied, released and discharged" when it was determined that Plaintiffs' claims to entitlement to the subject minerals were meritless.

c.) The Catchall Provision of Rule 60 (B) (6) Is Applicable To Appellants.

Realizing the importance of having disputes decided on their merits and in attempts to avoid injustice, the Legislature created a "catch-all" provision that courts could utilize in balancing the scales of justice. This provision states that Orders may be reversed in "any other reason justifying relief from the operation of the judgment."

W.Va. Rules of Civil Procedure 60 (b) (6). What better reason could the trial court have had to reverse the default judgment than the fact that it had previously decided that the claim upon which the subject award was based was meritless. As far as the docketing sheet for the controversy exhibits, no scheduling order had been issued setting a date for trial, and, as discussed above, Plaintiffs would not have been prejudiced in the least if the Judgment was vacated. Thus, this situation was ripe for the application of this “catchall” provision.

iii. Conclusion As For This Assignment of Error No. I.

As shown above, even a remote application of the *Hardwood* Analysis would have weighed exclusively in favor of vacating the subject judgment. According to the docketing sheet the case had not been set for trial and if it had, trial was not eminent. Further and more importantly, a review of the cursory Default Entry and resulting Default Judgment Order issued by the court, which appears to include little to no findings of fact or conclusions of law, evidences the fact that the lower court did not properly work through the required analysis. Finally, our legislature left the courts several avenues with which to avoid grossly inequitable results. There can be no more inequitable and manifestly unjust ruling than that which allows a Plaintiff that the court has already concluded has no viable claim against a defaulting defendant to recover \$704,000.00 for conversion of minerals that the same Court had previously ruled that the Plaintiff never even remotely owned.

B. The Lower Court Abused Its Discretion By Rendering a Default Judgment Award Amount To Plaintiffs That was Speculative, Erroneous, Arbitrary and Capricious.

As the factual section above and a review of the record will exhibit, Plaintiffs were issued a default judgment award in the amount of \$704,000.00. This amount was predicated upon prior evidence provided by Plaintiffs' retained oil and gas geologist or expert witness that Plaintiffs had lost considerable amounts of oil and gas royalties by reason of the improper and illegal drilling and production of wells upon the realty in question. While this amount was ascertained prior to Appellant's filing of the subject Rule 60 (b) Motion to Vacate and also prior to the lower court's ruling which rendered Plaintiffs' claims against Appellant meritless, awarding this amount to Plaintiffs was an abuse of discretion.

Normally, if the clerk of courts is required to enter a default judgment award under Rule 55 of the West Virginia Rules of Civil Procedure, it must first meet the criteria of "sum certain." While Counsel for Appellant is aware that when a default award is based upon a court order this rule is inapplicable, an analogy between the concept of "sum certain" and the arbitrary, speculative nature of lower court's award of damages to Plaintiffs in this specific instance of default can be made. "Sum Certain contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law. Typical 'sum certain' situations include: actions on money judgments, negotiable instruments, or similar actions where the damages can be determined without resort to extrinsic proof." *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W.Va. 69, 501 S.E. 2d 786, (1998).

In the instant case, the trial court certainly abused its discretion by entering this \$704,000.00 monetary award prematurely and based upon arbitrary and biased

representations of Plaintiffs and their expert, which later ended up being completely false. The fact that several Defendants were charged with converting minerals in unspecified amounts (Plaintiffs' Amd./Supp. Complaint requests an amount "not less than \$1,000,000.00") coupled with the fact that Plaintiffs' Amd./Supp. Complaint does not even allege that Appellant Nitro Energy ever removed minerals from the realty, renders the lower court's reasoning in allowing this \$704,000.00 award to stand completely unfathomable and at least a clear abuse of discretion. Plaintiffs' Amd./Supp. Complaint in regards to Appellant Nitro merely states that Appellant held legal interest in the subject minerals for approximately one year before assigning out these same interests. Once again, Appellants' extraction of minerals from the land is not mentioned. (See Plaintiff's Amd./Supp. Complaint). However, Plaintiffs' geologist/expert was able to convince the lower court that by merely holding these legal mineral interests for approximately one year without extracting, Appellants had damaged the Plaintiffs in an amount that was nearly 75% of Plaintiffs' total prayer for relief.

