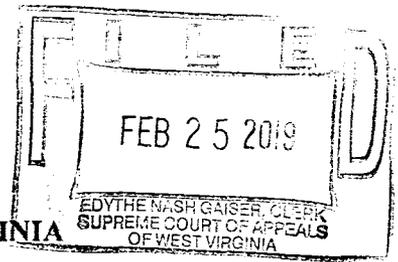


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0791

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

v.

**LOUANN A. MASCIOLI,
As Personal Representative of the Estate of Paul Mascioli,
Plaintiff Below, Respondent.**

On Appeal from the Circuit Court of Monongalia County
Hon. Susan B. Tucker, Judge
Civil Action No. 15-C-722

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. Introduction

In their appeal, Petitioners Mascioli Brothers Development (“Mascioli Brothers”), MBD Company, LLC (“MBD Company”), Carl Mascioli, and Albert Mascioli (collectively the “Partnership”) ask this Court, as they asked the Circuit Court, to act as if the incontrovertible and undisputed evidence of their partnership, which fills the record in this matter, did not exist. They urge the Court to ignore their filings with the State of West Virginia creating their companies and their admissions that they sought all of the protections and shared liability afforded to such entities, when it suited their purposes, for nearly thirty years.

They ask this Court to ignore the decades of undisputed documentary evidence, their own attestations and signatures, prior statements and sworn testimony, and the testimony of the Partnership’s own lawyer, to make the preposterous argument that no partnership ever existed. They ask this Court to ignore the straightforward provisions of our codified uniform partnership law under which there simply is no legitimate way to contest the existence of their partnership. For more than four years, they have taken these unreasonable, unsupported positions for one simple reason: to deny their deceased brother and partner’s estate the buyout of his interests required by law.

The undisputed evidence belying the Partnership’s position is so clear that it compelled Judge Susan Tucker to grant what she noted was only her second summary judgment in her many years on the bench. Although Judge Tucker gave the Partnership repeated opportunities to show some genuine dispute about a material fact, it could not do so. She also imposed mediation, and actively encouraged a conciliatory resolution on multiple occasions, which the Partnership rejected. As detailed below, the arguments the Partnership advances before this Court are invalid

as a matter of law and fail to raise any disputed issue of material fact or show any other flaw in the Circuit Court's analysis and ruling. This Court should deny the Petition and affirm the Circuit Court's judgment.

B. Procedural History

Petitioners appeal a final order by Judge Susan Tucker of the Circuit Court of Monongalia County granting summary judgment on findings of fact and conclusions of law in favor of Respondent LouAnn Mascioli, as Personal Representative of the Estate of Paul Mascioli, the Plaintiff below in a complaint brought in 2014. (R. at 14-45). Mrs. Mascioli filed a complaint after demands for information followed by a formal buyout demand were ignored by the Partnership. (R. at 40-43). The complaint and amended complaint sought the statutorily mandated purchase of the Paul Mascioli Estate's equitable interest in Mascioli Brothers and MBD Company, businesses that brothers Carl, Albert, and Paul Mascioli created and operated beginning in 1989 and continuing to present. (R. at 14-45, 90-97).

After attempts to mediate were frustrated by grudging intransigence on the part of the Partnership (R. at 428-429), the Circuit Court entered a briefing schedule for dispositive motions on the threshold issue of whether or not a partnership had been formed by the brothers. (R. at 136-137, 349). Accordingly, Mrs. Mascioli moved for partial summary judgment on the issue of whether Mascioli Brothers and MBD Company existed. (R. at 144-145). The Court heard the motion on June 29, 2017, and held its ruling in abeyance, instead ordering the parties to attempt another mediation and cautioning the Partnership that the matter "needs to be resolved." (R. at 379-380, 388-390).

Mediation failed and the parties continued engaging in discovery. (R. at 427-429). Thereafter, the parties voluntarily elected to waive their respective rights to a trial by jury. (R. at

1170-1171, 1222-1223). This stipulation was formalized when both parties executed a “Waiver of Jury Trial.” (R. at 1222-1223).

Mrs. Mascioli brought on her Motion for Summary Judgment for hearing by the Circuit Court on March 27, 2018. The Circuit Court noted that “This is probably the closest call that I’ve had for summary judgment[.]” (R. at 1200). The Circuit Court ultimately denied the motion, and directed Mrs. Mascioli’s counsel to draft an order that specifically cited to the applicable law but then stated that nevertheless the court “out of an abundance of caution, and in consideration of potential unresolved factual issues, declined to grant summary judgment” at that time. (*Id.*).

The Circuit Court was provided with additional insight into this matter on June 28, 2018, when it conducted a status conference specifically focused on an effort to reach a compromise in this matter. (R. at 1285-1308). Settlement negotiations ultimately failed. (R. at 1307-1308). The court adjourned and Mrs. Mascioli continued preparing for the bench trial. (R. at 1366-1367).

On Monday, July 9, 2018, the day before trial was scheduled to begin, the Circuit Court held an emergency hearing to address the Partnership’s Friday, July 6, 2018, request for a jury trial. (R. at 1363-1365). After performing independent research, and considering the arguments of counsel, the Circuit Court denied the Partnership’s oral request for a jury trial. (R. at 1379-1380).

The Circuit Court also heard additional arguments from counsel wherein Mrs. Mascioli’s “Motion for Summary Judgment” was renewed and reargued by counsel. (R. at 1368-1379). The Partnership responded to the renewal of the Motion and fully informed the Circuit Court, who was also the finder of fact, of exactly what evidence it intended to introduce at trial to try and rebut the evidence that a partnership existed between the brothers, much of which was subject to various motions *in limine*, and also to support their contention that Carl Mascioli was entitled to

approximately \$700,000 for his alleged but unsupported contributions to the partnership. (R. at 1380-1382, 774-870).

Following the hearing, the parties re-submitted their briefing to the Circuit Court and further provided it with a copy of Carl Mascioli's deposition transcript, as requested.¹ (R. at 1386-1387). On July 10, 2018, the parties appeared for the first day of the scheduled bench trial. After further consideration of Mrs. Mascioli's Motion for Summary Judgment, review of the relevant statutory provisions, and review of Carl Mascioli's deposition transcript, the Circuit Court granted Mrs. Mascioli's "Motion for Summary Judgment." (R. at 1401-1403). The Circuit Court directed Mrs. Mascioli to submit a proposed order by July 13, 2018, with any objections to the proposed order submitted no later than July 18, 2018. (R. at 1405).

After the hearing, counsel for the Partnership requested transcripts of the prior hearings in this case. (R. at 1416-1417). Although counsel received the transcripts in a timely fashion, counsel failed to submit any objections to Mrs. Mascioli's proposed "Order Granting Summary Judgment on Findings of Fact and Conclusions of Law." (*Id.*). Accordingly, the Circuit Court entered the "Order Confirming and Entering Plaintiff's Proposed Order" and the "Order Granting Plaintiff's Motion for Summary Judgment on Findings of Fact and Conclusions of Law." (R. at 1418-1443).

As directed by the Circuit Court, Mrs. Mascioli submitted a "Motion to Recover Reasonable Attorney Fees and Costs" on August 20, 2018, and set the same for hearing. (R. at 1444-1461). There being no objection to the hourly rate or number of hours expended, the Circuit Court awarded Mrs. Mascioli her fees and costs. (R. at 1609 -1612).

¹ Petitioners inappropriately included the exhibits to Carl Mascioli's deposition transcript in the appendix record. (R. at 1727-1882). The exhibits to Mr. Mascioli's deposition were never submitted to the trial court for review. Therefore, the exhibits should not have been included in the appendix record pursuant to Rule 6 of the West Virginia Rules of Appellate Procedure.

This appeal followed. As detailed *infra*, the Partnership's arguments are meritless and present no valid reason for this Court to disturb the findings of the Circuit Court.

