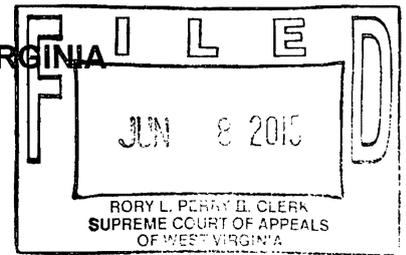


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Estate of Luigi Bossio, also
known as Louis Bossio,
Defendant Below, Petitioner**

vs.) No. 14-1328

**Bernard V. Bossio,
Plaintiff Below, Respondent**

AND

**Sam Bossio,
Defendant Below, Petitioner**

vs.) No. 14-1329

**Bernard V. Bossio,
Plaintiff Below, Respondent**

**THE ESTATE OF LUIGI BOSSIO
a.k.a. LOUIS BOSSIO'S REPLY BRIEF**

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II. ARGUMENT

The Respondent is apparently trying to confuse this Court. To accomplish this, the Respondent is misstating the law by adjusting the facts, issues, and holdings of the case law to fit his position. He is mistaken in regards to the burden of proof in this case and is tying his success in the Circuit Court to the Petitioners' lack of contradictory evidence. The Respondent is misstating other issues which are based in fact and can be easily proven. This Court should find that despite the Respondent's misapplied arguments, he has failed to meet his evidentiary burden.

The Respondent has stated numerous times that he has provided substantial "secondary" evidence. The Respondent is trying to perpetuate that the quantity of the evidence he provided at trial can compensate for that evidence's lack of quality. The proof he offered at trial consisted primarily of his own self-interested testimony. The Respondent's self-interested testimony is not enough evidence, "secondary" or otherwise, to overcome the heightened burden of evidence that this Court has established for the proponent of a lost document. This Court should, accordingly, overturn the Circuit Court's decision because it abused its discretion by finding that the Respondent's production at trial adequately portrayed that a Stock Purchase Agreement existed, was executed, contained the clauses claimed, and was lost.

A. The Respondent's arguments regarding the burden of proof for the proponent of a lost document should fail because he doesn't accurately state the relevant case law.

The Respondent is attempting to mold the applicable case law to fit his needs. For example, the Respondent's parenthetical implies that *Morrison v. Judy*, 123 W. Va. 200, 206-207, 13 S.E.2d 751, 754-55 (1941) stands for the proposition that "testimony

[is] sufficient to prove [the] existence of lost promissory note.” See Respondent’s Brief, page 13. The testimony that was “sufficient” was a party admission made in court and on the record by the party against whom the note was being enforced. *Id.* at 206-207; 13 S.E.2d 754-55.

At trial, the Petitioner never admitted that a stock purchase agreement existed, was executed, contained all the provisions that the Respondent claims, and that the stock purchase agreement was lost. Accordingly, the Respondent’s reliance on *Morrison* is misplaced and should not be given any weight by this Court.

Additionally, the Respondent relies on *Miller v. Estabrook*, 273 F. 143 (4th Cir. 1921) to craft a parenthetical that states “testimony and abstract of title sufficient to prove lost deed.” See Respondent’s Brief, page 13. The issue in *Miller* was not whether the deed was lost. *Id.* at 147. The parties agreed that the courthouse and the records it contained had been destroyed by fire. *Id.* This issue was whether adverse possession could be established as to the subsurface rights regarding a tract of land where those rights were claimed to have been previously severed. *Id.* at 146. The title abstract was admitted to show the land description of the tract in dispute and whether the surface and mineral rights had been severed. *Id.* at 147.

A stock purchase agreement that was executed by all the parties would be a similar piece of evidence in the present case. The Respondent was able to show a stock purchase agreement from 1982 that he believes was modified in 1990, and another stock purchase agreement from a foreign corporation BHM Development Corporation, Inc. See Appendix, pages 197-208, 254-265; Plaintiff’s Exhibits 2 and 3, respectively. Neither of these stock purchase agreements are signed by all the

parties—not even the one from BHM Development. *Id.* Therefore, Respondent's reliance on *Miller* is ill-fated and again misleading because he does not have an executed stock purchase agreement should be afforded no weight by this Court.

Next, the Respondents cite *Linn v. Collins*, 77 W. Va. 592, 87 S.E. 934 (1916) to support the parenthetical "testimony and evidence of signed deed sufficient to prove existence of lost note." See Respondent's Brief, page 13. Again, the Respondent misstates the issues addressed by the Court. The existence of the promissory note was not in question in the *Linn* case. *Id.* at 596, 87 S.E. 936. The party against whom enforcement was sought disputed the note's execution and non-payment. *Id.* The executed deed of trust was sufficient to prove that he had agreed to be bound by the note. *Id.* Since the Respondent in the present case has not produced anything similar to the deed of trust in *Linn* containing a recital that mirrors the purported stock purchase agreement, his reliance on *Linn* should receive no weight from this Court.

