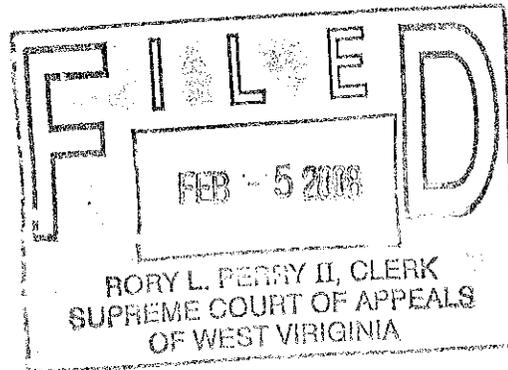


WEST VIRGINIA SUPREME COURT
OF APPEALS

State of West Virginia ex rel.
DEBORAH HARPER-ADAMS, Administratrix
of the Estate of Susie May Pendleton Smith,

Appellee

vs. No. 33730



Donna Sue Murray, individually and in her capacity
as former Administratrix of the Estate of Susie Mae
Pendleton Smith; and OneBeacon Insurance Company,
a corporation,

Appellants

BRIEF OF APPELLANT, DONNA SUE MURRAY

In the interest of time and expense, the appellant, Donna Sue Murray, pursuant to Rule 10 of the Rules of Appellate Procedure for the West Virginia Supreme Court of restates here for all practical purposes her initial Petition for Appeal. She based that Petition (and this appeal) on grounds the default judgment the Circuit Court of Kanawha County granted against her was improper, and the assessment of punitive damages against her as part of that judgment in lieu of attorney fees was contrary to the law of this jurisdiction.

STATEMENT OF FACTS

Plaintiff/respondent, Deborah Harper-Adams, was appointed to replace her sister, Donna Sue Murray, defendant/petitioner, as administratrix of their mother's estate, that of Susie Mae Pendleton Smith, who died September 1, 2000. A year after her appointment Harper-Adams filed this lawsuit against Murray alleging various torts against her for the prior administration of that estate. The other defendant, OneBeacon Insurance Company, was the surety for Murray's bond as administratrix.

Murray never filed an Answer to Harper-Adams' Complaint but was in communication with court personnel and opposing counsel throughout the course of this litigation. Murray acting pro-se represented herself in all matters before the circuit court.

September 22, 2006 a hearing was held on plaintiff's motion for default judgment on grounds Murray had failed to plead or otherwise defend against plaintiff's Complaint. A medical emergency involving an infant for whom she was caring precluded Murray's attendance, and she notified the court of her anticipated absence.

However, the hearing went forth, and default judgment was entered against Murray for \$108,766.00. This default judgment without further elaboration characterized the amount as a sum certain based upon Count I of the Complaint. Count I alleged Murray had embezzled and converted assets from the estate she had previously administered. However, Count I did not specify any amount or particular assets. The final order in

~~this action of March 21, 2007 reduced this "sum certain" to \$88,756.00 claiming a typographical error. The default judgment also awarded the plaintiff court costs and statutory attorney fees in the amount of \$10.00.~~

The default judgment further found liability in accordance with Count III of the Complaint citing fraud and set a writ of inquiry November 6, 2006 as damages in this regard were described as "not sum certain." Murray, a resident of Columbus, Georgia, appeared personally for the November 6, 2006 writ of inquiry; but the hearing was reset for November 29, 2006.

Murray again appeared at the November 29, 2006 hearing for the writ of inquiry. An order, and the final order in this action, was not entered until March 21, 2007. This order amended the earlier award nunc pro tunc to \$88,756.00, the third such figure plaintiff had set forth as a "sum certain."

The March 21, 2007 Order also awarded the plaintiff an additional judgment against Murray of \$50,000.00 for punitive damages. While not specific as the basis for this award, findings in the order stated plaintiff had requested an award of punitive damages in lieu of attorney fees. (The pleadings are bereft of any request of this nature). Yet the March 21, 2007 Order found "punitive damages in lieu of attorney fees is (sic) acceptable."

The Order of March 21, 2007 went on to described other matters primarily related to

collection of damages, transfer of assets and other issues related to the continued administration of the subject estate. However, it is the matters of default judgment and award of punitive damages conclusively adjudicated in the final Order of March 21, 2007 that Donna Sue Murray brings this Petition for Appeal.

