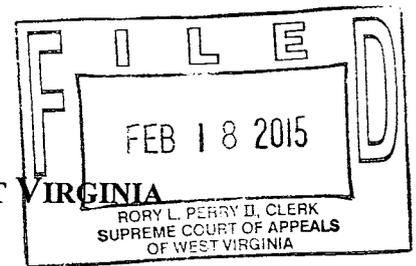


ARGUMENT
DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 14-0998



**GARY W. RICH and LAW OFFICE OF
GARY W. RICH, L.C.**, Plaintiffs/Counter-
Defendants/Third-Party Plaintiffs Below,
Petitioners

v.

JOSEPH SIMONI, Defendant/Counter-
Plaintiff Below, Respondent

v.

**COCHRAN, CHERRY, GIVENS,
SMITH, LANE & TAYLOR, P.C.**, Third-
Party Defendant/Counter-Claimant Below,
Respondent

v.

**LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY & PROCTOR,
P.A.**, Third-Party Defendant/Counter-
Claimant Below, Respondent

v.

BARON AND BUDD, P.C., Third-Party
Defendant/Counter-Claimant Below,
Respondent

From the United States District
Court for the Northern District of
West Virginia (Civil Action No.
1:12-cv-00012-IMK-JSK)

REPLY BRIEF OF PETITIONERS

Counsel for Petitioners,

Richard W. Gallagher (Bar No. 1327)
E. Ryan Kennedy (Bar No. 10154)
Counsel of Record
Robinson & McElwee, PLLC
140 W. Main Street Suite # 300
Clarksburg, WV 26302-0128
(304) 622-5022
rwg@ramlaw.com
erk@ramlaw.com

Tillman J. Finley (*pro hac vice*)
Counsel of Record
Marino Finley PLLC
1100 New York Ave., N.W. Suite 700W
Washington, D.C. 20005
(202) 223-8888
tfinley@marinofinley.com

TABLE OF CONTENTS

I.	Introduction	1
II.	Facts.....	3
	A. THE FACTS AND INFERENCES ARE, AND MUST BE, STATED IN THE LIGHT MOST FAVORABLE TO DR. SIMONI.....	3
	B. MR. RICH DOES NOT AGREE THAT DR. SIMONI IS ENTITLED TO COMPENSATION.....	5
	C. DR. SIMONI'S CLAIMED CONTRIBUTIONS ARE NEITHER WELL-DOCUMENTED NOR UNCONTESTED.....	5
	D. RESPONDENTS' DISPARAGEMENT OF MR. RICH AND HIS PRACTICE IS INACCURATE AND UNFAIR.....	7
	E. THE THIRD-PARTY RESPONDENTS WERE AWARE OF DR. SIMONI'S CONTENTIONS AND CONTRIBUTED TO ANY EXPECTATION HE HAD.....	11
III.	Argument.....	12
	A. DR. SIMONI'S ARGUMENTS RELY ON AN AMORPHOUS SET OF FACTS.....	12
	B. <i>WATSON V. PIETRANTON</i> IS NOT DISPOSITIVE OF THE ISSUE NOW BEFORE THE COURT.....	14
	C. DR. SIMONI'S EQUITY CASES ARE ALL DISTINGUISHABLE FROM, OR CONTRARY TO, HIS CONTENTIONS IN THIS CASE.....	15
IV.	Conclusion.....	17

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Abbott v. Marker</i> , 722 N.W.2d 162 (Wis. 2006).....	16
<i>Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love</i> , 231 W. Va. 577, 746 S.E.2d 568 (2013).....	14-15
<i>Practice Management Assoc. v. Bitet</i> , 654 So.2d 966 (Fla. Ct. App.1995).....	15
<i>Watson v. Pietranton</i> , 178 W. Va. 799, 364 S.E.2d 812 (1987).....	14
<i>“We the People” Paralegal Services v. Watley</i> , 766 So.2d 744 (La. Ct. App. 2000).....	15-16

RULES

W. Va. R. Prof'l Conduct 5.4.....	2, 3
-----------------------------------	------

I. INTRODUCTION

Petitioners are not, as Dr. Simoni repeatedly claims, seeking “to defensively wield the West Virginia Rules of Professional Conduct as a shield against personal and financial responsibility.”¹ (Response Brief of Joseph Simoni, Ph.D. on Certified Question (hereinafter “Simoni Brief”) at 1; *see also id.* at 7, 18.) Mr. Rich did not enter into any agreement which he knew to be unenforceable and from which he now seeks to escape. Nor does Mr. Rich object to compensating Dr. Simoni for the reasonable value of his time *if* a legally-viable, factually-supported, and ethically-proper means of doing so is pled by Dr. Simoni and *if* any such payment is limited to services Dr. Simoni performed for or at the direction of Mr. Rich.

