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IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

CONTEMPORARY GALLERIES OF
WEST VIRGINIA, INC., Defendant Below,

Petitioner,

v.

No. 21-0007

RIGGS COMMERCIAL REALTY, LLC, Plaintiff Below,

Respondent.

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RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

(Civil Action No. 18-C-327)

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II. STATEMENT OF THE CASE

Respondent Riggs Commercial Realty, LLC, Plaintiff below (hereinafter "Riggs"), filed a *Complaint* against Petitioner Contemporary Galleries of West Virginia, Inc., Defendant below (hereinafter "Contemporary Galleries"), on or about March 13, 2018. App. at pp. 5-10. Riggs, a real estate brokerage firm, secured a purchaser for one of Contemporary Galleries' buildings, and a tenant for another of it's buildings, and Contemporary Galleries refused to pay the brokerage commission. App. at pp. 6-8.

Quintie Smith, real estate agent of Riggs, and Leo Russell, owner and agent of Contemporary Galleries, came to an agreement that Riggs would secure a purchaser for a building owned by Contemporary Galleries at 1210 Smith Street, Charleston, West Virginia, and secure a tenant for a building owned by Contemporary Galleries at 3808 MacCorkle Avenue S.E., Charleston, West Virginia. App. at pp. 6-9. Quintie Smith tendered written listing agreements to Leo Russell, which Leo Russell promised to sign. App. at pp. 21-23, 179-185.

Meanwhile, Quintie Smith secured a tenant for Contemporary Galleries' MacCorkle Avenue property and a purchaser for the Smith Street property. App. at pp. 174-178, 186-193. Leo Russell signed a Notice of Agency Relationship for the Smith Street property agreeing to Riggs's dual representation of

purchaser and seller. App. at p. 194. Contemporary Galleries ultimately sold the Smith Street property to the purchaser secured by Riggs on terms similar to those in the agreement secured by Riggs. App. at pp. 195-204. Contemporary Galleries also ultimately leased the MacCorkle Avenue property to the tenant secured by Riggs on terms similar to those in the agreement secured by Riggs. App. at pp. 6-9. Contemporary Galleries then refused to pay Riggs' commissions on the sale and lease of the buildings on the basis that Leo Russell never signed the listing agreements tendered by Riggs. App. at pp. 6-9.

At trial of this matter, Angela Rae Moore (hereinafter "Angel Moore"), sole member of Respondent Riggs Commercial Realty, LLC, testified that she is an attorney and a real estate broker. App. at p. 41. After Riggs rested its case in chief, Contemporary Galleries' moved the court for a directed verdict on the basis of W. Va. Code § 30-40-25, that Riggs did not allege and prove that it held a real estate broker's license. App. at p. 50. The gist of Petitioner's argument was that, despite Angel Moore's testimony she was a real estate broker, Riggs did not prove that it held a valid broker's license at all times Riggs rendered service to Contemporary Galleries. App. at p. 50. Riggs argued that the statute is silent on what level of proof of licensure is required, and that Angel Moore's testimony was sufficient proof. App. at p. 52. Riggs moved the court to reopen

its case to cure the potential defect and submitted a brief on the matter. App. at pp. 140-144. The court denied Contemporary Galleries' motion for directed verdict and granted Riggs' motion to reopen the case for the narrow purpose of eliciting further testimony of Angel Moore. App. at p. 99.

Angel Moore passed the real estate broker's examination on January 8, 2016. App. at p. 136. Angel Moore testified that she has been a licensed real estate broker since she first received her broker's license January 29, 2016. App. at p. 120. Angel Moore testified that she was a licensed real estate broker in 2016 when the events that gave rise to the litigation occurred. App. at p. 106. Angel Moore testified that she has been continuously licensed as a real estate broker since January 29, 2016. App. at p. 110. Angel Moore testified that she is currently a licensed real estate broker. App. at pp. 105-106.

Three original Real Estate Broker licenses issued to Angel Moore were introduced into evidence at trial. App. at pp. 137-139. The first license authorized Angel Moore to operate from the broker's business address until June 30, 2016. App. at p. 137. The second license authorized Angel Moore to operate from the broker's business address until June 30, 2018. App. at p. 138. The third license authorized Angel Moore to operate from the broker's business address until June 30, 2020. App. at p. 139. None of the licenses have written on its face a beginning date

that such license is effective. App. at pp. 137-139. However, each license has written on its face "01/29/2016" and Angel Moore testified that date was the date of her initial licensure. App. at p. 120.

