

COPY

No. 13-0290

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOMENICK MARRARA, JR., individually and
as co-Trustee of the DOMENICK MARRARA, JR. TRUST,
SANDRA JEAN MARRARA, individually and
and co-Trustee of the DOMENICK MARRARA, JR., TRUST,
and DOMENICK Marrara, Jr., TRUST,

Plaintiffs Below, Petitioners,

v.

RIPLEY ASSOCIATES, LLC,

Defendant Below, Respondent.

On Petition for Appeal
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 12-C-59

BRIEF OF PETITIONERS, AND ASSIGNMENTS OF ERROR

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BRIEF OF PETITIONERS, AND ASSIGNMENTS OF ERROR

I. Statement of the Facts and Procedural History

1) This action concerns a judicial determination of the value of a dissociated member of a limited liability company's distributional interest pursuant to West Virginia Code § 31b-7-702.

2) Petitioner¹ Domenick Marrara, Jr. Trust is a trust organized under the laws of the state of West Virginia and a former member of Respondent Ripley Associates, LLC.

3) Petitioner Domenick Marrara, Jr. and Petitioner Sandra Jean Marrara are co-trustees of the Domenick Marrara, Jr. Trust.

4) On November 4, 2011, Petitioner Domenick Marrara, Jr., Trust dissociated from Respondent Ripley Associates, LLC, pursuant to West Virginia Code § 31B-6-601 et. seq.

5) By letter dated December 2, 2011, Respondent Ripley Associates, LLC, pursuant to West Virginia Code § 31B-7-701 et. seq., elected to purchase the distributional interest of Domenick Marrara, Jr., Trust, rather than dissolve and wind up the business of Ripley Associates, LLC, pursuant to West Virginia Code § 31B-8-801 et. seq.

6) West Virginia Code § 31B-7-701 provides that the parties should attempt to reach an agreement, within one hundred twenty (120) days, regarding the value of the dissociated member's distributional interest. *See* W. Va. Code § 31B-7-701(d). The parties were unable to reach an agreement regarding the value of the distributional interest of Petitioner Domenick Marrara, Jr., Trust in Respondent Ripley Associates, LLC.

¹"Petitioner," as used herein, refers to Domenick Marrara, Jr. Trust. "Petitioners," as used herein refers to Domenick Marrara, Jr. Trust, Domenick Marrara, Jr., and Sandra Jean Marrara.

7) Pursuant to West Virginia Code § 31B-7-701(d), if an agreement cannot be reached for the purchase of a dissociated member's distributional interest within one hundred twenty (120) days of the member's dissociation, the dissociated member has a right to a judicial proceeding to determine the fair market value of its distributional interest.

8) More than one hundred twenty (120) days passed since Petitioner Domenick Marrara, Jr., Trust dissociated from Respondent Ripley Associates, LLC, and Petitioner Domenick Marrara, Jr. Trust filed a Petition for Judicial Determination of Value.

9) Pursuant to West Virginia Code § 31B-7-701 et. seq., the Circuit Court of Preston County obtained jurisdiction to determine the value of, and to order the purchase of, Petitioner Domenick Marrara, Jr., Trust's distributional interest in Respondent Ripley Associates, LLC.

10) An evidentiary hearing to determine the value of Petitioner's distributional interest in Ripley Associates, LLC, was held before Special Judge Larry V. Starcher in the Circuit Court of Preston County on January 15, 2013.

11) The sole issue presented at the hearing was the value of Petitioner Domenick Marrara, Jr. Trust's distributional interest in Respondent Ripley Associates, LLC, as of November 4, 2011, the date of Petitioner's dissociation from Respondent.

