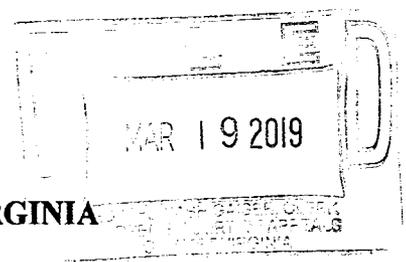


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0791

**CARL A. MASCIOLI,  
ALBERT J. MASCIOLI,  
MBD COMPANY, LLC and  
MASCIOLI BROTHERS DEVELOPMENT,**

**Defendants Below/Petitioners,**

v.

**Appeal from the Circuit Court of  
Monongalia County, West Virginia:  
Civil Action No. 15-C-722**

**LOUANN MASCIOLI,  
as Personal Representative  
of the Estate of Paul Mascioli,**

**Plaintiff Below/Respondent.**

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**PETITIONERS' REPLY BRIEF**

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## INTRODUCTION

Respondent asks this Honorable Court to ignore the sworn affidavits of two of the three alleged partners, one of whom has the identical interest of Respondent. Albert Mascioli has steadfastly maintained that neither he nor Paul had any interest in the eight properties improvidently titled in the name of either Mascioli Brothers Development or MBD Company, LLC. At common law, it is clear that the burden of proving a partnership among the partners is heavier than that by a third party. The Revised Uniform Partnership Act did not displace this crucial distinction and applies only where there is an agreement to share profits and losses, and, then, only as a “gap filler.” Because the Circuit Court refused to hear evidence concerning the conduct of the brothers over 23 years, and whether Carl, Albert and Paul Mascioli ever agreed to shared profits and losses, the order granting summary judgment must be reversed.

Because oral argument will aid in the presentation of the merits of this case, we respectfully request that this Honorable Court set the case for oral argument under Rule 19.

## ARGUMENT

### A. A DE NOVO STANDARD OF REVIEW IS PROPER BECAUSE THIS CASE PRESENTS A MIXED QUESTION OF FACT AND LAW AND BECAUSE THE CIRCUIT COURT WRONGFULLY APPLIED THE FACTS TO THE LAW WHEN MAKING ITS LEGAL CONCLUSION.

In finding facts upon which it based its inappropriate summary judgment ruling, the Circuit Court affirmed that, “although our standard of review for summary judgment remains de novo, a circuit court’s order granting judgment must set out factual findings sufficient to permit meaningful appellate review” (internal quotation and citation omitted). (R. at 1429). Respondent mistakenly claims that Petitioners’ argument is based on these findings of fact and not on the propriety of the summary judgment and thus suggests that the decision may be reviewed by a clearly erroneous standard. (Resp’t’s Br. at 17). To clarify, de novo is the proper standard of appellate review for this case because it presents mixed questions of fact and law.

This Honorable Court has stated that resolving mixed questions of law and fact require combining “fact-finding with an elucidation of the applicable law,” and that mixed questions are reviewed “along the degree-of-deference continuum.” *Fraternal Order of Police v. Fairmont*, 196 W.Va. 97, 100 n. 3, 468 S.E.2d 712, 715 n. 3 (1996). This Honorable Court may use a clearly erroneous standard when a question is dominated by facts. *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995). However, “[o]bstensible ‘findings of fact’ . . . are subject to de novo review when they involve applying the law or making legal judgments which exceed ordinary factual determinations.” *Cole v. Fairchild*, 198 W. Va. 736, 741, 482 S.E.2d 913, 918 (1996) (citing *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 582 n. 5, 466 S.E.2d 424, 432 n. 5 (1995)). More specifically, when a case presents “an interrelationship between factual and legal conclusions, [the Court’s] review is plenary.” *Id.*

Here, the Circuit Court made findings of fact before applying the facts to the law. However, the conduct of the brothers from 1989 through 2012 creates a complex history which is not susceptible to ordinary factual determinations.<sup>1</sup> There is a strong interrelationship between the facts presented by the three brothers' actions, testimony, and documents (or lack thereof) and if and how West Virginia business laws apply to these facts (or lack thereof). The factual and legal determinations necessarily merge before genuine issues can be identified. Therefore, on the continuum, this case falls far in the direction of requiring de novo review.