Also, the Respondent relies on foreign common law to support his position. For example, the Respondent states "lost insurance policy proven through testimony and business records listing the policy number." See Respondent's Brief, page 14, citing *Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2002). Presumably, the Respondent crafted the parenthetical in this manner because his testimony and a stock purchase agreement bearing policy numbers were admitted at trial. See Appendix, pages 197-208, Plaintiff's Exhibit 2. This, however, is misleading because it fails to address the true essence of the case. At issue in *Burt* was insurance coverage. See *Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2002). What the Respondent has not explained is that the insurer in *Burt* denied

coverage initially because Aetna's insured was a parent company of the appellant and thus the insurer claimed the denial was proper because it did not have appropriate notice. *Id.* at 88-90. Although the insured prevailed because it was able to produce records indicating that coverage existed, *Burt* is not analogous because the defendant insurer did not claim that the policy was non-existent, not executed, or disputed the policy's contents. *Id.* at 92-93. In this case, the Petitioner claims an executed stock purchase agreement doesn't exist so *Burt* is not analogous, and thus the Respondent's argument should be given no weight by this Court.

Likewise, the Respondent's parenthetical regarding *Roberson v. Ocwen Federal Bank FSB*, 250 Ga. App. 350, 553 S.E.2d 162 (2001) is not accurate. The Respondent states the case's holding as "testimony and secondary evidence sufficient to prove existence of lost agreement." See Respondent's Brief, page 14. In *Roberson*, the case was ultimately decided based on the party admission of the one against whom the credit card contract was being enforced. *Id.* at 350, 553 S.E.2d 164. The secondary evidence, a blank standard form credit card agreement, was admitted in lieu of the original document that had been destroyed pursuant to standard document reduction protocols. *Id.* at 351, 553 S.E.2d 164. It was admitted only to show contents—not existence as the Respondent indicates. *Id.* Existence and execution were admitted. *Id.* Again, in this case, the Petitioner is claiming that a stock purchase agreement neither existed nor was executed and so this Court should not give this argument from the Respondent any weight.

Again, when citing *Robinson v. Thornton*, 271 Cal.App.2d 605, 76 Cal Rptr. 835 (1969), the Respondent misapplies the holding. See Respondent's Brief, page 14.

While it is true that testimony was instrumental in proving the lost contract, it was the appellee/defendant's admission that a copy of the original executed document was identical to the missing contract that provided the California Court of Appeals with the necessary evidence to affirm the lower court's ruling. *Id.* at 839, 76 Cal.Rptr 837. Since the Respondent in the present case lacks such an admission, this argument should fail and not receive any weight by this Court.

Citing *Klein v. Frank*, 534 F.2d 1104 (5th Cir. 1976), the Respondent again misstates the holding. See Respondent's Brief, page 14. In *Klein*, the defendants moved for, and were granted, an involuntary dismissal. *Id.* at 1105. The appellant Klein desired to show the trial court that a letter, purportedly constituting a contract, was in existence but had been lost. *Id.* at 1107. In affirming the trial court's dismissal, the United States Circuit Court of Appeals for the Fifth Circuit held that the Florida statute of limitations for written contracts barred the original cause of action. *Id.* This ruling was based on the fact that even if proven to exist, the letter did not contain any provision the breach of which was enforceable by the plaintiff/appellant. *Id.* Importantly, the trial court reversed its decision during the trial that sustained an objection regarding the letter. *Id.* at 1108. Ultimately, the trial court allowed secondary evidence of the existence of a contract but no evidence was provided. *Id.* Indeed, the Court of Appeals noted that the proffered testimony (upon which the Respondent relies) was "glaringly inadequate to prove the contents of such letter." *Id.* The *Klein* court disposed of the case ultimately because the proponent of the lost document's own, self-interested testimony was insufficient to show that a longer statute of limitations applied to his case.

In our case, the Respondent has only offered his own, self-interested testimony to prove the existence, execution, contents, and loss of the stock purchase agreement. This Court should either overturn the Circuit Court's finding that the Respondent met his burden of proof, or, based on the Respondent's misapplication of *Klein*, afford no weight to his argument.

