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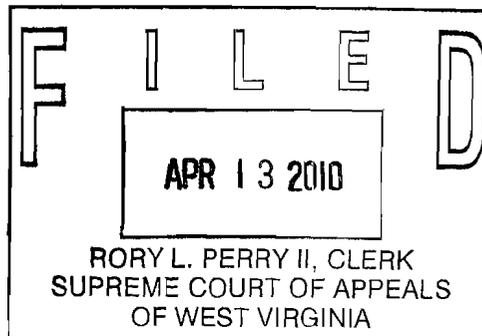
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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.

From the Circuit Court of
Mingo County, West Virginia
Civil Action No. 09-C-3

**RESPONDENT EVA C. COX CAUDILL'S BRIEF IN
RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

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**RESPONDENT EVA C. COX CAUDILL'S BRIEF IN
RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

Now comes the Respondent, Eva C. Cox Caudill, as Administratrix of the Estate of Mary Etta Southers (deceased), by counsel, and in response to the previously filed Petition for Writ of Prohibition (hereinafter "Petition") and Memorandum of Law in Support of Petition for Writ of Prohibition (hereinafter "Petitioner's Brief"), provides the following memorandum of law, asking the Court to deny the Petition and the relief requested.

FACTUAL AND PROCEDURAL BACKGROUND

The Factual Background section set forth within the Petitioner's Brief correctly states the procedural history of this case, which is quite simple: The Petitioner failed to file a timely response to the underlying lawsuit despite the fact that its notice of process designee, its Chief Financial Officer, and at least two attorneys acting as corporate counsel received notice of the claim more than twenty-five days before a response was due. Due to the failure to file a timely response, the Trial Court entered the Petitioner's default on the issue of liability and set a hearing on damages. *See*

Final Order, Ex. A. Thereafter, the Petitioner filed its Motion to Set Aside Default Judgment (hereinafter “Motion”), asking the Trial Court to set aside the entry of default for good cause, pursuant to Rule 55(c) of the *West Virginia Rules of Civil Procedure*. See *Motion*, Ex. B.

Importantly, the only “good cause” the Petitioner asserted as the basis for its Motion was, in the Petitioner’s words, the “excusable neglect” of its Chief Financial Officer, Linwood C. Thornton, II. See *Motion*, Ex. B. The Petitioner’s Motion included an Affidavit from Mr. Thornton which claimed that he received notice of the lawsuit from the company’s corporate counsel, but without instructions regarding any specific action he was to undertake. See *Affidavit of Linwood C. Thornton, II*, Ex. C. Mr. Thornton claims that during the time in which he received notice of the lawsuit, he was experiencing unexpected personal difficulties and was under “increased pressures” professionally with regard to a major acquisition and merger which involved millions of acres of timberland and negotiations to renew a \$25 million credit facility. *Id.*, Ex. C. Mr. Thornton claimed that due to his “excusable neglect” he failed to timely inform his insurance carrier of the lawsuit. *Id.*, Ex. C. The Petitioner did not offer an explanation as to why two attorneys, with knowledge of the suit and acting as corporate counsel, also failed to take any action. Thus, it was Mr. Thornton’s “excusable neglect” that the Petitioner relied on as the sole basis to demonstrate good cause for its failure to timely respond to the lawsuit. See *Motion*, Ex. B and Rule 55(c) of the *West Virginia Rules of Civil Procedure*.

Ultimately, the Trial Court ruled that the Petitioner’s Motion failed to demonstrate good cause and thus the Petitioner’s request that the Trial Court set aside the default was denied. See *Order Denying Motion to Set Aside Default Judgment on Liability* (hereinafter “Order”), Ex. D. The Petitioner now criticizes the Trial Court’s Order because it referenced “excusable neglect,” despite the fact that it was the Petitioner that raised the claim in the first place. As demonstrated below, the

Petition should be denied as the Petitioner has failed to meet its burden in demonstrating that the Trial Court flagrantly abused its discretion and caused the Petitioner to suffer irreparable harm that is not correctable on appeal.

ARGUMENT

A WRIT OF PROHIBITION IS INAPPROPRIATE AS THE PETITIONER CAN FILE AN APPEAL, HAS NOT SUFFERED IRREPARABLE HARM, AND HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT FLAGRANTLY ABUSED OR EXCEEDED ITS POWER OR DISCRETION

A writ of prohibition is reserved for cases in which the trial court has usurped, abused, or exceeded its legitimate powers. *See W.Va. Code*, §53-1-1. A writ of prohibition is not appropriate to prevent a simple abuse of abuse of discretion by a trial court. Syl. pt. 2, State ex rel Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977)(in part). Additionally, a writ of prohibition is not appropriate where it is used as a substitute for a petition for appeal. Syl. pt. 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953). Accordingly, the Court should not issue a writ of prohibition unless the abuse of discretion is “so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate.” See Syl. pts. 4 and 5, State ex rel. Shelton v. Burnside, 212 W.Va. 514, 575 S.E.2d 124 (2002). To make this determination, the Court will examine the following five factors:

1. whether the party seeking the writ has no other adequate means, such as a 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 procedure 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, 212 W.Va. 514, 575 S.E.2d 124 (in part).