But that is not what Dr. Simoni seeks to do in this case. Instead, Dr. Simoni asserts equitable claims for quantum meruit, unjust enrichment, and breach of implied contract seeking to recover *from Petitioners* an unspecified sum of money purportedly reflective of the value of the entirety of his time doing anything related to either or both of the Spelter and Fairmont litigations (the bulk of which pertains to his work as a consultant not for Mr. Rich, but first for Masry & Vititoe and later for the Third-Party Respondents, most extensively Levin Papantonio) *and* the value of his overall “contributions in” and “the role that in played in furtherance of” those cases. (*See* Simoni Brief at 5, 7.) Dr. Simoni premises his claimed entitlement to such a payment on his alleged expectation of the prospect that he would share in Petitioners’ legal fees if the cases were successful.

Because Dr. Simoni’s claim seeks vague and excessive compensation for activities Mr. Rich was neither involved in nor aware of and it is premised entirely upon Dr. Simoni’s claimed understanding of past discussions regarding the possibility of a fee-splitting arrangement, it

¹ If anything, the reverse is true and Dr. Simoni has attempted to use a distorted and overly sensationalized version of history suggesting unethical conduct by Mr. Rich as leverage to extract payment from Petitioners.

clearly asks Petitioners to perform, or the District Court to impose, a means of compensation that constitutes (or, at the very least, would be tantamount to) the sharing of legal fees with a non-lawyer. To be sure, Dr. Simoni is careful to plead only equitable causes of action and attempts to justify his claim by reference to his alleged hours spent engaged in activities related to the cases. But, at the end of the day, Dr. Simoni's own pleadings and testimony make clear that his expectation was of some sort of fee-splitting arrangement with Petitioners and he now seeks to recover from Petitioners the purported value of *all* of his claimed time, not just his time doing things requested or directed by Petitioners. Accordingly, the District Court certified to this Court the important question now before it: Can Dr. Simoni seek to enforce, through the back-door of equity, a claimed fee-sharing arrangement that would violate Rule 5.4.

Whether the law and public policy of West Virginia will permit someone in the position of Dr. Simoni to do this is a question on which this Court must provide the ultimate answer. To make clear that Petitioners have no interest whatsoever in hiding behind the Rules of Professional Conduct, we have taken no position on the certified question. If the question is answered in the affirmative, that is the end of the matter as the District Court already has concluded. (JA at 2172, 2185.) If the question is answered in the negative and Dr. Simoni is permitted to proceed with his claims as he has pled and supported them irrespective of the terms of Rule 5.4, Petitioners are confident that a jury ultimately will reject Dr. Simoni's version of the discussions between him and Mr. Rich and agree that the only thing that was ever discussed was *the possibility* of a fee-sharing arrangement *if and when Dr. Simoni got his law license*.

Whatever the Court determines the status and reach of Rule 5.4 to be, Petitioners will abide by that ruling irrespective of its impact on their liability, if any, to Dr. Simoni. However, so that the Court may decide the question on a clear record (albeit drawn, as it must be, as

favorably as possible to Dr. Simoni's version of events, however disputed it might be), Petitioners herein address certain factual misstatements made by Dr. Simoni and the Third-Party Respondents in their respective briefs and certain gaps and inconsistencies in Dr. Simoni's arguments.

II. FACTS

A. **THE FACTS AND INFERENCES ARE, AND MUST BE, STATED IN THE LIGHT MOST FAVORABLE TO DR. SIMONI**

As a general matter, it bears emphasizing the procedural context within which this issue is presented to the Court. The District Court certified the instant question within the framework of its consideration of summary judgment motions directed to the viability of Dr. Simoni's claims. Consistent with the standard on summary judgment, where and to the extent that evidence conflicts or the accounts of events differ, the evidence and all reasonable inferences therefrom must be set forth, discussed, and relied upon *in the light most favorable to Dr. Simoni*. This is what the District Court did in its Memorandum Opinion and Order presaging certification of the instant question. (JA at 2151 (“[T]he Court reviews all the evidence ‘in the light most favorable’ to the nonmoving party. The Court must avoid weighing the evidence or determining the truth”) (citation omitted).)

As a result, the factual scenario presented to this Court is, by and large, a summation of the manner in which Dr. Simoni has elected to plead and support his claims. This is Dr. Simoni's side of the story. As the District Court appropriately recognized, however, “many of the facts involved in the case are hotly disputed.” (JA at 2133.) In particular, Mr. Rich very much disputes that he and Dr. Simoni ever discussed any fee-sharing or fee-splitting arrangement that did not assume Dr. Simoni was a licensed attorney or was not contingent upon him becoming one. (*See, e.g.*, JA at 1035-38, 1040-42, 1332-33, 2142.) The need for such a

contingency was known to everyone, including Dr. Simoni, which is why he understood that Mr. Rich could not split anything with him unless he became a licensed attorney (JA at 1880), why he took the bar exam again in 2002 (JA at 1583-1584), why Mr. Rich consulted ethics counsel about the issues presented by a fee-sharing arrangement with an individual who contributed to a case both before and after he became licensed. (JA at 1051-54, 1417-18), and why Dr. Simoni ultimately testified in 2007 that he had not been promised any compensation for his efforts (JA at 551, 597, 680). None of this makes any sense unless it was understood by all that any prospect of fee-sharing was contingent upon Dr. Simoni obtaining his law license.²

