

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

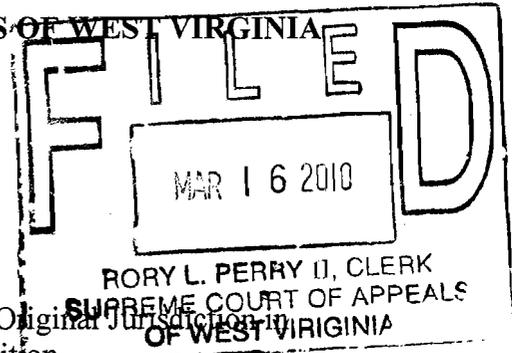
HEARTWOOD FORESTLAND  
FUND II LP,

Petitioner,

v.

THE HONORABLE MICHAEL  
THORNSBURY, and EVA C. COX  
CAUDILL, as Administratrix of the Estate  
of MARY ETTA SOUTHERS,

Respondents.



Upon Original Jurisdiction in  
Prohibition,  
No. \_\_\_\_\_  
(Civil Action No. 09-C-3, In the Circuit  
Court of Mingo County, West Virginia)

PETITION FOR WRIT OF PROHIBITION

COMES NOW, the Petitioner and Defendant below, Heartwood Forestland Fund II, LP, by and through counsel Chanin W. Krivonyak, Joshua C. Dotson, and Keith R. Hoover and the law firm of Pullin, Fowler, Flanagan, Brown & Poe and hereby petitions this Honorable Court for a Petition for a Writ of Prohibition pursuant to Article VIII, § 3 of the West Virginia Constitution, W. Va. Code § 53-1-1 et seq., and Rule 14(a) of the West Virginia Rules of Appellate Procedure. In support of this Petition, the Petitioner submits the included ***“MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION.”***

HEARTWOOD FORESTLAND FUND II LP,

By Counsel,

A handwritten signature in cursive script, appearing to read "Chanin W. Krivonyak", written over a horizontal line.

Chanin W. Krivonyak (WVSB # 7247)  
Joshua Charles Dotson (WVSB #10862)  
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JamesMark Building  
901 Quarrier Street  
Charleston, West Virginia 25301  
(304) 344 - 0100

DATED: March 16, 2010

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

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FUND II LP,**

**Petitioner,**

**v.**

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**Respondents.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Petitioner/Defendant below, does hereby certify that the foregoing "**Petition for Writ of Prohibition**" was served upon the following interested parties/counsel of record:

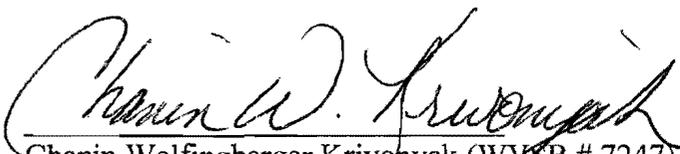
Honorable Michael Thornsby  
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by depositing a true copy of the same in the United States mail, properly addressed with postage fully paid, on this 16<sup>th</sup> day of March, 2010.

  
Chanin Wolfingbarger Krivonyak (WVSB # 7247)  
Joshua Charles Dotson (WVSB #10862)  
Keith R. Hoover (WVSB #11099)

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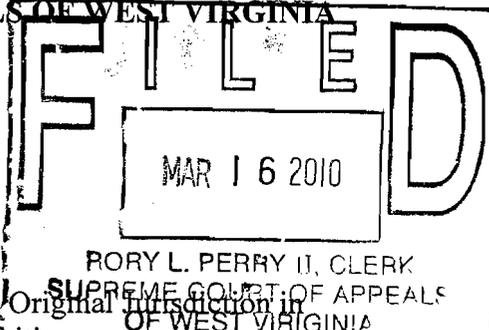
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**MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF  
PROHIBITION**

**By counsel:**

Chanin W. Krivonyak (WVSB # 7247)  
Joshua Charles Dotson (WVSB #10862)  
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## INTRODUCTION

“Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.” Syl. pt 1, *Wirt County Bank v. Smith*, 188 W.Va. 671, 425 S.E.2d 626 (2009). These words are more than a point of law; they are the very bedrock on which the civil justice system functions. The West Virginia Rules of Civil Procedure were designed to “expedite and simplify determination of civil actions and to obviate necessity of dismissing or reversing actions for mere technical defects or irregularities.” *Sorby v. Turner*, 201 W. Va. 571, 575, 499 S.E.2d 300, 304 (1997). In fact, this Court intended that “all of these rules be construed liberally and fairly so as to seek justice for all parties involved.” *Id.*

This is a case about a five (5) day failure to answer a Complaint, a subsequent entry of default in a wrongful death case in which the Respondent’s initial demand was Three Million Five Hundred Thousand Dollars (\$3,500,000), and an order denying a motion to set aside an order of default which relied on a clearly erroneous legal standard. In this case, the trial court’s entry of an order of default prevented the Petitioner from bringing in a third-party defendant whose conduct allegedly caused the decedent’s death and resulting Respondent’s injuries. Further, this potential third-party defendant has a contractual duty to indemnify the Petitioner in this litigation. By applying the wrong legal standard in considering whether to set aside the entry of default, the trial court will compel the Petitioner to pay significant expenses in defending this action and will possibly force the Petitioner to pay damages for the liability of a party absent in this civil action.

## STATEMENT OF JURISDICTION

This Petition for Writ of Prohibition is filed pursuant to Article VIII, § 3 of the West Virginia Constitution, W. Va. Code § 53-1-1 et seq., and Rule 14(a) of the West Virginia Rules of Appellate Procedure. Under Article VIII, § 3 of the West Virginia Constitution, “[t]he supreme court of appeals shall have original jurisdiction of proceedings in . . . prohibition . . . .”

## PARTIES

Petitioner/Defendant, Heartwood Forestland Fund II, L.P. (“Heartwood”), is a North Carolina limited partnership licensed to do business in West Virginia. Heartwood is solely managed by The Forestland Group (“TFG”) which is a timberland investment management organization headquartered in Chapel Hill, North Carolina. Mr. Linwood C. Thornton, II serves as Chief Financial Officer of TFG.

Respondent/Plaintiff, Eva C. Cox Caudill is the Administratrix of the Estate of Mary Etta Southers and is a resident of Whitesburg, Kentucky. Ms. Southers died on March 13, 2007, and at the time was a resident of Mingo County, West Virginia.

Respondent, Honorable Michael Thornsby is a duly elected Circuit Court Judge in the 30th Judicial Circuit, and is the presiding Judge in Civil Action No. 09-C-3.

## STANDARD OF REVIEW

W. Va. Code § 53-1-1 allows a litigant to petition the West Virginia Supreme Court for a Writ of Prohibition “in all cases of usurpation and abuse of power, when the inferior court . . . exceeds its legitimate powers.” The Writ “may not be used as a substitute for a petition for appeal.” Syl. pt 1, *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 575 S.E.2d 124 (2002)(in part). Therefore, “[a] motion to vacate a default judgment is addressed to the sound desecration 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 such discretion.” *Games-Neely ex rel West Virginia State Police v. Real Property*, 211 W. Va. 236, 565 S.E.2d 358 (2002). Under the “abuse of discretion” standard of appellate review, “[i]f the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion . . . . [and] permit[s] reversal where an incorrect legal standard is applied.” *Caperton v. A.T. Massey Coal Co., Inc.*, --- W. Va. ---, --- S.E.2d ---, 2009 WL 3806071 (2009)(internal citations omitted).

### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 13, 2007, Mary Etta Southers died when a tree fell onto her automobile as she drove on U.S. Route 52 in Mingo County, West Virginia. Heartwood allegedly owned the property from which the tree fell. Heartwood contracted with American Forest Management (“AFM”) to maintain and inspect the property, to indemnify Heartwood for any claims resulting for AFM’s failure to properly maintain the property, and to purchase liability insurance with Heartwood listed as an additional named insured. AFM has been responsible for the management of this property since 1999.

