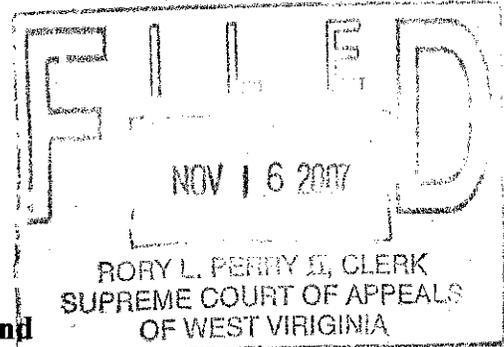


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**Case No.: 33528**



**WILLIAM L. GROVES and  
HARROLYN B. GROVES,  
Husband and Wife, Plaintiffs Below,  
Appellees,**

**v.**

**ROY G. HILDRETH & SON, INC.;  
ROY G. HILDRETH, JR., individually;  
NITRO ENERGY, INC.; GMH GAS CO.,  
INC.; THOMAS C. EVANS, III, individually;  
and BOGGS NATURAL GAS, FLP (named only  
for the purpose of instituting this action),  
Defendants Below,**

**NITRO ENERGY, INC., Appellant.**

**APPELLEES' BRIEF**

**Filed by: Harrolyn B. Groves, *Pro Se*  
2189 Otto Road  
Spencer, West Virginia 25276-7635  
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for the purpose of instituting this action),  
Defendants Below,

NITRO ENERGY, INC., Appellant.

**APPELLEES' BRIEF**

**I. Kind of proceeding and nature of ruling in lower tribunal**

This property rights action involves two purchases at a 1996 sheriff's tax sale. The resulting tax deeds may be either void or voidable for failure to comply with statutory notice requirements. The faces of the tax deeds appear to convey, between them, only a one-quarter interest in the oil and gas in the 158 (one hundred fifty-eight) acres of minerals at issue in this case. The purchaser of the tax deeds, along with two sister corporations, admitted that Appellee William L. Groves had rights in the mineral acreage at issue. The mineral acreage includes the minerals underlying real estate purchased by Appellees William L. Groves and Harrolyn B. Groves in 1999, at which time Appellees were absentee purchasers living in the State of Washington. Appellees retained a West Virginia attorney to search the title of the real estate, prepare the deed, and perform the other functions of conveyancing for their real estate purchase.

Far from alleging improper entry and removal of minerals, both Appellees' Complaint and Amended/Supplemented Complaint allege tortious conversion of ownership rights by the various

defendants, who held themselves out as owners of the minerals and leased the mineral acreage, resulting in various assignments of those leases. Appellees' Amended/Supplemented Complaint included additional claims of tortious interference with business relations, tortious inducement to breach contract, and tortious attorney malpractice.

The purchaser of the tax deeds entered into an oil and gas lease with the appellant, a foreign corporation. The appellant assigned two overriding royalty interests and the lease itself to three other of the defendants. The appellant's assignee conveyed the lease to Appellees early during the pendency of this proceeding, giving Appellees exclusive rights to develop the oil and gas. Meanwhile, the purchaser of the tax deeds had conveyed them to a sister corporation that entered into a successive fraudulent lease of all oil, gas, and other minerals in the tract to yet another of the defendants. The term of the fraudulent lease began before expiration of the term of the lease that was conveyed to Appellees. Appellees' lease was hotly contested until the defendants acknowledged Appellees' ownership and the validity of the lease during the hearing on the default damages, thereby curtailing challenges to the title to the oil and gas in the mineral acreage at issue.

The defendant that conveyed the lease to Appellees was dismissed from the action as a result of the conveyance. Nevertheless, this former defendant has reinserted itself by funding the appeal. This appeal is of the Denial of the motion to vacate the Default Judgment, the single action taken by the appellant in the lower court. Even though it had been in default in this case for more than fourteen months, the appellant was appearing represented by counsel in an unrelated matter in the U. S. District Court, Southern District of West Virginia, as well as in the Circuit Court of Roane County, West Virginia, at the same time that Appellees were prosecuting this case.

## **II. Question presented**

The question before the Court is whether Judge Robert G. Chafin was correct in denying the motion to vacate the Default Judgment in light of the facts of this case.

### III. Statement of facts of the case

On or about August 26, 2007, while the petition for this appeal was pending, Appellees learned that the appellant had brought a contract action against BNG Producing and Drilling, Inc. (BNG), one of the defendants in the case at bar, on August 8, 2002, in an unrelated matter in the U.S. District Court, Southern District of West Virginia. Based on this information, Appellees learned that BNG, in response, had brought a mechanic's lien action against the appellant in the Circuit Court of Roane County, West Virginia, on January 29, 2003. Copies of the Dockets for those cases are attached hereto as Exhibit "1" and incorporated herein by reference. A copy of the Circuit Court's Notice of Intent to Dismiss, pursuant to which that case was dismissed on October 15, 2007, is also attached hereto as Exhibit "2" and incorporated herein by reference. It is clear from these documents that both of these actions were being litigated at the same time, one in the same court, that Appellees were prosecuting the instant case.

Exhibits 1 and 2 also reveal that the appellant was represented in both of the above-described actions by Attorney David W. Hardymon, West Virginia Bar Number 8160, Ohio Bar Number 0005134. However, the record is wanting of evidence of unbundled legal services between Mr. Hardymon for the above-described actions involving BNG and Attorney Sean Cassidy for this case, as alleged by the appellant in its motion to vacate the Default Judgment, paragraph 2.<sup>1</sup> Although not reflected on the Docket for this case, the motion to vacate the Default Judgment was filed on or about November 22, 2006.

Nonetheless, on November 29, 2002, the appellant had assigned BNG and B&R Construction, Inc. (B&R), overriding royalty interests in the oil and gas lease that was later conveyed to Appellees. Exhibits C and D, attached to Appellees' Motion for Preliminary Injunctive

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<sup>1</sup>Citations to the record, the original of which was designated for this appeal, are incorporated, where mentioned, by reference.

Relief, Docket Line (D.L.) 6. The assignments reveal that the appellant prepared its own instruments of conveyance. The overriding royalty interests due BNG and B&R were property rights claimed by Appellees and made these two corporations necessary parties to Appellees' action. Correspondingly, the appellant was also a necessary party by virtue of its being assigned and assignment of property rights claimed by Appellees. Even so, BNG and B&R were dismissed from the action after the attorney for the two corporations, Mr. Thomas N. Whittier, filed Notices of Bona Fide Defenses on or about September 26, 2005, D.L. 14, and motions to dismiss these defendants were filed on November 7, 2005, D.L. 41.

Be that as it may, Appellees' Complaint was properly served on the sole officer of the appellant corporation and listed agent for service of process, Mr. Alan H. Walton, by the West Virginia Secretary of State. Mr. Walton signed the restricted delivery notice on September 10, 2005. D.L. 9. Appellees' Complaint contained claims of tortious conversion of mineral rights, ejectment, and quiet title and stemmed from two purchases made by Defendant Roy G. Hildreth & Son, Inc. (Hildreth & Son) at the 1996 Roane County Sheriff's tax sale. The resulting tax deeds, Exhibits C and D attached to Appellees' Complaint, include oil and gas underlying the real estate purchased by Appellees in 1999.

The faces of the tax deeds appear to convey, between them, no more than a one-quarter interest in the oil and gas in the mineral acreage at issue in this case. The tax deeds may be either void or voidable due to failure to comply with the notice requirements contained in West Virginia Code, Chapter 11A, *et. seq.*, Exhibits K and L attached to Motion for Summary Judgment filed by Defendants Roy G. Hildreth, Jr. (Hildreth,) Hildreth & Son, and GMH Gas Co., Inc. (GMH), D.L. 131. Appellees learned of the discrepancies with the minerals in their chain of title in late 2004, Exhibit B Attached to Appellees' Document Filing of October 10, 2006, D.L. 193, page 179, lines 3-6. Therefore, the discovery rule defeats the appellant's factual assertion of the two-year statute of

limitations on torts, Appellees Brief, page 4, lines 6-8. Additionally, Defendants Hildreth, Hildreth & Son; and GMH admitted in open court that Appellee William L. Groves had a 1/42<sup>nd</sup> right in the mineral acreage at issue. Transcript of hearing of October 10, 2006, D.L. 259, page 11, line 11.

Appellees filed their motion for Default Judgment on October 17, 2005, D. L. 25, after the appellant failed to appear, answer, plead, or otherwise defend. Judge David W. Nibert, the original judge assigned to the case, awarded Appellees the Default Judgment on March 15, 2006, entered on March 16, 2006, ordering a hearing on damages, D. L. 89. Senior Status Judge Robert G. Chafin was recalled to hear the case after Judge Nibert recused himself on the defendants' motion of April 5, 2006, D.L. 93. Judge Chafin entered a Time Frame Order setting a trial date of March 5, 2007. D. L. 130.