Having failed to obtain a law license, Dr. Simoni now denies the existence of the condition which he never satisfied and seeks to enforce (through the guise of equity) the once-contemplated, but never realized, prospect of a fee-sharing arrangement. Dr. Simoni is entitled to allege and support his claims for compensation in whatever manner he wishes and, at the summary judgment stage, the Court can only pass judgment on the claims he has pled and the version of the facts he has put forth by his deposition testimony and discovery responses. True or not, this is the record Dr. Simoni has presented in support of his claims. The question is whether that record, *Dr. Simoni's* record, presents a viable claim in light of the fact that it seeks to effect something which the West Virginia Rules of Professional Conduct prohibit. That is the question the Court is called upon to answer, but it should be made clear that Petitioners do not agree with, and very much dispute, Dr. Simoni's version of events and his characterization of his discussions with Mr. Rich. Petitioners did not enter into any unethical agreement or deal with

² Moreover, the very notion of a 50/50 fee-split or anything approaching that kind of a division of fees is economically inconsistent with any scenario that did not involve Dr. Simoni's entry into the cases as co-counsel. Petitioners were undertaking the substantial risks involved in plaintiffs-side toxic tort litigation and were incurring the overhead involved with maintaining a law license and law practice. Unless he got a law license and entered the cases in that capacity, Dr. Simoni was bearing no such risk or expense. To the contrary, he was maintaining a full-time job as a WVU professor and relying on his work related to the Fairmont and Spelter communities as support for his compliance with the University's expectations.

Dr. Simoni and, to the contrary, consulted with experienced ethics counsel throughout each of the underlying litigations so as to ensure compliance with the Rules of Professional Conduct.³

B. MR. RICH DOES NOT AGREE THAT DR. SIMONI IS ENTITLED TO COMPENSATION

Dr. Simoni asserts that Mr. Rich agrees or has admitted that he “is entitled” to compensation. (Simoni Brief at 5, 8.) This is not correct. What Mr. Rich said in his deposition was that “I think Joe is entitled *if it’s proper, if it’s legal*. I think he made a contribution.” (JA at 1123 (emphasis added).) Those are two very large ifs given how Dr. Simoni has pled and attempted to support his claims. To be clear, Petitioners do not dispute that Dr. Simoni contributed to the Fairmont and Spelter litigations. How much he contributed and the value of that contribution are another matter, but we do not deny that he made *some* contribution. Nor do Petitioners object to Dr. Simoni being compensated, *if* there is an ethical and lawful way of doing so and the compensation is reasonable. It does not follow, however, from these points that Dr. Simoni *is legally entitled* to the excessive, unreasonable, and undocumented compensation he seeks under the legal theory he has advanced. That is the very question to which this litigation is addressed.

C. DR. SIMONI’S CLAIMED CONTRIBUTIONS ARE NEITHER WELL-DOCUMENTED NOR UNCONTESTED

Dr. Simoni repeatedly characterizes his contributions as “significant and well-documented,” supported by “a figurative treasure trove of verifiable proof,” and “largely uncontested” by Mr. Rich. (Simoni Brief at 3-4, 7, 16, 17.) This is not so.

³ Petitioners note that Dr. Simoni had discussions with others, including the Third-Party Respondents, about whether and in what fashion he might be compensated—discussions to which Mr. Rich was not a party. So that the record is clear, until this litigation Mr. Rich was not aware that Robert Sweeney had paid Dr. Simoni anything with respect to the WVU asbestos case (*see* JA at 1414-15, 1968) nor was Mr. Rich aware of Dr. Simoni’s apparent discussions and/or machinations with his nephew, John Simoni (JA at 1675, 1680, 1682, 1694), as referenced by the Third-Party Respondents. (*See* Third-Party Resp. Brief at 5, 7.)

First, it is inaccurate for Dr. Simoni to state that Mr. Rich “generally agreed with [the] contents” of the after-the-fact Time Summary document he created in connection with this litigation. (Simoni Brief at 3-4.) To the contrary, Mr. Rich specifically disputed numerous entries on Dr. Simoni’s summary, including incidents where Dr. Simoni claims they both participated in meetings when Mr. Rich was not even in West Virginia at the time, and Mr. Rich disclaimed any knowledge as to the accuracy of many other entries. (*See* JA at 1258-61.)

