

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

BROOKANNE SELLARO,

Petitioner

v.

EUGENE JOSEPH SELLARO,

Respondent

No. 35733

**APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT OF
MONONGALIA COUNTY (07-D-83)**

RESPONDENT'S BRIEF

**Wesley W. Metheney
WV State Bar #2538
Wilson, Frame, Benninger & Metheney PLLC
151 Walnut Street
Morgantown, WV 26505
304.292.9429**

**Holli Massey Smith, Esq.
WV State Bar #2356
39 15th Street
Wheeling, WV 26003
304.232.3739**

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STATEMENT OF THE CASE

This case involves an appeal of the Order of Judge James P. Mazzone entered March 31, 2010, which vacated an award of alimony to the Petitioner and which affirmed the Family Court's classification of certain shares of Mylan stock as Respondent's sole and separate property. Both Judges in Monongalia County Circuit Court recused themselves in this matter. This Court then appointed Judge James P. Mazzone of Wheeling to hear the appeal from Family Court.

The reality of the situation, notwithstanding the parties' desired lifestyle, is that they have now effectuated their family plan, have fully retired, have liquidated their commercial enterprise, have paid off all marital debt, have been awarded equitable distribution, and have decided to go their own ways. A review of the record facts in this case is quite helpful.

At the time of the final hearing in this case, the parties had been married thirty-nine (39) years. Respondent, Eugene Joseph Sellaro, age 62, and Petitioner, Brookeanne Sellaro, age 60, were both in good health. Their children were raised and on their own. (Tr. 185, 447, 470). Throughout the marriage, like most couples today, both worked and contributed to the support of the family. (Tr. 355) Prior to going to law school, Respondent was a school teacher. During Respondent's law school years, his parents paid for his tuition (Tr. 353) and provided the parties with a place to live (Tr. 314-15, 353). Respondent also worked at his family's business as a bartender and for the State Department of Highways and the County Health Department. (Tr. 354), so he could support his family.

Consistent with the agreed upon family plan, Respondent retired, closed his law office, and ceased the practice of law in 2006, with no intention of re-entering the work place. (Tr. 447-448). He had not continued his legally required CLE to maintain his law license. (Tr. 450). He

had been a part-time city judge for two small cities in West Virginia, grossing about \$1,050.00 per month; however, the travel expenses, room and board twice a month from Florida to Morgantown following his retirement, exceeded the gross income received. (Tr. 379-381). The record contains resignation letters from Respondent to the respective cities in regard to his positions as city judge. Respondent, Eugene Joseph Sellaro, has no employment related income.

Consistent with the admitted family plan, Petitioner, Brookeanne Sellaro, who had been educated and employed as a LPN prior to the marriage (Tr. 315) and as late as 2006, earned \$30,000.00 per year, (Tr. 92, 197) allowed her LPN license to voluntarily lapse and retired with no intention of re-entering the work force. (Tr. 334, 491). Petitioner, Brookeanne Sellaro, has no employment related income.

Prior to the divorce action, the parties jointly owned a marital commercial enterprise which was comprised of rental apartments and storage buildings, from which they received monthly rental income. They sold this enterprise and from the proceeds of the sale and all marital debts were paid. Following the sale of this commercial enterprise, the parties were debt free. Petitioner knew her equitable share would be subject to payment of debt. (Tr. 185).

The only difference in the financial situation of the parties following the divorce was monthly income of \$3,200.00 that Respondent received from the rental of "separate" property he received from his deceased mother. Respondent also owns 2,812 shares of Mylan stock which was a gift from his deceased mother.

At this juncture, neither party has employment related income. They each have been awarded one-half (1/2) of the marital estate. They are similarly situated. The Petitioner has been awarded permanent alimony based in large part upon the unreliable and incredible testimony tendered by her expert witness.