The August 22, 2006, hearing on damages was also conducted by Judge Chafin, D.L. 133, 136. Appellees' Expert Witness, Mr. David F. Finch, a petroleum engineer with over forty-six years of experience, testified as to the damages. Transcript of hearing of August 22, 2006, D.L. 259, pages 5-19. When asked how he calculated the reserves for the oil and gas, Mr. Finch described his calculations, including detailed well spot maps and an oil and gas reserve estimation and economic evaluation, which were entered as Exhibits 1 through 4 during the hearing. Based on Mr. Finch's calculations, Appellees were awarded Default Judgment in the amount of \$704,000 (seven hundred four thousand dollars) plus interest at the statutory rate on August 31, 2006, entered on September 2, 2006, and stating that there was "no just reason for delay." D.L. 167. Appellees have retained Attorney James P. McHugh, West Virginia Bar Number 6008, for the limited purpose of recovering the judgment award.

The appellant filed its motion to vacate the Default Judgment on or about November 22, 2006, more than fourteen months after its default. Judge Chafin heard the motion on December 13, 2006, D.L. 197. The motion alleged that an attorney representing Westside Exploration, LLC

(Westside), was supposed to have defended the appellant. However, a false affidavit sworn by a person not an officer of the appellant corporation was the only evidence offered. The falsity of the affidavit is unquestionably established by Exhibits 8, 9, 10, and 11 attached to Appellees' Response to the Petition for Appeal; and no dual representation agreement is on the record. Further, the appellant admits awareness that Appellees' Amended/Supplemented Complaint, D.L. 54, named the appellant as a defendant but did not name Westside as a defendant. Appellant's Brief, page 12, lines 10-13. The appellant asserts that knowledge of this fact was an assurance that Westside's attorney was defending the appellant and that it wrongfully believed "that it too had been dismissed from the suit," Appellant's Brief, page 18, lines 3-4 and lines 13-15. Mr. Walton neither testified nor was present at the hearing of the motion to vacate the Default Judgment of December 13, 2006.

During the hearing, Judge Chafin stated, "I did not enter the Order for the default judgment, that was entered by a judge before I got into this matter, as well as I can recall," a quote that can be misleading if taken out of context. After Appellee Harrolyn B. Groves responded to the appellant's argument for vacating the Default Judgment, Judge Chafin found,

A lot of the things you argue for as damages are concerned in this thing were certainly not the basis for the damages that were awarded in this case.

Nonetheless, there is no question. I did not enter the Order for the default judgment, that was entered by a judge before I got into this matter, as well as I can recall.

Attorney Orton A. Jones interposed, "Yes, Your Honor," and Judge Chafin continued,

And there is certainly no excuse that I can find for setting aside the default judgment that was granted. Now the second issue would be – it's a – is there any reason for setting aside the order for damages that was entered in this 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.

Transcript of hearing of December 13, 2006, D.L. 259, page 17, lines 10-21. Judge Chafin's Order was entered on February 20, 2007, D.L. 237.

Contrary to the appellant's assertion, Attorney Cassidy did not file an Answer to Appellees' Complaint. Appellant's Brief, page 11. Rather, Mr. Cassidy's letter of September 28, 2005, Exhibit A attached to Appellees' Motion to Extend Oil and Gas Lease, D.L. 115, constituted an appearance on behalf of Defendant Westside as a matter of law. Furthermore, there is no evidence to support the appellant's assertions that it was in any sort of joint venture with Westside. Juxtaposed to the appellant's assertions that Westside was its partner, Appellees have found no documentation of the asserted partnership with the West Virginia Secretary of State, in the Michigan State Corporate Division Records, or in the Roane County Assumed Names Index. To the contrary, the public record reflects that the relationship was merely that of Assignor and Assignee. Exhibit C attached to Appellees' Response to Motion to Set Aside Default Judgment, D.L. 203.

Mr. Cassidy's letter offered to surrender and release the lease of the oil and gas at issue to Appellees in exchange for consideration. Appellees accepted and Westside's vice-president, Mr. William Boss, executed the instrument of conveyance, which was recorded on October 26, 2005. Exhibit B attached to Appellees' Motion to Extend Oil and Gas Lease, D.L. 115. Afterwards, Attorney Jones admitted that, on behalf of his clients, Defendants Hildreth, Hildreth & Son, and GMH, he had prevailed upon Mr. Boss to execute and have recorded another instrument attempting to nullify the conveyance. Summary Judgment Motion filed by Defendants Hildreth, Hildreth & Son, and GMH, D.L. 131, page 65, subparagraph h and Exhibits NN and OO attached thereto. Mr. Cassidy thereupon prepared a third instrument affirming the conveyance, which Mr. Boss executed on December 5, 2005, and which was recorded on December 7, 2005. Exhibit C attached to Appellees' Motion to Extend Oil and Gas Lease; Exhibit PP attached to Summary Judgment Motion filed by Defendants Hildreth, Hildreth & Son, and GMH.

As agreed, Defendant Westside was dismissed from the action on Appellees' motion of November 7, 2005, D.L. 41. Even so, Westside has inserted itself into the action once more by

funding this appeal. Appellant's Reply to Response to Motion to Set Aside Default Judgment, D. L. 205, paragraphs 1 and 2.

Meanwhile, before the damages hearing of August 22, 2006, Defendants Hildreth, Hildreth & Son, and GMH hotly contested the ownership and validity of the oil and gas lease which had been conveyed to Appellees by Westside. However, in an abrupt about-face during the hearing, these defendants acknowledged Appellees' ownership and the validity of the oil and gas lease. Transcript of hearing of August 22, 2006, D.L. 259, page 70, lines 20-22. Because of their attempt to nullify the lease, Appellees had been forced to add claims of tortious interference with business relations and tortious inducement to breach contract against Defendants Hildreth, Hildreth & Son, and GMH in the Amended/Supplemented Complaint, filed on December 8, 2005, D.L. 54. However, as a result of the defendants' about-face, challenges of Appellees' landlord's title to the oil and gas in the mineral acreage at issue were curtailed as a matter of law.

To the Amended/Supplemented Complaint, Appellees also reluctantly included a claim of tortious attorney malpractice against Defendant Thomas C. Evans, III, who had searched the title,<sup>2</sup> prepared the deed, and performed the other functions of conveyancing for Appellees' real estate purchase in 1999. Since the search of Appellees' real estate title was not for loan documentation purposes,<sup>3</sup> the sole reason for the title search was for Appellees' satisfaction. An issue of fact that remains disputed is Appellee William L. Groves' specific charge to Defendant Evans to search the minerals. Transcript of October 10, 2006, hearing, D.L. 259, page 83, lines 8-12. Nevertheless, the title to Appellees' real estate remains clouded to this day, as is evidenced by the defendants'

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<sup>2</sup>The entire chain of Appellees' title consists of only seven links to the patent. Exhibit A attached to Appellees' Complaint; Exhibits 16-20 attached to Defendants' Document Filing of October 3, 2005, not reflected on the Docket; and Exhibits A and B attached to Appellees' Objections to Defendants' Proposed Orders dated November 10, 2005, D.L. 46.

<sup>3</sup>Exhibit E attached to Appellees' Response to the Summary Judgment Motion Filed by Defendant Thomas C. Evans, III, D.L. 184.

admission that the minerals other than oil or gas are "still up in the air." Transcript of hearing of December 13, 2006, D. L. 259, page 8, lines 11-12. However, Appellees' claim on Chicago Title Insurance Co., for which Defendant Evans' agency relationship at the time Appellees purchased title insurance was unknown to Appellees until after the real estate closing and for which agency relationship Defendant Evans neglected to obtain a dual representation agreement, was denied. Exhibit B attached to Appellees' Complaint.

Notwithstanding, Defendant GMH, Grantee of Defendant Hildreth & Son, had entered into a second fraudulent lease of the same mineral acreage on May 5, 2005, with Boggs Natural Gas, FLP (Boggs), even though the term of the original oil and gas lease remained unexpired. The successive lease also purported to lease to Boggs the minerals other than oil or gas. Exhibit B attached to Appellees' Motion for Preliminary Injunctive Relief, D.L. 6. In accordance with its lease, on or about August 19, 2005, Boggs obtained four permits to drill gas wells and sent a Surface Owner Waiver form to Appellees, which stimulated Appellees' filing their Complaint. Exhibits E and F attached to Appellees' Motion for Preliminary Injunctive Relief.

In order to mitigate damages to themselves and to avoid damaging Boggs and its stated "intended farnees," Appellees narrowed the issues in controversy by constricting their exclusive right to develop the oil and gas in their leasehold estate with entry into a sublease to Boggs. The sublease is of four cylindrical areas of oil and gas, 1200 (twelve hundred) feet in diameter to a depth not to exceed the Onondaga formation, around the permitted well sites. Attachment to Joint Motion to Dismiss Boggs, D.L. 41. Appellees' consideration for the sublease consists of two separate allotments of gas for domestic use from any wells drilled in accordance with the sublease in addition to the allotment of gas for use for heat and light in one dwelling house awarded Appellees in accordance with the lease conveyed them by Westside, Order Granting Plaintiffs Lease of Oil and Gas, D.L. 236.