On January 5, 2009 the Estate of Ms. Southers filed suit against Heartwood in the Circuit Court of Mingo County, West Virginia. The Honorable Michael Thornsby received the case assignment. The West Virginia Secretary of State’s office served Heartwood via its registered agent “CT Corporation” on January 7, 2009.

Linwood C. Thornton II is employed by the Forestland Group, LLC (“TFG”) as the Chief Financial Officer. On or about January 12, 2009, a legal assistant from Petitioner’s corporate counsel, Womble, Carlyle, Sandridge, and Rice, PLLC, sent a copy of the Complaint through electronic mail. The legal assistant also copied two attorneys who serve as the Petitioner’s

corporate counsel, David Baddour and Ken Shelton, providing copies of the Service of Process Transmittal, Summons and Complaint, First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions. The electronic mail message did not contain any instructions for Mr. Thornton.

During this same period of time, Mr. Thornton's attention was distracted by sudden medical problems involving both of his elderly parents. On January 6, 2009, his 68 year old mother was hospitalized for several days for major back surgery. Only two weeks after his mother was released from the hospital, his 73 year old father was hospitalized with a kidney stone attack. In addition to medical problems from his parents, Mr. Thornton was also preoccupied with a pending divorce from his wife. In addition to these stressful life events, Mr. Thornton was also involved in several large land transactions for his employer, an external audit, and the downturn in the economy which significantly impacted TFG's operations.

Heartwood's Answer to the Complaint was due on Friday, February 6, 2009. When counsel for the Respondent did not receive the Answer, he waited only five days before filing a Motion for Default Judgment on February 11, 2009. The Honorable Michael Thornsbery signed and entered an Order granting Default Judgment on the same day, February 11, 2009. The Order "granted **default judgment** against the Petitioner, Heartwood Forestland Fund II, L.P, **on the issue of liability only.**" *Order* (emphasis added). The Court then set the case for trial on the issue of damages on March 2, 2009.

On February 19, 2009, Mr. Thornton received the Entry of Default Judgment from corporate counsel, David Baddour. On the same day, Mr. Thornton instructed Mr. Baddour to contact Respondent's counsel. Corporate counsel, Ken Shelton responded asking Mr. Thornton if he had counsel in West Virginia handling the matter. Mr. Thornton then attempted to contact

Respondent's counsel to discuss the matter on Thursday, February 19, 2009. Mr. Thornton was finally able to speak with counsel, Tom Ward on Monday, February 23, 2009.

Heartwood's insurance company did not receive notice of the claim until February 24, 2009. On February 27, 2009, counsel was retained on behalf of Heartwood. On March 25, 2009, counsel for Heartwood filed its Motion to Set Aside Default Judgment. On April 8, 2009, the Respondent filed her Response to the Defendant's Motion to Set Aside Default Judgment. The parties made oral arguments on their motions before Judge Thornsby on April 13, 2009. To clarify the standard argued at the hearing that the Court was to apply in determining whether to set aside an order of default, Heartwood filed its Reply to the Plaintiff's Response on May 11, 2009. The Court then waited almost ten (10) months to issue a ruling. On February 12, 2010, Judge Thornsby entered an Order denying Heartwood's motion to set aside the order of default. The trial court's order incorrectly relied upon the wrong standard in denying Heartwood's motion. The trial court relied upon the factors in *Parsons* which were to be applied in determining whether to set aside a more final award of default judgment rather than the more lenient standard established in *Groves* for an order of default. The Court incorrectly relied upon a finding that Heartwood failed to establish "excusable neglect" which prevented it from timely filing the responsive pleading when the Petitioner was not required to establish excusable neglect. It is from this Order that Heartwood now petitions this Court for a Writ of Prohibition.

