



# In the Supreme Court of Appeals of West Virginia

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Docket No. 14-1328 and Docket No. 14-1329  
(Consolidated)

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**ESTATE OF LUIGI BOSSIO A/K/A LOUIS BOSSIO**, Defendant Below, Petitioner,  
v.  
**BERNARD V. BOSSIO**, Plaintiff Below,  
Respondent.

AND

**SAM BOSSIO**, Defendant Below, Petitioner,  
v.  
**BERNARD V. BOSSIO**, Plaintiff Below,  
Respondent.

Appeal from an Order of the Circuit Court of Monongalia County (No. 08-C-821) certified as final under W.Va. Code § 58-5-1 and W.Va.R.C.P. 54

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## Petitioner's Reply Brief

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## REPLY ARGUMENT

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1. Neither this Court nor any court applying West Virginia law has ever held that a party opposing an alleged lost instrument must produce contradictory evidence.

Respondent Bernard Bossio's ("**Bernard**") brief claims that this Court must affirm the Circuit Court because "Petitioners offered no evidence whatsoever" that the alleged 1982 Contract or 1990 Contract did not exist. (See Respondent's Brief, pp. 21–22.) In footnote 5 of his brief, Bernard similarly argues that "Petitioners offered no evidence or even suggested that Respondent lost the Agreement." (See Respondent's Brief, p. 19 n.5.) Bernard's brief appears to be arguing that Petitioners Samuel Bossio ("**Sam**") and the Estate of Luigi Bossio (the "**Estate**") held some evidentiary burden before the Circuit Court. But the sole case cited in Bernard's brief for that proposition—*Banks v. Mitsubishi Motors Credit of Am., Inc.*, 435 F.3d 538 (5th Cir. 2005)—had nothing to do with West Virginia law and is otherwise distinguishable.

In *Banks*, the alleged "lost agreement" was simply an arbitration agreement, and consequently the proponent of that agreement was only seeking arbitration. *See id.* at 539–540. In this case, Bernard is seeking the enforcement of an alleged agreement that would give him 50% control over a corporation holding valuable assets. (See Petitioner Brief, p. 23.) The *Banks* case is factually distinguishable. Moreover, the court in *Banks* was applying Mississippi law, not West Virginia law, and there is no indication that the two states' laws are similar. *See id.* at 540 ("Mississippi contract law applies here.") For example, the *Banks* case says nothing about Mississippi law requiring an elevated burden of proof for the establishment of an allegedly lost contract, while this Court has for decades demanded such an elevated burden of proof. *See, e.g., Marshall v. Elmo Greer & Sons, Inc.*, 193 W.Va. 427, 429, 456 S.E.2d 554, 556 (1995). The *Banks* case in no way

stands for the proposition that an opponent of an allegedly lost contract bears any burden of proving a negative—namely, that the contract was never written or executed.

This Honorable Court has furthermore never held that a defendant in a lost-contract case ever has a burden of proof, or that there is any burden shifting in lost-contract cases. To the contrary, this Court has held that the proponent of an allegedly lost contract holds the burden of proving “the execution, contents, and loss” of the agreement in question. *Linn v. Collins*, 77 W.Va. 592, 87 S.E. 934 (1916); *see also Marshall*, 193 W.Va. at 429, 456 S.E.2d at 556 (holding that a party seeking the enforcement of an allegedly lost contract has the burden of introducing “conclusive” proof of its contents). The burden is squarely on the proponent to prove the contents, execution, and loss of an alleged lost contract. The Circuit Court erred or abused its discretion in holding as a matter of law that Bernard had proven the execution, contents, and loss of either of the alleged contracts in this matter.

**2. The Petitioner absolutely argued that Bernard Bossio had not proven the contents of the alleged 1990 Contract, including the insurance provision. There is no waiver of this issue.**

Bernard’s brief claims that Sam “never raised ... the fact that the insurance obligations were removed in the 1990 Contract,” and thus, Sam should be deemed to have waived those arguments. (See Respondent’s Brief, pp. 22–23.) That assertion is simply incorrect.