In fact, Dr. Simoni’s time summary contains *mostly* entries that make no reference to Mr. Rich at all and about which Mr. Rich would have no knowledge, but instead describe dealings with other attorneys, experts, plaintiffs, or others.⁴ The entries that do reference Mr. Rich, generally do so in passing, merely to note his presence, and/or to include him in a list along with other lawyers.⁵ None of the entries state that Mr. Rich instructed or directed Dr. Simoni to do anything, and only a small handful of them even state that Dr. Simoni did something “for” Mr. Rich or “helped” Mr. Rich do something.⁶

This should not be surprising since the bulk of Dr. Simoni’s actual work was as a consultant to Masry & Vititoe pertaining to the Fairmont litigation from approximately 2000

⁴ *See, e.g.*, JA at 0228 [Fall/2000 (20.0 hours) and 11/01/2000 to 12/01/2000 (35.0 hours)]; JA at 0230 [03/22/2001 thru 03/28/2001 (25.0 hours)]; JA at 0231 [07/17-18/2001 (7.0 hours)]; JA at 0233 [11/13/2001 thru 11/15/2001 (12.0 hours)]; JA at 0250 [02/2002 (43.0 hours)]; JA at 0251 [05/04/2002 (3.0 hours)]; JA at 0236 [05/27/2002 thru 05/31/2002 (20.0 hours)]; JA at 0253 [08/08/2003 (10.0 hours) and 08/18/2003-08/22/2003 (23.0 hours)]; JA at 0256 [01/2004 (30.0 hours)]; JA at 0257 [06/08/2004 (10.0 hours)]; JA at 0258 [06/26/2004-06/28/2004 (14.5 hours)]; JA at 0259 [07/23/2004-07/31/2004 (110.0 hours)]; JA at 0261 [01/03/2005-01/07/2005 (62.0 hours)].

⁵ *See, e.g.*, JA at 0229 [1/22/2001 thru 01/27/2001 (“Arranged, coordinated, and participated in 01/27/01 informational meeting at IUE hall with Nancy Eichler and Melissa Dutcher (Masry), and Rich”)]; JA at 0230 [3/2001 (“Local level work re development of case; Worked closely with legal team, i.e. Masry & Vititoe and Rich ...”)]; JA at 0235 [03/29/2002 (“Discussions, Rich and Eichler”)]; JA at 0255 [12/10/2003 (“With Rich, took Medina et al. to Pittsburgh Airport; stopped in Canonsburg, on way, for meeting at Crouse Risk Management, at South Point, Canonsburg, PA”)].

⁶ Petitioners note that Dr. Simoni initially sought compensation for alleged time researching potential malpractice claims against Petitioners and the other plaintiffs’ attorneys in the Fairmont litigation (JA at 243) and many of his claimed hours were for periods of time *after* he moved to Florida.

until at least December 12, 2006 (JA at 0498, 0508)⁷ and as “a non-testifying consultant to Levin, Papantonio, pertaining to Spelter matters” from the summer of 2003 until at least December 12, 2006. (JA at 0497.) As Dr. Simoni himself testified, after the summer of 2003, his work was with and directed by Levin Papantonio. (JA at 1984, 2077.)

Further, many of the entries on Dr. Simoni’s purported Time Summary (reflecting the substantial majority of the total of his claimed time) are conclusory and repetitious multi-hour blocks of time (ranging from 15.0 to 45.0 hours, with two outliers beyond even that range, one of 62.0 hours and another of 110.0 hours) purporting to describe activities over the course of a week, month, or entire season (*e.g.*, Fall 2001, Summer 2003, *etc.*). This generalized block-billing approach not only is completely unverifiable, but the text of the 40 or so such entries are largely indistinguishable from each other. Accordingly, while Mr. Rich disputes some of the entries based upon his own personal knowledge, he has no knowledge with respect to many of them by virtue of the fact that others actually were directing and working with Dr. Simoni and Mr. Rich has no way to judge the accuracy of the numerous conclusory, repetitive, and vague block entries.

D. RESPONDENTS’ DISPARAGEMENT OF MR. RICH AND HIS PRACTICE IS INACCURATE AND UNFAIR

Apparently hoping to dirty Mr. Rich up for the secondary battle to come should Petitioners have to compensate Dr. Simoni in some fashion for work he did for them or at their direction, the Third-Party Respondents have interspersed their briefing with personal attacks on Mr. Rich, taking as gospel everything that Dr. Simoni claims and further embellishing even that. While the procedural context requires the Court to accept Dr. Simoni’s version of disputed facts,

⁷ During a portion of 2002, Dr. Simoni also served as a consultant to the Masry law firm pertaining to Spelter matters. (JA at 0498, 0510-11.)

we note below a series of embellishments and mischaracterizations with which Petitioners take issue.