Addressing the Respondent's treatment of *Dart Inds., Inc. v. Commercial Union Ins. Co.*, 28 Cal.4th 1059 (2002), he did accurately state the holding in that case. See Respondent's Brief, page 14. Documents and testimony from the insurance agent was sufficient to prove the lost insurance policy. *Id.* Omitted, however, was the distinction between California law applied in that case and West Virginia law controlling in this one. Compare *Dart Inds., Inc. v. Commercial Union Ins. Co.*, 28 Cal.4th 1059 (2002) with *Marshall v. Elmo Greer & Sons*, 193 W. Va. 427; 456 S.E.2d 554. California only requires that existence, execution, contents, and loss be proved by a preponderance of evidence as opposed to West Virginia's tradition of a heightened burden of proof. *Id.* at 1071. Therefore, this Court cannot rely on *Dart Industries* as persuasive authority due to the different burdens of proof required.

The Respondent is attempting to support his inadequate production of evidence at trial by misapplying the holdings of both mandatory and persuasive authorities. Since the Respondent's evidence at trial consisted primarily of his own, self-interested testimony, he has not overcome the heightened burden of proof required of a proponent of a lost document. This Court should, therefore, overturn the Circuit Court's ruling because it abused its discretion by ruling in favor of the Respondent.

B. This Court should consider the Bossio Estate's arguments regarding contract interpretation because the Bossio Estate did address the construction of 1990 stock purchase agreement while the case was before the Circuit Court.

The Respondent argues that this Court should dismiss the Bossio Estate's argument regarding the Circuit Court's construction of the stock purchase agreements. See Respondent's Brief, pages 22-23. Importantly, the Bossio Estate did indicate at trial to the Circuit Court that a dispute as to the proper relation of the clauses within the stock purchase agreements did exist. See Appendix, pages 361-369, 468-473, Defendant, the Estate of Luigi Bossio a/k/a Louis Bossio's Proposed Findings of Fact and Conclusions of Law and Defendant, the Estate of Luigi Bossio a/k/a Louis Bossio's Brief in Response to Plaintiff's Brief in Support of Conclusions of Law, respectively. Once notice was provided by the Bossio Estate, it relied on the Circuit Court to exercise sound discretion in its interpretation and construction of the agreements' clauses. Since the Circuit Court abused its discretion by not correctly applying fundamental contract construction rules, the Bossio Estate can only now argue its construction position. Since the Bossio Estate informed both the Circuit Court and the Respondent of the disputed effect of the termination clause, there is no unfair surprise; the Respondent is not prejudiced by the Bossio Estate arguing that the Circuit Court abused its discretion in the construction of the stock purchase agreements. Moreover, this issue is ripe for adjudication by this Court because the issue of the termination clause's operation has been developed, and was adjudicated below.

The Respondent cites *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544; 687 S.E.2d 123 (2009) to support the proposition that the Bossio Estate's argument regarding the Circuit Court's construction of the stock purchase agreements has been

waived. "When arguments are raised for the first time on appeal, 'we must necessarily find that the argument has been waived.'" See Respondent's Brief, page 23, citing *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 550; 687 S.E.2d 123, 129 (2009). The Respondent has again failed to precisely identify the rule established by the authority that he relies on. In *Zaleski*, one of the several issues that faced this Court was whether the trial judge was biased and if he should have been recused. *Id.* at 550, 687 S.E.2d 129. The appellant asked for this relief for the first time while the case was on its second appeal. *Id.* Relief was denied because this Court deemed that the request had been waived. *Id.* Furthermore, this Court also held that such relief was not warranted in *Zaleski* because West Virginia Trial Court Rule 17.01 requires that a motion be brought within 30 days of discovering the ground for disqualification and the appellant had exceeded that mandate. *Id.* at 551, 687 S.E.2d 130. This is not analogous to the argument advanced by the Bossio Estate because it is asking this Court to overturn the Circuit Court's decision regarding the construction of the stock purchase agreement because the Circuit Court abused its discretion by not applying fundamental contract construction rules. That argument was never waived by the Bossio Estate and it is proper for this Court's consideration.

C. The Respondent makes numerous errors in framing his case and this Court should not be persuaded by his analysis.

The Respondent has argued several positions in his brief that are not supported by the record. These issues that the Respondent assert range from the Petitioners' burden of proof through arguing that despite the financial troubles the Corporation faced, it would still have been able to purchase a deceased shareholder's interest.

Since these disputed arguments are based on the developed record, this Court should not be persuaded by the Respondent's inadequate analyses.