### ARGUMENT

I. Writ of Prohibition is Proper When a Trial Court Abuses Its Discretion In Issuing and Order.

W. Va. Code § 53-1-1 allows a litigant to petition the West Virginia Supreme Court for a Writ of Prohibition "in all cases of usurpation and abuse of power, when the inferior court . . . exceeds its legitimate powers." It is clear that the Writ "may not be used as a substitute for a

petition for appeal.” Syl. pt 1, *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 575 S.E.2d 124 (2002)(in part).

A Writ of Prohibition will not be used to prevent a “simple abuse of discretion by a trial court.” Syl. pt 5, *Burnside*. Instead, “the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” Syl. pt 4, *Burnside*. In making this determination, the Court will examine the following five factors:

1. whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
2. whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
3. whether the lower tribunal's order is clearly erroneous as a matter of law;
4. whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
5. whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. pt 2, *Burnside* (in part).

The Court has interpreted these five factors to be “general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.” Syl. pt 2, *Burnside* (in part). Further “[a]lthough all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

II. Based on an Application of the *Burnside* Factors, this Court Should Correct the Trial Court's Order Denying Heartwood's Motion to Set Aside Default via a Writ of Prohibition

a. **Heartwood has no other adequate means to obtain the desired relief.**

At this point in the litigation, Heartwood cannot directly appeal the Order of the Circuit Court granting default. Under W. Va. Code § 58-5-1, litigants can only appeal “final decisions” of a circuit court. A case is final “only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.” Syl. pt 1, *Vaugh v. Greater Huntington Park and Recreation Dist.*, 223 W. Va. 583, 678 S.E.2d 316 (2009). An order setting aside a default **judgment** is appealable. *Parsons v. McCoy*, 157 W. Va. 183, 202 S.E.2d 632 (1973).

West Virginia case law interprets the Federal Rules of Civil Procedure to mean that “[t]he federal rule's distinction between a default and a default judgment has resulted in recognition that a default order is interlocutory. In reality, it represents a default on liability and, until the amount of damages is ascertained, there is no final judgment.” *Coury v. Tsapis*, 172 W. Va. 103, 304 S.E.2d 7 (1983). This interpretation is important because 1998 amendments made the West Virginia Rules similar to the Federal Rules. As recently as 2009, this Court cited this case in footnote for the proposition that orders of default are not appealable.

The *Litigation Handbook on the West Virginia Rules of Civil Procedure* offers the same interpretation. The Handbook states that “[s]ince the entry of a ‘default’ represents an interlocutory order only if it is not a final appealable order.” Franklin D. Cleckley, Robin J. Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 55[a] at 1108. Because entry of default is not a final judgment, Heartwood’s only mechanism to challenge the Circuit Court’s ruling is a Petition for Writ of Prohibition.

**b. Heartwood will be prejudiced in a way that is not correctable on appeal.**

While Heartwood owned the tract of land from which the tree allegedly fell, it contracted with AFM to supervise and administer the property. According to the Complaint, the Respondent is alleging the “[d]efendant knew or should have known of the dangerous condition posed by the Tree as a reasonable inspection would have revealed that the tree was diseased and/or decayed and/or dying . . . .” (emphasis added). However, in the land management contract, AFM agreed to “property protection” as one of its provided services. Property protection was defined to include, among other things, insect and disease surveys, storm damage assessments, and general property inspections. By the very terms of the land management agreement, AFM, **not Heartwood**, allegedly breached its duty to the Respondent by failing to notice the diseased, decayed, and/or dying tree on Heartwood’s property.

AFM further agreed to “fully defend, protect, indemnify, and hold harmless” Heartwood for any “personal injury or death or property damage caused by, arising out of, or in any way incidental to, or in connection with the performance of services hereunder . . . .” Additionally, AFM agreed to purchase and maintain liability insurance with Heartwood listed as an additional named insured. This policy covered the contractual liability assumed under the indemnification provision of the agreement.