Sam in fact challenged Bernard’s uncorroborated testimony that the alleged 1990 Contract had different insurance requirements than the alleged 1982 Contract, and he did so in the portion of the record cited in Bernard’s brief. (See Respondent’s Brief, p. 23 (citing APP. 343–360; 481–494).) Specifically, in Defendant Sam Bossio a/k/a Samuel Bossio a/k/a Savario Bossio’s Proposed Findings Of Fact And Conclusions Of Law (which may be found in the Appendix at pp. 343–360) Sam argued:

31. *According to Bernard, the only substantive change made with respect to the 1982 buy-sell agreement in 1990 was the removal of language requiring Bossio Enterprises to purchase life insurance for the shareholders.* (Trial Tr. 38:6-38:14.)
30. Bernard, by his own testimony, cannot clearly and conclusively recall what was in the 1982 buy-sell agreement; ergo, he cannot meet the standard of the elevated burden to clearly and conclusively prove what was contained in the 1990 agreement.
31. Indeed, the law calls for more than a general recollection of the contents of the lost instrument, it calls for proof of the instrument's provisions to be complete in every detail. *Stump v. Harold*, 23S.E. 2d 656, 658 (W.Va. 1940).
32. In order for Bernard's position to prevail, one would have to take Bernard's equivocal testimony regarding that content of final 1982 buy-sell agreement as correct, *and then also assume that those exact terms were also contained in the 1990 buy-sell agreement, minus the insurance requirement. Such a series of assumptions does not square with the elevated burden of proof in this case.*
39. Given that no one allegedly involved in the process, including Bernard, whose testimony was less than clear, can recall anything specific regarding the terms and conditions of the alleged 1982 or 1990 buy-sell agreements; there is simply a lack of clear and convincing evidence to find the terms and conditions of this lost 1990 buy-sell agreement.

(APP. 348, 356–357 (emphasis added).) Thus, Sam absolutely raised the argument that Bernard had not met his burden of proof before the Circuit Court—including the argument that Bernard had failed to show that the contents of the alleged 1990 Contract were the same as the contents of the alleged 1982 Contract “minus the insurance requirement.” (APP. 356.) Bernard's argument that Sam has waived this issue is simply not true and is belied by the record.

**3. Whether the uncorroborated testimony of an interested witness meets an elevated burden of proof is not a question of witness credibility.**

As described in Sam's principal brief, Bernard testified that the alleged 1982 Contract and 1990 Contract differed in that the latter 1990 Contract made the purchase of insurance policies optional and not mandatory and also removed language providing that the contract would automatically terminate upon the "termination of the insurance policies on the shareholders." (APP. 63, 75.) But the only evidence for that allegation about the contents of the 1990 Contract was the uncorroborated testimony of Bernard. At no point was Bernard able to introduce or point to any documentary evidence showing that the alleged 1990 Contract contained those terms. Neither did any other witness testify that the 1990 Contract did not require the maintenance of insurance and would not terminate if the insurance ever lapsed. In response, Bernard's brief simply argues that "Judge Clawges obviously accepted Respondent's testimony," and that "credibility determination" cannot be addressed by this Court. (See Respondent's Brief, p. 24.)

But whether a party has met its burden of proof is not a question of credibility, and this Court and other courts applying West Virginia law have held that the uncorroborated testimony of an interested witness cannot meet an elevated burden of proof of the level of the "clear and convincing" standard. *See Thompson v. Stuckey*, 171 W.Va. 483, 486, 300 S.E.2d 295, 298 (1983); *Thacker v. Peak*, 800 F.Supp. 372, 375 (S.D.W.Va. 1992); *Phillips v. Consolidation Coal Co.*, 1998 WL 488613, 153 F.3d 721 (4th Cir. 1998) (unpublished opinion). This is not a matter of credibility; it goes to the fundamental burden of proof. For example, in *Phillips* the plaintiff testified that he had been promised lifetime employment with Consolidation Coal Company, and the jury obviously found him credible because "the jury found that Phillips had such a contract and that Consol had breached it." *See id.* at \*1. But citing this Court's opinion in *Thompson v. Stuckey*, the Fourth Circuit held that a party "cannot satisfy the clear and convincing evidentiary

burden by offering nothing more than his own testimony.” Thus, the Fourth Circuit held that the plaintiff had “failed to establish a prima facie claim for recovery on his alleged contract” because his amount of proof was insufficient as a matter of law. *See id.* at \*3. Whether the plaintiff was credible as a witness was a separate and independent question of whether the plaintiff had met the elevated burden of proof.