Both the unrecorded sublease and the recorded Memorandum of Agreement were prepared by Boggs' attorney, Mr. Whittier. As part of the negotiated agreement, BNG and B&R, Mr. Whittier's other client's in this action, surrendered and released to Appellees the overriding royalty interests that they had been assigned by the appellant. Exhibits 8 and 9 attached to the attachment to the Joint Motion to Dismiss Boggs Natural Gas, FLP, D.L. 41. As results, Boggs was named only for the purpose of instituting the action in Appellees' Amended/Supplemented Complaint, D.L. 54; Appellees were relieved of paying the overriding royalty interests to BNG and B&R; and the two successful wells stimulated Appellees' lease into its secondary, or perpetual, phase, Transcript of hearing of December 13, 2006, D.L. 259, page 24, lines 14-22.

Appellees continued to narrow the issues in controversy. During the October 10, 2006, hearing, the court granted Appellees' motions to withdraw the claim of conversion based on the recovery against the appellant in default and to withdraw the claims of tortious interference with business relations and tortious inducement to breach contract based on the defendants' acknowledgement of Appellees' oil and gas lease, with entry on October 17, 2006, D.L. 194. After granting Appellees' motions, Judge Chafin heard the defendants' summary judgment motions. Summary Judgment was granted, with entry on December 14, 2006, D.L. 205, over Appellees' objection that the proposed order prepared by the defendants' attorneys "fails to accurately reflect the court's findings of fact and conclusions of law," Transcript of hearing of December 13, 2006, D. L. 259, page 4, lines 16-17.

The final hearing below was on February 20, 2007, during which Judge Chafin considered the two proposed orders denying the motion to vacate the Default Judgment and announced,

Basically, the difference between these two orders is one of them recites my ruling that I found no cause; the other recites that I had considered the Parsons Factors, et cetera, which were the arguments of the Plaintiff in the matter. It puts me in the position today that if I refuse to sign the one that says I considered the

Parsons Factors, someone is going to be arguing that I didn't even consider the Parsons Factor, which was what the whole thing was.

So, if it makes anybody feel any better about that, I will tell you in making my ruling on the 13<sup>th</sup> day of December, the Court did consider the Parsons Factors. In consideration of those, found that there was no sufficient cause to vacate the default judgment order and will, therefore, sign the order prepared by the Groves in that matter which does recite that.

Transcript of hearing of February 20, 2007, D.L. 249, page 7, lines 5-20.<sup>4</sup>

The time for appealing the underlying judgment ran on or about January 5, 2007, some twenty-three (23) days after Judge Chafin's denial of the motion to vacate the Default Judgment on December 13, 2006, and some 105 (one hundred five) days before the appellant's filing of the petition for this appeal on or about April 20, 2007.

#### **IV. Appellees' statements meeting the appellant's assignments of error**

A. The first assignment of error is without merit because rigorous application of the factors determining 'good cause' shows conclusively that the Circuit Court was within its discretion in denying the motion to vacate the Default Judgment.

B. The second assignment of error is moot because the court-ordered hearing on damages was held, in which Appellees' Expert Witness testified as to his calculations of the default damages.

C. The third assignment of error is without merit because any potential error in the court's order is harmless.

D. The fourth assignment of error is similarly without merit because vacating the Default Judgment would result in manifest injustice to Appellees rather than to the appellant in light of the facts of this case.

#### **V. Points and authorities relied upon**

##### **A. Federal Authority**

1. Federal Rule of Civil Procedure 60.

2. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113

S. Ct. 1489, 123 L.Ed.2d 74 (1993).

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<sup>4</sup> Mr. Skeen's proposed order is Exhibit 13 attached to Appellees' Response to the Petition for Appeal.

3. *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11<sup>th</sup> Cir. Fla. 1996).

**B. West Virginia Authority**

1. West Virginia Code, Chapter 11A, *et. seq.*
2. West Virginia Rule of Civil Procedure 55.
3. West Virginia Rule of Civil Procedure 60.
4. West Virginia Rule of Civil Procedure 61.
5. West Virginia Trial Court Rule 24.01.
6. West Virginia Rule of Professional Conduct 1.2.
7. West Virginia Rule of Professional Conduct 1.7.
8. *Cales v. Wills*, 212 W. Va. 232, 569 S.E.2d 479 (2002).
9. *Cox v. State*, 194 W. Va. 210, 460 S.E.2d 25 (1995).
10. *De Lapp v. De Lapp (in re Delapp)*, 213 W. Va. 757, 584 S.E.2d 899 (2003).
11. *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W. Va. 69, 501 S.E.2d 786 (1998).
12. *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E. 2d 147 (1995).
13. *Hardwood Group v. LaRocco*, 219 W. Va. 56, 631 S.E.2d 614, 2006 (2006).
14. *Hensley v. West Virginia DHHR*, 203 W. Va. 456, 508 S.E.2d 616 (1998).
15. *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983).
16. *Lee v. The Gentleman's Club, Inc.*, 208 W. Va. 564, 542 S.E.2d 78 (2000).
17. *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972).
18. *Nancy Darlene M. v. James Lee M., Jr.*, 195 W. Va. 153, 464 S.E.2d 795 (1995).
19. *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 256 S.E.2d 758 (1979), *superseded by statute sub nom, Martin v Randolph County Bd. Of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995).

20. *Pennington v. Bluefield Orthopedics P.C.*, 187 W. Va. 344, 419 S.E.2d 8 (1992).
21. *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996).
22. *Realco Ltd. Liab. Co. v. Shawkey*, 218 W. Va. 247, 624 S.E. 2d 594 (2005).
23. *State v. Hosby*, \_\_\_ W. Va. \_\_\_, 648 S.E. 2d 66, 2007 W. Va. LEXIS 43 (2007).
24. *Stillwell v. The City of Wheeling.*, 210 W. Va. 599, 558 S.E.2d 598 (2001).
25. *TXO Prod. Corp. v. Alliances Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd* on other grounds, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993).

## VI. Discussion of law

Appealed from in this case is the Circuit Court's denial of a motion to vacate a default judgment filed in accordance with West Virginia Rule of Civil Procedure 60(b). West Virginia Rule of Civil Procedure 55(c) allows a court to set aside a judgment by default in accordance with West Virginia Rule of Civil Procedure 60(b) for "good cause shown." The Court has held, "Rarely is relief granted under this rule because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted." *Powderidge Unit Owners Ass'n v. Highland Props, Ltd.*, 196 W. Va. 692, 704, 474 S.E.2d 872, 884 (1996), *citing to Cox v. State*, 194 W. Va. 210, 220, 460 S.E.2d 25, 34-5 (1995).

The appellant's reliance on *McDaniel v. Romano*, 155 W. Va. 875, 190 S.E.2d 8 (1972) is misplaced. Not only does *Powderidge* preempt *McDaniel*, *McDaniel* itself, at 880, recognized that any judicial tendency "to grant relief from a default judgment, and also from a dismissal of an action when no decision on the merits has been had, does not imply that the courts will or should always grant relief from a default judgment or a dismissal." Here, the appellant alleges that its lack

of representation was due to a miscommunication between someone not even an officer of the appellant corporation and an attorney who does not litigate cases. Here, the sole evidence of the alleged miscommunication is a false affidavit. Here, as in Judge Carrigan's dissent in *McDaniel* at 881, the appellant's allegation is not supported by any proven facts, is self-serving, and suggests that the appellant's failure to answer and defend was due to willful neglect. Therefore, denial of relief from the Default Judgment is proper.

In *Hardwood Group v. LaRocco*, 219 W. Va. 56, 59, 631 S.E.2d 614, 616-17 (2006), the defendant below, Claire V. LaRocco, appealed from the Circuit Court's denial of a motion that had been filed in accordance with West Virginia Rule of Civil Procedure 60(b). Chief Justice Davis delivered the opinion of the *Hardwood* Court, writing,

We now expressly hold that when addressing a motion to set aside an entry of default, a trial court must determine whether 'good cause' under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met. In analyzing 'good cause' for purposes of motions to set aside a default, 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 answer.

*Id.* at 63. Justice Cleckley further explains that, "although the factors examined in deciding whether to set aside a default or default judgment are the same, courts apply the factors more rigorously in the case of a default judgment, because the concepts of finality and litigation repose are more deeply implicated in the latter action." *Id.* In this case, the Default was entered on March 16, 2006. The Default Judgment was entered on September 2, 2006. Thus, the factors examined in deciding whether to set aside the Default Judgment entered against the appellant here are more rigorously applied, elevating the appellant's burden.