12) At the conclusion of said hearing, by Order signed by Special Judge Larry V. Starcher on February 19, 2013, and entered by the Circuit Clerk on February 20, 2013,

the Circuit Court found that the value of the distributional interest of Petitioner Domenick Marrara, Jr. Trust in Ripley Associates, LLC, was five hundred thousand dollars (\$500,000.00).²

13) West Virginia Code § 31b-7-702(e) [hereinafter, at times, referred to as “Section 702(e)”] provides that: “Interest must be paid on the amount awarded from the fair market value determined under section 7-701(a) to the date of payment.” W. Va. Code § 31b-7-702(e).³

14) After the evidentiary hearing regarding the value of Petitioner’s distributional interest, Petitioners argued that Section 702(e) mandates that interest on Petitioner Domenick Marrara, Jr. Trust’s distributional interest in Respondent Ripley Associates, LLC, began to accrue on the date of Petitioner’s dissociation from Respondent, namely November 4, 2011, and that interest continues to accrue until the date of payment.⁴

15) Respondent objected to Petitioners’ proposed Order which would have awarded Petitioner Domenick Marrara, Jr. Trust interest on the value of its distributional interest in Respondent Ripley Associates, LLC, from the date of dissociation, November 4, 2011, until paid in full. Respondent argued, among other things, that the correct interpretation of Section 702(e) was to award interest only from

²See Exhibit 4 of the Appendix, at RIP-APP39-40.

³W. Va. Code § 31B-7-701 is, at times, referred to herein as “Section 701.” Similarly, W. Va. Code § 31B-7-702 is, at times, referred to herein as “Section 702.”

⁴See Exhibit 1, pages RIP-APP01 through 08 of the Appendix.

the date of the award, January 15, 2013, to the date of the payment of said amount, plus interest.⁵

16) The Circuit Court, informed the parties, via letter, that interest would not begin to accrue until the January 15, 2013, evidentiary hearing regarding the value of Petitioner's distributional interest in Respondent.⁶

17) The Circuit Court, in its Order Regarding Evidentiary Hearing on Value of Plaintiff Domenick Marrara Jr. Trust's Interest in Ripley Associates, LLC, ruled that Petitioner Domenick Marrara, Jr. Trust was entitled to interest only from January 15, 2013, the date of the hearing on the judicial determination of value, to the date of payment.⁷ Petitioners appeal the Circuit Court's ruling in this regard.

II. Summary of the Argument

Petitioners contend that the Circuit Court erred in determining the date on which interest began to accrue on the value of Petitioner Domenick Marrara, Jr. Trust's distributional interest in Ripley Associates, LLC. The Circuit Court ruled that interest on the value of Petitioner's distributional interest in Respondent did not begin to accrue until January 15, 2013, the date of the evidentiary hearing determining such value. Petitioners contend that this ruling is incorrect and that, instead, the Court, in

⁵See Exhibit 2, pages RIP-APP09 through 32 of the Appendix.

⁶See Exhibit 3, pages RIP-APP33 through 34 of the Appendix.

⁷See Exhibit 4, pages RIP-APP35 through 40 of the Appendix.

accordance with Section 702(e), should have ruled that interest on the value of Petitioner's distributional interest in Respondent Ripley Associates, LLC, began to accrue on November 4, 2011, the date of Petitioner's dissociation from Respondent, and that said interest continues to run until such amount, plus all accrued interest, is paid in full.

Section 702(e) specifically provides that "[i]nterest must be paid on the amount awarded from the fair market value determined under section 7-701(a)[.]" W. Va. Code § 31B-7-702(e). As this Court will readily recognize, Section 701(a) references only one date: the date of a member's dissociation from a company. *See* W. Va. Code § 31B-7-701. The date of a member's dissociation from a company, in this case November 4, 2011, is the only logical date on which interest can begin to accrue. Moreover, the general purpose and scope of Article 7 would be contravened by the Circuit Court's interpretation of Section 702(e), which completely neglects the value of a dissociated member's distributional interest between the date of dissociation and the date of final adjudication. Finally, the Circuit Court's interpretation would lead to perverse incentives for limited liability companies and would likely result in additional, unnecessary, litigation to determine the value of a dissociated member's distributional interest in a company.