C. Statement of Facts

In its "Order Granting Plaintiff's Motion for Summary Judgment on Findings of Fact and Conclusions of Law," the Circuit Court detailed its findings of fact in ten pages. (R. at 1418-1427.) None of those facts were disputed before the Circuit Court, and none are disputed here. Rather, as discussed in detail below, what the Partnership has labeled a dispute of fact, with little or no citation to the record in this matter, actually does not address the facts of the case, but rather relates only to the legal conclusions the Partnership urged upon the Circuit Court -- legal conclusions that find no support in the record and often contradict the Partnership's own admissions. The undisputed facts of the case are as follows:

1. Mascioli Brothers Development

"Mascioli Brothers Development" ("Mascoli Brothers") was founded by Carl Mascioli, Albert Mascioli, and Plaintiff's decedent, the late Paul Mascioli, with the assistance of legal counsel, as a West Virginia partnership. (R. at 570-571, 563-564). Five real estate properties were purchased by Mascioli Brothers from 1989 through 1998. (R. at 780-795). The deeds conveying each property unequivocally provide that the purchaser is Mascioli Brothers Development, a West Virginia partnership. (*Id.*).

Mascioli Brothers enlisted the partnership's legal counsel, Daniel Oliver, to assist with the first two purchases. (R. at 562-564). Shortly thereafter, Mr. Oliver wrote to Mascioli Brothers and stated:

Although we have not finalized the Partnership Agreement between you [Carl], Albert, and Paul, I also enclose a certificate

showing ownership of business under assumed name that I would ask that you fill in the addresses where indicated, and please have each of your brothers sign it in front of a Notary and record it in the Monongalia County Clerk's Office. Later, we can work on the actual details of the Partnership Agreement, but I do want to have this Certificate recorded now because Mascioli Brothers Development owns two (2) parcels of property and there are no records in the Monongalia County Courthouse showing who the owners of that business are.

(R. at 568-569). The Partnership admits that no partnership agreement was ever executed between the brothers. (Pet'r's Br. at 12). The Partnership also concedes, despite the fact that Carl Mascioli and Albert Mascioli had earlier both executed affidavits stating to the contrary, there were no oral agreements regarding the ownership of properties owned by Mascioli Brothers. (R. at 537, 624, 266-274, 885-896).²

It remains undisputed that the "Certificate Showing Ownership of Business Under Assumed Name" recognizing the existence of "Mascioli Brothers Development, a West Virginia Partnership" was executed by all three brothers and filed in the Monongalia County Clerk's Office on May 2, 1990. (R. at 570-571). The partners identified their respective roles in the partnership: Carl was the "Sec Treas," Albert was the "President," and Paul was the "Vice President" of Mascioli Brothers. (*Id.*).

From 1994 through 2008, multiple deeds, right of ways, leases, and easements were executed by Mascioli Brothers. It was never disputed that these documents were all executed in the Mascioli Brothers name and signed by all three brothers, Carl, Albert, and Paul, in their

² Petitioners Carl and Albert Mascioli stated in separate affidavits that "at all times [Carl, Paul, and Albert] agreed that the properties belonged to [Carl]" and that Albert "was present many times when we discussed this." (R. at 764 ¶ 6; R. at 769 ¶¶ 6, 13.) Albert testified at his deposition that he "[didn't] recall the discussions and I don't know who wrote this [affidavit]." (R. at 625). In fact, Albert testified that he and Paul never discussed the ownership of the properties. (R. at 625). Carl confirmed that there were no oral agreements regarding the ownership of these properties. (R. at 537).

capacity as a “partner” of Mascioli Brothers. (R. at 573-598). Attorney Daniel Oliver represented Mascioli Brothers in most of these transactions. (R. at 564-566).

Mr. Oliver testified at his deposition that he believed that Mascioli Brothers was a West Virginia partnership, consisting of Carl, Albert, and Paul Mascioli, during the entirety of his representation of the entity. (R. at 562-563, 565-566). When Mr. Oliver was questioned at his deposition regarding his interactions and conversations with the brothers regarding Mascioli Brothers or the partnership in general, counsel for the Partnership objected on the basis of attorney-client privilege. (R. at 564). At that time, Mr. Oliver confirmed that he represented Mascioli Brothers and that his representation extended to the partners of that entity: Carl, Albert and Paul Mascioli. (*Id.*). The Partnership enjoyed the benefit of this assertion of privilege throughout the deposition and did nothing to suggest that Mr. Oliver was incorrect, or allow him to testify regarding conversations with Albert or Paul Mascioli. (*Id.*).

With respect to the real estate purchased by Mascioli Brothers, the ninety-two (92) acres of land (“Camp Ridge”) was purchased with the intention of developing a housing community that the brothers named “Silver Tree Estates.” (R. at 535, 548). Plats and plans for the development were prepared by CTL Engineering of WV, Inc., at the brothers’ request in mid-1990. (R. at 548). In 2006, Silver Tree Estates was revisited when the brothers engaged Petroplus & Associates, Inc., a real estate company in Morgantown, West Virginia. (R. at 689-705).

Although the housing development never materialized, the brothers received tax write-offs and income from the property. (R. at 599-600, 552, 628-629). Specifically, Albert and Paul Mascioli claimed a donation of 7 acres of the Camp Ridge property by and between “Mascioli Brothers Development, a West Virginia Partnership” and the Monongalia County Board of Education on their respective 1992 tax returns, representing that each had a “1/3 undivided

interest” in the property. (R. at 577-584, 599-600). The Partnership admits that this transaction constitutes “shared profits.” (Pet’r’s Br. at 3).

In 2014, a representative of Northeast Natural Energy LLC (“Northeast”) met with Carl and Albert, the living partners of Mascioli Brothers, at Albert’s home to negotiate an oil and gas lease. (R. at 550-551). On April 17, 2014, and September 12, 2014, Mascioli Brothers entered into an oil and gas lease with Northeast for the Camp Ridge property. (R. at 632-635). The lease was signed by Carl, as President of Mascioli Brothers, and Albert, as Vice President of Mascioli Brothers. (*Id.*) Albert admitted at his deposition that as of April 17, 2014, he was the Vice President of Mascioli Brothers. (R. at 627).

Shortly thereafter, Albert organized Mascioli Brothers, LLC,³ and attempted to convey all of LouAnn Mascioli and Mascioli Brothers’ right, title and interest in the oil, gas, and coal bed methane, and the right to remove the same to Mascioli Brothers, LLC. (R. at 636-648). To this end, LouAnn Mascioli was presented with a deed, signed by Albert, on behalf of “MASCIOLO BROTHERS DEVELOPMENT, A West Virginia Partnership.” (R. at 646-648). Mrs. Mascioli refused to sign the document and entered into a separate oil and gas lease with Northeast for her interest, as the widow of Paul. (R. at 651-658).

On September 30, 2014, Albert, on behalf of “MASCIOLO BROTHERS DEVELOPMENT, A West Virginia Partnership” granted “all of its right, title and interest in the oil, gas and coal bed methane, and the right to remove the same” to “MASCIOLO BROTHERS, LLC.” (R. at 659-662). Mascioli Brothers, LLC received an upfront payment from Northeast and royalty payments. (R. at 552). It is admitted by the Partnership that Albert and Carl split the

³ Mascioli Brothers LLC is a manager-managed limited liability company managed by Albert Mascioli and recognized by the West Virginia Secretary of State on May 30, 2014. (R. at 636-645).

upfront payment and royalty payments 50/50. (R. at 552, 628-629). The Partnership admits that this is yet another example of “shared profits” between the brothers. (Pet’r’s Br. at 3).

The remaining undeveloped real estate owned by Mascioli Brothers is referred to as Dupont Road or “Dupont Plaza,” the name given to the property “in order to get the Department of Highways to give us a permit to get in and out.” (R. at 546). In or around 1992, Carl Mascioli hand-wrote a receipt for the clearing of Dupont: “Received from Carl Mascioli Sec-Treas Mascioli Bros Dev. \$5,000.00 for excavation work at development site.” (R. at 547, 572).

In attempts to develop this land as a RV park, Carl and Paul, on behalf of Mascioli Brothers, prepared a “Request for Estimate” for the Morgantown Utility Board in 2012. (R. at 546-47, 620-21). This was one of many business development ideas the brothers, and Paul specifically, had for this property. (R. at 626, 694). Furthermore, signage was placed on the Dupont property advertising leasing opportunities for the property. (R. at 541, 630-31). The Partnership admits that these signs, which remain on the property today, display the contact information for Carl, Albert, and Paul. (*Id.*).