First, any allegation of threats or physically aggressive behavior or comments by Mr. Rich towards Dr. Simoni is clearly disputed. (*See, e.g.*, JA at 1096.) To be sure, Mr. Rich did get upset with and frustrated by Dr. Simoni at times, both as a result of things he had done that potentially could have harmed the litigations (JA at 1207, 1356-57, 1463-64, 1487-89) and because nothing was happening with respect to Dr. Simoni getting licensed (JA at 1332-33). But Mr. Rich never threatened Dr. Simoni or anyone else. (JA at 1096.)

Second, the nefarious characterization the Third-Party Respondents attempt to give to Mr. Rich and Dr. Simoni's conversations (*see* Third-Party Resp. Brief at 8-9; Third-Party Reply Brief at 1, 4-5) is greatly overstated and relies upon actions that actually had nothing to do with any concern either individual had about compensation-related discussions. For instance, the Third-Party Respondents take a single reference in Dr. Simoni's Counterclaim to "a Morgantown alleyway" as the location of one April 2002 conversation and twist that into an assertion that the conversations were had in "great secrecy." (Third-Party Resp. Brief at 8.) In fact, Mr. Rich and Dr. Simoni simply went for a walk while talking, which Mr. Rich often did, not only with Dr. Simoni but with many others, and the referenced "alleyway" is a pleasant pedestrian street adorned with at least one bench and frequented by many people. Indeed, in his deposition testimony Dr. Simoni merely described the conversation as occurring "outside on the street." (JA at 1653.)

It is true that Mr. Rich had concerns about his office or phones being monitored, but that concern had nothing to do with the nature of any of his interactions with Dr. Simoni. Instead, this was a general sensitivity borne of Mr. Rich's past experience working as a diplomat in many

third-world countries and working as a corporate security officer for a major international corporation involved in multi-billion-dollar international deals. That sensitivity was heightened during the Fairmont litigation as a result of the fee disputes and tensions among plaintiffs' counsel, which had included an attorney from Masry & Vititoe threatening Mr. Rich's daughter. (See JA at 1346-49.) None of this, however, had anything to do with the nature of what he and Dr. Simoni were discussing other than information relating to Mr. Rich's family.⁸

It also is true that Dr. Simoni "always removed the battery from his phone before he would talk about anything he felt was sensitive." (JA at 1349-50.) This was a regular practice of Dr. Simoni's which Mr. Rich observed and understood to arise from a concern about his tax situation and fear that the Internal Revenue Service was after him. It is Mr. Rich's understanding that Dr. Simoni had federal tax liens against him or his property and had some involvement in a movement or series of seminars about the tax code being illegal or unconstitutional and people therefore should not pay their taxes. To the best of Mr. Rich's recollection, Dr. Simoni said that another individual involved in those matters had advised him to remove the battery from his phone.

Though not relevant to the certified question, Petitioners also note that it is inaccurate for Dr. Simoni or the Third-Party Respondents to assert or suggest that Mr. Rich was in any way dependent upon Dr. Simoni professionally. That is a distortion of Mr. Rich's law practice and the circumstances by which Mr. Rich ever became involved in any of these cases in the first place. Prior to and during the events in question, Mr. Rich was an experienced immigration attorney with an established and successful nationwide practice handling a variety of matters for an impressive array of clients ranging from large corporations to white collar professionals to

⁸ Because one of the things he and Dr. Simoni were discussing in June 2005 was where one of his daughters would be going to college, Mr. Rich was particularly concerned about surveillance on the occasion they walked to the riverside park. (JA at 1347, 1349-50.)

professional athletes. This practice was built upon professional expertise and international contacts developed by Mr. Rich as a diplomat and corporate security officer. Mr. Rich had represented the United States in establishing banking relationships in the various former Soviet republics, conducted fraud and asset recovery investigations for a major international company, and overseen the negotiation of multi-million dollar (and even billion-dollar) contracts. Mr. Rich did not need or want Dr. Simoni to bring him work.

A long-time attorney friend of Mr. Rich's, Larry Harless, introduced him to Dr. Simoni in 1999 (JA at 1015-18) and it was only because of and through Mr. Harless that Mr. Rich ever became involved with anything in which Dr. Simoni also was involved. (*See* JA at 1018-19.) Those matters, however, were not the focus of Mr. Rich's practice (there were only three cases to which both Mr. Rich and Dr. Simoni had any connection) and he never asked or cared if Dr. Simoni was looking for or bringing potential cases to him; Dr. Simoni's periodic causes were not in any way an organizing focus of Mr. Rich's business.⁹ (*See* JA at 1029, 1054.) Indeed, Mr. Rich was initially not interested in becoming involved at all, as was every other attorney to whom Dr. Simoni and/or Mr. Harless spoke in light of the associated risk and the prominence of the defendants. Mr. Rich ultimately agreed only reluctantly based upon the personal appeals of his friend, Mr. Harless, to "stand up, be a man, and help these people because no one else will." (*See* JA at 1157-59.)