Moreover, Petitioners contest the propriety of the summary judgment decision because the Circuit Court, in applying facts to the law, failed to assess the facts in the light most favorable to the nonmovant. Had the Circuit Court properly done so, it would have found genuine issues of material fact pertaining to the legal conclusion of whether or not a partnership existed among the brothers. Here, both Albert and Carl, the two remaining brothers, both stated in their affidavits that the brothers did not act as a partnership, did not share profits or losses, and that Carl was the owner of the eight properties.

“At the summary judgment stage, the trial judge’s function is not . . . to weigh the evidence and determine the truth of the matter but determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Even if there is no dispute as to the evidentiary facts, summary judgment is not appropriate where the ultimate factual conclusions to be drawn are in dispute. *Overstreet v.*

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<sup>1</sup> Respondents repeatedly note that the Circuit Court had not previously granted many summary judgment motions. However, it is of absolutely no relevance that this case presented one of this Circuit Court’s “closest calls.” (Resp’t’s Br. at 3). Each case deserves its own consideration regardless of what experience a certain judge may have. The facts and their application to the law in this case, just as in any case, cannot be considered quantitatively or qualitatively with others. In each individual case, if facts are susceptible to more than one inference, summary judgment is inappropriate.

*Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 937 (4th Cir. 1991). In reviewing the evidence, a court must neither resolve disputed facts nor weigh the evidence (*Russell v. Microdyne Corp.*, 65 F.3d 1229, 1239 (4th Cir. 1995), nor make determinations of credibility. *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986).

Here, the Circuit Court's application of facts was improper because it incorrectly weighed the credibility of the evidence in favor of Respondent. The Order described the evidence as "undisputed" when it was hotly disputed by Carl and Albert. (R. at 1432). As Petitioners' original brief explains, the record is filled with evidence pointing to both sides of the main questions at hand: (1) whether the three brothers carried on as co-owners a business for profit, and (2) who owned the eight properties. W. Va. Code § 47B-2-2(a). This Honorable Court should—upon plenary review—determine that genuine issues of material fact exist.

**B. IF THE CIRCUIT COURT HAD NOT IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE DAY OF TRIAL, PETITIONERS WOULD HAVE PRESENTED EVIDENCE IN MORE THAN A SUMMARY FASHION SHOWING THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.**

Respondent wrongly suggests that Petitioners "fully informed the Circuit Court, who was also the finder of fact, of exactly what evidence it intended to introduce at trial to rebut the evidence that the partnership existed between the brothers." (Resp't's Br. at 27). In fact, because the Circuit Court granted summary judgment on the first day of trial, the Petitioners were precluded from presenting this evidence and conclusively establishing that (1) no partnership existed among the three brothers, and (2) Carl owned and paid for the eight properties.

Intent is relevant to the extent that it shows the brothers never associated to carry on as co-owners a business for profit, a threshold question under the RUPA. W. Va. Code § 47B-2-2(a). By testifying at trial as to their intent and conduct, Petitioners would have shown that, over

the course of 23 years: 1) Neither Albert nor Paul ever questioned that Carl was the sole owner of the eight properties, 2) Neither Albert nor Paul contributed to or conferred benefit to the properties in a material way, 3) Neither Albert nor Paul received profits other than the tax benefit of a single charitable donation, 4) neither Paul nor Albert claimed interest or ownership in the properties, while the brothers were memorializing their business interests in the store, and 5) No brother ever held a meeting to discuss partnership business. (R. at 885-913).

If the Circuit Court had not granted summary judgment, Petitioners also would have presented evidence at trial concerning Carl's purpose and intent in filing a document for Mascioli Brothers Development. The County Clerk had recorded two prior deeds for properties purchased solely by Carl, in the name of Mascioli Brothers Development, without Albert's and/or Paul's signatures. However, when the County Clerk required more details before recording a third deed, Carl simply did what the County Clerk required of him to have his deed recorded. (R. at 885-86). This testimony creates a genuine issue of fact precluding summary judgment.