III. Standard of Review

"Where the issue on appeal from the circuit court is clearly a question of law

or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, Chrystal R.M. v. Charlie A. L., 194 W.Va. 138, 459 S.E.2d 415 (W. Va. 1995).

IV. Assignments of Error and Argument

A. The Circuit Court erred in determining the date on which interest began to accrue on Petitioner Domenick Marrara, Jr. Trust’s distributional interest in Ripley Associates, LLC.⁸

i. A plain reading of W.Va. Code § 31b-7-702(e) and W.Va. Code § 31b-7-701(a) indicates that interest begins to accrue on the value of Petitioner Domenick Marrara, Jr. Trust’s distributional interest, on November 4, 2011, the date of Petitioner’s dissociation from Ripley Associates, LLC.

Petitioners assert no error in regards to the Circuit Court’s determination that the distributional interest of Petitioner Domenick Marrara, Jr. Trust is valued at five hundred thousand dollars (\$500,000.00) as of November 4, 2011. The sole issue of this appeal is whether the Circuit Court erred in its interpretation of Section 702(e). More specifically, the issue is whether the Circuit Court erred by ruling that, pursuant to Section 702(e), interest did not begin to accrue on Petitioner Domenick Marrara, Jr. Trust’s distributional interest in Ripley Associates, LLC, until January 15, 2013, the date of the hearing regarding the value of said distributional interest. Petitioners assert that said ruling was incorrect. Unfortunately, this Court has yet to address this specific issue. However, as the forthcoming analysis of Section 702(e) clearly shows, the Circuit Court erred in its ruling, and the Circuit Court should have ruled that interest began to

⁸Petitioners first raised the issue set forth and expounded upon herein, in Exhibit 1, pages RIP-APP01 through 08 of the Appendix. The Circuit Court’s ruling, which is the subject of this appeal, is set forth in Exhibit 4, pages RIP-APP35 through 40 of the Appendix.

accrue on the value of Petitioner's distributional interest in Ripley Associates, LLC, on November 4, 2011, the date of Petitioner's dissociation from Respondent.

First, the plain language of Section 702(e) indicates that interest must be calculated from the date of dissociation. More specifically, Section 702(e) provides that: "[i]nterest must be paid on the amount awarded from the fair market value determined under section 7-701(a) to the date of payment." W. Va. Code, § 31B-7-702(e). The Circuit Court interpreted W. Va. Code, § 31B-7-702(e) to mean that interest should only begin to accrue on the date of the final hearing which determines the value of the dissociated member's distributional interest, which in this case was January 15, 2013.⁹ In explaining its ruling, the Circuit Court reasoned that interest was to be paid on the "amount awarded," and there was no "award" until January 15, 2013.¹⁰ However, a close examination of the language in both W. Va. Code, § 31B-7-702(e) and W. Va. Code, § 31B-7-701(a) shows that the Circuit Court's interpretation is erroneous.

While Section 702(e) might, when read on its own, appear somewhat unclear as it never specifically states a date certain for when interest is to begin to accrue, Section 701(a), which is explicitly referenced in Section 702(e), resolves any ambiguity and makes clear that interest began to accrue on Petitioner's distributional interest on November 4, 2011, the date of Petitioner's dissociation from Ripley Associates, LLC. Section 701(a) provides, in pertinent part, that:

⁹See Exhibit 4, pages RIP-APP39 and 40 of the Appendix.

¹⁰See Exhibit 3, page RIP-APP34 of the Appendix.

A limited liability company shall purchase the distributional interest of a: (1) Member of an at-will company that members of a limited liability company “shall purchase” the distributional interest for its fair value determined **as of the date of the member's dissociation** if the member's dissociation does not result in a dissolution and winding up of the company's business under section 8-801.