At the trial of this case, Petitioner's expert witness, upon whose opinion the Family Court largely relied, testified he never even met with or interviewed his client. (Tr. 67). Petitioner's expert further testified that he DID NOT know any of the following facts prior to giving his expert opinion in this case:

1. The age of either party; (Tr. 71)
2. The retirement status of either party; (Tr. 72)
3. The life plan of the parties; (Tr. 72)
4. The prior work history of Petitioner (his own client); (Tr. 65-69)
5. Petitioner's earning ability; (Tr. 67-69)
6. The vocation of Respondent; (Tr. 67-69)
7. The status of either parties' professional license; (Tr. 67-69)
8. The closing of Mr. Sellaro's law office; (Tr. 72)
9. The sale of the apartment and storage building rentals enterprise and that its rental income no longer existed; (Tr. 67-71);
10. That all debts had been paid in full; (Tr. 71, 92-95);
11. The current income of Respondent (Tr. 98).

The expert admitted that he really did not get enough information prior to his testimony to be able to determine Respondent's bottom figure income. (Tr. 71).

Nevertheless, Petitioner's expert testified that Respondent had the ability to pay upwards of \$5,000.00 per month in spousal support based upon Respondent's historical income over the previous five years of Twelve Thousand Five Hundred Dollars (\$12,500.00) per month.

Historical income which would have included occupational income of both parties which no longer existed! Historical income from a commercial rental enterprise which no longer existed!

He testified that he assumed Respondent had received all of the gross proceeds from the commercial sale. (Tr. 77). He even agreed that Mr. Sellaro's law office income over the years had been negligible, (Tr. 91) with most marital income coming from these very rentals, which now no longer existed. He had "no idea" what happened to the proceeds of the sale. (Tr. 95)

Petitioner's expert then stated that Mr. Sellaro would be a "prudent investor" and thus, no negative effect on Mr. Sellaro's income (even though he had no idea what his current income even was) would occur because Mr. Sellaro would, upon liquidation of the rental properties, shift the gross proceeds of that sale to an investment income producing account (even though most of the proceeds were used to pay off marital debt.)

At trial, the parties agreed that the apartment and storage building sale totaled \$1,500,112.54 as evidenced by Respondent's Exhibit R-4. The parties agreed and the Exhibits R-4 to R-5A show that from this gross sale, marital debts were paid as follows:

1. All commercial rental enterprise related mortgages;
2. All mortgage indebtedness related to both family residences;
3. All indebtedness relating to three family vehicles;
4. All credit card debt;
5. All real estate taxes;
6. All long term capital gain taxes; and
7. The alternative minimum tax assessed for 2006.

After deduction of the above marital debts, this left the sum of \$389,000.00 of sale proceeds in the form of three (3) \$100,000.00 CDs and \$89,000.00 cash in a checking account. When Petitioner left the marriage, she took \$200,000.00 in CDs from the sale of these

commercial assets. Instead of \$1,500,000.00 that Petitioner's expert assumed Mr. Sellaro had received, Respondent actually only received \$189,000.00. Petitioner got \$200,000.00.

Following the tender of this expert's financial opinions presented to establish a basis for payment of alimony, the Petitioner then further alleged that she had been abused during the marriage, and should also receive alimony for that reason. The record in this case shows that the parties were married nearly forty (40) years. Only two incidences were submitted in regard to the allegations of abuse. Both instances were precipitated by the conduct of Petitioner. One was in 2005, following a night out at a restaurant in Florida which involved a night of heavy drinking by the Petitioner (Tr. 145). Petitioner admitted she started the altercation by first pushing Respondent and then throwing jewelry at him. (Tr. 295). As Petitioner was trying to strike Respondent, he reacted defensively and Petitioner was struck in the eye. Petitioner did not go to a doctor, did not call the police, she took no action of any kind. (Tr. 295). Respondent testified that Petitioner struck him and he was trying to avoid further conflict. (Tr. 372).

The second incident, also precipitated by Petitioner, occurred when the parties were sitting on a bed having a discussion about one of their children and Petitioner kicked Respondent. Respondent pulled Petitioner's foot and she slid off the bed on to the floor. (Tr. 373). Petitioner was not injured. The parties then went downstairs in their home to watch TV. (Tr. 188, 296).

The record in this case indicates that the parties were never involved in any divorce action, criminal actions, domestic violence actions (Tr. 295), and had never lived separate and apart at any time throughout the marriage. (Tr. 253).