1. The Respondent mistakenly recites the Petitioners' burden of proof.

Several times during the Respondent's brief he asserts that the Petitioners failed to produce contradictory evidence of the existence, execution, and contents of any stock purchase agreement. See Respondent's Brief, pages 15, 18, and 21. Presumably, the Respondent believes that his burden of proof to establish the existence, execution, and contents of the lost document requires only a showing by a preponderance of the evidence. In such a case, the Respondent may have produced more evidence than the Petitioners, but this is not that case. First, the case law as cited by the Petitioners requires something akin to clear and convincing evidence. Under that standard, the Respondent's burden is not to show only that he produced slightly more evidence than the opponent, but he must clearly and convincingly prove that the documents existed, were executed, and their contents. Second, there has never been any evidence to the contrary to show; if there is no evidence of the documents existence, then there certainly could not be any that would directly prove their non-existence. Since the Respondent's argument fails, the Petitioners have no evidentiary burden to meet.

2. The Respondent's comparison of the BHM Development Corporation Inc.'s stock purchase agreement to the non-existent 1990 Bossio Enterprises Inc. stock purchase agreement is misleading.

The Respondent claims that the BHM stock purchase agreements are "identical" to the 1990 Bossio Enterprises Inc. stock purchase agreement. See Respondent's Brief, pages 6, 20, and 24. This is troubling for three reasons. First, the Respondent

was not able to produce an executed copy of the BHM agreement. See Appendix, pages 254-265, Plaintiff's Exhibit 3. Second, the two corporations had completely different missions at the time of their founding (one a pizza business and the other a real estate developer), thus it is not likely that their Corporate governance was identical. Finally, if the two were indeed identical, it would seem that the Respondent would make a claim to have the BHM agreement enforced as well. He has not made that claim. Accordingly, this Court should conclude that one agreement from a foreign corporation should not bear any evidentiary weight on the governance of the instant corporation.

3. This Court should not be confused by the Respondent's claim that real property was conveyed to the Corporation for the purpose of facilitating the shareholders' duty to purchase a deceased shareholder's interest.

The Respondent claims that the shareholders conveyed property to the Corporation and that the conveyance also severed any interest retained by their spouse. See Respondent's Brief, page 27. The Respondent goes on, to also claim that this action evidences the shareholders' intent to disinherit Emilia Bossio. *Id.* This is not true. The purpose of the conveyances was to capitalize the failing pizza business.

“[We] did not bring the real estate into the corporation. We kept the real estate outside the corporation , [sic] and then we were not able to get a loan at the bank because we had nothing but pizza shop statements showing a loss. And then what we did was, we transferred all the real estate holdings that we had to Bossio Enterprises in 1988 so that the bank could in fact give us that loan for operating cash.”

See Appendix, page 70. This also speaks to the argument that the Corporation could ill afford to purchase a deceased shareholder's interest because it lacked the liquid assets to do so. See Petitioner's Brief, pages 34-36.

The Respondent makes the unsound argument that the stock value was tied directly to the amount of cash available to purchase a deceased shareholder's interest.

See Respondent's Brief, page 27. While it is true that as the corporate value fluctuated that so too did the value of the stock, it is not true that regardless the value of the stock, the corporation would have been able to purchase a deceased shareholder's interest. There are several times during the Respondent's testimony at trial where he refers to the Corporation's financial status as being poor. See Appendix, pages 56, 60, and 70. Since the Corporation lacked the necessary operating cash, the shareholders capitalized it with their personal property to obtain loans. Because there were so many loans, it was not likely the Corporation could purchase a deceased shareholder's interest without the proceeds of an insurance policy or additional capitalization. Therefore, the Corporation could not have purchased a deceased shareholder's stock without the insurance policies' proceeds. With no money to pay the insurance premiums, there was no money to perform on the stock purchase agreements; therefore this Court should overturn the Circuit Court's decision that there was no consequence for not maintaining insurance policies because there was no money anywhere in the Corporation to fulfill the agreement

III. CONCLUSION

The Respondent's arguments are confusing and misleading to this Court. The case law and record solidly support the Bossio Estate's assertion that the Circuit Court erred and abused its discretion by ruling that the Respondent had met his evidentiary burden in proving the existence, execution, contents, and loss by a heightened evidentiary standard likely equal to clear and convincing.

Additionally, this Court should find that the Bossio Estate did not waive its argument regarding the Circuit Court's interpretation and construction of the non-

existent documents because the Bossio Estate argued for the proper effect to be given to the documents (if they were found to exist) at trial.



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CERTIFICATE OF SERVICE

I, Jason E. Wingfield, certify that on June 8, 2015, I served a copy of *The Estate of Luigi Bossio, a.k.a. Louis Bossio Petitioner's Reply Brief* by facsimile and mailing a copy by United States First Class Mail, postage prepaid, addressed to:

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