W. Va. Code, § 31B-7-701(a) (emphasis added).

In this case, Petitioner Domenick Marrara, Jr. Trust’s dissociation did not result in the dissolution or winding up of Respondent Ripley Associates, LLC. Section 701(a) makes clear that the fair market value referenced in Section 702(e) is to be determined as of the date of dissociation. Accordingly, the date of relevance, as clearly stated in Section 701(a), is the date of dissociation. **There is no reference anywhere, in either Section 701 or Section 702, to the date of the hearing to determine the value of a member’s distributional interest.** Thus, the language contained Section 702(e), regarding the computation of interest on a member’s distributional interest, clearly must be interpreted such that interest begins to accrue on the date of dissociation.

The Circuit Court’s reasoning that the term “amount awarded” in Section 702(e) means that no interest can be computed prior to the award is also clearly misplaced. The reference to the “amount awarded” in Section 702(e) clearly refers to the principal sum or *amount* that interest is to be calculated from (the “award”). The “amount awarded” is completely irrelevant as to the *date* on which interest begins to accrue. Obviously, interest can begin to accrue on an “amount awarded” prior to the determination of the actual award. Indeed, this is the case for all awards of prejudgment interest, for which the West Virginia Code explicitly provides. *See* W. Va.

Code § 56-6-31. In other words, in cases in which prejudgment interest is awarded under W. Va. Code § 56-6-31, the amount of the award is not determined until the trial occurs. However, successful litigants are still entitled to interest for the time period between the accrual of the cause of action and the time period when the trial begins. Accordingly, despite the Circuit Court's reasoning, West Virginia law clearly provides that interest can accrue before the amount of an award is actually determined.

ii. The scope and purpose of Article 7 of West Virginia's Uniform Limited Liability Company Act would be frustrated by the Circuit Court's interpretation of Section 702(e).

Next, the obvious scope and purpose of Article 7 of Chapter 31b of the West Virginia Code is to appropriately compensate a dissociated member for his distributional interest in a limited liability company at the time of his dissociation. Section 701(b) provides in pertinent part: "[a] limited liability company must deliver a purchase offer to the dissociated member whose distributional interest is entitled to be purchased **not later than thirty days** after the date determined under subsection (a) of this section." W. Va. Code, § 31B-7-701(b) (emphasis added). This subsection is further evidence of Article 7's purpose to swiftly and efficiently compensate dissociated members for their distributional interest as of the date of dissociation.

Section 702 provides the procedures for a judicial determination of the value of a dissociated member's distributional interest, should the dissociated member and the limited liability company fail to agree on a purchase price for said distributional

interest. It is clear that the overall purpose of Section 702 is the same as Section 701: to compensate the dissociated member for his distributional interest in the company at the time he dissociated from the company. Accordingly, Section 702(e) must be interpreted so that interest on a dissociated member's distributional interest in an LLC begins to accrue on said member's date of dissociation. Such interpretation is the only manner by which a dissociated member could be placed in the position that he would have been in had he received his distributional interest on the date of dissociation. It would be nonsensical for Section 702(e) to interject a different date, i.e. the date of the hearing on the determination of the value of the member's distributional interest, into the interest calculation.

Moreover, the Circuit Court's interpretation of Section 702(e) fails to adequately compensate dissociated limited liability company members for the value of their distributional interests as of the date of dissociation. This inadequacy stems from the fact that in the time period between dissociation and final adjudication on value, the limited liability company retains the monetary sum of the dissociated member's interest while the dissociated member is unable to utilize the funds to which he is entitled. Additionally, during said time period, the dissociated member does not have the ability to run, or to take part in running, the company. Essentially, the dissociated member's interests and rights are frozen at the time he dissociates from the company.