Only two witnesses were called by either party to address Petitioner's allegations of abuse. Both witnesses were close personal friends of both parties and knew the parties

throughout the entire marriage. Except for the one Florida incident discussed above, both witnesses testified that they had never seen or observed any physical abuse by Respondent. Both testified that they were routinely in the parties' home for dinners, had traveled extensively with the parties throughout the United States (Tr. 134,170-171), and simply never observed any act of abuse by the Respondent. (Tr. 143-144, 172-173). It seems that Petitioner has abandoned her reliance upon those allegations in support of alimony since her statement of the case fails to even address her prior allegations of abuse.

Notwithstanding the facts as outlined above, the Family Court awarded \$2,500.00 per month, nearly eighty percent (80%), of Respondent's separate property income to the Petitioner as permanent alimony in this case. The Circuit Court rightfully found that the Family Court erred when it awarded permanent alimony and vacated the same. The Family Court also found, based upon the testimony, that the Mylan stock was Respondent's sole and separate property. Petitioner now appeals the findings of Judge Mazzone contained in his Order dated March 31, 2010.

SUMMARY OF ARGUMENT

The Circuit Court's rulings in this case on the alimony issue and the stock classification issue were both proper. In vacating the alimony award to Petitioner, Judge Mazzone found that the testimony of Petitioner's expert, upon which the Family Court largely relied, was unreliable and should not have been given any weight. It is well settled that where the evidence does not support the findings of the Family Court, those findings are entitled to no deference. The decision of the Family Court in making an award of alimony to Petitioner was an abuse of discretion and was properly vacated by the Circuit Court.

Judge Mazzone also found that the evidence of record tendered at the final hearing in this matter was sufficient to establish that the 2,812 shares of Mylan stock was the sole and separate property of the Respondent and, therefore, not subject to equitable distribution. Therefore, based upon the record evidence, the Family Court's finding was not clearly erroneous, and Judge Mazzone's finding was proper.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

It is Respondent's position that the Circuit Court committed no error in this case. The Circuit Court properly applied West Virginia law and did not abuse its discretion in doing so.

Since no new ground or legal theory is being addressed in this case, Respondent does not believe a Rule 20 argument is warranted. To the extent that this Court believes that a Rule 19 argument would be helpful to a better understanding of the issues in this case, Respondent has no objection to such argument and to a subsequent memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY FOUND THAT THE PETITIONER WAS NOT ENTITLED TO ALIMONY.

This Court has stated that in reviewing a final order entered by a circuit court upon a review of a decision of a family court, it reviews the findings of fact made by the family court under a clearly erroneous standard, and reviews the application of law to the facts under an abuse-of-discretion standard. *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005). All questions of law must be reviewed *de novo*. *Id.* Applying these standards, it is clear that the Circuit Court of Monongalia County properly concluded that the Family Court was clearly

erroneous in its findings of fact with regard to the factors relating to alimony, and that the Family Court had abused its discretion in awarding alimony to Petitioner.

Under West Virginia Code § 48-6-301, a court granting a divorce is authorized, but not required, to award spousal support to either party. In determining whether alimony is to be granted in a particular case, a court must consider the 20 factors set out in § 48-6-301(b):

- (1) The length of time the parties were married;
- (2) The period of time during the marriage when the parties actually lived together as husband and wife;
- (3) The present employment income and other recurring earnings of each party from any source;
- (4) The income earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children;
- (5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provisions of article seven of this chapter, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive spousal support, child support or separate maintenance: Provided, That for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity;
- (6) The ages and the physical, mental and emotional condition of each party;
- (7) The educational qualifications of each party;
- (8) Whether either party has foregone or postponed economic, education or employment opportunities during the course of the marriage;
- (9) The standard of living established during the marriage;
- (10) The likelihood that the party seeking spousal support, child support or separate maintenance can substantially increase his or her income earning abilities within a reasonable time by acquiring additional education or training;

- (11) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;
- (12) The anticipated expense of obtaining the education and training described in subdivision (10) above;
- (13) The costs of educating minor children;
- (14) The costs of providing health care for each of the parties and their minor children;
- (15) The tax consequences to each party;
- (16) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home;
- (17) The financial need of each party;
- (18) The legal obligations of each party to support himself or herself and to support any other person;
- (19) Costs and care associated with a minor or adult child's physical or mental disabilities; and
- (20) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of spousal support, child support or separate maintenance.