Other courts have held that a clear-and-convincing burden of proof cannot be met by uncorroborated oral testimony in a wide variety of contexts. *See, e.g., Hettinga v. Sybrandy*, 886 P.2d 772, 774–775 (Idaho 1994) (plaintiff’s uncorroborated testimony was insufficient to establish a resulting or constructive trust in land, which under Idaho law must be established by evidence that is “clear, satisfactory and convincing”); *Gritten v. Dickerson*, 66 N.E. 1090, 1092 (Ill. 1903) (uncorroborated testimony of the grantor, or party executing a deed, is insufficient to impeach a certificate of the deed’s acknowledgment, which requires proof of the “clearest, strongest, and most convincing character”); *BJ Services Co. v. Halliburton Energy Services, Inc.*, 338 F.3d 1368, 1373 (Fed. Cir. 2003) (uncorroborated testimony alone cannot constitute the clear-and-convincing proof necessary to show inventorship under a patent); *Finnigan Corp. v. Intl. Trade Commn.*, 180 F.3d 1354, 1370 (Fed. Cir. 1999) (uncorroborated oral testimony, even if found credible, cannot by itself provide the clear-and-convincing evidence required to invalidate a patent); *In re Jefferson*, 11-51958-KMS, 2015 WL 359901, at \*5 (Bankr. S.D.Miss. Jan. 26, 2015) (uncorroborated testimony alone does not constitute clear-and-convincing evidence sufficient to create a question of fact regarding the validity of a deed of trust); *McNutt v. Est. of McNutt*, CIV A 3:09-CV-2-FLW, 2009 WL 3756907, at \*6 (D.N.J. Nov. 6, 2009) *aff’d*, 386 Fed.Appx. 113 (3d Cir. 2010) (unpublished) (self-serving uncorroborated testimony insufficient to establish prima facie case of breach of oral contract against decedent’s estate, which under New Jersey’s “Dead Man’s Act” must

be proven by clear-and-convincing evidence). For example, patents are presumed valid by statute, and a party asserting that a patent is invalid under the “prior use” doctrine must present clear-and-convincing evidence of prior use. *See Finnigan* 180 F.3d at 1365. But the plaintiff cannot satisfy that clear-and-convincing burden through uncorroborated oral testimony even if there is no question as to the credibility of the witness; “This is not a judgment that [the plaintiff’s] testimony is incredible, but simply that such testimony alone cannot surmount the hurdle that the clear and convincing evidence standard imposes....” *Finnigan* 180 F.3d at 1370. Whether a plaintiff is credible as a witness is not the same question as whether the plaintiff has met his or her burden of proof.

This Court has cautioned against using the testimony of a single interested witness to meet an elevated burden of proof, and federal courts applying West Virginia precedent have held that a plaintiff cannot satisfy a clear-and-convincing evidentiary burden by offering nothing more than his or her own testimony. This rule has been widely applied in a variety of contexts where a party bears an elevated burden of proof. In this case the only evidence as to the contents of the alleged 1990 Contract was Bernard’s uncorroborated testimony. The Circuit Court erred or abused its discretion in holding that uncorroborated testimony represented “conclusive” or “clearest and most satisfactory” evidence of the contents of the alleged 1990 Contract. Bernard’s uncorroborated testimony falls far short of the heavy elevated burden of the clear-and-convincing proof and thus, the Circuit Court committed an error as a matter of law.

## CONCLUSION

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The Circuit Court's order should be reversed because as a matter of law, Bernard Bossio did not meet the elevated burden of proof necessary in order to prove or enforce the allegedly lost contracts in this case. Petitioner Sam Bossio asks this Court to reverse the decision of the Circuit Court and remand with instructions for judgment to be entered in favor of Sam Bossio and the Estate of Luigi Bossio.

Signed: \_\_\_\_\_



Date: \_\_\_\_\_

6-5-15

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## CERTIFICATE OF SERVICE

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I hereby certify that on this 5th day of June 2015 true and accurate copies of the foregoing Petitioner's Reply Brief were deposited in the U.S. Mail contained in postage-paid packages addressed to the counsel for all other parties to this appeal as follows:

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