The *Hardwood* Court, at 60, reminds litigants that "a motion to vacate a default judgment is addressed to the sound discretion of the court and the court's ruling on such motion will not be

disturbed on appeal unless there is a showing of an abuse of discretion.” Pursuant to the abuse of discretion standard, the Court “will not disturb a circuit court’s decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.” *State v. Hosby*, \_\_\_ W. Va. \_\_\_, 648 S.E.2d 66, 70, 2007 W. Va. LEXIS 43 (2007) (a *per curiam* opinion), citing to *Hensley v. West Virginia DHHR*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (1998), quoting *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E. 147, 149 (1995). In this case, the appellant fails to meet its elevated burden to show that Judge Chafin abused the court’s discretion by denying the motion to vacate the Default Judgment because Judge Chafin neither made a clear error of judgment nor exceeded the bounds of permissible choices in the circumstances of this case.

**A. Rigorous application of the factors determining ‘good cause’ shows conclusively that the Circuit Court was within its discretion in denying the motion to vacate the Default Judgment. Therefore, the first assignment of error is without merit.**

Judge Chafin stated during the hearing of February 20, 2007,

Basically, the difference between these two orders is one of them recites my ruling that I found no cause; the other recites that I had considered the Parsons Factors, et cetera, which were the arguments of the Plaintiff in the matter. It puts me in the position today that if I refuse to sign the one that says I considered the Parsons Factors, someone is going to be arguing that I didn’t even consider the Parsons Factor, which was what the whole thing was.

So, if it makes anybody feel any better about that, I will tell you in making my ruling on the 13<sup>th</sup> day of December, the Court did consider the Parsons Factors. In consideration of those, found that there was no sufficient cause to vacate the default judgment order and will, therefore, sign the order prepared by the Groves in that matter which does recite that.

The appellant’s proposed order states only that “the court having heard the argument of counsel and having reviewed the pleadings and affidavits filed in support and in opposition to said motion, does hereby deny said motion, and the movant’s objection and exception to such adverse ruling are here noted and preserved.”

In contrast, the Order signed by Judge Chafin states,

The Court, having considered Nitro's motion, Plaintiffs' response, Nitro's reply, the exhibits, the arguments of the parties, Plaintiffs' expert witness testimony, the law of the case, and the record as a whole makes the following Findings of Fact and Conclusions of Law:

1. Having considered the *Parsons* factors, the court found that the factors support an award of a final judgment against Nitro, whose intransigence must be weighed heavily against it.
2. Nitro has presented no argument or excuse which rises to the level of excusable neglect or unavoidable delay justifying the relief requested.
3. Having further performed the *Hardwood* analysis, this court holds that the grant of final default and the award to Plaintiffs is reasonable and proper.

Whereupon, the court denied the appellant's motion to vacate the default judgment and noted of record and preserved the appellant's exceptions and objections.

West Virginia Rule of Civil Procedure 61 embodies the harmless error rule and states that no error or defect in any order or in anything done or omitted by the court is ground for vacating a judgment unless refusal to take such action appears to the court inconsistent with substantial justice. A rigorous application of the factors considered in determining whether the 'good cause' requirement of West Virginia Rule of Civil Procedure 55(c) has been met clearly demonstrates that the Circuit Court's refusal to vacate the Default Judgment is consistent with substantial justice. Thus, any potential error in the order signed by the court is harmless.

**(1) The first factor to be considered is the degree of prejudice suffered by the plaintiff from the delay in answering.**

The initial inquiry is the degree of prejudice to the plaintiff if the default judgment is vacated. *Hardwood*, 219 W.Va. at 64. By virtue of its default, the appellant admitted the allegations contained in Appellees' Complaint and Amended/Supplemented Complaint as a matter of law. *Farm Family Mut. Ins. Co. v. Thorn Lumber Co.*, 202 W. Va. 69, 75, 501 S.E.2d 786, 792 (1998). Appellees' multi-claim, multi-party action, to which the appellant was a necessary party, alleges ownership of the mineral acreage at issue in this case and conversion of Appellees'

ownership rights by the various defendants. Appellees advanced theories of ownership based in existing law or good faith arguments for slightly modifying or extending existing law. The appellant admitted these allegations as a matter of law.

Defendant Hildreth & Son purchased two tax deeds at the 1996 Roane County Sheriff's tax sale, leased the mineral acreage to the appellant, and then conveyed the tax deeds to a sister corporation, GMH. The appellant itself prepared the instruments assigning overriding royalty interests to BNG and B&R and then conveyed the lease to Westside. GMH entered into a successive fraudulent lease of the mineral acreage, including the minerals other than oil or gas, which the defendants admit are "still up in the air," to Boggs. Boggs obtained four permits to drill gas wells in accordance with the fraudulent lease. Consequently, Appellees filed their Complaint.

Appellees began to narrow the issues in controversy by entering into a sublease to Boggs of four cylindrical areas of oil and gas around the permitted well sites in order to mitigate damages to themselves and avoid damaging Boggs and its stated "intended farmees." As parts of the negotiated agreement on which the sublease was based, BNG and B&R surrendered and released to Appellees the overriding royalty interests that they had been assigned by the appellant and Boggs was named only for the purpose of instituting the action in Appellees' Amended/Supplemented Complaint. In addition to constraining Appellees' rights to drill wells within the cylinders subleased to Boggs, the two wells stimulated Appellees' lease into its secondary, or perpetual, phase.

Amidst these maneuvers, Appellees' Judgment of Default against the appellant was entered on March 16, 2006. A hearing on damages was ordered. At the damages hearing of August 22, 2006, Appellees' Expert Witness, Mr. David F. Finch, a petroleum engineer with over forty-six years of experience, carefully calculated the reserves of the oil and gas within the mineral tract at issue. Mr. Finch described his calculations, including detailed well spot maps and an oil and gas reserve estimation and economic evaluation. Mr. Finch used scientifically accepted methods of

analysis commonly relied upon by the Securities and Exchange Commission. Therefore, Mr. Finch's calculations are certain, correct, and conservative, rather than speculative, erroneous, arbitrary, or capricious, as asserted by the appellant. Based on Mr. Finch's calculations, Appellees were awarded Default Judgment, discounted to present value, in the amount of \$704,000 plus interest at the statutory rate, entered on September 2, 2006, and stating that there was "no just reason for delay."

It is simply a matter of common sense that the size and value of the reserves of oil and gas within any tract of minerals do not depend on whether the rights to those reserves are based on a deed or a lease. In fact, Mr. Finch's calculation of the damages as to a leasehold estate is lower than damages to a deedholder because Mr. Finch adjusted his calculated damages downward to allow for the usual and customary royalty of 1/8<sup>th</sup> of any oil and/or gas produced to be paid by the lessee to the deedholder. Therefore, in addition to Mr. Finch's calculated damages to Appellees' leasehold estate by one well drilled in accordance with the fraudulent lease, the damages to Appellees as deedholders would be \$100,570 (one hundred thousand, five hundred seventy dollars) greater, bringing the damages, discounted to present value, to \$804,570 (eight hundred four thousand, five hundred seventy dollars) per well. Further, because two wells were drilled in accordance with the fraudulent lease, the damages to a deedholder, discounted to present value, would be \$1,609,140 (one million, six hundred nine thousand, one hundred forty dollars). Since, by its failure to deny, the appellant admitted as a matter of law that Appellees are the rightful deedholders of the mineral tract at issue, the appellant's liability for defaulting in this action should be this larger amount.

But for the law's well-known prohibition of double recovery, *Pennington v. Bluefield Orthopedics P.C.*, 187 W. Va. 344, 349, 419 S.E.2d 8, 13 (1992), and the appellant's default, Appellees would have recovered damages to their leasehold estate from GMH. GMH's entry into and the two wells drilled in accordance with the fraudulent lease was a conversion of Appellees'

rights to develop the minerals in their leasehold estate. Clearly, Appellees' withdrawal of the conversion claim based on the Default Judgment award was a sea change in the case. Appellees also narrowed the issues by withdrawing the tortious interference with business relations and tortious inducement to breach contract claims against Hildreth, Hildreth & Son, and GMH based on these defendants' acknowledgement of the lease even though the defendants' own pleadings satisfy the elements of both claims.

Due to the prohibition of double recovery, Appellees also did not appeal the attorney malpractice claim against Defendant Evans even though Defendant Evans' search of the chain of title consisting of only seven links failed to discover the tax deeds while they were still in the redemption period, failed to discover that three quarters of the oil and gas appear to remain unsevered and that all of the minerals other than oil or gas remain unsevered, failed to discover the existence of a valid easement, and neglected to get a waiver of the dual representation that arose due to Defendant Evans' agency relationship with Appellees' title insurers. If Appellees had not recovered the Default Judgment, the action either would not have been disposed of on summary judgment or Appellees would have appealed. Thus, the prejudice suffered by Appellees from the appellant's delay would have been enormous if Judge Chafin had vacated the Default Judgment after granting Summary Judgment.