The three remaining properties purchased by Mascioli Brothers are residential properties. Despite requiring all tenants to sign lease agreements – lease agreements that were drafted by legal counsel – the Partnership only produced in discovery a handful of leases. (R. at 544, 601-616, 914-921, 958-981, 1177). Although the Partnership admits that certain information identifying the parties to the few leases they produced had been crudely removed by the Partnership apparently to try and obscure the identity of the lessor, it nonetheless admits that the lessor in at least some of the leases is Mascioli Brothers. (R. at 545, 601-616).

Following Paul's death, Carl and Paul's widow, LouAnn, discussed “Tax Receipts” for three of the five of the properties owned by Mascioli Brothers for purposes of the administration

of Paul's Estate. (R. at 653-654, 663-665). Carl wrote on the top of certain of these Tax Receipts: "Paul on this deed." (*Id.*) The five properties purchased by Mascioli Brothers remain in the name of Mascioli Brothers. (R. at 543).

2. MBD Company, LLC

The Partnership's brief to this Court fails to even address MBD Company, its formation, or the undeniable identity of its members. (*See* Pet'r's Br.) MBD Company was a West Virginia limited liability company that was founded by Carl, Albert, and Paul on October 26, 1998, with the assistance of attorney Daniel Oliver. (R. at 666-671, 566-567). Despite the Partnership's repeated assertion that MBD Company "didn't exist" (R. at 542), Mr. Oliver confirmed at his deposition that MBD was an existing West Virginia limited liability company, a fact that is made doubly clear by records maintained by the West Virginia Secretary of State. (R. at 567, 683-684).

Defendants concede that there was no operating agreement for MBD Company. (R. at 108). Defendants also admit that, despite the fact that both Carl and Albert Mascioli had executed affidavits stating to the contrary, there were no oral agreements between the brothers regarding the ownership of properties owned by MBD Company. (R. at 537, 624, 266-274, 885-896).

During its existence, MBD Company purchased two residential properties. (R. at 672-682). Attorney Daniel Oliver was involved in at least one of these purchases, preparing a deed dated September 24, 2001. (R. at 567). Mr. Oliver testified that it was his belief that MBD Company was operating as an LLC as of this date. (*Id.*).

MBD Company was administratively dissolved by the Secretary of State in 2002. (R. at 683-684). Despite being administratively dissolved, MBD Company purchased another residential property on or about January 20, 2003. (R. at 685-687). The Partnership produced the

promissory note for this purchase listing MBD Company, LLC as the borrower. (R. at 1034-1037).

Furthermore, in 2006, four years after MBD Company was terminated, the Partnership engaged Petroplus & Associates, Inc. to propose a marketing strategy for two properties owned by MBD Company and the two undeveloped properties owned by Mascioli Brothers. (R. at 554, 688-705). Petroplus presented its strategy to MBD, "c/o All Members" at the address where Carl, Albert and Paul conducted business. (*Id.*). The cover letter sets forth that Petroplus believed it had gained a "clear understanding of your real estate goals" after several meetings. (R. at 688). Those goals are explained in the marketing strategy as commercial leases for the MBD Company properties and Dent's Run, and a housing development, Silver Tree Estates, on the Camp Ridge property. (R. at 689-705).

The Partnership further admits that a website, <http://mbdcompany.com>, was created by Petroplus and provided the names and contact information for Carl, Albert, and Paul with a list of properties owned by both MBD Company and Mascioli Brothers that were for sale or lease. (R. at 539-540, 706). The Partnership concedes that Albert and Paul were in fact contacted by interested parties regarding the properties owned by the partnership. (Pet'r's Br. at 3). The Partnership also admits that Paul was involved in seeking other commercial opportunities for properties owned by MBD Company. (R. at 553).

The Partnership also produced in discovery some leases for properties owned by MBD Company: a 2012 lease that provides that rent is payable to "Mascioli Brothers" (R. at 707-714), and a 2016 lease that has admittedly been altered and replaced with handwriting where the lessor was identified. (R. at 544-545, 715-722).

Following Paul's death, Carl and LouAnn discussed "Tax Receipts" for two of the three properties owned by MBD for purposes of the administration of Paul's Estate. (R. at 653-654, 663-665). Carl wrote on the top of both of these Tax Receipts: "Paul on this deed." (*Id.*). Finally, it is undisputed that the three properties purchased by MBD remain in the name of MBD. (R. at 543).

3. Valuation of the Partnership

Appraisals were conducted on each of the eight properties owned the Partnership at the expense of Mrs. Mascioli. (R. at 723-747). The uncontested appraised value of the properties as of December 20, 2012, collectively totals \$3,030,400. (*Id.*)

Mrs. Mascioli also retained a business valuation expert, Dr. Richard A. Riley, Jr. (R. at 1079-1137). Dr. Riley prepared a valuation of Partnership. (*Id.*). As set forth in his detailed 26 page report, Dr. Riley concluded that the fair market value of a one-third ownership interest in the Partnership as of December 20, 2012 on a controlling, non-marketable basis is \$1,010,000. (*Id.*).

The Partnership did not identify any expert to oppose the appraisals or Dr. Riley's valuation.⁴ (R. at 1044-1046). Instead, the undisputed evidence in this matter is Carl Mascioli's sworn testimony that rental income received from the properties owned by the Partnership was used to purchase the properties, payoff any loans on the properties, and to pay for all maintenance, insurance, and tax expenses. (R. at 538, 559). This admission is obvious given the Partnership's repeated assertion that Carl Mascioli did not accept any profits from the supermarket business, his sole employer, from 1989 through 2010. (Pet'r's Br. at 2).

⁴ Petitioners inappropriately included Defendants' Disclosure of Expert Witnesses in the appendix record. As clearly set forth in the Docket Sheet, the only document provided to the trial court was the Certificate of Service for Defendants' Disclosure of Expert Witnesses. Therefore, this document should not have been included in the appendix record pursuant to Rule 6 of the West Virginia Rules of Appellate Procedure.

II. SUMMARY OF ARGUMENT

The Partnership's first assignment of error actually contains four separate assignments of error, all of which are defeated by the record and proper application of the law by the Circuit Court. (Pet'r's Br. at 1, 8-15). First, the Partnership posits that the Circuit Court erred by granting summary judgment because it failed to take into account the historical common law concerning the formation of partnerships. But the common law regarding the formation of partnerships was long ago displaced by statute in West Virginia, and is now governed entirely by the Revised Uniform Partnership Act ("RUPA") which has been incorporated into our Code. In any case, the Partnership fails to demonstrate how historical common law decisions apply to this matter in a way that might alter the Circuit Court's findings.

The Partnership next argues that evidence regarding the brothers' intent to create a partnership and their conduct over the years was not considered by the Circuit Court. (Pet'r's Br. at 2, 8-9). Although the Partnership presents this contention as if it were a disputed issue of fact, it actually is a conclusion of law, and therefore does not affect the Circuit Court's ability to resolve by summary judgment the issue of whether the Partnership was, in fact, a partnership as a matter of law. Furthermore, even a cursory review of the Circuit Court's Order reveals a detailed discussion regarding the conduct of the Partnership from 1989 through present, including the countless and undisputed ways in which the Partnership carried on as coowners a business for profit. (R. at 1418-1434). This "conduct" evidence was not ignored; to the contrary, it was the basis for the Circuit Court's finding that "The record is replete with evidence of these three brothers acting like a partnership." (R. at 1403). In applying the law to the undisputed facts, the Circuit Court appropriately concluded that a partnership was formed, despite whether the brothers intended to form a partnership. (R. at 1430).

The Partnership takes issue with the Circuit Court's granting summary judgment on the first day of trial, having denied the same motion several months earlier. Why the Partnership believes this constitutes reversible error is unclear. But in any case, Judge Tucker made it abundantly clear at the March 27, 2018, hearing on the "Motion for Summary Judgment" that she was inclined to grant the motion, which would have been only the second motion for summary judgment she had granted in nine years, but believed that the parties, who are family, should attempt to reconcile their differences and reach an agreement by settlement. (R. at 1171-1172, 1200). The Circuit Court repeatedly informed the Partnership that it had "problems" and should resolve this matter. (R. at 1171-1172). Instead of heeding the Circuit Court's warning, the Partnership trudged forward holding steadfast to the untenable position that a partnership never existed.