Neither did Mr. Rich "rely on Dr. Simoni's organization, legal skills, and other contributions for years" after he learned that Dr. Simoni was not a licensed attorney. (Simoni

⁹ While he became acquainted professionally with Dr. Simoni through Mr. Harless and the two became friendly over time, Dr. Simoni was not important to or any part of Mr. Rich's practice or business model. Dr. Simoni's decades of community activism had touched upon litigation in several prior instances and he urged many attorneys to take on matters in which he had taken interest. There was nothing in Dr. Simoni's relationship with Mr. Rich that was unique from Dr. Simoni's relationships with various other attorneys over the years; indeed, Mr. Rich believes Dr. Simoni discussed the WVU, Fairmont, and Spelter litigations with other attorneys. (JA at 1048-50, 1054.)

Brief at 4.) What Mr. Rich said in the testimony cited by Dr. Simoni was that he continued to work and communicate with Dr. Simoni after he found out that he was not an attorney. (JA at 1075.) The fact that Dr. Simoni was not an attorney only prohibited Mr. Rich from sharing fees with him—it did not require him to cease all communication with Dr. Simoni. At any rate, the fact that Mr. Rich did not do so does not equate to *reliance* upon his contributions.

E. THE THIRD-PARTY RESPONDENTS WERE AWARE OF DR. SIMONI'S CONTENTIONS AND CONTRIBUTED TO ANY EXPECTATION HE HAD

Finally, it is inaccurate to claim, as the Third-Party Respondents do, that they had no knowledge of any of this. (See Third-Party Resp. Brief at 3, 12 n.2.) Both Mr. Rich and Dr. Simoni discussed with the Third-Party Respondents the question of whether Dr. Simoni would or could be compensated. According to Dr. Simoni's Counterclaim, in "a telephone conference regarding fee splitting on August 25, 2003, Mr. Steven Medina – at that time the lead attorney from Levin, Papantonio, Thomas, Mitchell, Rafferty & Procter, P.A. - referred to Dr. Simoni as the 'heart and soul' of the case and made clear that 'taking care of Joe [Simoni]' was necessary[.]" (JA at 153-54 [¶ 82].) Dr. Simoni understood Mr. Medina to mean "taking care" of him in terms of financial compensation. (JA at 1890-91.)

In June 2007, Mr. Rich specifically advised Farrest Taylor and Keith Givens of The Cochran Firm regarding a then-recent telephone conversation with Dr. Simoni in which Dr. Simoni had "seemed agitated" and made mention of payment, to which Mr. Givens had responded indicating that he did not see a problem with compensating Dr. Simoni "after this case is over, and he would be paid like any vendor." (JA at 1133-36, 1379-87.)

In addition, in August 2007, Dr. Simoni himself spoke with Mr. Givens "about compensation for me" and "talked to him about the situation that I felt that I was in," meaning "I'm in this situation, which I shared with him, where I have this agreement [with Mr. Rich],

okay, and I'm concerned about whether I'm actually going to be – whether the agreement's going to be held up” (JA at 1757-60, 1899-1900.) Mr. Givens responded by telling Dr. Simoni “we'll talk about that more before I leave” and, the next day, he told Dr. Simoni “about what we talked about yesterday, ... don't worry about that. I understand and I will take care of it.” (JA at 1759-60.) Indeed, The Cochran Firm asked Dr. Simoni for an invoice for his hours and expenses, but he never responded and never provided an invoice. (See JA at 223-24, 2141)

Finally, in the spring of 2010 (just as he became a critical fact witness in the Spelter litigation), Dr. Simoni, through his attorney, demanded payment from all of the lawyers for the plaintiffs in both the Fairmont and Spelter litigations—not just Petitioners. (JA at 411-13.) Indeed, Dr. Simoni's lawyer exchanged communications about Dr. Simoni's claims with a representative of the entire group of Spelter lawyers (including Levin Papantonio and the Cochran Firm) throughout 2010.

Accordingly, though irrelevant to the issue before this Court, it simply is not true that the Third-Party Respondents had no knowledge of Dr. Simoni's claims until the litigation before the District Court.

III. ARGUMENT

A. DR. SIMONI'S ARGUMENTS RELY ON AN AMORPHOUS SET OF FACTS

Dr. Simoni contends that his “counterclaim against Mr. Rich revealed, on its face, no claim to any portion of a ‘percentage fee split,’ contingency fee, or similar arrangement to share legal fees.” (Simoni Brief at 6.) The District Court, however, very much disagreed with this assertion, specifically concluding that Dr. Simoni's Amended Counterclaim “again sought compensation based on the fee-splitting agreement” and explaining that “the evidence adduced in discovery undercuts his argument and reinforces that his compensation claim remains based

entirely on a fee-splitting agreement with Rich.” (JA at 2167.) Indeed, Dr. Simoni’s own briefing before the District Court affirmatively asserted that “most, if not all, of the discussions regarding compensation between Mr. Rich and Dr. Simoni were underscored by the prospect of ‘percentage split of attorney fees earned by [Mr.] Rich.’” ... And, it is this understanding and expectation which forms the basis for Dr. Simoni’s claims made in this matter.” (JA at 400.)