Yet the appellant concludes merely that "the amount of resulting prejudice stemming from Appellant Nitro's failure to answer was excusable neglect at best." The appellant asserts that it extracted no minerals, that the tax deed purchaser would have been ultimately liable for converting the mineral rights, that the Circuit Court ultimately disposed of the case on summary judgment, and that, therefore, the first factor should be weighed in its favor. However, the appellant, a necessary party to the action, failed to appear, answer, plead, or otherwise defend for more than fourteen months. If this had been a case in which the appellant was the only defendant below, the action

would have been concluded with two hearings, one on March 15, 2006, the result of which was entry of Default on March 16, 2006, the last on August 22, 2006, the result of which was the Default Judgment entered on September 2, 2006. The summary judgment motions would never have been heard on October 10, 2006, with entry of Summary Judgment on December 14, 2006. The appellant should not now be allowed to rely on a summary judgment that was entered after the Default Judgment was entered. Neither should the appellant's liability be vitiated by allowing it to now deny allegations heretofore admitted as a matter of law.

The appellant could have been liable, through its admissions of Appellees' allegations as a matter of law, for a damage award of over twice that awarded by the Default Judgment entered against it. Hence, rigorous application of the first factor shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the circumstances because of the extremely conservative nature of the award and the enormous amount of prejudice that would have been suffered by Appellees if Judge Chafin had vacated the Default Judgment after granting Summary Judgment. In addition, the result of a full trial would not have been different.

**(2) The second factor to be considered is the presence of material facts and meritorious defenses.**

The second factor focuses on whether "there is . . . reason to believe that a result different from the one obtained would have followed from a full trial." *Hardwood*, 219 W. Va. at 64, quoting *Hinerman v. Levin*, 172 W. Va. 777, 783-84, 310 S.E.2d 843, 850 (1983). Here, there is no reason to believe that a different outcome would have resulted from a full trial. As has been argued, without the Default Judgment, Appellees would have recovered from GMH for its entry into the fraudulent lease with Boggs, resulting in the drilling of the two wells and the damages caused thereby. For this reason alone, the outcome of a full trial would not have been different.

Additionally, in accordance with *TXO Prod. Corp. v. Alliances Resources Corp.*, 187 W. Va. 457, 467, 419 S.E.2d 870, 880 (1992), *aff'd* on other grounds, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993), "during the existence of the relation of landlord and tenant, the tenant is estopped to deny his landlord's title." Until the defendants acknowledged the lease during the hearing of the default damages of August 22, 2006, ownership of the minerals was hotly contested. The tax deeds may be either void or voidable in accordance with statutory notice requirements. The defendants admitted that Appellee William L. Groves had a 1/42<sup>nd</sup> right in the mineral acreage at issue. The faces of the tax deeds appear to convey no more than one quarter of the oil and gas in the mineral acreage at issue, leaving three quarters of the oil and gas unaccounted for. The defendants admitted that the minerals other than oil or gas are "still up in the air." The acknowledgment of the lease was, thus, another sea change in the case, estopping Appellees from denying their landlord's title. But for this constraint of the law, Appellees would still be contesting ownership of the oil and gas. Even as things stand, a cloud remains on Appellees' title due to the fact that the minerals other than oil or gas are still up in the air. Nonetheless, the claim against Chicago Title Insurance Company, Appellees' title insurers, was denied.

The appellant asserts that the Circuit Court's grant of Summary Judgment after entry of the Default Judgment is "evidence that Appellant Nitro certainly had meritorious defenses if the default were set aside." This assertion ignores the prohibition of double recovery and that Appellees would have recovered Mr. Finch's calculated damage award from a full trial due to GMH's entry into the fraudulent lease. Also ignored are the facts that Appellees are estopped from denying the defendants' title during the term of the lease, now in its perpetual phase, and that the estoppel is the legal restraint that mandated the Summary Judgment. Therefore, any appeal by Appellees would have been improvident.

For the foregoing reasons, rigorous application of the second factor shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the circumstances because a different outcome would not have resulted from a full trial. The significance of the interests at stake in this case makes a just outcome even more important.

**(3) The third factor to be considered is the significance of the interests at stake.**

Based on the *Parsons* Court's holding that \$35,000 is not an insignificant amount, *Parsons v. Consolidated Gas Supply Corp.*, 163 W. Va. 464, 473, 256 S.E.2d 758, 763 (1979), the Default Judgment of \$704,000 in this case is significant. The appellant could have simply filed notice of a bona fide defense, just as BNG and B&R. Just as BNG and B&R were dismissed from the action, so might the appellant have been. Yet the appellant's absence for more than fourteen months resulted in GMH's absolution for its entry into the fraudulent lease.

Oil and gas litigation usually involves significant sums of money. The appellant's comments about "shot[s] in the dark," "images of wealth and power," and "attempting to divest various Defendants of their mineral rights" are unfounded. Appellees are West Virginians who were simply trying to have a mistake in the title to their real estate corrected in order to protect and preserve precious West Virginia resources rather than watching those resources be stripped away, much as resources are stripped away from third world countries. The implication of the appellant's unfounded remarks would be a slippery slope towards wholesale vacation of default judgments of significant sums of money, no matter whether the damaged parties are made whole or not. In this case, Appellees have satisfied themselves with an outcome that does not make them whole to, in short, put this matter to rest.

Two facts are probative of the significance of the interests at stake. The first is the attempt by Defendants Hildreth, Hildreth & Son, and GMH to nullify Westside's conveyance of the lease to Appellees after it was recorded. The second is that Westside has reinserted itself into this action by

funding the appeal. These facts are suggestive of the value of Appellees' lease and of the significance of damage caused thereto by GMH's entry into the fraudulent lease. As argued, the damage award is extremely conservative, given the constraints the two wells that were drilled in accordance with the fraudulent lease place on Appellees' right to develop the oil and gas in their leasehold estate.

Consequently, rigorous application of the third factor shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the circumstances by denying the appellant's motion to vacate the Default Judgment. Moreover, the intransigence of the appellant, in and of itself, supports the Default Judgment.

**(4) The fourth factor to be considered is the degree of intransigence of the defaulting party.**

"Any evidence of intransigence on the part of a defaulting party should be weighed heavily against him in determining the propriety of a default judgment." *Hardwood*, 219 W.Va. at 65, quoting *Hinerman*, 172 W. Va. at 782. Rather than its plain and ordinary meaning, as asserted by the appellant, "intransigence" is a term of legal art. A review of West Virginia case law provides guidance:

In *Hinerman* at 784, the Court found that the appellant's "failure to answer the pleading of [the] appellee in a timely fashion, his failure to be responsive to the initiatives of the court, and his generally obstreperous approach to this matter indicate an intransigent posture that made the entering of a default judgment both necessary and inevitable." In *Realco Ltd. Liab. Co. v. Shawkey*, 218 W. Va. 247, 250, 624 S.E.2d 594, 597 (2005), a *per curiam* opinion following the guideline of *Hinerman*, the intransigence of the appellant was exhibited by his "complete disregard for the pending action for the approximately eleven-month period prior to entry of the default order." In *Lee v. The Gentleman's Club, Inc.*, 208 W. Va. 564, 567, 542 S.E.2d 78, 82 (2000), another *per*

*curiam* opinion that addressed intransigence in terms of the *Hinerman* guideline and affirmed a default judgment obtained seven months after the complaint was filed, intentional avoidance of communications was found to be an unreasonable attempt at ignoring possible litigation “in hopes that the matter will vanish.” In *Cales v. Wills*, 212 W. Va. 232, 242, 569 S.E.2d 479, 489 (2002), the defendant failed to file an answer to the complaint or any other pleading in the six-month period between the date of service and trial and the Court found “this intransigence to be significant.”

Here, the appellant is a foreign corporation. Its registered agent for service of process and only officer, Mr. Alan H. Walton, was properly served Appellees’ Complaint by the West Virginia Secretary of State and signed the restricted delivery notice on September 10, 2005. Appellees continued to serve pleadings on the appellant through Mr. Walton. On October 17, 2005, Appellees moved for Default Judgment and sent notice to the appellant through Mr. Walton. Judgment of Default was entered on March 16, 2006. The Default Judgment was not entered until September 2, 2006.

Just as in *Hardwood* at 623, the appellant was afforded many opportunities for an earlier response. Longer than in *Realco*, the appellant disregarded the pending action for more than fourteen months. Longer than in *Lee*, the Default Judgment here was not obtained until more than eleven months after Appellees’ filed their Complaint. Not for more than fourteen months and only after entry of the damages award did the appellant finally appear, filing its motion to vacate the Default Judgment on or about November 22, 2006. Mr. Walton neither testified nor was present at the hearing. Only a false affidavit was produced purporting to show excusable neglect. Therefore, just as in *Hardwood* and *Cales*, the degree of intransigence exhibited by the appellant is significant. The Order Denying the motion to vacate the Default Judgment, entered on February 20, 2007, specifically states that the appellant’s intransigence “must be weighed heavily against it.”

