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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA PROPST,
Individually and on behalf of
Propst Plumbing and Heating, Inc.,

Plaintiff,

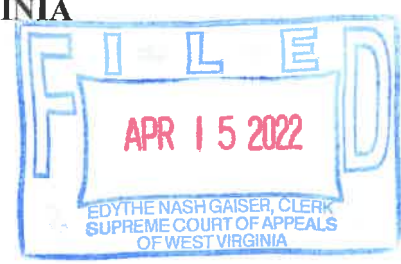
v.

**PROPST PLUMBING AND HEATING,
INC., P.D. PROPST ENTERPRISES,
LLC, PAUL D. PROPST, SR., and PAUL
D. PROPST, JR.,**

Defendants.

Civil action no: 21-C-141

Jefferson County



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**PLAINTIFF'S REPLY IN OPPOSITION TO MOTION TO REFER CASE TO THE
BUSINESS COURT DIVISION**

Plaintiff Linda Propst, by counsel:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Individually and on behalf of
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Plaintiff,

v.

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Defendants.

Civil action no: 21-C-141

Judge Hammer (Jefferson County)

TO: THE HONORABLE CHIEF JUSTICE

**PLAINTIFF’S REPLY IN OPPOSITION TO MOTION TO REFER CASE TO THE
BUSINESS COURT DIVISION**

Plaintiff Linda Propst (“Plaintiff”), by and through her undersigned attorneys, hereby responds in opposition to the Defendants’ motion to refer this matter to the Business Court Division (“Business Court”).

This case is not a Business Court case. Not only does it not meet the formal criteria for transfer to Business Court, but it is, at heart, not a business dispute. Rather, the central allegations in this case – breach of fiduciary duty, fraud, conversion – are brought by an individual plaintiff against individual defendants. Accordingly, the Plaintiff asks this Honorable Court to deny the Defendants’ motion.

I. Factual Background

This case involves a family business, Propst Plumbing and Heating, Inc. (“the company”). The company was started by Johnny Propst in 1972. Over the years, the company installed and

serviced plumbing, heating and air conditioning equipment throughout the Eastern Panhandle of West Virginia and surrounding areas.

Shares in the company were ultimately passed down to Johnny Propst's three children, resulting in all three of them being equal owners: Defendant Paul Propst, Sr. (Paul, Sr.), Paula Angus (not a party to this action) and Ronald Propst. Ronald Propst worked in the business with his brother. Following his passing on May 22, 2020, Plaintiff Linda Propst, Ronald's wife, became the owner of her husband's interest in the company.

Before the illness which ultimately led to Ronald Propst's death, everyone worked together to successfully operate the company. The company was profitable and allowed the shareholders to earn a good living for themselves and their families. However, following Ronald's passing, the Defendants did not provide Linda with any information concerning the activities, transactions and financial status of the company. Nor did they provide her with any payments, distributions or other benefits pursuant to her ownership interest.

In fact, following Ronald's death, Linda learned for the first time of problems with the Defendants' financial management of the company, going back many years. Specifically, she discovered that the company was paying for a wide variety of credit card charges by Defendants Paul, Sr. and his son Paul Propst, Jr. ("Paul, Jr.") which appear to be personal charges unrelated to the plumbing and heating company. A witness is expected to testify that, when asked about those charges, Paul, Sr. indicated that, "You're going to see some charges on there that you don't like, and if you think you're going to get reimbursed for it, you're wrong," or words to that effect.

It also became apparent that the Defendants were using the company to pay for expenses incurred by a different construction company operated by Paul, Sr.'s son, Defendant Paul Prost, Jr. That company, P.D. Propst Enterprises, LLC, is also a named Defendant. Once Linda started

asking about these matters formally, the Defendants suddenly began closing down and winding up the plumbing and heating company.

From facts known to Linda, including witness observation of inventory for P.D. Propst Enterprises, LLC being stored on the company property of the plumbing and heating company, it appears that the Defendants may have been diverting the plumbing and heating business to Paul Jr.'s separate construction company. During this time, Linda received no payments from the company. The Defendants apparently kept all of the money and income earned by the company. without making any payments or distributions to Linda, despite her 1/3rd ownership share in the corporation.

Based on all of these facts, and others set forth in the complaint, it appeared to the Plaintiff that the individual defendants used the company to enrich themselves and their other businesses improperly, thus depleting company resources at the Plaintiff's expense. When pre-suit attempts to resolve this matter proved unsuccessful, the Plaintiff filed this action in the Circuit Court of Jefferson County, West Virginia on September 30, 2021.

Importantly the complaint is brought by the Plaintiff in her individual capacity, and as a shareholder on behalf of the company. The complaint raises six separate counts: Breach of Fiduciary Duty, Conversion, Fraud, Tortious Interference, Statutory Violations, Constructive Trust. Paul, Sr. and Paul, Jr. are named as individual defendants. As a formal matter, the Plaintiff named as a defendant the plumbing company itself. But the dispute is really between individuals: Linda versus Paul, Sr. and Paul, Jr. related to their allegedly improper charges and their alleged misuse and appropriation of the plumbing business. Therefore, while the tortious interference count relates to Paul, Jr.'s separate company, PD Propst Enterprises, LLC, the main portion of the complaint involves claims by the individual plaintiff against individual defendants.