Before this Court, Dr. Simoni again attempts to have it both ways. In his factual narrative, Dr. Simoni carefully avoids any reference to an agreement or deal. Instead, he speaks only of “the reasonable value” of his contributions (Simoni Brief at 2), his “distinct impression that there was a ‘clear possibility of being compensated’” (*id.* at 4), and his “discussions” and “communications” with Mr. Rich about “the prospect of compensation” (*id.* at 4, 5). But Dr. Simoni’s legal arguments are broader, seeking compensation for or in line with something beyond the reasonable value of his time (*see* Simoni Brief at 7 (arguing “law should permit him to collect a reasonable and equitable sum from Mr. Rich as compensation for the services that he rendered *and the role that he played in furtherance of the Philip/Westinghouse Litigation and the Spelter Litigation.*”) (emphasis added)) and specifically analogizing his situation to parties to other cases who had an actual fee-sharing agreement. (*See* Simoni Brief at 11 (stating question at issue as being “whether [the] ethical rules operate to render unenforceable a compensation arrangement *that is derived from an agreement* which calls for the sharing of legal fees between a lawyer and a non-lawyer”) (emphasis added); at 13 (arguing “innocent parties to a contract” may obtain reasonable compensation “when *their agreement* is voided for illegality”) (emphasis added).)

Given the summary judgment context, it is fair to take at face value Dr. Simoni’s version of events and to draw all reasonable inferences in his favor, but Dr. Simoni cannot advance

multiple different versions of the facts. Either there was an agreement or there was not. Either he expected to be compensated for his time on an hourly-rate basis or he expected to receive some percentage split of the attorney's fees. Dr. Simoni can pick whichever version of events he prefers and, at least at the summary judgment stage, he can stand on that story. But he is not entitled to simultaneously rely upon both of these very different narratives. Despite the equitable nature of Dr. Simoni's remaining causes of action, his Amended Counterclaim and his own sworn testimony make clear that what he is seeking is a judicially-imposed fee-sharing arrangement. That is why the District Court certified the instant question to this Court.

B. *WATSON V. PIETRANTON* IS NOT DISPOSITIVE OF THE ISSUE NOW BEFORE THE COURT

Reflective of the inconsistencies noted in the previous section, Dr. Simoni claims that the decision in *Watson v. Pietranton*, 178 W. Va. 799, 364 S.E.2d 812 (1987) "is dispositive of the certified question before this Court." (Simoni Brief at 11.) It is not.

First, in *Watson* there was an actual, definite agreement at issue which one party sought to specifically enforce and the other sought to have declared illegal and unenforceable. Here, Dr. Simoni alleges that no specific agreement was reached and disclaims direct enforcement of an agreement. Instead, he seeks a judicially-imposed agreement based upon his claimed expectation that ultimately he would be the beneficiary of some sort of fee-sharing arrangement.

Second, *Watson* involved the different scenario of a fee-splitting agreement *between* lawyers. The agreement, therefore, was not unethical merely by virtue of its existence but only because the lawyers had not obtained the consent of their clients. Had the clients been advised and consented, there would have been nothing at all problematic about the agreement.

Here, though, the contemplated agreement would itself be a violation of the Rules. Dr. Simoni downplays the distinction between an agreement to split fees among lawyers and an

agreement to share fees with a non-lawyer, but there are different concerns implicated by the rules pertaining to each such agreement. As noted by Justice Loughry in his *Gaddy Engineering* concurrence, *Watson* “is both factually and legally inapposite” because:

Fee-sharing agreements between lawyers and nonlawyers, as is the case here, invoke distinct ethical issues which have at their core the protection of the public. As discussed within this concurrence, it is that crucial need to protect the public’s interest which regularly compels the conclusion that fee-sharing agreements between lawyers and nonlawyers violate public policy and are thus unenforceable as illegal agreements.

Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, 231 W. Va. 577, 746 S.E.2d 568, 579 n.2 (2013) (Loughry, concurring).

Accordingly, however the Court may ultimately determine to answer the question certified in this case, that answer is not necessarily dictated by the Court’s opinion in *Watson*.

C. DR. SIMONI’S EQUITY CASES ARE ALL DISTINGUISHABLE FROM, OR CONTRARY TO, HIS CONTENTIONS IN THIS CASE

Dr. Simoni advances the proposition that even if the Rules of Professional Conduct are statements of public policy with the force of law equal to that given to statutes enacted by the Legislature, “equity demands that this Court not adopt a rule of law that prevents Dr. Simoni from realizing just compensation for that benefit under the non-contractual theories advanced in his counterclaim.” (Simoni Brief at 22.) In other words, the law should not prevent Dr. Simoni from seeking, or a court from imposing, an arrangement that would violate public policy and be illegal if accomplished pursuant to an express contract.