Ultimately, the Circuit Court granted Mrs. Mascioli's "Motion for Summary Judgment" when it became clear that the Partnership was unable to come forward with any issue of contested material fact. (R. at 1401-1403). In doing so, the Circuit Court noted: "I have concluded that my hesitation to grant summary judgment, based on historical rulings by the Supreme Court, is not enough to overcome the undisputed facts in this case." (R. at 1403). The Partnership's assertion that this ruling was an "abrupt change in opinion" is meritless, and the record makes that undeniable. (Pet'r's Br. at 9).

The Partnership's attempt to characterize the Circuit Court's grant of summary judgment as a sanction for the alleged spoliation of evidence is plagued by a similar problem: the record unquestionably disproves it. (R. at 1402-1403). In fact, the only place the Circuit Court's order references the Partnership's shredding of documents is in paragraph 72 under the sub-heading "Defendants' Conduct." (R. at 1427.) The Circuit Court's reasoning for granting summary

judgment was not based on a claim of spoliation; it was based on overwhelming and undisputed evidence conclusively proving the existence of a partnership as a matter of law. (R. at 1418-1443).

The Partnership raised its assignment of error concerning joint and several liability for the first time after the order granting summary judgment had been entered by the Circuit Court. (R. at 1416-1417, 1616-1623). In any event, the law conclusively disposes of the argument that it was error to enter an order against Carl Mascioli and Albert Mascioli. (Pet'r's Br. at 9). The applicable statute plainly states that all partners are liable jointly and severally for all obligations of the partnership.

The Partnership's assignment of error concerning valuation and contribution is defeated by the record, which contradicts the factual premise for its argument. The RUPA gives the circuit court discretion to determine the buyout price of a dissociated partner's interest and any offset. The record demonstrates that the Circuit Court, in its sound discretion, considered the uncontested evidence regarding the value of the Partnership and determined the buyout price of the Paul Mascioli's Estate's interest. (R. at 1402-1403, 1418-1443). Furthermore, the Circuit Court cited and discussed the Partnership's argument concerning amounts due to Carl Mascioli, but rejected its unsupported "estimate" of those amounts. (R. at 1402, 1434-1438). The Partnership fails to show that the Circuit Court abused its discretion in determining the buyout price of the Paul Mascioli's Estate interest.

The Partnership's assignment of error concerning the award of attorney's fees and costs likewise is defeated by the record and the law. The Circuit Court explicitly found that the Partnership had acted arbitrarily, vexatiously, and in bad faith. (R. at 1404). Some of these findings were detailed in the order granting summary judgment. (R. at 1427). But regardless of

the Partnership's conduct, the RUPA expressly allows for an award of attorney's fees and expenses based solely on the partnership's failure to tender payment or an offer to pay. It is undisputed that the Partnership to this day has never tendered payment or offered to pay the Paul Mascioli Estate the statutorily required buyout of its interest. (R. at 1439). Therefore, the Circuit Court was within its sound discretion to award attorney's fees and expenses in this matter.

As for the amount of the attorney's fees and costs awarded, the Circuit Court carefully considered and followed the seminal test for determining the reasonableness of attorneys' fees and costs. There having been no objection to the hours expended or rates charged by Respondent's counsel, the Partnership fails to show that the Circuit Court committed plain error and abused its discretion in awarding attorney's fees and costs in the amount of \$245,158.46.

Finally, the Partnership argues the Circuit Court erred when it refused to call in a jury at the eleventh hour, even after both parties had stipulated to trial by the Circuit Court. (Pet'r's Br. at 23-24). The Circuit Court granted the Motion for Summary Judgment in this matter. Therefore, this assignment of error is moot.

For all these reasons, Mrs. Mascioli requests that the Court affirm the Circuit Court's ruling granting summary judgment in the Estate's favor.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case because the law regarding the issues presented is well-settled, the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then Respondent agrees with Petitioners that argument under W. Va. R. App. P. 19 is appropriate because the appeal involves assignments of error in the application

of settled law, and that the appeal is appropriate for disposition by memorandum decision under W. Va. R. App. P. 21.

IV. ARGUMENT

A. Standards of Decision and Review.

Although the Partnership's description of the applicable standards of review is less than clear, it appears to acknowledge that the sole assignment of error to which a *de novo* standard applies is the assignment that challenges the propriety of summary judgment because of the alleged existence of a genuine issue of material fact.⁵ (Pet'r's Br. at 8.) The Court should note, however, that most of the argument that the Partnership has shoehorned into the section of its brief addressing that first assignment error *does not* challenge the propriety of summary judgment, but instead contests the Circuit Court's findings of fact. Findings of fact made by the Circuit Court are reviewed under a clearly erroneous standard.⁶ This distinction is more fully discussed below in the specific responses to the Partnership's arguments.

As the Partnership acknowledges, the Circuit Court's award of attorney's fees and costs⁷ and its decision to deny the Partnership's last-minute jury trial demand⁸ may be reversed only if this Court finds an abuse of discretion. (Pet'r's Br. at 8.) Likewise, the Circuit Court's

⁵ E.g., Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

⁶ E.g., Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996) ("We review challenges to findings of fact under a clearly erroneous standard.")

⁷ E.g., *Beto v. Stewart*, 213 W. Va. 355, 360, 582 S.E.2d 802, 807 (2003) ("The decision to award or not award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse.")

⁸ E.g., Syl. Pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) (holding that a circuit court's rulings on procedural matters are reviewed under an abuse of discretion standard).

determination of the buyout price for the Paul Mascioli Estate's share of the partnership, and its resolution of Carl Mascioli's offset claim, also take an abuse of discretion standard.⁹

B. The Partnership Has Failed to Identify Any Genuine Issue of Material Fact To Preclude the Circuit Court from Finding that a Partnership Existed as a Matter of Law.

The Partnership's brief to this Court employs an internally contradictory, shotgun approach to challenge the Circuit Court's decision to grant summary judgment. Although the Partnership titles its primary argument as if it offers up material challenges to the facts, it never actually identifies any specific fact with which it takes issue. (Pet'r's Br. at 9-10). The Circuit Court detailed its findings of fact over ten pages of its Order granting summary judgment. (R. at 1418-1427.) None of the facts spread across those ten pages were disputed before the Circuit Court, and none are disputed here. As acknowledged by the Partnership, "where the facts are undisputed, or susceptible of only one inference, the question as to whether a partnership exists between particular persons is one of law for the court."¹⁰ (Pet'r's Br. at 12).

Instead of pointing to a specific disputed fact that might have precluded summary judgment, the Partnership argues only that evidence regarding the brothers' intent to create a partnership and their asserted self-serving belief that a partnership did not exist create a genuine issue of fact that precluded summary judgment. (Pet'r's Br. at 3, 8-9). But that is wrong as a matter of law. Because the partners' subjective belief about the existence of a partnership is irrelevant under our law, their opinion on that point could not create a *material* dispute of fact – the only type of dispute that can preclude summary judgment. This Court has held on many occasions that a "material fact" on a motion for summary judgment is one that has the capacity to

⁹ *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 262 P.3d 108, 111–12 (Wash. 2011) ("The [Revised Uniform Partnership Act] gives the court discretion to determine the buyout price of a dissociated partner's interest, and we will not disturb its decision absent abuse of that discretion.")

¹⁰ *Pruitt v. Fetty*, 148 W. Va. 275, 278–79, 134 S.E.2d 713, 716 (1964).

sway the outcome of litigation under applicable law.¹¹ “Factual disputes that are irrelevant or unnecessary will not be counted.”¹²

RUPA, as adopted by our legislature and incorporated into West Virginia Code, defines a partnership as “an association of two or more persons to carry on as coowners a business for profit. . . .”¹³ RUPA further provides that “the association of two or more persons to carry on as coowners a business for profit forms a partnership, **whether or not the persons intend to form a partnership.**”¹⁴ As this Court has noted, under the RUPA definition of “partnership,” “people operating a business together for profit ‘may inadvertently create a partnership despite their expressed subjective intention not to do so.’”¹⁵ Given RUPA’s resolution of the existence of a partnership without regard to the parties’ intent, the Partnership’s allegation that the Mascioli brothers did not intend to form a partnership, even if true, is not a *material* fact with bearing on the Circuit Court’s ability to grant summary judgment.