West Virginia Code § 48-6-301(b). In addition, W. Va. Code § 48-8-104 provides that "[i]n determining whether spousal support is to be awarded, or in determining the amount of spousal support, if any, to be awarded, the court shall consider and compare the fault or misconduct of either or both of the parties and the effect of the fault or misconduct as a contributing factor to the deterioration of the marital relationship." *Id.* § 48-8-104.

The Family Court's award of alimony to Petitioner was based in large part on its mistaken belief that the evidence supported a finding that (1) Petitioner had forfeited educational and vocational opportunities during the marriage, (2) Respondent had engaged in "substantial inequitable conduct" during the marriage, and (3) Respondent has the financial ability to pay \$5,000 in support each month based upon a net monthly income of over \$12,500. Each of these

findings is clearly erroneous, as there was no evidence to support any of the findings. It is well settled that where the evidence does not support the findings of the Family Court, those findings are entitled to no deference. *See, e.g., Thomas v. Morris*, 224 W. Va. 661, 687 S.E.2d 760 (2009) (Family Court's factual findings with regard to value of husband's business were not supported by evidence and thus should be reversed); *Chenault v. Chenault*, 224 W. Va. 141, 680 S.E.2d 386 (2009) (Family Court's qualified domestic relations orders did not reflect evidence before the court and thus orders must be vacated).

In particular, the evidence at trial demonstrated that Petitioner had earned her nursing degree and her license as a nurse prior to the marriage, as she was working as a licensed practical nurse in 1968 at the time of the marriage. Petitioner's testimony established that she did not work for about five years after the birth of the parties' second child, but returned to work in 1977 and worked steadily until her recent retirement, last earning \$30,000.00 in 2006. The record is devoid of any evidence to prove any forfeiture of educational opportunities or vocational opportunities.

Moreover, the alleged "substantial inequitable conduct" on the part of Respondent consisted of two isolated incidents that took place in 2005 and 2006, respectively. The first incident occurred when Respondent, defensively responding to the provocation of having jewelry thrown at him and being hit by Petitioner, struck Petitioner. The second incident, disputed by Respondent, purportedly occurred during an incident when Respondent pulled Petitioner off of a bed after she kicked him. Neither incident was reported to police or prosecutor nor was any domestic violence order sought. No other allegations of physical contact were made with regard to the entire 40-year marriage. No evidence of domestic violence, separation or prior filing of a divorce, was brought out until now. Although the Family Court characterized these two incidents

as "substantial inequitable conduct," it is clear that they fail to rise to that level. In numerous West Virginia cases, the courts have defined "substantial inequitable conduct" by a party as misconduct that is so serious that "the trier of fact can infer from it that it *caused* the dissolution of the marriage." *Goddard v. Goddard*, 176 W. Va. 537, 538-39, 346 S.E.2d 55, 56-57 (1986) (emphasis added); *accord Rogers v. Rogers*, 197 W. Va. 365, 368, 475 S.E.2d 457, 460 (1996); *Nutter v. Nutter*, 174 W. Va. 398, 401, 327 S.E.2d 160, 163 (1985).

The Family Court made no findings whatsoever to the effect that the two incidents alleged by Petitioner caused the dissolution of the marriage in this case. The absence of such a finding precludes the Family Court's conclusion that the incidents were "substantial inequitable conduct." In addition, the nature of the incidents were such that no finding of "substantial inequitable conduct" could legitimately have been made. An examination of the West Virginia cases that discuss the term shows that the courts reserve its use for serious, ongoing disruptions to a marriage, and decline to use the term for lesser incidents. *Compare Goddard*, 176 W. Va. at 538, 346 S.E.2d at 56 (although "marriage had been beset with extreme turmoil and wife accused husband of beating her on several occasions and choking her with a telephone cord on one occasion, court found that evidence was not sufficient to show that this conduct caused, or was a factor in causing, the end of the marriage), *and Nutter*, 174 W. Va. at 401, 327 S.E.2d at 163 (testimony which indicated that wife had often bickered with husband and harassed him, and that wife falsely accused husband of having an affair, did not rise to the level of "substantial inequitable conduct" because it was not shown that it "independently caused the dissolution of the marriage"), with *Charlton v. Charlton*, 186 W. Va. 670, 672, 413 S.E.2d 911, 913 (1991) (husband's adultery was "substantial inequitable conduct" that caused the end of the marriage), *and Dyer v. Tsapis*, 162 W. Va. 289, 249 S.E.2d 509 (1978) (husband's conduct, which gave rise