ASSIGNMENTS OF ERROR

1. Whether entry of default judgment was proper where plaintiff had made multiple appearances? The lower court ruled on petitioner's failure to file an answer to the plaintiff's complaint and was silent regarding her appearances in this action.
2. Whether a sum certain award in default judgment is appropriate where there is no specific finding of such set forth in the order granting the award or set forth with specificity in the pleadings? The so-called "sum certain" kept shifting, however a letter in the court file from plaintiff's counsel seems to indicate the final "sum certain" of \$88,766.00 amounted to a "misappropriated IRA." However, there is no such finding of any sum certain amount in the default judgment order.
3. Whether an award of punitive damages in lieu of attorney fees is appropriate in circumstances where neither the grounds for punitive damages or the basis for the amount of attorney fees are set forth? The final Order of March 21, 2007 did not set forth any grounds for an award of punitive damages and never specifically stated the punitive.

~~damages were to be for attorney fees.~~ regarding attorney fees this final order did not set forth why attorney fees were justified or apply the amount of \$50,000.00 to legal services rendered equivalent to that particular figure.

4. Where ratio of punitive damages to compensatory damages is more than half is there a reasonable relationship between the two? The lower court made no such finding in a situation where punitive damages amounted to \$50,000 and compensatory damages \$88,766.00; thus punitive damages amounting to over half the amount awarded for compensatory damages.

5. Should principles of due process govern award of punitive damages? There was no notice or any other prior indication the hearing which assessed punitive damages in lieu of attorney fees would address this matter.

6. Are punitive damage awards subject by right to appellate review? Holdings of this Court suggest they are.

7. Did cost of this litigation to the plaintiff justify an award of punitive damages in an amount greater than half that of compensatory damages? The lower court did not make any such finding and as stated previously made no effort to ascertain the extent of legal services rendered in accordance with the amount of punitive damages awarded in lieu of legal fees.

8. Was award of punitive damages here appropriate where no finding was made of the

party's conduct against whom the punitive damages were assessed? Aside from the superficial allegations of plaintiff's pleadings, no finding or report was made of defendant's conduct. There was simply an award of punitive damages in lieu of attorney fees on top of a default judgment award for compensatory damages.

9. Is award of punitive damages appropriate where no inquiry was made of the financial condition of the party against whom the punitive damages were assessed? No inquiry was made into the defendant's financial condition prior to imposing punitive damages upon her.

10. Is an award of punitive damages in lieu of attorney fees appropriate where no finding made as to the veracity of those attorney fees? The record is silent as to any correlation between the amount of attorney fees awarded via punitive damages and the extent of services purportedly justifying fees, or an award, in the amount granted.

11. Should grounds for awarding attorney fees against a losing party be set forth where as general rule such fees are not recoverable as damages? No grounds or basis was set forth as to why attorney fees were merited.

12. Does a judgment entered four (4) months after a ruling on the writ of inquiry violate promptness requirement of Rule 58 of the West Virginia Rules of Civil Procedure and arguably prejudice the petitioner's right of appeal to the default judgment? The four-month delay in entering the order for the writ of inquiry will undoubtedly lead to plain-

tiff/respondent disputing the timeliness of petitioner's appeal to the default judgment. From petitioner's perspective the final order in this action occurred with the March 21, 2007 writ of inquiry making this petition timely with respect to the default judgment order as well.

13. Did Writ of Inquiry judgment of March 21, 2007 constitute a final order for purposes of appeal to all issues including that of default judgment? This writ of inquiry order constituted a final order concluding the litigation of this action at the trial court level.

Accordingly, it is the final order upon which this Petition for Appeal is based, and the incorporation of an appeal to the default judgment order September 22, 2006 is timely as well.

POINTS AND AUTHORITIES UPON WHICH PETITIONER HAS RELIED

Colonial Ins. Co. v. Barrett, , 208 W.Va. 706, 542 S.E.2d 869 (2000) W.Va. LEXIS 145

Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991)

Farley v. Economy Garage, 170 W.Va. 425, 294 S.E.2d 279 (1982)

Farm Family Mut. Ins. Co. v. Thorn Lumber Co., 501 S.E.2d 786 (W.Va. 1998)

Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991)

Intercity Realty Co. v. Gibson, 154 W.Va. 369, 175 S.E.2d 452 (1970)

McDaniel v. Romano, 155 W.Va. 875, 190 S.E.2d 8 (1972)

~~Rule 54, West Virginia Rules of Civil Procedure~~

Rule 58, West Virginia Rules of Civil Procedure

DISCUSSION

Donna Sue Murray, a resident of Columbus, Georgia, never responded in writing to the plaintiff's complaint. However, Murray, who represented herself, appeared personally at both hearings for the writ of inquiry and maintained contact with the lower court's staff throughout the course of this litigation.

Seeking default judgment, the plaintiff's motion stated Murray had "failed to plead or otherwise defend Plaintiff's Complaint as provided for in the West Virginia Rules of Civil Procedure." (Plaintiff's Motion for Default Judgment, para. 8). And although Murray notified the circuit court of her family medical emergency, she failed to attend the hearing where default judgment was rendered against her.