As demonstrated below, the Petitioner has failed to demonstrate that the Trial Court flagrantly abused its discretion in a manner which caused the Petitioner to suffer irreparable harm not correctable on appeal. Thus, the Petitioner cannot satisfy the Burnside factors and its petition should be denied. See Syl. pt. 2, Burnside, 212 W.Va. 514, 575 S.E.2d 124 (in part).

A. The Petitioner has other adequate means to obtain the desired relief as it can file a direct appeal.

There is no question that the Petitioner has the right to appeal any future judgment order the Trial Court will enter, after the hearing on damages. See Parsons v. McCoy, 157 W.Va. 183, 202 S.E.2d 632 (1973). In such an appeal, the Petitioner can raise its current argument that the Trial Court abused its discretion in granting default on the issue of liability and any other errors that the Petitioner may assert were made during the damages portion of the lawsuit. Thus, the Petitioner's claim that it has no other adequate means to obtain relief is incorrect as the Petitioner can raise the same argument it has asserted in this writ, in its direct appeal. Accordingly, the Petitioner has failed to satisfy the first Burnside factor. See Syl. pt. 2, Burnside, 212 W.Va. 514, 575 S.E.2d 124.

B. The Petitioner has failed to show irreparable harm not correctable on appeal.

The Petitioner also fails to demonstrate that it will suffer irreparable harm if the Petition is not granted. The only "harm" the Petitioner has even alleged is that it is being forced to "defend against and possibly pay for the entirety of liability," despite the fact that another entity, American Forest Management (hereinafter "AFM"), has contractual obligations to indemnify and defend the Petitioner in this case. *See Petitioner's Brief*, 8-9. However, even if the Petitioner is correct and AFM has an obligation to indemnify, the Petitioner will be entitled to reimbursement of all costs,

including attorney fees expended in defending this matter, and thus will suffer no harm. *See Forestland Management Consulting Agreement* (hereinafter “Agreement”), p. 2-3, Ex. E. Specifically, the indemnification Agreement requires AFM to indemnify and hold the Petitioner harmless from any liability, cost, and expense, including attorneys’ fees and expenses incurred in defending a claim. *See Agreement*, p. 2, Ex. E.

The Petitioner claims that it has tendered the defense in this action to AFM, but that AFM has not agreed to provide a defense despite its contractual obligations. *See Petitioner’s Brief*, 8. Regardless of the current state of that dispute, the fact of the matter is that the Petitioner may attempt to enforce its rights under the Agreement. If the Petitioner is correct, it will recover all defense costs and liability payments from AFM. If the Petitioner is incorrect, then it will ultimately be responsible for the defense costs and judgment award anyway. Thus, in either situation, the Petitioner will not suffer any irreparable harm that is not correctable on appeal. Accordingly, the Petitioner has failed to satisfy the second Burnside factor. *See Syl. pt. 2, Burnside*, 212 W.Va. 514, 575 S.E.2d 124 (in part).

C. The Trial Court applied the correct legal standard in considering whether or not the Petitioner demonstrated good cause sufficient to justify the setting aside of the entry of default.

The third Burnside factor, the one which receives substantial weight, asks whether or not the Court applied the correct legal standard. *Id.* While the Petitioner is correct in asserting that there is a distinction between the entry of default versus the entry of a default judgment, the Order reflects that the Trial Court applied the correct standard, given the procedural history of the case. *See Order*, Ex. D.

The Trial Court entered the Petitioner’s default on the issue of liability only. *See Final Order*, Ex. A. Thus, a hearing on damages has not occurred and default judgment has not been

entered. Given this posture, the standard by which the Petitioner’s Motion to Set Aside Default Judgment should have been judged is whether or not the Petitioner can demonstrate “good cause” for its failure to file a timely Answer. *See* Rule 55(c), *West Virginia Rules of Civil Procedure*. In analyzing “good cause” for the purposes of considering whether or not to set aside the entry of default, as opposed to default judgment, this Court has held that the Trial Court should have considered the following five factors:

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

Syl. pt. 4, Hardwood Group v. Larocco, 219 W.Va. 56, 631 S.E.2d 614 (2006)(in part).