to strong suspicion of adultery and which would lead persons in community reasonably to believe that husband committed adultery, and, thus, to hold wife up to ridicule and contempt, could reasonably be considered sufficient "inequitable conduct" to permit an award of alimony).

The Family Court was clearly erroneous in concluding that Respondent could expect a net income of \$12,500.00 from which alimony could be paid. This \$12,500.00 figure came from Petitioner's expert witness who based his testimony on the mistaken belief that Petitioner was still earning income from his law practice and receiving thousands of dollars each month from apartment and storage building rentals that had been sold and no longer existed. As the Court pointed out, this expert's conclusions were based on a serious misunderstanding of the facts, and he was unaware that the parties were past retirement age, and that both Petitioner and Respondent had in fact retired. The Court pointed out that Petitioner's expert was ignorant of the fact that the parties had long planned on retiring as early as possible and living off the income from this property during retirement. The agreement of the parties with regard to the 50-50 division of the marital property meant that each party has the ability to be self-supporting during retirement in accordance with their long-range plan, and thus an award of alimony was both unnecessary and contrary to the parties' intent with regard to their finances.

In addition to the fact that the Family Court's findings of fact were unsupported, it is clear that the legal standard that it employed was improper. The Family Court awarded alimony on the basis of its finding that Respondent had engaged in "substantial inequitable conduct," but there is nothing in W. Va. Code §§ 48-6-301(b) or 48-8-104 that permits a court to award support on that basis. Instead, as noted by the Circuit Court, fault of a party is but one of many factors to be considered in determining whether alimony is necessary or appropriate, and a court evaluating fault in setting alimony must make a determination as to whether the conduct in

question caused the deterioration of the marital relationship. Again, as stated above, the Family Court did not make a finding with regard to whether Respondent's conduct caused the deterioration of the marital relationship.

Because the parties were put in equal positions as a result of the property division, and because the parties were both retired, the decision of the Family Court to award alimony to Petitioner was plainly an abuse of discretion. As the court found in *Sloan v. Sloan*, 219 W. Va. 105, 632 S.E.2d 45 (2006), absent a finding of a statutory bar to alimony, "the determination of awarding [spousal support] is to be based on "the financial position of the parties."" *Id.* at 108-09, 632 S.E.2d at 48-49 (alteration in original) (quoting *Banker v. Banker*, 196 W. Va. 535, 541, 474 S.E.2d 465, 471 (1996) (quoting *Hickman v. Earnest*, 191 W. Va. 725, 726, 448 S.E.2d 156, 157 (1994)). At the same time, however, spousal support is not to "be awarded solely for the purpose of equalizing the income between spouses." *Pelliccioni v. Pelliccioni*, 214 W. Va. 28, 34, 585 S.E.2d 28, 34 (2003) (quoting *Stone v. Stone*, 200 W. Va. 15, 19, 488 S.E.2d 15, 19 (1997)). Where, as in the present case, the parties each have the resources and the means to support themselves, a substantial alimony award is an abuse of discretion. *See Banker*, 196 W. Va. at 542, 474 S.E.2d at 472 (a balanced distribution of large assets precludes a substantial award of alimony; at most, court may award nominal alimony solely for the purpose of leaving open for later resolution the issue of more substantial alimony where there is proof of uncertainty about one spouse's future earnings, financial condition, or health); *Jordan v. Jordan*, 192 W. Va. 377, 452 S.E.2d 468 (1994) (awarding former wife only \$1 per year in alimony was appropriate; parties had relatively equal net incomes); *Channell v. Channell*, 189 W. Va. 441, 432 S.E.2d 203 (1993) (denial of alimony award to wife was not an abuse of discretion in divorce action, where the evidence showed that neither party had a greater income earning ability than the other).