Further, this award, like the remainder of the lower court's ruling in regards to Appellant Nitro Energy, is based completely on the assumption that Plaintiffs were valid owners of the minerals in question, a point that was summarily dismissed by summary judgment. To further evidence this abuse of discretion, it should be reiterated that at the time the lower court denied Appellant's Motion To Vacate, it had already concluded that Plaintiffs did not own these minerals and never had.

The lower court, even if it felt compelled to punish Appellants for its excusable neglect in failing to answer, certainly abused its discretion in rendering the amount of the default award prematurely and without adequately assessing damages in conjunction with

the other defendants below. Just as the Court's Order denying Appellant's Motion to Vacate, this initial Final Judgment Order contains no findings of fact as to how this \$704,000.00 award was ascertained. This in and of itself should constitute an abuse of discretion and be a justifiable basis for setting it aside. As shown above, Judge Chafin himself appeared to be inclined to at least alter the amount of the default judgment award. During said hearing Judge Chafin states, "Now, the second issue would be one – it's a- is there any reason for setting aside the order for damages that was entered in the matter and that's a much, much closer, closer call in this thing. But I'm going to deny the motion to set aside the default judgment." (See Exhibit C, pg. 17, lines 16-21). This statement evidences that Judge Chafin, himself, appeared to be seriously questioning the validity of the default judgment award. This being the case, a decision to uphold this speculative award should certainly have been based upon further analysis and/or explanation other than, "But I'm going to deny the motion to set aside the default judgment." (See Exhibit C, pg. 17, lines 16-2). As shown above, the lower court's award of this \$704,000.00 amount was premature, arbitrary and capricious. Yet, Appellants now stand indebted to Plaintiffs for almost a million dollars. At the very least, even assuming that this court will not set aside the entry of default against Appellant, the lower court's abuse of discretion in ascertaining this amount prior to the conclusion of the case warrants this honorable Court's intervention by having at least the matter of damages being handed back down to the lower court for tailoring. However, in light of the fact that Plaintiffs do not own the minerals in question and never did, allowing any damages to stand against the Appellant would be absurd and capricious.

Going further, a brief review of the transcripts from the August 22, 2007 hearing on damages that was conducted prior to Appellant Nitro Energy appearing in the action will reveal that the \$704,000.00 default judgment award was based upon biased and highly speculative testimony from Respondents' own oil and gas expert. This expert states, "you never know in Roane County until you've drilled the well, whether or not what you're after is there or not. It's just that part of the risk of the business and that's why things cost what they cost." (See Exhibit F, pg. 13, lines 2-5). The Court, in questioning this witness, itself proposes the question that the damages proposed would only be appropriate if they (the oil and gas driller) "hit something." (See Exhibit F, pg. 19, lines 15-16). With the Court itself remarking on the speculative nature of the award Respondents were seeking, it is clear that an abuse of discretion occurred. To further exhibit the fact that Respondent's were merely "judgment shopping", during this same hearing Respondent Harrolyn Jones states, "At this time, we ask the Court to award us Mr. Finch's calculation as damages against Nitro Energy, the party involved - - 1.2 million dollars." (See Exhibit F, pg. 21, lines 8-11). Upon being reminded by the Court that Mr. Finch had arrived at a figure of \$704,672.000, Mr. Jones quickly concedes, "Well, if that is what the Court wishes to award." (See Exhibit, pg. 21, lines 15-16). These statements further exhibit the abuse of discretion that was exhibited by the lower court in allowing this speculative, arbitrary award amount to stand.

C. The Lower Court Abused Its Discretion In Failing to Delineate Within Its Various Order the Specific Facts and Conclusions Of Law Upon Which It Based Its Default Judgment Ruling and Order Denying Nitro's Motion To Vacate Same.