The Petitioner apparently agrees that the Trial Court properly applied the first three factors. The Petitioner’s claim is that the Trial Court incorrectly applied the fourth and fifth factors of the Hardwood test and applied an additional requirement of “excusable neglect” as if default judgment had already been entered and the motion was being considered under Rule 60(b) of the *West Virginia Rules of Civil Procedure*. However, the Trial Court’s Order in this case clearly indicates that it considered the five Hardwood factors ¹ in its decision to deny the Petitioner’s Motion and did not

¹ The Order reflects that the Trial Court found that the first factor favored the Petitioner as the Plaintiff was not “unduly prejudiced” by the delay. *See Order*, ¶13, Ex. D. Next, the Trial Court found that the second factor favored the Petitioner as there were “considerable material issues of fact and meritorious defenses in this matter.” *See Order*, ¶ 17, Ex. D. Next, the Trial Court found that the third factor favored the Petitioner as there were significant interest at stake. *See Order*, ¶ 20, Ex. D.

require a finding of excusable neglect, but simply considered neglect as that was the only good cause asserted for the failure to file a timely response. *See Order*, Ex. D and *Motion*, Ex. B.

With regard to the fourth and fifth Hardwood factors (intransigence of the defaulting party and the reason for the delay), the Trial Court's Order reflects that it considered the following:

- (1) The Petitioner's authorized agent for service of process, its Chief Financial Officer, and two attorneys acting as corporate counsel received notice of the claim, but took no action to ensure that a timely Answer was filed. *See Order*, ¶¶ 22, 24, 31, Ex. D.
- (2) During the time period between receipt of the Complaint and the date its Answer was due, the Petitioner was preoccupied with large scale business transactions. *See Order*, ¶4, Ex. D.
- (3) Although the Petitioner alleges "excusable neglect" as the reason for failing to file a timely Answer, the acts are more properly classified as negligence on the part of corporate counsel and Mr. Thornton. *See Order*, ¶ 29, Ex. D.

There is no question that the Court considered the reason for the Petitioner's delay and whether the Petitioner was intransigent. Ultimately, the Court found that the multiple failures of corporate counsel and a chief financial officer to respond to a wrongful death lawsuit simply because they were preoccupied with significant business transactions was not good cause. *See Order*, ¶ 30, Ex. D. Thus, the Trial Court appropriately applied the Hardwood factors and applied the appropriate "good cause" standard required by Rule 55(c). *See Order*, Ex. D, Rule 55(c), *West Virginia Rules of Civil Procedure*, and Syl. pt. 4, Hardwood Group v. Larocco, 219 W.Va. 56, 631 S.E.2d 614 (in part).

D. The Trial Court did not require the Petitioner to demonstrate excusable neglect.

The Petitioner also claims that the Trial Court also committed clear error because it required the Petitioner to show "excusable neglect." Although the Court did not view the Petitioner's actions as "excusable neglect," there is nothing in the Order indicating that the failure to find excusable neglect was the reason for the Court's denial of the Petitioner's Motion. *See Order*, Ex. D. To the

contrary, the Trial Court's Order clearly indicates that it failed to find "good cause" which is the proper standard pursuant to Rule 55(c) of the *West Virginia Rules of Civil Procedure*. See *Order*, Ex. D. Thus, regardless of whether or not the Court considered "excusable neglect," there is no doubt the Court applied the correct standard in addressing good cause.

Furthermore, although the Order mentions "excusable neglect," there is nothing wrong with the Trial Court considering "excusable neglect" or any other Rule 60(b) factor when deciding whether or not to set aside the entry of default. See Hardwood, 219 W.Va. 56, 62, 631 S.E.2d 614, 620. Specifically, in Hardwood, this Court noted that "while a factor under Rule 60(b) **can be a consideration**, it is not a required finding prior to setting aside the entry of default." *Id.* (emphasis added). Thus, it was not error for the Trial Court to consider excusable neglect.

Additionally, it was entirely appropriate for the Trial Court to address "excusable neglect" in its Order because that was the Petitioner's only alleged reason for failing to file a timely response. See *Motion*, Ex. B. Thus, in accordance with the inquiry required by the fifth factor of the Hardwood test, the Trial Court considered and evaluated the reason the Petitioner stated for failing to file a timely Answer, which is absolutely reasonable and appropriate.

Accordingly, because the Trial Court applied the correct law, the Petitioner has failed to demonstrate a clear error sufficient to satisfy the third factor of the Burnside test for extraordinary relief. See Syl. pt. 2, Burnside, 212 W.Va. 514, 575 S.E.2d 124 (in part).

E. The Trial Court's Order does not represent a persistent disregard for procedural or substantive law and does not raise any issue of first impression.

The Petitioner also fails to satisfy the final two Burnside factors. As demonstrated above, the Trial Court correctly applied the law and thus the Petitioner cannot demonstrate the fourth Burnside factor, which is a persistent disregard for procedural or substantive law. See Syl. pt. 2,

Burnside, 212 W.Va. 514, 575 S.E.2d 124. It appears from the Petitioner's Brief that it has conceded this fact. *See Petitioner's Brief*, 12 (admitting that the petition cannot establish all five factors).