It is axiomatic this jurisdiction disfavors default judgment and favors adjudication of disputes on their merits. See Intercity Realty Co. v. Gibson, 154 W.Va. 369, 175 S.E.2d 452 (1970) and McDaniel v. Romano, 155 W.Va. 875, 190 S.E.2d 8 (1972). Ms. Murray by personal appearances and communications with court staff certainly exhibited a willingness to dispute the plaintiff's claims. Likewise the definition of "appearance" is given a liberal interpretation in light of favoring resolution on their merits. Colonial Ins.

Co. v. Barrett, 208 W.Va. 706, 542 S.E.2d 869, (2000) W.Va. LEXIS 145 (W.Va. 2000)

In addition to rendering default judgment in its Order of September 22, 2006 the lower court awarded "sum certain" damages in the amount of \$108,766.00. (Order of September 22, 2006). Oddly enough, the plaintiff would modify this so-called "sum certain" figure on two separate occasions.

When a default judgment has been obtained a hearing must be held (writ of inquiry) to ascertain the specific damages. Farley v. Economy Garage, 170 W.Va. 425, 294 S.E.2d 279 (W.Va. 1982). There is no record such hearing occurred here. Further, the term "sum certain" contemplates a situation where the amount cannot be reasonably disputed such as a money judgment, a negotiable instrument, etc. Farm Family Mut. Ins. Co. v. Thorn Lumber Co., 501 S.E.2d 786 (W.Va. 1998). Plaintiff's Complaint named a figure three times that awarded, her motion was silent and the Order simply stated the amount. A sum certain based upon default judgment contemplates more than this.

November 29, 2006 a hearing was held as a writ of inquiry to establish damages for Count III of the plaintiff's complaint, presumably her claim of fraud, as damages in this regard were not sum certain. As in the hearing two months earlier the requisite specificity was absent. Here the lower court assessed punitive damages in lieu of attorney fees. Here there was no notice of such contemplated action, and the award itself violated numerous, if not all, of the principles governing punitive damages and

attorney fees. Add insult to injury the Order reflecting this hearing was not entered until four months later arguably prejudicing petitioner's appeal to the earlier default judgment ruling.

West Virginia in recent years has been in the national judicial limelight concerning punitive damages. A seminal holding discusses at length this issue and has set the standard for subsequent holdings in this jurisdiction. Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). In addition to the required lack of due process (no notice), the assessment of punitive damages contained no finding of defendant's conduct, whether there was a reasonable relationship of the amount to the actual harm, the financial ability of the defendant and whether this amounted to favoring a local over the out-of-state defendant. All of these issues are discussed in Garnes and subsequent rulings on this issue by this Court. Id.

Further, this award found "(p)unitive damages are an appropriate measure of damages in this case, and the Court finds that punitive damages in lieu of attorney fees is acceptable." (Order of March 21, 2007, para. 15). However, Garnes does not agree with this rationale finding punitive damages in lieu of attorney fees only appropriate where the compensatory damages may be less significant or a finding of gross conduct. Id. No such finding was made here because circumstances of such nature were not present. If the basis were one of the plaintiff's cost of litigation, then a finding of

those costs should have been detailed. This did not occur either.

As a general rule, in the absence of contractual or statutory liability a party is responsible for his own attorney fees. This is known as the 'American rule' and prevails in West Virginia. In assessing attorney fees via punitive damages the lower court simply did so without further explanation or justification.

Rule 58 of the West Virginia Rules of Civil Procedure requires the prompt entry of a judgment order. Through (plaintiff's) attorney oversight, this did not occur until four months after the hearing. This should not prejudice the timing of the petitioner's appeal to the September 2006 default judgment. A final order is that which concludes the litigation. Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991). The March 21, 2007 Order concluded this litigation thereby constituting a final order for purposes of this appeal.

Based upon the foregoing this Petition should be granted. In making this argument including that of timeliness, the undersigned is also recommending to the petitioner that she seek setting aside these judgments in the circuit court. However, the limitation of options on the weekend prior to her deadline for this Petition compels her to keep this avenue open.

Respectfully submitted,

DONNA SUE MURRAY

By Counsel



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CERTIFICATE OF SERVICE

I, Richard A. Robb, counsel for the appellant, Donna Sue Murray, certify I have sent by U.S. Mail this day of February 5, 2008 a true copy of the Brief of Appellant, Donna Sue Murray to appellee, Deborah Harper-Adams, at her mailing address of 903 Park Avenue Dunbar, WV 25064 and a courtesy copy of the same to Keith R. Huntzinger, counsel for OneBeacon Insurance Company, at his mailing address of 401 Market Street, Suite 401, Steubenville, OH 43952.


Richard A. Robb