The Partnership failed to come forward with any genuine issue of material fact as to whether a partnership existed between the brothers. Instead, it responded to the “Motion for Summary Judgment” with nothing more than commentary from counsel that found no support in the record, and self-serving, inconsistent “amended” affidavits focused on the alleged lack of intent to form a partnership. (R. at 871-896). Those amended affidavits conceded that Mascioli Brothers and MBD were formed, but merely denied that the brothers intended to create a partnership. (R. at 885-887). Likewise, in the briefing to this Court, the Partnership continues to argue that the belief of Carl and Albert that a partnership did not exist and their intentions are

¹¹ *Jividen v. Law*, 194 W. Va. 705, 714, 461 S.E.2d 451 (1995).

¹² *Id.*

¹³ W. Va. Code § 47B-1-1(7).

¹⁴ W. Va. Code § 47B-2-2(a) (emphasis added).

¹⁵ *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 540, 766 S.E.2d 785, 799 (2014) (quoting Allan Donn, Robert W. Hillman, & Donald J. Weidner, *The Revised Uniform Partnership Act*, § 202, Official Comments (Thompson Reuters 2014)).

controlling. (Pet'r's Br. at 9). But RUPA makes it clear that the intent or the belief of the parties is immaterial to determination of whether a partnership exists.¹⁶

As decided by the Circuit Court, the overwhelming and uncontested evidence is susceptible to only one inference: the Mascioli brothers formed Mascioli Brothers Development and carried on as partners and later, when MBD Company, LLC was administratively terminated, continued to carry on business as partners using the names Mascioli Brothers and MBD Company interchangeably. (R. at 1418-1434). The Partnership's assignment of error on this point is defeated by the record and the law. For these reasons, this Court should refuse to disturb the Circuit Court's ruling.

1. The Circuit Court Carefully and Properly Followed This Court's Precedent and the Revised Uniform Partnership Act in Granting Summary Judgment to The Estate of Paul Mascioli.

In its appeal to this Court, the Partnership complains that the Circuit Court's Order failed to properly apply the law to the undisputed facts because it did not take into account three turn-of-the-century pre-RUPA common law decisions regarding the mechanics of partnership formation. (Pet'r's Br. at 10-11). But the Partnership misses the fact that those "historical" decisions have little to do with current West Virginia law.

Our legislature adopted RUPA in 1995 to "govern[] all partnerships" in existence before, on, or after July 1, 1995.¹⁷ RUPA is a "gap filler" in that it only governs such partnerships when there is no partnership agreement or to the extent an agreement does not otherwise provide.¹⁸ The Partnership concedes that there is no partnership agreement between the brothers. (Pet.'r's Br. at 12).

¹⁶ W. Va. Code § 47B-2-2(a); *Valentine*, 234 W. Va. at 540, 766 S.E.2d at 799.

¹⁷ W. Va. Code § 47B-11-4.

¹⁸ *Valentine*, 234 W.Va. at 540, 766 S.E.2d at 799; W. Va. Code §47B-1-3(a).

The Partnership argues that the pre-RUPA case law cited in its brief is necessary to present “a complete picture of West Virginia law” as to whether a partnership was formed by the Mascioli brothers. But our contradictory common law concerning partnership formation has been entirely displaced by RUPA.¹⁹ In *Valentine*, this Court distinguished the definition of a general partnership at common law and its statutory definition under RUPA.²⁰ At common law, a general partnership was defined as “a contract relation between two or more competent persons who have combined their money, effects, labor and skill, or some or all of them, in a lawful joint enterprise, or business, for the purpose of joint profit.”²¹ But RUPA defines partnership as: “an association of two or more persons to carry on as coowners a business for profit. . . .”²² RUPA describes in lucid language how a partnership is now formed in West Virginia:

the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.²³

It is hardly necessary to say that the pre-RUPA precedent cited by the Partnership, which dates from 1894, 1919, and 1929, has no application under current West Virginia law to the extent that it holds that a party’s intent is relevant to whether a partnership is formed. Our statute and case law make clear that is not the case under current law.²⁴

¹⁹ The Partnership argues that common law “not displaced by RUPA” remains valid. (Pet’r’s Br. at 13.) Inexplicably, however, it fails to acknowledge that our common law concerning the relevance of the parties’ intent to form a partnership has been *entirely* displaced by RUPA. The statute could hardly address the issue more clearly. It states: “the association of two or more persons to carry on as coowners a business for profit forms a partnership, **whether or not the persons intend to form a partnership.**” W. Va. Code § 47B-2-2(a) (emphasis added).

²⁰ *Id.*

²¹ *Id.* (quoting Syllabus Point 4, *Hi Williamson & Co. v. Nigh*, 58 W.Va. 629, 53 S.E. 124 (1906)).

²² *Valentine*, 234 W. Va. at 540, 766 S.E.2d at 799 (quoting W.Va. Code § 47B-1-1(7)).

²³ *Id.* (quoting W.Va. Code § 47B-2-2(a)).

²⁴ *Id.*

The Partnership accuses the Circuit Court of taking this Court's holding in *Valentine* "entirely out of context." (Pet.'r's Br. at 10). But the decision speaks for itself. The full quotation in *Valentine* states:

Further, this opinion will not attempt to comprehensively discuss the common law rules of general partnerships, for a simple reason: most of those common law rules have been augmented or supplanted by statute. As we discuss in the next section, partnership law in West Virginia is now guided by the *Revised Uniform Partnership Act*. Hence, much of the following discussion on the common law of general partnerships is purely historical and academic. But understanding the primordial rules of general partnership law leads to an understanding of how mining partnerships came to exist, and why real property ownership by the partners is critical to the formation of a mining partnership.²⁵

RUPA further provides a list of "rules" to consider in determining whether or not a partnership exists.²⁶ This list is noticeably absent from the Partnership's briefing. Nowhere in RUPA is the requirement that partners must share all profits or losses in order to form a partnership.²⁷ Even if this requirement did exist, the Partnership admits in its brief to this Court that the brothers repeatedly shared profits. (Pet.'r's Br. at 3, 11-13).

Perhaps most notable about the Partnership's appeal is the fact that none of the supplanted common law principles that it purports to rely upon actually support the proposition that the Circuit Court misapplied the law or erred in granting summary judgment. Without a single citation to authority, the Partnership argues that "[t]he authorities suggest that sharing in profits and losses is the most important factor in determining whether a partnership was formed." (Pet.'r's Br. at 11). Instead, the four cases that are cited later in the briefing speak only to the

²⁵ *Valentine*, 234 W. Va. at 534, 766 S.E.2d at 793 (emphasis added).

²⁶ W. Va. Code Ann. § 47B-2-2(c).

²⁷ *Id.* The RUPA only provides that "A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment." *Id.*

intention of the parties to form a partnership,²⁸ which has been displaced by RUPA, the degree of evidence required to prove the existence of a partnership,²⁹ and the standard for deciding the issue of whether a partnership exists as a matter of law.³⁰ Even if those cases continued to constitute good law after RUPA, which they most certainly do not, they illuminate no error whatsoever in the Circuit Court's judgment.

In this Court as in the Circuit Court, the Partnership continues to mischaracterize and misapply our law on the formation of a partnership. The Partnership persists in the argument that "motive and intent are relevant" to determining whether the brothers formed a partnership. (R. at 1380-1381). They are not. RUPA conclusively states that "the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership."³¹ The Circuit Court's order is replete with undisputed evidence of the Mascioli brothers carrying on as coowners of a business for profit. (R. at 1418-1427). The Partnership's assignment of error on this point is defeated by the record and the law. For these reasons, this Court should refuse to disturb the Circuit Court's ruling.

2. The Circuit Court Expressly Considered All Evidence Regarding the Conduct of the Parties in Determining that a Partnership Existed.

The Partnership's argument that the Circuit Court failed to consider the conduct of the Mascioli brothers in determining whether a partnership existed is not supported by the record. The Circuit Court's order contains a detailed discussion regarding the conduct of the Partnership from 1989 through present and its effect on the Court's ruling. (R. at 1418-1427). The Partnership's assignment of error on this point is defeated by that fact alone.

²⁸ Syl. Pt. 2, *Duffield v. Reed*, 84 W.Va. 284, 99 S.E. 481 (1919).