Heartwood has tendered the defense in this action to AFM for indemnification based on the land management agreement. To date, AFM has not agreed to provide a defense for Heartwood. AFM has a contractual obligation to defend Heartwood in this action. However, until the entry of default is set aside, it is unlikely AFM’s carrier will assume the defense of Heartwood. The entry of default therefore prejudices Heartwood by forcing it to defend against and possibly pay for the entirety of liability when the alleged failures of another entity, AFM, are

what allegedly caused the decedent's untimely death and resulting Respondent's damages. Heartwood's right to raise the affirmative defenses of indemnification and/or contribution is prejudiced by the entry of default in less than a week after its deadline to answer the Complaint. Further, because these affirmative defenses address the duties of parties during the entirety of litigation, these defenses cannot be effectively raised *after* judgment and cannot be corrected on appeal.

**c. The trial court clearly erred as a matter of law when it required Heartwood to establish excusable neglect before setting aside its entry of default.**

According to the third *Burnside* factor, this Court should grant a writ of prohibition because the trial Court order is clearly erroneous as a matter of law. In this case, the Circuit Court applied the incorrect legal standard in analyzing whether to set aside the prior entry of default. Under *Burnside*, this factor receives substantial weight in determining whether this Court issues a writ of prohibition. *See* Syl. pt 2, *Burnside*.

Rule 55 of the West Virginia Rules of Civil Procedure makes a distinction between a default and a default judgment. "A default relates solely to the issue of judgment on liability. On the other hand, a default judgment represents a judgment on both liability and damages." *Litigation Handbook*, § 55[2] at 1095. In the Circuit Court's original Order, it granted the Respondent's "default judgment against [the defendant] on the issue of liability only." The Order further set a March 2, 2009 trial on the issue of damages. By the order's express language, even though the Court granted "default judgment," it is clear the Court intended to enter default only.

When a litigant files a motion to set aside **default**, the trial court must determine whether "good cause" under Rule 55(c) of the West Virginia Rules of Civil Procedure has been met. Syl.

pt 4, *Hardwood Group v. LaRocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006)(in part). In analyzing “good cause,” the trial court should consider:

1. the degree of prejudice suffered by the plaintiff from the delay in answering;
2. the presence of material issue of fact and meritorious defenses;
3. the significance of the interests at stake;
4. the degree of intransigence on the part of the defaulting party; and
5. the reason for the defaulting party’s failure to timely file an answer.

Syl. pt 4, *Hardwood* (in part).

On the other hand, when a litigant files a Motion to Set Aside **Default Judgment**, the trial should consider:

1. the degree of prejudice suffered by the plaintiff from the delay in answering;
2. the presence of material issue 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. a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied.

See Syl. pts 3 & 5, *Hardwood*.

Therefore, this Court articulated this difference between a Motion to Set Aside Default and a Motion to Set Aside Default Judgment:

“[w]hen the issue is one of whether to set aside an entry of default so that the ‘good cause’ standard of Rule 55(c) is applicable, **it is not absolutely necessary that the neglect or oversight offered as a reason for the delay** in filing a responsive pleading be excusable . . . . **Thus, while a factor under Rule 60(b) can be a consideration, it is not a required finding prior to setting aside an entry of default.** . . . [Instead], a trial court may consider ‘the reason for the defaulting party’s failure to timely file an answer.’”

*Hardwood*, 219 W. Va. at 62.

In reaching its conclusion, this Court recognized that “due to the differences in the finality of the judgment, the standard is applied more leniently in the case of default.” *Id.*

Despite the different standards established by this Court, the trial court applied the standard for default judgment in denying Heartwood's Motion to Set Aside Default. The trial court's errors of law are apparent from reviewing its Order.

In paragraph two (4) of the trial court's order, it wrote:

In addressing a motion to set aside a default judgment, "good cause" requires not only considering the factors set out in Syllabus point 3 of Parsons v. Consolidated Gas Supply Corp., but also requires a showing that a ground set out under Rule 60(b) of the West Virginia Rules of Civil Procedure has been satisfied.

(internal citations omitted)

It is important to note that the trial court found in Heartwood's favor on the first three factors of the *Parsons* test and failed to properly analyze the fourth factor. In doing so, the Court found that the Respondent was not unduly prejudiced by Heartwood's delay in answer; that Heartwood asserted several material issues of fact and meritorious defenses; and that significant interests were present for both the Respondent and the Petitioner. The Court spent paragraphs 22 through 28 analyzing whether the actions of Heartwood were "excusable neglect."