The three brothers could agree that all eight properties belonged to Carl without a discussion or writing. Significantly, Albert Mascioli, whose interests are identical to Paul's (and Respondent), steadfastly maintains there was never a partnership between the three brothers. That the brothers cannot point to agreements regarding the eight properties is understandable. People simply do not discuss or otherwise memorialize what they cannot imagine exists. The brothers' conduct bears this out. Despite the existence of genuine issues of material fact regarding the existence of a partnership, the Circuit Court entered an Order granting summary judgment. Thus, the Circuit Court erred in entering such Order. *Parker v. Estate of Bealer*, 221 W. Va. 684, 687, 656 S.E.2d 129, 132 (2007) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)).

**C. PETITIONERS PRESENTED EVIDENCE THAT NO PARTNERSHIP EXISTED AMONG THE BROTHERS SUFFICIENT TO DENY SUMMARY JUDGMENT AS A MATTER OF LAW.**

Had the Circuit Court properly considered the relevancy of summary evidence in the record, it would have recognized a genuine issue of material fact in how the brothers' actions—which reflected their intentions—did not conclusively demonstrate a partnership *among the brothers*. It is crucial to distinguish between the establishment of a partnership among the three brothers—which is a key issue in this case—and the establishment of a partnership as to third parties. The Revised Uniform Partnership Act addresses contract liability of a purported partner to “one or more persons not partners,” which is not the case here. W. Va. Code § 47B-3-8(a).

Subsection (f) of this same provision clarifies that this is an exception to the general rule that persons who are not partners as to each other are not liable as partners to others. W. Va. Code § 47(b)-3-8(f) (explaining how an individual can be liable for contracts entered into with third parties as a partnership even if there is not partnership); *see Pruitt v. Fetty*, 134 S.E.2d 713, 148 W. Va. 275 (1964) (explaining the doctrine of estoppel, similarly prescribed in the Uniform Partnership Act, as a “principal of law [that can] only be relied on by third parties).

Petitioners do not dispute the potential contract liability of an apparent partnership as to third parties, including grantors, lessors, creditors, etc., based on this theory. More specifically, Petitioners do not dispute that Carl may be liable to third parties for the documents he initiated or deeds or leases he signed or had signed when he purchased and leased the properties. However, this case was not brought by third parties. This case was brought by a representative of an alleged partner in a partnership that did not exist *among the brothers*.

**D. SUMMARY JUDGMENT AS TO MBD COMPANY, LLC WAS IMPROPER BECAUSE IT WAS DISSOLVED PRIOR TO PAUL MASCIOLI'S DEATH AND THUS SHOULD BE TREATED AS A PARTNERSHIP IN THIS MATTER.**

According to the Circuit Court's order, "if a limited liability company is dissolved, but two or more persons of the limited liability company continue to carry on as co-owners of the business for profit, the nature and structure of the business changes from a limited liability company to a partnership." (R. at 1433). Therefore, the Circuit Court found that MBD Company, LLC ("MBD") could only have been a partnership after it was administratively dissolved in 2002. *Id.* Respondent's brief also refers to MBD as a partnership. (Resp't's Br. at 10, 11).

Paul was still alive in 2002 when MBD was administratively dissolved. Like Albert, Paul never demanded anything from MBD or participated in dissolving the company. It terminated through inaction. Thus, Paul's Estate's representation of his interest in this case can apply only to what happened after MBD was dissolved, and, after its dissolution, the brothers did not carry on as co-owners of the business for profit. Accordingly, all arguments in Petitioners' brief that a partnership did not exist are also applicable to MBD.

**CONCLUSION**

WHEREFORE, based upon the evidence in the record and the authorities cited herein, the Petitioner respectfully request that this Honorable Court reverse the Circuit Court's Order granting summary judgment and remand the case for trial on the substantive issues.

Respectfully submitted,

CARL A. MASCIOLI,  
ALBERT J. MASCIOLI,  
MBD COMPANY, LLC, and  
MASCIOLI BROTHERS  
DEVELOPMENT,

By Counsel,



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