Moreover, the appellant's stubborn resistance to the court's control in this case is highlighted by the fact that the appellant had brought a contract action against BNG on August 8, 2002, in the U.S. District Court, Southern District of West Virginia but had, on November 29, 2002, assigned BNG and its sister corporation, B&R, overriding royalty interests in the oil and gas lease that was later conveyed to Appellees. Afterwards, BNG brought a contract action related to the federal action against the appellant in the Circuit Court of Roane County on January 29, 2003. Since the appellant was represented in these two actions by Mr. Hardymon, any pleadings were sent, not to the appellant's registered agent for service of process and only officer, Mr. Walton, but to Attorney Hardymon. Contrastingly, all pleadings in this case were sent to Mr. Walton during the same time frame that the above-described actions were being litigated. A corporation sophisticated enough to prepare its own instruments of conveyance either knew or should have known that something was amiss with any supposed representation in an action in which the corporation itself continued to receive pleadings after an attorney was supposedly retained. This suggests an intentional avoidance of communications, which was found in *Lee* to be an unreasonable attempt at ignoring litigation in hopes that the matter would vanish.

The appellant asserts that Mr. Cassidy filed an Answer on behalf of Westside and was supposed to do the same for the appellant. However, Mr. Cassidy never filed an Answer on behalf of Westside and advised Mr. Boss that "I do not litigate cases and that he would need to retain West Virginia counsel to represent Westside Exploration, LLC." Instead, Mr. Cassidy's letter offering to surrender and release the lease to Appellees in exchange for consideration constituted the only appearance Mr. Cassidy made in this action. *Cales*, 212 W. Va. at 240. If Mr. Cassidy had represented both Westside and the appellant, West Virginia Rule of Professional Conduct 1.7 would have required a dual representation agreement.

The appellant's brief is replete with arguments that its lack of representation was due to a miscommunication between someone not even an officer of the appellant corporation and an attorney who does not litigate cases. Yet the only officer of the appellant corporation was not present at the hearing of the appellant's motion to vacate the Default Judgment. The false affidavit that Mr. Skeen knew to be false at the time he argued the appellant's motion below was the only evidence proffered by the appellant. In addition, the record is devoid of evidence of unbundled legal services as would have been required by West Virginia Rule of Professional Conduct 1.2 if both Mr. Hardymon and Mr. Cassidy were simultaneously representing the appellant. These facts are suggestive of a situation where there was an unreasonable attempt to ignore the litigation in hopes that the matter would vanish.

In addition, the appellant's assertions that Westside was a joint venture partner are wholly unsubstantiated. Appellees have found no documentation of any partnership between Westside and the appellant with the West Virginia Secretary of State, in the Michigan State Corporate Division Records, or in the Roane County Assumed Names Index. To the contrary, the public record reflects that the relationship was merely that of Assignor and Assignee. The appellant alleges that it wrongfully believed that it had been dismissed from the suit while acknowledging that it remained a defendant in the Amended/Supplemented Complaint. The appellant's assertion that knowledge of this fact was an assurance that Mr. Cassidy was defending both it and Westside defies logic and common sense. It is not a credible reason for the appellant's failure to timely answer but is yet another exhibition of intransigence.

All of this evidence of intransigence demonstrates that entry of the Default Judgment was both necessary and inevitable. Thus, rigorous application of the fourth factor shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the

circumstances in finding the appellant's intransigence to be significant. The appellant additionally fails to provide an adequate reason for its default.

**(5) The fifth factor to be considered is the reason for the defaulting party's failure to timely file an answer.**

The final factor focuses on satisfaction of a ground pursuant to West Virginia Rule of Civil Procedure 60(b). Chief Justice Davis wrote,

While *Parsons* requires a showing of excusable neglect under Rule 60(b), the Rule itself provides other grounds for granting relief. Insofar as this opinion does not require examination of any other factor under Rule 60(b), we will refrain from determining to what extent the other factors under Rule 60(b) have application to a default judgment.

*Hardwood*, 219 W. Va. at 63. The appellant separately addressed the fifth factor and charged the court below with ignoring the applicability of grounds (1), (5), and (6) contained in West Virginia Rule of Civil Procedure 60(b) to the case at bar. Nonetheless, Appellees herein incorporate into address of the fifth factor the three reasons cited to by the appellant for its failure to timely appear, answer, plead, or otherwise defend.

**a. The appellant fails to meet its elevated burden to show mistake or excusable neglect in failing to timely answer in accordance with West Virginia Rule of Civil Procedure 60(b)(1).**

The appellant cites to *Delapp v. Delapp (In re Delapp)*, 231 W. Va. 757, 584 S.E.2d 899 (2003), but fails to apply the test for excusable neglect to the facts of the instant case. In accordance with *Delapp* at 764, citing to *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L.Ed.2d 74, 89-90 (1993), four factors assist courts in determining whether there was excusable neglect as the basis for setting aside a default judgment: (1) the danger of prejudice to the other party; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay, including whether it was in the reasonable control of the movant; and (4) whether the movant acted in good faith.

The first factor to be considered has been fully briefed in the section regarding the degree of prejudice suffered by the plaintiff from the delay in answering. The prejudice suffered by Appellees would be enormous if the Default Judgment was vacated. The second factor to be considered has also been briefed in the section regarding the presence of material facts and meritorious defenses. The appellant's delay in this case of fourteen months had a monumental impact on the judicial proceedings. By virtue of the Default Judgment and the prohibition of double recovery, GMH was absolved of liability for entry into the fraudulent lease that ultimately caused the damages to Appellees' leasehold estate.

The third factor to be considered is the reason for the delay, including whether it was in the reasonable control of the movant. The appellant was aware that it had been named a defendant in Appellees' Amended/Supplemented Complaint but that Westside, which the appellant alleges was supposed to be retaining Mr. Cassidy to represent both corporations, had not. The appellant asserts that knowledge of this fact was an assurance that Westside's attorney was defending the appellant and that it wrongfully believed that it had been dismissed from the suit along with Westside. Meanwhile, the appellant was represented by another attorney, Mr. Hardymon, in two other actions in West Virginia courts. It is not reasonable that a sophisticated corporation could in any way be assured that its interests were being legally protected by counsel when Mr. Cassidy specifically told Mr. Boss that conveying the lease to Appellees "would not affect the other parties in the lawsuit," and "I do not litigate cases."

In *Delapp* at 764, the miscommunication was between a Circuit Court Clerk and the attorney for the appellant. In *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11<sup>th</sup> Cir. Fla. 1996), the miscommunication was between an associate attorney and lead counsel. Here, the appellant's reliance on a communication between someone not even an officer of the appellant corporation and an attorney who does not litigate cases is simply too attenuated. The appellant's allegation that Mr.

Cassidy was representing both Westside and the appellant in the same action without a dual representation agreement and with no communication is simply not credible.

Furthermore, the time for appealing the underlying judgment ran on or about January 5, 2007, some 23 days after Judge Chafin's denial of the motion to vacate the Default Judgment on December 13, 2006, and some 105 days before the appellant's filing of the petition for this appeal on or about April 20, 2007. It was certainly within the reasonable control of the appellant to have Mr. Skeen file an appeal of the underlying judgment instead of waiting until an appeal of the court's denial of the motion to vacate the Default Judgment was the only avenue of appeal left. When viewed side by side, these facts suggest that the appellant's failure to answer and defend was due to willfulness rather than excusable negligence.

The fourth factor to be considered in determining whether there was excusable neglect is whether the movant acted in good faith. The appellant's intransigence demonstrates a lack of good faith and has been fully briefed in the section regarding the degree of intransigence of the defaulting party. The appellant's registered agent for service of process continued to receive Appellees' pleadings when those same pleadings would have been sent to the appellant's attorney if it had one. At the same time, the appellant was represented in other West Virginia actions by Mr. Hardymon. It is unreasonable to ask the Court to believe that a sophisticated corporation would not or should not know that something was very wrong when pleadings continued to stream into the address of its registered agent for service of process rather than to its attorney. That a sophisticated corporation would not give the attorney a telephone call to inquire about the matter suggests bad faith.

The appellant's attorney, Mr. Skeen, offered into evidence nothing more than a false affidavit in support of the appellant's motion to vacate the Default Judgment. The false affidavit is the first inkling of the appellant's alleged involvement in any sort of joint venture with Westside. The falsity of the affidavit leaves the allegation without support. Furthermore, Appellees have found no

documentation of the asserted partnership with the West Virginia Secretary of State, in the Michigan State Corporate Division Records, or in the Roane County Assumed Names Index. To the contrary, the public record reflects that the relationship was merely that of Assignor and Assignee. The appellant's very allegation at this late date that Westside was a joint venture partner without any supporting evidence, in and of itself, is another suggestion of bad faith. Thus, any neglect on the part of the appellant was unreasonable and inexcusable.

The appellant's appeal to equity and unjust enrichment if the Default Judgment is allowed to stand has already been briefed. It will be recalled that Appellees should recover twice the amount of the Default Damages awarded because of GMH's entry into the fraudulent lease, thereby converting Appellees' mineral rights in their leasehold estate. The appellant, instead of liability for only a lessee's 'working interest' of 7/8<sup>ths</sup> of the revenue of all gas produced from only one of the two wells drilled in accordance with the fraudulent lease, should be liable for the total amount of revenue from those two wells since it admitted the allegations in Appellees complaints as a matter of law. Thus, the damages awarded are extremely conservative so that the appellant's appeal to equity and unjust enrichment should not avail it.