Subsequently, in paragraph 30, the trial court made the fatal conclusion of law when it found that "the Defendant has not made the necessary showing of good cause **and excusable neglect** for failing to file an Answer in this cause of action during the appropriate time period." (emphasis added) Based on this finding, the Court denied Heartwood's Motion to Set Aside Default.

This finding is erroneous as a matter of law. *Hardwood* established a clear distinction between the standards for setting aside default and default judgment. As part of this distinction, *Hardwood* states that "while a factor under Rule 60(b) can be a consideration, it is not a required finding prior to setting aside an entry of default." *Hardwood*, 219 W. Va. at 62. Therefore, by

requiring Heartwood to establish that its conduct was excusable neglect, the trial court's order contained a clear and fatal error of law.

**d. This question of whether an appeal of an entry of default is interlocutory is a novel question of law.**

While dicta included in this Court's opinions and secondary sources such the *Litigation Handbook on West Virginia Rules of Civil Procedure* suggest that an appeal of an entry of default is interlocutory, the point of law has yet to be clearly established through syllabus point. This case presents the proper vessel for this Court to establish and clarify this point of law.

**e. Based on the *Burnside* factors, a writ of prohibition in this case is proper.**

The Petitioner can establish four of the five *Burnside* factors. Further, the Petitioner's strongest argument is factor three which this Court gives "substantial weight." Therefore, this Court should grant the Petitioner a Writ of Prohibition and use the Writ to set aside the trial court's entry of default.

**III. By applying the *Hardwood* factors to the findings of fact by the trial court, this Court can conclude, as a matter of law that the entry of default should be set aside.**

**a. The Respondent was not prejudiced by the delay in answering.**

As the trial court found in its Order Denying Motion to Set Aside Judgment on Liability, the Respondent was not prejudiced by the delay in answering. The incident occurred on March 13, 2007. The Complaint was filed almost two years later on January 5, 2009. The Respondent/Plaintiff moved for, and received, an entry of default on February 11, 2009, five (5) days after the Petitioner/Defendant was supposed to answer. Finally, the trial court waited ten months, from April 13, 2009 until February 12, 2010, to rule on Heartwood's motion to set aside. It is hard to argue the Respondent was prejudiced in the five (5) days between the deadline for

the responsive pleading and the entry of default when the case is still being litigated almost three years after the incident due to factors beyond Heartwood's control.

**b. Heartwood has several issues of material fact and meritorious defenses.**

The trial court found that Heartwood raised issues of material fact and meritorious defenses. While Heartwood owns the land from which the tree allegedly fell, it was not responsible for the maintenance and inspections of the property. This creates an issue of material fact on the issue of liability which needs to be resolved by the trier of facts. Further, the land management agreement included provisions which required AFM to indemnify and hold harmless Heartwood in any claim for "personal injury or death or property damage caused by, arising out of, or in any way incidental to, or in connection with the performance of services hereunder . . ." For this reason, Heartwood not only raised an issue of material fact, but it also raised the affirmative defense of indemnification and/or contribution.

**c. The interests at stake are significant.**

The trial court found that the interests at stake for both parties are significant. In this wrongful death action, there is a possibility of a large award of damages. In the deposition of Respondent's economic expert, the witness testified that the estimated value of the Respondent's lost earning capacity claim of the decedent ranged from \$337,503 to \$652,731. The potential for such a large verdict raises stakes which are significant, especially when the liability may rest with an entity not yet a party to the action.