As stated repeatedly above and as will be fully reflected in the record, the lower court did not set out in its various order the specific facts and conclusions upon which

they were based. This in and of itself constitutes an abuse of discretion. In the attached Sept. 2, 2006 Order granting Default Judgment to Plaintiffs in the amount of \$704,000.00, the lower court does not mention the specific facts leading up to Appellant's Default, let alone mention the calculation and facts upon which it bases this huge monetary award. An even greater abuse of discretion takes place in the lower court's February 20, 2007 Order in which it denies Appellant's Motion to Vacate the previously entered default judgment and allows this large monetary award to stand without even mentioning the facts or conclusions of law upon which its denial were based or the fact that this same lower court had previously ruled on December 13, 2006, that Plaintiffs had never owned an interest in the subject minerals. (See Exhibits A, B, D).

D. The Lower Court Abused Its Discretion In Allowing A Manifest Injustice To Stand Against Appellant Nitro Energy By Awarding Plaintiffs \$704,000.00 in Damages for Conversion of Mineral Rights To Which the Lower Court Had Previously Decided Were Not Owned By Plaintiffs.

While the lower court's initial decision to enter Default Judgment was a clear abuse of discretion under the circumstances of the case when applied to the test applied by West Virginia Law, an even greater example of abuse of discretion occurred when it award \$704,000.00 in monetary damages for conversion of minerals before the case was complete and without adequate findings of fact and conclusions of law. While these actions constitute an abuse of discretion, the lower court's actions in allowing both the default judgment and monetary award to stand in light of the fact that this same court had previously ruled that Plaintiffs' had never owned any of the mineral rights in question go well beyond an abuse of discretion. Even assuming that the lower court sought to somehow punish Appellants for their failure to answer, such punishment should in no way have been in the form of a \$704,000.00 slap on the wrist. This is essentially what

happened. The trial court was fully aware that the Plaintiffs did not own the subject minerals when this award was upheld on February 20, 2007. Allowing this award to stand will result in a manifest injustice to Appellant Nitro Energy. This type of conduct on behalf of the trial court brings up several equitable considerations such as unconscionability, unclean hands, estoppel, etc.

VI. CONCLUSION AND PRAYER FOR RELIEF

Based Upon the foregoing, your Appellant, Nitro Energy, Inc., prays that his appeal be granted; that full briefs and arguments be entertained by this Court; and that this Court reverse the Final Order Denying Defendant Nitro Energy's Motion to Vacate Default Judgment entered by the Circuit Court of Roane County, West Virginia, on February 20, 2007, in accordance with the assignments of error set forth herein; In the alternative, Appellant Nitro Energy requests that the Default Judgment monetary award entered against it be adequately tailored to take away the unconscionable result of allowing Plaintiffs to secure a \$704,000.00 Judgment based upon allegations of conversion of property that was never owned by Plaintiffs'; and, " that Appellant have such other and further relief as the Court may see fit to grant.

APPELLANT NITRO ENERGY

By Counsel


Larry L. Skeen, #3437

Skeen and Skeen

108 Hills Plaza

Charleston, WV 25301

Counsel for Appellant

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WILLIAM L. GROVES and HARROLYN
B. GROVES, Husband and Wife,

Plaintiffs,

vs.

Appeal No. 33528
Roane County Civil Action No. 05-C-62

ROY G. HILDRETH AND SON, INC.,
ROY G. HILDRETH, JR., individually,
NITRO ENERGY, INC., GMH GAS CO.,
INC., THOMAS C. EVANS, III, individually,
and BOGGS NATURAL GAS, FLP.,

Defendants.

CERTIFICATE OF SERVICE

I, LARRY L. SKEEN, attorney for defendant Nitro Energy, Inc., do hereby certify that the foregoing Appellant Nitro Energy's Brief Supporting Its Appeal was duly served upon all counsel of record by mailing a true copy thereof, by United States Mail, postage prepaid, on this ^{30th} ~~10th~~ day of October, 2007, addressed to them as follows:

William L. Groves and Harrolyn B. Groves, pro se 2189 Otto Road Spencer, WV 25276	Orton A. Jones #1924 P. O. Box 7 Spencer, WV 25276 <i>Counsel for Roy G. Hildreth & Son, Inc., and Roy G. Hildreth, Jr., individually, and GMH Gas Company</i>
John F. McCoskey Christopher D. Negley Shuman McCuskey & Slicer, PLLC 1411 Virginia Street East, Suite 200 P. O. Box 3953 Charleston, WV 25339-3953 <i>Counsel for Thomas C. Evans, III</i>	


Larry L. Skeen #3437