Furthermore, Section 702(e) would essentially be rendered meaningless if it is applied in a manner consistent with the Circuit Court's ruling. West Virginia Code §

56-6-31, which governs awards of post judgment interest, provides that “[u]nless otherwise provided, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not.” W. Va. Code, § 56-6-31. As such, in this case, if interest could not be awarded pursuant to Section 702(e), then post-judgment interest would automatically begin to accrue on the value of Petitioner’s distributional interest on February 20, 2013, the date of the entry of the Order Regarding Evidentiary Hearing on Value of Plaintiff Domenick Marrara Jr. Trust’s Interest in Ripley Associates, LLC.¹¹

Under the Circuit Court’s interpretation, the only interest which can be awarded to a dissociated member under Section 702(e), is for the small window of time, usually only a few days¹², between the date of the hearing in which the Circuit Court determines the value of the member’s distributional interest and the date that the order memorializing said determination is actually entered. It defies all logic to interpret Section 702(e) to provide interest for such a short time period. As this Court is well

¹¹ See Exhibit 4 of the Appendix, at RIP-APP40.

¹² In this particular case, due to the dispute set forth herein, as well as an issue regarding a Counterclaim filed in the underlying suit which is irrelevant to this appeal, the time period between the evidentiary hearing regarding the Court’s determination of the value of Petitioner’s distributional interest and the entry of the Order memorializing the same was an exceptionally lengthy thirty-six (36) days. Additionally, and as this Court is well aware, Special Judge Larry V. Starcher is a Senior Status Judge, who does not have any legal staff, clerks, etc., and therefore, Special Judge Starcher has to perform his own legal research, and typing, which likely also caused additional time to elapse in this matter. However, this case was exceptional for the aforesaid reasons, and an Order memorializing a Circuit Court’s findings regarding a member’s distributional interests would typically be entered very shortly after the hearing regarding the same.

aware, statutes related to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments. Syl. Pt. 3, Smith v. State Workmen's Compensation Commissioner, 159 W.Va. 108, 219 S.E.2d 361 (1975). It is simply not plausible to think that the West Virginia Legislature would enact a separate subsection to a statute (i.e. Section 702(e)) in order to award a dissociated member interest for such a short time period (between the hearing and the date of entry of the order), when the **only** relevant date referenced throughout Article 7 is the date of the member's dissociation from the company.

Ultimately, the only way to adequately compensate the dissociated member for the time period between dissociation and the final adjudication on the value of the member's distributional interest is to award the dissociated member interest on the value of his distributional interest from the date of dissociation. Accordingly, the Circuit Court's ruling, which refuses to award a dissociated member any interest on the value of said member's distributional interest between the date of dissociation and the date of the hearing regarding the value determination, leaves the dissociated member in a disadvantageous position and is contrary to the general purpose of Article 7 of Chapter 31b of the West Virginia Code.

iii. The Circuit Court's interpretation of Section 702(e) would provide incentive for Limited Liability Companies to refuse to agree with dissociated members and squander judicial resources.

Finally, and perhaps most importantly, the Circuit Court's interpretation of

Section 702(e) would create perverse incentives for limited liability companies throughout the State and would severely frustrate judicial economy. Specifically, if interest on a disassociated member's distributional interest does not begin to accrue on the date of dissociation, limited liability companies would have an incentive **NOT** to come to an agreement for the purchase of a dissociated member's interest under Section 701. Under the Circuit Court's interpretation of Section 702(e), limited liability companies would avoid paying any interest on the dissociated member's distributional interest until an evidentiary hearing on the same is held. Thus, limited liability companies would be advantaged by refusing to offer full value to dissociated members and would have incentive to hold out, forcing the dissociated member to file a petition in circuit court, and ultimately have an evidentiary hearing before the matter can be resolved.

The time period between a member's dissociation and the final adjudication regarding the value of the member's distributional interest, as demonstrated in this case, can often be a year or more. The Circuit Court's incorrect interpretation of Section 702(e) would result in a windfall for limited liability companies, as companies would retain the entire value of the dissociated member's distributional interest during the time period before the hearing to determine the value of the member's distributional interest. Conversely, the dissociated member would not be compensated in any manner during said time period even though the dissociated member would not be permitted to participate in the company's decision making, or otherwise. Clearly, such

cannot be a correct interpretation of Section 702(e).