The company and Paul, Sr. both filed answers by November 2, 2021. After an unsuccessful attempt at early mediation, Paul, Jr. and PD Propst Enterprises filed answers on March 25, 2022. The Defendants filed the pending motion for referral on April 5, 2022 – over six months after the lawsuit was first filed.

II. Argument

A. Applicable standard for transfer to the Business Court Division

The West Virginia Trial Court Rules define which cases may be referred to Business Court. W. Va. Trial Ct. R. 29.01 *et seq.* The Rules provide a three-part definition of what constitutes business litigation that may be referred to the business court, and in order for a case to fall within the definition, it must meet all three parts:

“For purposes of this Rule, the following definitions apply:

(a) "Business Litigation" -- one or more pending actions in circuit court in which:

(1) the principal claim or claims involve matters of significance to the transactions, operations, or governance *between business entities; and*

(2) the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; *and*

(3) the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government

organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.”

W. Va. Trial Ct. R. 29.04 (emphasis added).

This definition makes it perfectly clear that Business Court is for disputes *between businesses*, not suits brought by and between individuals. This understanding is reinforced by Rule 29.01 which specifically provides that Business Court Division rules, procedures, and processes are adopted for efficiently managing and resolving litigation “involving commercial issues and *disputes between businesses*” (emphasis added).

B. This case does not belong in Business Court because the claims are not between businesses.

Plaintiff Linda Propst is, of course, an individual. While she also seeks to vindicate her rights as a shareholder on behalf of the company as well, she necessarily remains an individual claimant. For this reason alone, the case does not qualify for transfer to Business Court because the claims are not “between business entities.”

Moreover, although there are also two business defendants named in this suit – the company itself and Paul, Jr.’s separate business – the complaint focuses on the action of the individuals (Paul, Sr. and Paul, Jr.) and their individual actions (*See, e.g.*, Count I - Breach of Fiduciary Duty, Count II - Conversion, Count III – Fraud, Count V – Statutory Violations).

In fact, even the company itself – Propst Plumbing and Heating, Inc. – is essentially defunct at this point. The company’s office location was sold months ago, and there are no ongoing operations. Answer of Defendant Paul, Sr., ¶4 (indicating that the business real estate has been sold and that the company “is currently conducting no business”). The West Virginia Secretary of State’s website also indicates that the company is no longer in compliance. Available at

<https://apps.sos.wv.gov/business/corporations/organization.aspx?org=23551> (last accessed April 11, 2022).

Therefore, because (1) the plaintiff is an individual and not a business entity, (2) claims are made against the individual defendants and (3) the underlying business effectively no longer exists in any operational sense, this matter is simply not a case “between business entities” as contemplated by the Business Court rules. Accordingly, the Defendants’ motion to refer does not meet the requirement of W. Va. Trial Ct. R. 29.04(a)(1), and it should be denied.¹

C. This case does not belong in Business Court because it does not require specialized treatment or knowledge.

The second prerequisite for referral to Business Court is that the dispute must

“present[] commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable”

W. Va. Trial Ct. R. 29.04(a)(2).

Business Court was “designed to handle complex commercial litigation cases between businesses.” An Overview of the Development and Operation of Trial Court Rule 29 by Judge Christopher C. Wilkes available at <http://www.courtswv.gov/lower-courts/business-court-division/overview-TCR29.html> (last accessed April 11, 2022).

This is not that sort of case. This case is not a novel or complicated case involving large companies, trade secrets or business processes. There is no complex tax or accounting issue involved. There is nothing commercially or technologically specialized about this case at all. The Plaintiff merely has alleged that the individual defendants have improperly used a small and now

¹ The Defendants’ motion does not discuss the “between businesses” requirement of Rule 29.04(a)(1).

defunct family business to benefit themselves improperly at her expense. This is essentially a breach of fiduciary type of claim long familiar to the circuit judges of this state.

Accordingly, this case falls squarely within the ordinary jurisdiction of the Circuit Court of Jefferson County. This case was assigned to Judge David M. Hammer who was elected by the voters of the 23rd Judicial Circuit. While this state's fine business court judges are undoubtedly an asset in the administration of other, more specialized business disputes, no one could conceivably claim that the elected Circuit Court Judge of Jefferson County lacks the knowledge or expertise to provide "a fair and reasonable resolution" or to otherwise preside over this matter.²

Accordingly, because this case does not require specialized treatment or knowledge, it is not a candidate for transfer to Business Court.

CONCLUSION

For the reasons stated above, this case simply does not belong in Business Court. Therefore, the Plaintiff respectfully asks this Honorable Court to deny the Defendants' motion.

Plaintiff Linda Propst,
by counsel:

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² In fairness, the Defendants do not claim that the Circuit Court could not handle this matter. In fact, their motion does not discuss the "specialized treatment and knowledge" requirement of Rule 29.04(a)(2) at all.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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Civil action no: 21-C-141

Plaintiff,

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v.

**PROPST PLUMBING AND HEATING,
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LLC, PAUL D. PROPST, SR., and PAUL
D. PROPST, JR.,**

JURY TRIAL DEMANDED

Defendants.

CERTIFICATE OF SERVICE

I certify that on the 13th day of April, 2022, I served the foregoing ***PLAINTIFF'S REPLY
IN OPPOSITION TO MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION***
by United States Mail, first class, postage prepaid to the following:

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