**d. Heartwood's delay of five (5) days was a not significantly intransigent.**

The trial court never correctly analyzed this factor in its order denying Heartwood's motion to set aside. However, had the court properly considered this factor, it could have found in favor of Heartwood. Because the Complaint was served via the West Virginia Secretary of

State's office on January 7, 2009, the responsive pleading was due on Friday, February 6, 2009. Respondent moved for and received an order entering default on Wednesday, February 11, 2009. The trial court gave Heartwood less than a week after the deadline to file its answer. Further, the trial court granted this Motion in an *ex parte* action without providing any notice or opportunity for Heartwood to remedy the situation. Further, once Heartwood received notice of the default, it acted immediately by notifying its insurance carrier and attempting to contact Respondent's counsel.

This is not a case where Heartwood actively ignored a proceeding. Instead, this is a case where an employee of a company made an honest mistake. The trial court's order even classified Heartwood's conduct as "negligence." In this case, Heartwood did not act in a callous or indifferent manner and its intransigence should be considered minimal.

**e. Heartwood's reasons for defaulting are significant and warrant a set aside.**

Unlike the stringent standards of setting aside a default judgment order based on Rule 60(b) of the West Virginia Rules of Civil Procedure, this court may consider the broad reasons for Heartwood's default by considering the facts as a whole.

Mr. Thornton did not act on the electronic mail message forwarding a copy of the Summons and Complaint because he received no instructions from corporate counsel regarding the pleadings. Simultaneous to receiving the pleadings, Mr. Thornton was actively involved in caring for both of his elderly parents when each developed separate and significant medical complications. Mr. Thornton's attention was further diverted by pending divorce proceedings. As if these two circumstances were not enough, Mr. Thornton's professional responsibilities with TFG required extensive travel to address the economic downturn and large acquisitions throughout the United States. Mr. Thornton's duties as a son, spouse, and corporate officer each

pulled him in difficult directions. It is understandable he forgot to verify that corporate counsel acted on the Summons and Complaint. This Court may consider the circumstances leading to the default as a whole when considering whether to set aside an entry of default. In the past, this Court has examined conduct far worse than that of Heartwood and still set aside an entry of default judgment.

For example, in *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W. Va. 309, 664 S.E.2d 531 (2008), this Court applied the more difficult standard articulated in Syl. pt 5 of *Hardwood* to set aside default judgment in a case where the defaulting party waited fourteen (14) months before answering. In *Groves*, the plaintiff filed a complaint on September 1, 2005. In the months that followed, the defaulting party ignored several motions and notices and failed to appear for a final hearing on damages. At this hearing, the circuit court granted Groves \$704,000 via default judgment. The defaulting party did not make its first appearance until November 27, 2006. On appeal, this Court concluded that the degree of the intransigence by the defaulting party was significant. Despite this finding and even with the fourteen (14) month delay in appearing, this Court still used a more difficult standard than is applied in this case and set aside the entry of default judgment. If this Court set aside an entry of default in *Groves* where the conduct of the defaulting party was far more egregious, then this Court should also set aside an entry of default using a more liberal standard for conduct far less intransigent.

### CONCLUSION

When all five *Hardwood* factors are considered on the whole, the balancing test should sway to Heartwood's favor. While it is clear that Heartwood is not without fault in failing to answer the Complaint, its conduct should not rise to the level where it deprives Heartwood of its chance to have the case heard on its merits and it strips the Respondent of the right to seek

damages from an appropriate party not involved in the litigation. The judicial system prefers that cases be won or lost on the correct application of law to facts. The system fails to protect the rights of litigants when technical or procedural defects control the outcome of litigation. The West Virginia Rules of Civil Procedure specifically allow for the set aside of entries of default out of respect for this legal truth. If any case should have an entry of default set aside, it is this case.

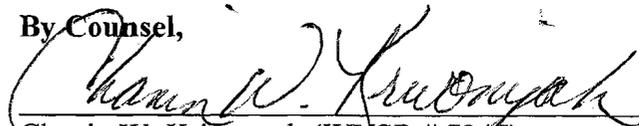
**PRAYER FOR RELIEF**

WHEREFORE, the Petitioner, Heartwood Forest Fund II prays as follows:

1. That the Petition for Writ of Prohibition be accepted for filing;
2. That this Court issue a rule directing the Respondents to show cause, if they can, as to why a Writ of Prohibition should not be awarded;
3. That the case be stayed until resolution of the issues raised in this Petition;
4. That the Court award a Writ of Prohibition against the Respondents, instructing the Circuit Court to set aside its February 11, 2009 entry of default;
5. That, in the alternative, the Court award a Writ of Prohibition against the Respondents, instructing the Circuit Court to use the correct legal standard and reconsider its Order denying Heartwood's Motion to Set Aside in light of *Hardwood v. LaRacco*; and
6. That the Court award such other and further relief as the Court may deem proper.