With regard to the fifth and final Burnside factor, the Petitioner asserts that this case raises a novel issue of law regarding whether or not a party can appeal the entry of default.² *See Petitioner's Brief*, 12. Specifically, the Petitioner claims that although dicta in this Court's prior opinions suggest that an appeal of the entry of default is interlocutory and cannot be directly appealed, the Court has not specifically made such a holding. *See Petitioner's Brief*, p. 12. While it is true that this Court has, on occasion, made an exception to the general rule and reviewed default cases where judgment was not final, the fact of the matter is that this issue is not a novel one and is certainly not a matter of first impression for this court. See Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464, 256 S.E.2d 758 (1979).

In Parsons, the Court recognized that "there is much to be gained by all parties to the litigation by having the validity of a default judgment for failure to file a timely response tested by way of direct appeal, rather than awaiting the final outcome of the litigation. Parsons, 163 W.Va. 464, 256 S.E.2d 758 (1979). Like the procedural history in this case, the trial court in Parsons entered the defendant's default, but reserved the question of damages for a later hearing. Parsons, 163 W.Va. 464, 467, 256 S.E.2d 758, 760. Despite the fact that the judgment was not a final judgment, this Court permitted a direct appeal of the trial court's decision that the defendant had not shown good cause. Id., 163 W.Va. at 470, 256 S.E.2d at 762. While Parsons may be cited as support for filing a direct appeal at this juncture, Parsons can be distinguished because in that case there

² It is notable that the Petitioner's argument that it may be able to appeal the entry of default is directly contrary to the Petitioner's claim (under the first Burnside factor) that it has no other means of relief. If the Petitioner could have appealed the entry of default, obviously a writ of prohibition was improper. See Burnside, 212 W.Va. 514, 575 S.E.2d 124.

were two defendants and only one had failed to file a timely answer. Id. Thus, unlike the current case, the defendant who was challenging the default order in Parsons would have had to wait to appeal until the remaining claim against the other defendant was resolved. Id., 163 W.Va. at 465, 256 S.E.2d at 759. In this case, no other defendants remain and thus the liability portion of the case is completed and the Petitioner can directly appeal upon the entry of a final judgment order.

Even after the Parsons decision, this Court recognized a “rather liberal procedural rule with regard to appeals of default judgments” and summarized a number of cases in which the Court had permitted appeals of a default order, despite the fact that no final order had been entered in terms of damages. See Coury v. Tsapis, 172 W.Va. 103, 107, 304 S.E.2d 7, 11-12 (1983)(citations omitted). However, in Coury, the Court noted the difference, at that time, between Rule 55 of the *Federal Rules of Civil Procedure* and Rule 55 of the *West Virginia Rules of Civil Procedure*. Coury, 172 W.Va. at 106, 302 S.E.2d. 7, 10. Specifically, the Court noted that the West Virginia Rule did not recognize the concept of a “default” separate from a default judgment, whereas the Federal Rule made such a distinction. Id. Subsequent to the Coury opinion, Rule 55(a) of the *West Virginia Rules of Civil Procedure* was amended to recognize the distinction as set forth in the Federal Rule. See Rule 55 of the *West Virginia Rules of Civil Procedure*. Thus, the prior situation which prompted the Court to permit, on occasion, an exception to the rule, is no longer present. Accordingly, it would appear that the facts of this case do not give rise to the prior exceptions to the rule that this Court recognized.

While there may not be a syllabus point directly on point for whether or not a party can appeal the entry of default, the issue is not a new or novel one and is certainly not an issue of first impression for this Court. Accordingly, the Petitioner has also failed to satisfy the fifth and final factor of the Burnside test. See Syl. pt. 2, Burnside, 212 W.Va. 514, 575 S.E.2d 124 (in part).

CONCLUSION

Due to the Petitioner's filing of a writ of prohibition, it has the difficult burden of proving that the Court flagrantly abused its discretion and caused the Petitioner to suffer irreparable harm that is not on appeal. Not only has the Petitioner failed to demonstrate irreparable harm, the Petitioner clearly has the right to appeal the Trial Court decision, if not at the present time, certainly after the Court enters a final judgment. Further, the Petitioner has failed to satisfy the remaining Burnside factors and thus, its Petition for Writ of Prohibition must be denied. See Syl. pt. 2, Burnside, 212 W.Va. 514, 575 S.E.2d 124 (in part).

EVA C. COX CAUDILL,
ADMINISTRATRIX OF THE ESTATE
OF MARY ETTA SOUTHERS,

Plaintiff,

By Counsel:



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EXHIBITS

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