²⁹ *Hinkson v. Ervin*, 40 W.Va. 111, 20 S.E. 849 (1894); Syl. Pt. 1, *Lipscomb v. Ballard*, 106 W.Va. 694, 146 S.E. 826 (1929).

³⁰ *Pruitt*, 148 W.Va. at 279, 134 S.E. 2d at 716.

³¹ W.Va. Code § 47B-2-2(a).

The brothers' "conduct" was not ignored by the Circuit Court; it was the basis for the Circuit Court's finding that "The record is replete with evidence of these three brothers acting like a partnership." (R. at 1403). In applying the law to the undisputed facts, the Circuit Court reached the only reasonable conclusion supported by the record and the law: a partnership was formed. (R. at. 1430). The Partnership's assignment of error on this point cannot overcome the undisputed evidence.

In any event, as detailed *supra*, RUPA does not require equal contributions from partners, sharing of profits and losses, or equal authority and control; it requires only the association of two or more persons to carry on as coowners a business for profit.³² Indeed, the Author's Comments to RUPA contemplate, "some partnerships are extremely hierarchical, with control concentrated in a single partner."³³ Therefore, the fact that Carl Mascioli may have called the shots and wrote the checks is irrelevant to the determination of whether the Mascioli brothers were carrying on as owners a business for profit. It simply indicates that according to Carl and Albert Mascioli, the partnership operated in a hierarchical manner with the self-proclaimed president/secretary and treasurer of the Partnership also handling the finances. (R. at 570-572, 266-274, 885-896).

This Court has recognized an important distinction in RUPA that differs from the common law, which is especially applicable in this matter:

This new philosophy is bluntly expressed in *West Virginia Code* § 47B-2-1: "A partnership is an entity distinct from its partners."

This philosophical distinction is important to understanding property owned by partnerships. Under the entity theory, "Partners are no longer conceived of as co-owners of partnership property. Rather, the partnership entity owns partnership property." Donn, *Revised Uniform Partnership Act*, § 203. "Even property

³² W.Va. Code § 47B-2-2(a)

³³ § 202, Formation of Partnership, Rev. Uniform Partnership Act Section 202 (2018-2019 ed.)

that is contributed by partners becomes property of the entity rather than property of a cotenancy of the contributing partners.³⁴

The law is clear: whatever Carl's purported intent may have been, and whether or not he solely made decisions with respect to which properties to purchase, the Partnership accumulated property, not Carl Mascioli.

The Partnership has never disputed the findings of facts as set forth by the Circuit Court. Indeed, the Partnership prepared "Defendant's Proposed Order Denying Plaintiff's Motion for Summary Judgment on Findings of Fact and Conclusions of Law" in which it expressly adopted many of those facts. (R. at 1249-1262). Instead, the Partnership misstates much of the evidence to this Court and misapprehends its legal significance. For example, all property leases in the record *were not* payable to Carl only, as the Partnership represents to this Court. (Pet'r's Br. at 12). Mrs. Mascioli provided four of only a handful of leases produced in this matter that either show the lessor identified as "Mascioli Brothers," or have the lessor's name removed. (R. at 544-545, 601-616, 707-722). Similarly, many of documents cited by the Partnership in support of the contention that Carl paid for all expenses are actually documents addressed to "Mascioli Brothers Development." (R. at 926-927, 946, 948-949, 951, 955-957). One thing is clear from the documents cited and the record: nothing demonstrates that Carl Mascioli personally expended funds with connection to the partnership. (R. at 538, 559, 922-932, 946-957, 958-991, 1000-1010, 1016-1021).

Even in its arguments to this Court, the Partnership has pointed to no "specific facts showing there is a genuine issue for trial."³⁵ Rather, it simply points to its lawyer's commentary and conclusions, and claims that they alone somehow created disputed facts. But that is not our

³⁴ *Valentine*, 234 W. Va. at 541, 766 S.E.2d at 800.

³⁵ W. Va. R. Civ. P. 56(e) (emphasis added).

law, and the Partnership has pointed to no disputed fact in the record that precluded summary judgment. For these reasons, the Court should affirm the Circuit Court's ruling.

3. The Circuit Court Did Not Err in Granting Summary Judgment on the Day of Trial.

The Partnership argues that the Circuit Court somehow erred in granting summary judgment on the day of trial. But there was no "abrupt change in opinion" by the Circuit Court, and the record makes that undeniable. (Pet'r's Br. at 9). Indeed, the record is clear that the Circuit Court was always inclined to grant summary judgment. (R. at 379-380, 1171-1172, 1200, 1287). The Circuit Court gave the Partnership every opportunity to come forward with a genuine issue of material fact to avoid summary judgment. But the Partnership repeatedly failed, as it has in this Court, to identify any genuine issue of material fact, which this Court defines as "facts that ha[ve] the capacity to sway the outcome of the litigation."³⁶ (R. at 266-274, 885-896).

Prior to the depositions of Carl and Albert Mascioli, Mrs. Mascioli moved for partial summary judgment on the issue of whether Mascioli Brothers and MBD Company existed. (R. at 1-13, 144-145). The Circuit Court heard arguments of counsel on June 29, 2017, and held the motion in abeyance. (R. at 346-387). Notably, the Circuit Court ordered the parties to mediation stating that the matter "needs to be resolved." (R. at 379-380, 388-390).

After considerable discovery occurred, Mrs. Mascioli, by counsel, brought on her "Motion for Summary Judgment" for hearing by the Circuit Court on March 27, 2018. The Circuit Court noted at the outset of the hearing that she had only granted "maybe one" motion for summary judgment in her nine years as a circuit court judge. (R. at 1171-1172). The Circuit Court went on to note that "This is probably the closest call that I've had for summary judgment[.]" (R. at 1200). The Circuit Court ultimately denied the motion, and, against her

³⁶ *Jividen*, 194 W. Va. at 708, 461 S.E.2d at 454.

normal practice, directed Mrs. Mascioli's counsel to draft an order that specifically noted the applicable law but stated that the court: "out of an abundance of caution, and in consideration of potential unresolved factual issues, declined to grant summary judgment" at that time. (*Id.*).

The Circuit Court was provided with additional insight into this matter on June 28, 2018, when the court conducted an all-day status conference specifically focused on an effort to reach a compromise. (R. at 1285-1308). Thereafter, on Monday, July 9, 2018, the day before trial was scheduled to begin, the Circuit Court requested an emergency hearing to address the Partnership's Friday, July 9, 2018, request for a jury trial. (R. at 1363-1365). The Circuit Court also heard additional arguments from counsel wherein Mrs. Mascioli's "Motion for Summary Judgment" was renewed and reargued by counsel. (R. at 1368-1379). The Circuit Court also reviewed W.Va. Code §47B-7-1(i) providing that "The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest." (R. at 1369-1370).

The Partnership responded to the renewal of the "Motion" and again 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 a partnership existed between the brothers, and also to support their contention that Carl Mascioli was entitled to an approximately \$700,000 credit for his alleged contributions to the partnership. (R. at 1380-1382). Following the hearing, the parties re-submitted their briefing to the Circuit Court and further provided it with a copy of Carl Mascioli's deposition transcript, as requested. (R. at 1386).

On July 10, 2018, the parties appeared for the first day of the scheduled bench trial. After further consideration of Mrs. Mascioli's Motion for Summary Judgment, the Circuit Court stated:

I have also read and reread the Uniform Partnership Act, specifically, the section relating to purchase of dissociated partners interest. And I have reviewed your arguments from the March 27 hearing. And I'm going to grant the Motion for Summary Judgment, and I'll tell you why. There is no issue of fact regarding the values. There has been no expert testimony establishing the values, and it is uncontroverted. It's just that simple. The values are what they are as they stand.

I also found some of the facts in the Defendants' pleadings and arguments are totally inconsistent with the evidence that I have reviewed over the last 24 hours. I reviewed and was reminded of the huge problem with disclosure, going back to the shredding and spoliation of the evidence, accompanied by it preposterous explanation. I have reviewed the law in this matter with regard to establishing whether or not a partnership exists. And basically, if it looks like a partnership, and holds itself out to the world as a partnership, it's a partnership. And there is no issue of fact in that regard in this case. The record is replete with evidence of these brothers acting like a partnership.