Furthermore, the Circuit Court's interpretation of Section 702(e) would also result in a significant waste of judicial resources as many cases that could reasonably be resolved by the parties under Section 701 would instead be forced into circuit courts under Section 702. Section 701 provides a means with which the dissociated member and the company can determine the value of the member's distributional interest informally, without incurring the cost and expenses associated with litigation. If Section 702(e) is interpreted in a manner consistent with the Circuit Court's ruling then the company would have much less incentive to resolve such matters informally with the dissociated member, pursuant to Section 701. Such is contrary to Article 7, which clearly encourages limited liability companies and former members to come to mutual agreements for separation, and to determine the value of the dissociated member's distributional interest, under Section 701 **before** utilizing the judicial procedures available under Section 702.

Similarly, even if limited liability companies had a good faith dispute as to the value of the dissociated member's interest, the Circuit Court's interpretation of Section 702(e) would still incentivize companies to continually delay the final judicial hearing on the value of such distributional interest. Ultimately, the Circuit Court's interpretation of Section 702(e) would provide perverse incentives for limited liability companies and lead to the judiciary resolving more and more disputes that could be adequately resolved by the companies and their dissociated members. Such is further

proof that the Circuit Court's ruling is incorrect and must be overturned.

IV. Request for Oral Argument

As this Court has yet to interpret Rule 702(e), Petitioners hereby requests that they be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

V. Conclusion

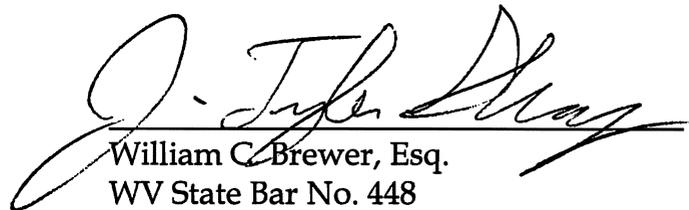
Section 702(e) specifically provides that "[i]nterest **must** be paid on the amount awarded from the fair market value determined under section 7-701(a)[.]" W. Va. Code § 31B-7-702(e). As set forth herein, the date of a member's dissociation from a company, in this case November 4, 2011, is the only logical date from which interest can begin to accrue.

WHEREFORE, for the reasons set forth herein, Petitioners respectfully request that this Court hereby reverse and/or vacate, in part, the Circuit Court's February 20, 2013, Order Regarding Evidentiary Hearing on Value of Plaintiff Domenick Marrara, Jr. Trust's Interest in Ripley Associates, LLC. More specifically, Petitioners request that this Court reverse the Circuit Court's ruling that interest on Petitioner Domenick Marrara, Jr. Trust's distributional interest in Ripley Associates, LLC, did not begin to accrue until January 15, 2013, and that this Court rule that, pursuant to West Virginia Code § 31b-7-702(e), interest on the value of Petitioner

Domenick Marrara, Jr. Trust's distributional interest in Ripley Associates, LLC, began to accrue on November 4, 2011, the date of Petitioner Domenick Marrara, Jr. Trust's dissociation from Ripley Associates, LLC, at the rate of seven percent (7%) per annum, and that said interest runs until payment has been made in full to Petitioner.

RESPECTFULLY SUBMITTED,
PETITIONERS, BY COUNSEL.

BREWER
&
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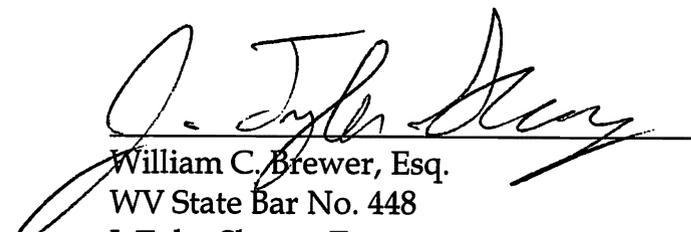
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **BRIEF OF PETITIONERS, AND ASSIGNMENTS OF ERROR** and a copy of the Appendix , on the 18th day of June, 2013, via United States mail, postage prepaid, upon the following:

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