**HEARTWOOD FORESTLAND FUND II LP,**

By Counsel,



Chanin W. Krivonyak (WVSB # 7247)  
Joshua Charles Dotson (WVSB #10862)  
Keith R. Hoover (WVSB # 11099)

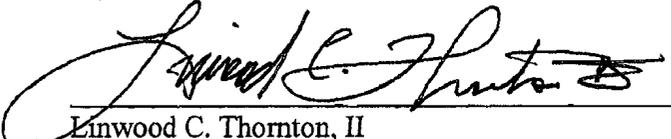
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, West Virginia 25301  
(304) 344 - 0100

DATED: March 16, 2010

**HEARTWOOD FORESTLAND FUND II, LP'S  
VERIFICATION OF PETITION  
FOR WRIT OF PROHIBITION**

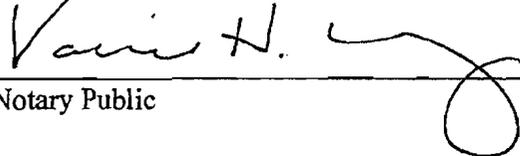
STATE OF NORTH CAROLINA,  
COUNTY OF Orange, to-wit:

In verification of the Petition for Writ of Prohibition, Linwood C. Thornton, II, for Heartwood Forestland Fund II, Petitioner, hereto affixes his Verification of the Petition for Writ of Prohibition heretofore filed herein and incorporated by reference herein, and certifies that all allegations contained in the same Petition are, to the best of his knowledge and belief, true and correct.

  
\_\_\_\_\_  
Linwood C. Thornton, II

Taken, subscribed and sworn to before the undersigned, a Notary Public in and for the County of Orange and State of North Carolina, this the 16th day of March, 2010.

My Commission expires: April 10, 2010.

  
\_\_\_\_\_  
Notary Public

(SEAL)



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HEARTWOOD FORESTLAND  
FUND II LP,**

**Petitioner,**

v.

Upon Original Jurisdiction in  
Prohibition,

No. \_\_\_\_\_  
(Civil Action No. 09-C-3, In the Circuit  
Court of Mingo County, West Virginia)

**THE HONORABLE MICHAEL  
THORNSBURY, and EVA C. COX  
CAUDILL, as Administratrix of the Estate  
of MARY ETTA SOUTHERS,**

**Respondents.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Petitioner/Defendant below, does hereby certify that the foregoing "**Memorandum of Law in Support of Petition for Writ of Prohibition**" was served upon the following interested parties/counsel of record:

Honorable Michael Thornsby  
Mingo County Circuit Court  
Mingo County Courthouse  
75 East Second Avenue  
P.O. Box 1198  
Williamson, WV 25661

W. Thomas Ward, Esquire  
Ward & Associates, PLLC  
PO Box 628  
250 East 2nd Avenue  
Williamson, WV 25561-0628

R. Chad Duffield, Esquire  
FARMER, CLINE & CAMPBELL, PLLC  
P.O. Box 3842  
Charleston, WV 25338

Darrell V. McGraw, Jr.  
West Virginia Office of the Attorney General  
West Virginia State Capitol Building  
Room 26-E  
Charleston, WV 25305

by depositing a true copy of the same in the United States mail, properly addressed with postage fully paid, on this 16<sup>th</sup> day of March, 2010.



Chanin Wolfingbarger Krivonyak (WVSB # 7247)  
Joshua Charles Dotson (WVSB #10862)  
Keith R. Hoover (WVSB #11099)

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