Petitioner argues in her brief that "(g)ranting a spouse alimony based upon length of the marriage, and parties' contributions during the marriage is well settled in West Virginia law" (Pet'r's Br. at 10), and cites to a number of cases that she claims provide support for an alimony award in this case. However, these cases cited by Petitioner are all so factually dissimilar from the present case as to preclude reliance upon them under the present circumstances. For example, in *Butcher v. Butcher*, 178 W. Va. 33, 357 S.E.2d 226 (1987), cited first by Petitioner, the court held that the circuit court erred in awarding only rehabilitative alimony to the wife, but the facts showed that the wife was 50 years old, had never worked during the marriage, had no vocational skills, and had no independent income to rely upon. *See also Ward v. Ward*, 202 W. Va. 454, 504 S.E.2d 917 (1998) (trial court abused its discretion in making an award of rehabilitative alimony in lieu of permanent alimony upon termination of marriage, where 49-year-old ex-wife's wages as a cashier were approximately \$12,000 and ex-husband's wages as a business executive were in excess of \$100,000, and there was nothing in the record to establish that ex-wife's potential wages as a cashier would ever approach those earned by ex-husband, and ex-husband also retained marital assets); *Hinerman v. Hinerman*, 194 W. Va. 256, 460 S.E.2d 71 (1995) (wife was slightly over 50 years old and had only worked in her dance studio during marriage; income from studio was minimal while husband had a substantial income at steel company; court remanded to consider permanent alimony); *Kapfer v. Kapfer*, 187 W. Va. 396, 419 S.E.2d 464 (1992) (51-year-old wife with health problems had last worked outside the home as a secretary 20 years earlier; husband was a highly paid petroleum engineer); *Bettinger v. Bettinger*, 183 W. Va. 528, 396 S.E.2d 709 (1990) (45-year-old wife was unemployed; husband was doctor with income over \$100,000; court remanded for determination of whether permanent alimony would be appropriate); *Queen v. Queen*, 180 W. Va. 121, 375 S.E.2d 592 (1988)

(51-year-old wife working as a sales clerk at minimum wage; husband had solely owned company and much higher income than wife; court remanded for consideration of permanent alimony); *Gorby v. Gorby*, 180 W. Va. 60, 61, 375 S.E.2d 424, 425 (1988) (wife was 48 and unemployed; husband was employed; court remanded for consideration of permanent alimony); *Magaha v. Magaha*, 196 W. Va. 187, 469 S.E.2d 123 (1996) (wife was 41 with back injuries and did not have a high school diploma; court found she was entitled to alimony).

Each of the above cases relied upon by Petitioner are easily distinguishable from the present situation because in those cases the parties were not retired and the court found that the husband was working and had a substantially greater income and earning capacity than the wife. In contrast, the parties in this case are substantially equally situated, as both are retired, both have substantial property, and both could return to work if the need arose.

Therefore, for all of the foregoing reasons, this Court must affirm the ruling of the Circuit Court that an award of alimony to Petitioner should be vacated.

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT CERTAIN SHARES OF MYLAN STOCK WERE RESPONDENT'S SOLE AND SEPARATE PROPERTY AND NOT SUBJECT TO EQUITABLE DISTRIBUTION

Although Petitioner argues that the Circuit Court abused its discretion in failing to reverse the Family Court's order with regard to the Mylan stock because Respondent presented no documentary evidence to show that the stock was separate property, she fails to recognize that Respondent's testimony alone was sufficient evidence to establish the stock as his separate property. In making her argument, Petitioner has completely misstated the holding of *Pearson v. Pearson*, 200 W. Va. 139, 488 S.E.2d 414 (1997). According to Petitioner, *Pearson* established that "bare assertions without documentary evidence are insufficient to prove facts