Rigorous application of West Virginia Rule of Civil Procedure 60(b)(1) shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the circumstances because the appellant has not met its elevated burden to show mistake or excusable neglect as the reason for its failure to timely answer. Likewise, the appellant fails to meet its burden to show any reason for its failure to timely file an answer in accordance with West Virginia Rule of Civil Procedure 60(b)(5).

**b. The appellant fails to meet its elevated burden to show that a prior judgment upon which the default judgment is based has been reversed, vacated, or that prospective application of the judgment is no longer equitable in accordance with West Virginia Rule of Civil Procedure 60(b)(5).**

The Court, in *Nancy Darlene M. v. James Lee M., Jr.*, 195 W. Va. 153, 156, 464 S.E.2d 795, 798 (1995), found that the language of West Virginia Rule of Civil Procedure 60(b)(5) "has been suggested to apply in situations where the controlling circumstances of the action have changed."

In contrast to the appellant's reiterated assertions that the Default Judgment should have been vacated because of the Summary Judgment and that Appellees do not own the mineral rights at issue, Appellees, as leaseholders, have exclusive rights to develop the oil and gas in the mineral tract at issue in this case and to the revenue of all oil and/or gas produced less the royalty. As has been fully explained, the damage award is only one-half the actual damage to the leasehold estate caused by the two wells drilled in accordance with the fraudulent lease. The Default Judgment should be allowed to stand because of the prohibition of double recovery. But for the prohibition of double recovery, Appellees would not have withdrawn the conversion claim. But for withdrawal of the conversion claim, which the Order states was based on Appellees' Default Judgment, Appellees would have recovered damages to their leasehold estate caused by the fraudulent lease

If the controlling circumstances of the action changed, it was the Default Judgment that caused the change. Therefore, if the Court determines that the controlling circumstances were changed, vacation of the Default Judgment should not now be allowed to prevent Appellees from recovering damages caused by constraints on development of the mineral acreage in their leasehold estate. As illustrated by the chain of events, the Summary Judgment in this case did not satisfy, reverse, or vacate the Default Judgment as argued by the appellant. Rather, the Default Judgment was an integral component that made the Summary Judgment necessary and inevitable.

In addition, prospective application of the Default Judgment is equitable. Conversion of Appellees' mineral rights was the basis of Appellees' suit. Conversion of Appellees' mineral rights by GMH's entry into the fraudulent lease is the basis of Mr. Finch's careful and conservative calculations of damages. Thus, the appellant's argument that prospective application of the Default Judgment would be inequitable and manifestly unjust is simply erroneous.

Rigorous application of West Virginia Rule of Civil Procedure 60(b)(5) shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible choices in the circumstances because the appellant has not met its burden to show that a prior judgment upon which the default judgment is based has been reversed, vacated, or that prospective application of the judgment is no longer equitable. Application of West Virginia Rule of Civil Procedure 60(b)(6) to the facts of this case yields a similar result.

**c. The appellant fails to meet its elevated burden to show any other reason justifying relief from operation of the judgment in accordance with West Virginia Rule of Civil Procedure 60(b)(6).**

West Virginia Rule of Civil Procedure 60(b)(6) is identical to Federal Rule of Civil Procedure 60(b)(6). Therefore, federal guidance provides clarification, see *Pioneer*, 123 L.Ed.2d. at Headnote 6: "To justify relief under Rule 60(b)(6), a party must show extraordinary circumstances suggesting that the party is faultless in the delay."

The appellant's registered agent for service of process signed the restricted delivery notice on September 10, 2005, verifying that the appellant was properly served Appellees' Complaint. The appellant admits awareness that it was named a defendant in Appellees' Amended/Supplemented Complaint but that it knew Westside was not also named a defendant. Westside is the party on which the appellant asserts reliance for a defense in this action. The appellant asks the Court to believe that knowledge of the fact that it was named a defendant but that Westside was not somehow assured the appellant that Westside's attorney was defending it and that it had been dismissed from the action.

These facts show that the appellant had actual knowledge of Appellees' action. These facts suggest that the appellant chose not to protect its interests because a sophisticated corporation's officer would surely telephone the attorney to find out what was going on. Yet there is no evidence that the sole officer and registered agent for service of process, Mr. Walton, ever talked to Attorney Cassidy, suggesting that the appellant was at fault for its delay. Taken together, the appellant's exhibitions of willful, unreasonable, and inexcusable neglect also strongly suggest fault.

The appellant fails to show that it was faultless for the delay and simply repeatedly urges the Court to retrospectively apply what ultimately became the law of this case with the grant of Summary Judgment and to ignore everything else that happened in this multi-claim, multi-party action involving complex civil litigation. Contrary to the appellant's assertion, the date set for trial was March 5, 2007. Appellees began narrowing the issues for trial by entering into the sublease to Boggs in order to mitigate and avoid damages. Appellees continued to narrow the issues with withdrawal of the conversion claim based on recovery of the Default Judgment and withdrawal of the tortious interference with business relations and tortious inducement to breach contract claims based on the defendants' acknowledgement of the lease conveyed to Appellees by Westside.

Appellees were estopped from appealing the grant of Summary Judgment even though the faces of the tax deeds appear to convey no more than a one-quarter interest of the oil and gas in the mineral acreage at issue, Appellee William L. Groves had a 1/42<sup>nd</sup> right in those minerals, the minerals other than oil or gas are "still up in the air," and Defendant Evans' title search was less than satisfactory. Contrary to the appellant's assertion that Appellees would not have been prejudiced by vacation of the Default Judgment granted them, Appellees have satisfied themselves with a recovery that is less than optimal. Under these circumstances, it would be inequitable to reverse the grant of Default Judgment. Therefore, rigorous application of West Virginia Rule of Civil Procedure 60(b)(6) shows that Judge Chafin did not make a clear error of judgment or exceed the bounds of permissible

choices in the circumstances because the appellant has not met its burden to show any other reason justifying relief.

The appellant has failed to meet its elevated burden to show 'good cause' in accordance with West Virginia Rule of Civil Procedure 55(c). The Denial of the motion to vacate the Default Judgment in accordance with West Virginia Rule of Civil Procedure 60(b) is clearly consistent with substantial justice. Denial of the motion to vacate the Default Judgment was, therefore, within the Circuit Court's discretion. The second assignment of error is moot.

**B. The court-ordered hearing on damages was held, in which Appellees' Expert testified as to his calculations of the default damages. Therefore, the second assignment of error is moot.**

West Virginia Rule of Civil Procedure 55(b)(2) states, in pertinent part,

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary.

This is exactly what the court did in this case. The Default was entered on March 16, 2005, by Judge Nibert. A hearing on damages was ordered. The damages hearing of August 22, 2006, was conducted by Judge Chafin, who was recalled to hear the case after Judge Nibert recused himself. Appellees' Expert, Mr. Finch, who has over forty-six years of experience as a petroleum engineer, testified as to the damages based on careful calculations of the reserves of oil and gas in the mineral tract at issue. Mr. Finch's description of his calculations is on the record, as are his detailed well spot maps and oil and gas reserve estimation and economic evaluation. The record demonstrates that Mr. Finch used scientifically accepted methods of analysis commonly relied upon by the Securities and Exchange Commission and arrived at calculations of the oil and gas reserves in the mineral tract at issue that are certain, correct, and conservative. Thus, the damages hearing served the same purpose as a common law writ of inquiry, to assess damages.

West Virginia Rule of Civil Procedure 55(b)(1) is inapplicable here, as asserted by the appellant, because this is not a case in which the clerk entered the judgment for a sum certain. Therefore, the appellant's reliance on *Farm Family Mut. Ins. Co.*, 202 W. Va. at 69, for the definition of "sum certain" is inapplicable, rendering the second assignment of error moot. Therefore, the Court should disregard this assignment of error.

The appellant's remarks about the punitive nature of the Default Judgment, while irrelevant due to the mootness of the second assignment of error, need Appellees' response. In accordance with *Stillwell v. The City of Wheeling*, 210 W. Va. 599, 605, 558 S.E.2d 598, 605 (2001), "A default judgment is a sanction that may be imposed against a party for his or her failure to comply with certain procedural requirements associated with a lawsuit." Rather than questioning the amount of the default judgment, Judge Chafin stated at the conclusion of the hearing of the appellant's motion to vacate the Default Judgment,

A lot of the things you argue for as damages are concerned in this thing were certainly not the basis for the damages that were awarded in this case.

Nonetheless, there is no question. I did not enter the Order for the default judgment, that was entered by a judge before I got into this matter, as well as I can recall.

At which juncture Attorney Orton A. Jones interposed, "Yes, Your Honor," and Judge Chafin continued,

And there is certainly no excuse that I can find for setting aside the default judgment that was granted. Now the second issue would be – it's a – is there any reason for setting aside the order for damages that was entered in this 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.