But none of the cases on which Dr. Simoni relies are from West Virginia and nearly all of them involve lawyers attempting to recover the value of their time, on an hourly rate basis, where a previous referral fee or contingent fee agreement was invalidated or otherwise inapplicable (for instance, by virtue of the discharge of the attorney). The two exceptions are *Practice Management Assoc. v. Bitet*, 654 So.2d 966 (Fla. Ct. App. 1995), a case that does not involve

lawyers or legal ethics at all but rather New York regulations applicable to the practice of medicine, and “*We the People*” *Paralegal Services v. Watley*, 766 So.2d 744 (La. Ct. App. 2000), a case which turns on a particular Louisiana statute that expressly permits recovery for performance under a null contract albeit not by a party “who knew or should have known of the defect that makes the contract null. *Id.* at 748-49 (quoting and relying on La. C.C. art. 2033).

Finally, Dr. Simoni curiously relies on *Abbott v. Marker*, 722 N.W.2d 162 (Wis. 2006), a case in which a non-attorney sued an attorney attempting to enforce an alleged referral fee agreement. The attorney disputed the existence of any such agreement, 722 N.W.2d at 164 n.1 & 167, but the Wisconsin courts held that even if the agreement was as the non-attorney claimed, it could not be enforced through either a contractual claim or an equitable claim for quasi-contract or unjust enrichment. *Id.* at 166-68.

Dr. Simoni contends that this somehow supports his ability to recover in equity, claiming that although the Court of Appeals of Wisconsin “at its discretion, chose not to permit relief on unjust enrichment grounds in this particular instance, it recognized that it lawfully could do so, provided that the party seeking compensation conferred some benefit on the defendant.” (Simoni Brief at 22.) The *Abbott* court did not recognize any such thing. To the contrary, it plainly stated in the first sentence of the second paragraph of the extended block quote Dr. Simoni includes in his own brief, that “*First*, we choose not to enforce an agreement through unjust enrichment when the party cannot enforce the agreement through contract *because it is illegal.*” 722 N.W.2d at 168 (emphasis added). The lack of a benefit conferred on the attorney was the second of two independent reasons given by the court for its affirmance of the dismissal of the non-attorney’s unjust enrichment claim. Thus, contrary to Dr. Simoni’s contention, even if the lawyer had

received a benefit of marketable value, the non-lawyer's unjust enrichment claim still would fail because the alleged expectation was unenforceable.

IV. CONCLUSION

Petitioners respectfully request that the Court answer the question certified by the District Court. While Petitioners take no position with respect to whether the answer should be yes or no, we do ask that the Court's answer be clear and definitive such that the parties can be guided accordingly in the course of any further proceedings that may ultimately be necessary before the District Court.

Dated: February 18, 2015



Richard W. Gallagher (Bar No. 1327)
E. Ryan Kennedy (Bar No. 10154)
ROBINSON & MCELWEE, PLLC
140 W. Main Street, Suite # 300
Clarksburg, WV 26301-2914
(304) 622-5022
(304) 622-5065 (facsimile)

Tillman J. Finley (*pro hac vice*)
MARINO FINLEY PLLC
1100 New York Avenue, N.W.
Suite 700W
Washington, DC 20005
(202) 223-8888
(877) 239-2146 (facsimile)

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, E. Ryan Kennedy, counsel for Petitioners Gary W. Rich and the Law Office of Gary W. Rich, L.C., do hereby certify that I have caused to be served the foregoing **REPLY BRIEF OF PETITIONERS** upon the below counsel of record this 18th day of February, 2015, via first class mail:

Jeffrey M. Wakefield
Caleb P. Knight
FLAHERTY SENSABAUGH
BONASSO PLLC
P.O. Box 3843
Charleston, WV 25338-3843

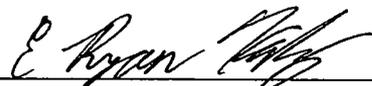
Christopher J. McCarthy
BOOTH & MCCARTHY
P.O. Box 4669
Bridgeport, WV 26330

Cary L. McDougal
Baron & Budd, PC
3102 Oak Lawn Ave., 11th Floor
Dallas, TX 75219-4281

Angela Mason
163 West Main Street
Dothan, AL 36301

William F. Cash III
LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY &
PROCTOR, P.A.
316 South Baylen Street
Pensacola, FL 32502

DATED: February 18, 2015



Richard W. Gallagher (Bar No. 1327)
E. Ryan Kennedy (Bar No. 10154)
ROBINSON & MCELWEE, PLLC
140 W. Main Street
Suite # 300
Clarksburg, WV 26301-2914
(304) 622-5022
(304) 622-5065 (facsimile)