from an evidentiary standpoint." (Petitioner's Brief at 14.) In fact, *Pearson* stated only that factual assertions in arguments made to a court by a party must be supported by evidence in the record, and the court specifically stated that such evidence could be from "testimony or documentary evidence." 200 W. Va. at 146, 488 S.E.2d at 421. In particular, in *Pearson* the attorney for the wife had argued to the Family Court that she was entitled to an enhancement in her alimony award because she had been emotionally abused during the marriage. However, the Family Court found, and the West Virginia Supreme Court affirmed, that there was simply no evidence in the record—either testimonial or documentary—to support the allegation that the wife had been emotionally abused. The cases cited by *Pearson* made the same point concerning the need for supporting evidence, as *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), held that in a summary judgment action the movant must point to specific evidence to support his motion and cannot rely on bare assertions of fact, and in *Powderidge Unit Owners Ass'n v. Highland Properties*, 196 W. Va. 692, 474 S.E.2d 872 (1966), the court reached the very same conclusion. Thus, in none of the cases cited by Petitioner did the courts address any distinctions between testimonial and documentary evidence.

In fact, it is well accepted that the testimony of a party is sufficient to establish particular property as separate property in the context of equitable distribution. In *Zalusky v. Zalusky*, 2002 WL 31553133 (Va. App. 2002), for example, the Court of Appeals of Virginia squarely held that the wife's testimony, without any supporting documentation, was sufficient to show that a brokerage account opened during the marriage was separate property because it was funded by proceeds from the sale of a house she owned prior to the parties' marriage. The court stated that "(w)here a particular link in the tracing chain is based solely upon the unsupported testimony of one spouse, the trial court is free to credit that testimony and find the asset to be separate

property.” *Id.* at 2-3 (quoting Turner, *Equitable Distribution of Property* § 5.23, at 274 (West 2nd ed.1994)). Similarly, in *Eikleberry v. Eikleberry*, 2002 WL 46987, 2 (Ohio App. 2002), the court held that the wife's testimony concerning her purchase of investments was sufficient to establish them as separate property, noting that the equitable distribution statute "only requires a party prove separate property was theirs. It does not require any particular form of proof." *See also Walter v. Walter*, 561 S.E.2d 571 (N.C. App. 2002) (evidence supported trial court's finding that the \$11,000 found in safe in the marital home was husband's separate property; husband offered testimony that the \$11,000 came from the sale of clocks that had been his separate properties, and wife acknowledged the original \$11,000 as husband's separate property, but testified that funds from this source were used for marital purposes and replaced with marital funds, and trial court implicitly resolved this conflicting testimony in husband's favor). Thus, from all evidence of record in the case at hand, it is clear that the Court's finding that these certain shares of Mylan stock were the sole and separate property of the Respondent was not clearly erroneous.

CONCLUSION

For the reasons set forth herein, Respondent requests that this Honorable Court affirm the findings of Judge James P. Mazzone which vacated the award of alimony to Petitioner and found that certain shares of Mylan Stock were the sole and separate property of Respondent, and not subject to equitable distribution.

Dated: February 4, 2011

Respectfully submitted,

EUGENE JOSEPH SELLARO
RESPONDENT

By Counsel



Wesley W. Metheney, Esq.
WV State Bar #2538
WILSON FRAME BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, WV 26505
Counsel for Respondent



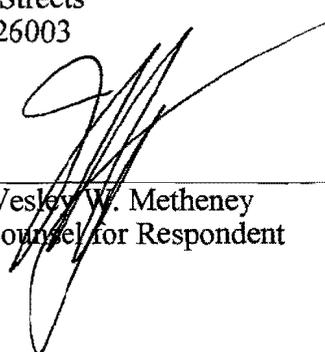
Holli Massey Smith, Esq.
WV State Bar 2356
39 15th Street
Wheeling, WV 26003
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Wesley W. Metheney, do hereby certify that I have served a true and accurate copy of RESPONDENT'S BRIEF upon the Petitioner, Brookeanne Sellaro, by mailing copies thereof, by United States Mail, postage prepaid, this 4th day of February, 2011, addressed as follows to her counsel of record:

Paul J. Harris, Esq.
Fifteenth & Eoff Streets
Wheeling, West Virginia 26003

Shawn L. Fluharty, Esq.
Fifteenth & Eoff Streets
Wheeling, WV 26003



Wesley W. Metheney
Counsel for Respondent