Judge Chafin's statements appear to be the thoughtful reflections of a well-seasoned judge who has thought about his ruling on a matter, decided how he is going to rule, and not changed his mind because of the arguments of the parties. Because it is moot, the second assignment of error fails to show abuse of discretion. The third assignment of error is similarly without merit.

**C. Any potential error in the court's order was harmless, rendering the third assignment of error without merit.**

The harmless error rule embodied in West Virginia Rule of Civil Procedure 61 states that no error or defect in any order or in anything done or omitted by the court is ground for vacating a judgment unless refusal to take such action appears to the court inconsistent with substantial justice. Rigorous application of the factors considered in determining whether the 'good cause' requirement of West Virginia Rule of Civil Procedure 55(c) and examination of the appellant's four assignments of error in this case have clearly demonstrated that the Circuit Court's refusal to vacate the Default Judgment is consistent with substantial justice. Thus, any potential error in the order signed by the court is harmless.

The transcripts on the record reflect that Appellee Harrolyn B. Groves argued the *Hardwood* analysis, including the *Parsons* factors below. Judge Chafin's Order, quoted near the beginning of Appellees' address of the first assignment of error, states that the court considered the *Parsons* factors, performed the *Hardwood* analysis, that no argument or excuse offered by the appellant rose to the level of excusable neglect or unavoidable cause, and is consistent with his reputation for writing concise orders. The appellant's proposed order states only that the court heard the argument of counsel and reviewed the pleadings and affidavits filed in support and in opposition. The appellant should not now complain about an order that was more inclusive than the scant one it proposed.

Further, any potential error in the order was harmless because the Default Judgment has been shown in the previous sections of Appellees' brief to be consistent with substantial justice and not affecting the substantial rights of the parties in light of the facts of this case. Yet this assignment of error illuminates a problem involving the management of attorneys who attempt to usurp the authority vested in officers of the court by West Virginia Trial Court Rule 24.01 when

orders authored by attorneys are expanded, sometimes into fictional novels, rather than faithful representations of the courts' findings, rulings, and holdings.

The Summary Judgment Order on the record in this case is directly on point. The transcript of the hearing of the defendants' summary judgment motion is conclusive evidence that the court did not conclude, find, or hold many of the conclusions, findings, and holdings contained in the order proposed by the defendants' attorneys and signed by the court. For this reason, Appellees objected to the Order on the grounds that it "fails to accurately reflect the court's findings of fact and conclusions of law." These two extremes illuminate a tension facing judges between writing concise, succinct orders and having attorneys prepare orders for the sake of judicial efficiency and economy. As a consequence of the failure of the Summary Judgment Order to accurately reflect the court's findings of fact and conclusions of law in this case, the appellant's reliance on the Summary Judgment Order should be given little weight.

The third assignment of error thus fails to show abuse of discretion because the Order is consistent with substantial justice and any potential error is harmless. The fourth assignment of error is likewise without merit.

**D. Vacating the Default Judgment would result in manifest injustice to Appellees in light of the facts of this case. Therefore, the fourth assignment of error is also without merit.**

Appellees filed this action on September 1, 2005. The appellant's registered agent for service of process signed the restricted delivery notice on September 10, 2005. The appellant failed to appear, answer, plead, or otherwise defend. Appellees filed the Motion for Default Judgment on October 17, 2005. Default was entered on March 16, 2006, ordering a hearing on damages in accordance with West Virginia Rule of Civil Procedure 55(b)(2). It simply is not possible that the court abused its discretion in entering the Judgment of Default in light of these facts.

The damages hearing conducted on August 22, 2006, will undoubtedly be recalled. Appellees' Expert, Mr. Finch testified as to the damages. Mr. Finch performed careful calculations and used scientifically accepted analyses to determine the oil and gas reserves in the mineral tract at issue. Mr. Finch's calculations are certain, correct, and conservative. The appellant remained absent, thereby admitting Appellees' claims as a matter of law. The Default Judgment, entered on September 2, 2006, awarded damages based on only one well when there are actually two wells constraining Appellees' development of the mineral acreage in their leasehold estate. The damages are for only the 'working interest.' The damages were discounted to present value. It simply is not possible that the court abused its discretion in entering the Default Judgment in light of these facts.

If this was a case involving a single defendant, the August 22<sup>nd</sup> proceeding would have concluded Appellees' action. To this point, it is impossible that the court abused its discretion in light of the facts of the case. If the action had been concluded with the August 22<sup>nd</sup> damages hearing, then the hearing of the defendants' summary judgment motions on October 22, 2006, would never have occurred. The appellant's attempt to have the Court retrospectively apply what has become the law of a case involving complex civil litigation and sea changes in the positions of the parties regarding each other is tantamount to attempting to shift the burden to Appellees rather than showing excusable neglect or unavoidable cause in accordance with West Virginia Rule of Civil Procedure 60(b). Furthermore, in accordance with *Stillwell*, at 605, a default judgment can be punitive. The *TXO* Court, at 476, approved of punitive awards of up to 500 (five hundred) times the compensatory damages in some circumstances. The damages awarded Appellees are only half the actual damages Appellees suffered. Therefore, the appellant's ever so offensive statement that Judge Chafin somehow has unclean hands by reason of his refusal to vacate the Default Judgment is patently absurd.

Since Appellees' recovery is only half the actual damages, vacating the default judgment would be unconscionable in light of the facts of this case and would result in manifest injustice to Appellees rather than to the appellant. The appellant has, thus, failed to meet its elevated burden to show "good cause" in accordance with West Virginia Rule of Civil Procedure 55(c) in all four of its assignments of error. Therefore, the Denial of the motion to vacate the Default Judgment in accordance with West Virginia Rule of Civil Procedure 60(b) is consistent with substantial justice and was within the Circuit Court's discretion.

## **VII. Conclusion**

In brief, Appellees' Complaint was filed on September 1, 2005, and was properly served on the appellant's registered agent for service of process by the West Virginia Secretary of State, with the restricted delivery notice being signed on September 10, 2005. The appellant failed to appear, answer, plead, or otherwise defend. Consequently, Appellees filed their motion for Default Judgment on October 17, 2005. The entry of Default, on March 16, 2006, ordered a hearing on Appellees' damages. The hearing on damages, in which Appellees' Expert Witness calculated the default damages, was held on August 22, 2006, with entry of the Default Judgment on September 2, 2006, stating that there was "no just reason for delay."

The appellant filed its motion to vacate the Default Judgment on or about November 22, 2006. The only evidence of excusable neglect was a false affidavit sworn by someone other than the one and only officer of the appellant corporation. The affidavit falsely alleged reliance on an attorney who does not litigate cases. The motion was denied, with entry on February 20, 2007. The appellant filed the petition for this appeal on or about April 20, 2007.

Rigorous application of the factors determining 'good cause' shows conclusively that the Circuit Court was within its discretion in denying the motion to vacate the Default Judgment. Any potential error in the court's order was harmless. As a consequence of the development of this

multi-claim, multi-party action involving complex civil litigation, clearly, vacating the Default Judgment would create an unconscionable result and manifest injustice to Appellees in light of the facts of this case. Judge Chafin correctly assessed the evidence and the law in this case. Therefore, Judge Chafin's denial of the motion to vacate the Default Judgment was correct.

**VIII. Relief requested**

Appellees request that the Court affirm the Circuit Court's judgment and grant such other relief as the Court may deem appropriate.

**DATED** this 16<sup>th</sup> day of November, 2007.

Harrolyn B. Groves

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WILLIAM L. GROVES and  
HARROLYN B. GROVES,  
Husband and Wife, Plaintiffs Below,  
Appellees,

v.

Case No.: 33528

ROY G. HILDRETH & SON, INC.;  
ROY G. HILDRETH, JR., individually;  
NITRO ENERGY, INC.; GMH GAS CO.,  
INC.; THOMAS C. EVANS, III, individually;  
and BOGGS NATURAL GAS, FLP (named for  
the purpose of instituting this action only),  
Defendants Below,

NITRO ENERGY, INC., Appellant.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2007, Appellees William L. Groves and Harrolyn B. Groves served copies of Appellees' Brief by First Class Mail to Roy G. Hildreth & Son, Inc.; Roy G. Hildreth, Jr.; and GMH Gas Co., Inc., to counsel, the Law Offices of Hedges, Jones, Whittier, & Hedges, P.O. Box 7, Spencer, WV 25276; to Thomas C. Evans, III, to counsel, the Law Offices of Shuman, McCuskey, & Slicer, P.O. Box 3953, Charleston, WV 25339; and to Nitro Energy, Inc., to counsel, the Law Offices of Skeen & Skeen, 108 Hills Plaza, Charleston, WV 25330.

I declare under penalty of perjury in accordance with the laws of the State of West Virginia that the foregoing is true and correct.

DATED this 16<sup>th</sup> day of November, 2007.

  
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