(R. at 1402-1403). The Circuit Court granted Mrs. Mascioli's "Motion for Summary Judgment."

(R. at 1401-1403). In doing so, the Circuit Court noted: "I have concluded that my hesitation to grant summary judgment, based on historical rulings by the Supreme Court, is not enough to overcome the undisputed facts in this case." (R. at 1403).

Moreover, the Circuit Court's order makes it abundantly clear that its decision was not based on the claim of spoliation of evidence. In fact, the only place the Circuit Court's order references the Partnership's shredding of documents is in paragraph 72 under the sub-heading "Defendants' Conduct." (R. at 1427.) The Circuit Court's reasoning for granting summary judgment was not based on a claim of spoliation; it was based on overwhelming and undisputed evidence and application of RUPA. (R. at 1418-1443). For all of these reasons, this Court should refuse to disturb the Circuit Court's ruling.

C. The Judgment Order Against Carl Mascioli and Albert Mascioli is Appropriate.

The Partnership raised its third assignment of error for the first time only after the Circuit Court entered its summary judgment order. (R. at 1618). In any event, this assignment of error is without merit. RUPA provides, in part, “the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest.”³⁷ While this section speaks to an obligation of the partnership, W.Va. Code § 47B-3-6 provides that “all partners are liable jointly and severally for all obligations of the partnership[.]”³⁸

Any perceived doubt as to whether joint and several liability applies to the partnership’s obligation to buy out a dissociated partner’s interest was resolved by the Authors’ Comment to RUPA Section 306, codified as W.Va. Code § 47B-3-6, which expressly provides that individual partners are liable for the buyout provisions found in W.Va. Code § 47B-7-1:

The buyout duty is, at the first level, an obligation of the partnership. Because of the joint and several liability created by R.U.P.A. Section 306, however, the buyout obligation does not stop with the partnership and extends to the partners unless, perhaps, the partnership is a limited liability partnership.”³⁹

The Circuit Court’s judgment therefore was properly entered against Carl Mascioli and Albert Mascioli. The Partnership has identified no error in the Circuit Court’s order in this regard. For these reasons, the Court should affirm the Circuit Court’s ruling.

D. The Circuit Court Expressly Considered All Evidence Regarding the Valuation of the Partnership and the Alleged Contributions of Carl Mascioli.

The Partnership’s argument that the Circuit Court failed to consider the value of the partnership and alleged contributions by Carl Mascioli is not supported by the record. The

³⁷ W.Va. Code § 47B-7-1(e).

³⁸ *Id.*

³⁹ § 701. *Purchase of Dissociated Partner’s Interest*, Rev. Uniform Partnership Act Section 701 (2018-2019 ed.)

Circuit Court's order contains a detailed discussion regarding the uncontested value of the Partnership and the complete lack of any evidence demonstrating that Carl Mascioli was entitled to his alleged contributions to the partnership. (R. at 1418-1427). The Partnership's assignment of error on this point is defeated by that fact alone.

1. The Value of the Partnership was Established by Uncontested Expert Reports.

RUPA gave the Circuit Court discretion to determine the buyout price of a dissociated partner's interest and any offset.⁴⁰ The Partnership fails to demonstrate that the Circuit Court abused that discretion in determining the Paul Mascioli Estate's buyout interest.

RUPA instructed the court how to calculate the buyout price:

The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection (b), section seven, article eight of this chapter if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of (1) the liquidation value or (2) the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership being wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.⁴¹

Appraisals were conducted on each of the eight properties owned by the Partnership at the expense of Mrs. Mascioli. (R. at 723-747). The uncontested appraised value of the properties as of December 20, 2012, the date of Paul Mascioli's disassociation, collectively totals \$3,030,400. (*Id.*) The Partnership did not identify any expert to oppose the appraisals, despite being encouraged to do so by the Circuit Court. (R. at 1044-1046, 1201-1202). In its arguments to this Court, the Partnership relies only on its lawyer's unsupported assertion that the values are

⁴⁰ W.Va. Code §47B-7-1(i)

⁴¹ W.Va. Code § 47B-7-1(b).

“inflated by more than \$1,000,000.” (Pet’r’s Br. at 22). The Partnership has pointed to no abuse of discretion in the Circuit Court’s adoption of the only appraisals conducted in this matter.

Mrs. Mascioli also retained a business valuation expert, Dr. Richard A. Riley, Jr. (R. at 1079-1137). The Partnership did not depose Dr. Riley, did not move to exclude his valuation report, or move in *limine* to limit his anticipated testimony in any way. (R. at 1-13). Dr. Riley prepared a valuation of Partnership. (R. at 1079-1137). As set forth in a detailed 26 page report, Dr. Riley concluded that the fair market value of a one-third ownership interest in the Partnership as of December 20, 2012 on a controlling, non-marketable basis is \$1,010,000. (*Id.*).

The Partnership mistakenly argues that the determination of the “going concern” value of the Partnership created an issue of material fact. (Pet’r’s Br. at 17). In support of this argument, the Partnership cites an inapplicable case⁴² regarding valuations of utilities by various public service commissions. (Pet’r’s Br. at 17). Notably, however, it recognizes that “going concern value” is generally defined “**as the value of a commercial enterprise’s assets** or of the enterprise itself as an active business with future earning power[.]” (Pet’r’s Br. at 16-17 (emphasis added)).

Here, the only valuation expert identified, Dr. Riley, considered all relevant valuation approaches and ultimately chose the “asset approach” as the most appropriate method. (R. at 1098-1100). In using this approach, Dr. Riley relied upon the uncontested appraisal values of the Partnership’s assets.” (*Id.*) The Partnership’s own argument to this Court regarding the proper way to determine the value of a business as a going concern – the value of a commercial enterprise’s assets – demonstrates beyond dispute that Dr. Riley’s methodology was proper. (Pet’r’s Br. at 16-17).

⁴² *Bluefield Tel. Co. v. Pub. Serv. Comm’n of W. Va.*, 102 W. Va. 296, 135 S.E. 833, 835 (1926) (addressing a situation in which The Public Service Commission determined a rate case from the history of the utility, instead of from the opinions of an expert witness who testified for the utility).

This valuation is further supported by the law. RUPA gives the circuit court discretion to determine the buyout price of a dissociated partner's interest and any offset.⁴³ As Dr. Riley's report makes clear, the asset approach was selected based on the nature of the Partnership and the information available – namely the holding of real estate. (R. at 1099).

The Partnership goes on to posit later in its brief that the “more realistic liquidation value of the assets...is most likely less than \$2,000,000.” (Pet'r's Br. at 22). In making this unsupported argument, the Partnership fails to acknowledge that RUPA instructs the court to award the dissociated partner “the greater of” the “liquidation value” or “value based on a sale of the entire business as a going concern.”⁴⁴ It also fails to take into account the Official Comments to Section 701 of the Revised Uniform Partnership Act, codified as W.Va. Code §47B-7-1, providing:

“Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal.”⁴⁵

Importantly, the Partnership did not identify a valuation expert. In fact, despite the Partnership's representation to this Court that Carl Mascioli's personal accountant, Peggy Galloway, reviewed certain information, neither Ms. Galloway nor any other expert witness was identified to testify at trial. (R. at 1044-1046). Simply, there is no abuse of discretion by the Circuit Court in relying upon the uncontested and appropriate appraisals and valuation of the Partnership. The Partnership has identified no error in the Circuit Court's order in this regard. For these reasons, the Court should affirm the Circuit Court's ruling.

⁴³ W.Va. Code §47B-7-1(i)

⁴⁴ W.Va. Code § 47B-7-1(b) (emphasis added).

⁴⁵ § 701, Purchase of Dissociated Partner's Interest., Unif. Partnership Act 1997 § 701(emphasis added).

2. The Circuit Court Did Not Abuse its Discretion in Concluding that Carl Mascioli was Not Entitled to Any Credits to his Partnership Account.

The Partnership next argues the Circuit Court abused its discretion in failing to offset the buyout price by the unsupported estimation that Carl Mascioli is due “approximately \$725,000.00.” (Pet’r’s Br. at 22). But the law requires documentary proof of contributions made by a partner to preclude the obvious and inherent inequity of allowing a partner to simply credit his partnership account at his or her leisure and without proof:

The managing partner, whose duty it is to keep correct accounts...will be held to strict proof of the items in his partnership account, with which he seeks to charge the partnership; and if he has not credited himself on the books of the firm with such items, and cannot or does not furnish the amounts of such items, with dates, and vouchers, or by other satisfactory evidence show to whom disbursements have been made, going to make up the sum total claimed by him, he is to be denied credit therefor in settlement of the partnership.⁴⁶

Despite being the self-proclaimed Secretary-Treasurer of the Partnership, there is no documentary evidence that Carl paid for the purchase of the properties, maintenance, expenses, property taxes (undisputedly in name of Mascioli Brothers and MBD Company), or insurance with his personal funds. Instead, the documents cited by the Partnership in support of this contention are nothing more than invoices, notices, and handwritten notes, some of which are addressed to Carl individually, while many others are addressed to Mascioli Brothers Development. (Pet’r’s Br. at 12; R. at 922-932, 946-957, 958-991, 1000-1010, 1016-1021). Of the “receipts” cited, it is impossible to tell what some purport to show, others are dated after Paul Mascioli’s death, and still others were paid by “Mascioli Brothers Development.” (R. at 1010, 1025-1027, 1029-1030, 948). The inference that these documents create – that Carl Mascioli

⁴⁶ *Gay v. Householder*, 71 W. Va. 277, 76 S.E. 450 (1912). RUPA has not displaced the requirement that partners keep accurate accountings of their charges to his or her partnership account.

acted in the capacity as the secretary-treasurer of the partnership – was confirmed by Carl Mascioli at his deposition when he testified that rental income received from the properties owned by the Partnership was used to purchase the properties, pay off any loans on the properties, and to pay for all maintenance, insurance, and tax expenses. (R. at 538, 559).

Even in this Court, the Partnership has pointed to no support for the argument that Carl Mascioli is entitled to any credit to his partnership account. Instead, the Partnership relies upon bald assertions with no factual support in the record and argues that the Circuit Court abused its discretion by failing to consider its unsupported estimations. The Partnership has identified no error in the Circuit Court's judgment. For this reasons, the Court should affirm the Circuit Court's ruling.

E. The Circuit Court Appropriately Awarded The Estate Reasonable Attorney Fees and Costs.

The Partnership mistakenly contends that the Circuit Court abused its discretion in awarding attorneys' fees and costs because there was no evidence that it acted arbitrarily, vexatiously, or in bad faith. The Partnership's assignment of error is premised on an inaccuracy and misapplication of the law. The Partnership also argues that the amount awarded by the Circuit Court is not reasonable, even though it conceded before the Circuit Court that the rates charged by counsel and the hours expended were appropriate. (R. at 1597-1598). But the Partnership cannot demonstrate an abuse of discretion, or indeed, any error at all. It has presented no valid basis for this Court to disturb the Circuit Court's findings.

1. **The Circuit Court Carefully and Appropriately Applied RUPA in Awarding Reasonable Attorneys' Fees and Costs.**

The Partnership continues to ignore the law in asserting its fifth assignment of error. Our law states:

The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. **The finding may be based on the partnership's failure to tender payment or an offer to pay[.]**⁴⁷

As initially conceded by the Partnership, it is undisputed that the Partnership failed and refused to tender payment or offer to pay the Estate of Paul Mascioli. (R. at 1275, 1439). The statement to this Court that "Petitioners made several offers to pay Respondent" is simply untrue and finds no support in the record. (R. at 428-429, 1365-1366, 1372-1375). The only "offers" made in this matter included no buyout or payment to the Estate, but rather only provisions that the Estate pay Carl Mascioli in exchange for property or to assume Paul's role as a one-third partner with Carl and Albert. (*Id.*). These findings alone permitted the Circuit Court to award attorneys' fees and costs.⁴⁸

But the Circuit Court's order went on to detail in eight paragraphs some of the arbitrary, vexatious, and bad faith conduct the Petitioners engaged in throughout the course of this litigation. (R. at 1427). This matter was before the Circuit Court for nearly four years. In that time, the Circuit Court was on the front line to witness the way in which the Partnership chose to harass Mrs. Mascioli and impede this case's progress at every turn, even noting the "huge problem with disclosure" that plagued and delayed this litigation. (R. at 1403). The Circuit Court specifically points to evidence of the tactics employed by the Partnership in its order granting

⁴⁷ W.Va. Code 47B-7-1(i) (emphasis added).

⁴⁸ *Id.*

summary judgment including, but not limited to: refusing to mediate this matter in good faith on at least two occasions; refusing to produce any “accounting” until ordered by the Circuit Court; admitting to altering and destroying documents; forcing Mrs. Mascioli to file a motion to compel; refusing to permit inspections of the properties in a timely manner; refusing to provide Mrs. Mascioli’s appraisers with information, only to confront the appraiser with the requested and withheld information at his deposition; and submitting inaccurate and inconsistent factual representations to the Court that were wholly inconsistent with the evidence. (R. at 1427). The Partnership fails to demonstrate that this ruling by the Circuit Court even approached the abuse of discretion necessary for this Court to disturb it. Therefore, this Court should affirm the trial court’s ruling.

2. The Amount of Attorneys’ Fees and Costs was Reasonable and Within the Circuit Court’s Discretion.

The Partnership’s next assignment of error leaves it with the heavy burden of showing that the Circuit Court abused its discretion in awarding the Estate of Paul Mascioli \$245,158.46 in attorneys’ fees and costs. It has not approached such a showing; indeed, it has failed to show any error in any of the trial court’s challenged ruling.

The Partnership conceded on the record before the Circuit Court that the amounts charged and hours expended by Mrs. Mascioli’s counsel were reasonable and appropriate. (R. at 1597-1598). Before this Court, the Partnership merely repeats its unsupported assertions that the uncontested appraisals are “inflated” and that Carl Mascioli is entitled to an estimated offset of \$725,000. It then contends that those assertions somehow weigh in favor of reducing the fee award. (Pet’r’s Br. at 22-23). Not only is this argument premised on a factual and legal

inaccuracy, but the Partnership also ignores the well-settled precedent of this Court governing evaluations of the reasonableness of attorneys' fees.

“[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees[.]”⁴⁹ The factors generally used in West Virginia to consider whether a fee is reasonable were set forth over 20 years ago in *Aetna Cas. & Sur. Co. v. Pitrolo*.⁵⁰ The Estate of Paul Mascioli fully addressed each of the 12 *Pitrolo* factors at length in its “Motion to Recover Reasonable Attorney Fees and Costs,” all of which dictated in favor of a substantial award. (R. at 1444-1459). The Estate further submitted an itemized statement of the discounted fees and costs incurred. (R. at 1504-1583). The Circuit Court, in its discretion and with no objection to the amount charged or the hours expended, found the award of all fees and expenses reasonable. (R. at 1609-1612.) The Partnership fails to demonstrate that this ruling constituted an abuse of discretion, or indeed, was erroneous at all.

F. The Circuit Court’s Refusal to Accommodate the Partnership’s Belated Request for a Jury Trial is Moot.

The final assignment of error is moot. Because the Circuit Court decided this matter on summary judgment, its refusal to accommodate the Partnership’s last-minute demand for a jury trial, after having stipulated to waiver of a jury trial earlier in the litigation, had no effect on its judgment in this matter.

V. CONCLUSION

The Partnership’s assignments of error are without merit. It was given every opportunity to come forward with a genuine issue of material fact to avoid summary judgment and could not do so. The Partnership has provided this Court with no valid reason to disturb the Circuit Court’s

⁴⁹ Syl. Pt. 1, *Heldreth v. Rahimian*, 219 W. Va. 462, 637 S.E.2d 359 (2006).

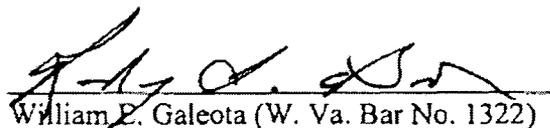
⁵⁰ 176 W.Va. 190, 196, 342 S.E.2d 156, 162 (1986).

judgment, which was imposed only after every other alternative, including mediation, had been exhausted. There could hardly be a better example of the judicious application of Rule 56, as this Court has repeatedly urged. Accordingly, the judgment entered by Circuit Court of Monongalia County should be affirmed.

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