The trial concluded and the jury found in favor of Riggs on all issues. App. at pp. 146-148. The jury awarded Riggs \$116,760.00 plus interest. Contemporary Galleries later moved the circuit court for a new trial and relief from judgment. App. at pp. 150-152. The court entered an order denying Contemporary Galleries' motion for new trial and relief from judgment. App. at pp. 169-173. This appeal followed.

III. SUMMARY OF ARGUMENT

The Circuit Court did not err as a matter of law by denying Contemporary Galleries' motion for directed verdict at trial of this matter. Under W. Va. Code §30-40-25, the level of proof necessary to "bring or maintain an action" to recover compensation for service for which a real estate broker's license is required is not specified. Allegations of Contemporary Galleries that Riggs failed to allege and prove in its case in chief that it was a licensed broker are false. In its *Complaint*, Riggs alleged that it was "duly licensed to conduct business in West Virginia as a real estate broker." App. at p. 5 ¶ 4. During the testimony of Angel Moore, Riggs' owner and agent, she testified that she was a real estate broker and such testimony

was not rebutted by Contemporary Galleries. App. at p. 41. W. Va. At the time Contemporary Galleries moved the court for a directed verdict, a reasonable jury could have found Riggs "proved" it held a real estate broker's license, and therefore the Circuit Court did not err in denying the motion.

Even if this Court were to find that a reasonable jury could not have found Riggs "proved" it held a brokerage license at the time Contemporary Galleries made its motion for a directed verdict, the Circuit Court properly allowed Riggs to reopen it's case in chief to provide further evidence of it's licensure. The Circuit Court did not abuse its discretion by allowing Riggs to reopen its case in chief to introduce further evidence that it was a licensed real estate broker at all times service was rendered to Contemporary Galleries.

"It is within the sound discretion of the court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purposes of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed." Syl. Pt. 4, State v. Fischer, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Contemporary Galleries erroneously argues that "surprise" to the movant is the test for whether a Circuit Court should grant a motion to reopen movant's case in chief. The test is "surprise" to the non-movant, Contemporary Galleries. The reason the test

for "surprise" is based on "surprise" to the non-movant is because the non-movant must be afforded the opportunity to answer any new evidence. See Id. at 78.

The Circuit Court permitted Riggs to reopen its case prior to Contemporary Galleries' case in chief. Contemporary Galleries made no argument that it was "surprised" by the introduction of further testimony of Angel Moore that she was a licensed broker, or the admission of Angel Moore's brokerage licenses into evidence. Contemporary Galleries had every opportunity to answer this evidence. Furthermore, it is well settled that a case should be decided on its merits and not on procedure. In the Interest of Moss, 170 W. Va. 543, 551, 295 S.E.2d 33, 41-42 (1982).

The Circuit Court did not err in denying Contemporary Galleries' renewed motion for directed verdict. Angel Moore testified that she is a real estate broker and was licensed at the time Riggs rendered service to Contemporary Galleries. Angel Moore's broker's licenses show that she has been a licensed broker since January 29, 2016. W. Va. Code §30-40-25 does not provide what amount of proof of licensure is necessary to "bring and maintain" such an action. A reasonable jury could find that there was sufficient evidence proving Riggs held a real estate broker's license at all times Riggs rendered services to Contemporary Galleries.

The Circuit Court did not abuse its discretion by denying Contemporary Galleries' motion for new trial. In considering all evidence, conflicts, facts, and inferences in favor of Riggs, it is clear that the jury verdict should not be disturbed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Respondent Riggs Commercial Realty, LLC does not believe oral argument is necessary in this case because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

V. STANDARD OF REVIEW

This Court reviews the Circuit Court's denial of a directed verdict de novo:

This Court applies "a de novo standard of review to the . . . denial of a pre-verdict . . . motion for judgment as a matter of law." Gillingham v. Stephenson, 209 W. Va. 741, 745, 551 S.E.2d 663, 667 (2001)." We also have indicated that a motion for judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." Waddy v. Riggelman, 216 W. Va. 250, 255, 606 S.E.2d 222, 227 (2004), quoting Yates v. University of West Virginia Bd. of Trs., 209 W. Va. 487, 493, 549 S.E.2d 681, 687 (2001). In addition, "[u]pon a motion for [pre-verdict judgment as a matter of law], all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed." Syl. pt. 5, Wager v. Sine, 157 W. Va. 391, 201 S.E.2d 260 (1973).

Wheeling Park Comm'n v. Dattoli, 237 W. Va. 275, 787 S.E.2d 546 (2016).

This Court reviews a Circuit Court's decision to allow a party to reopen its case to permit introduction of further evidence under the abuse of discretion standard:

A motion to reopen a case to permit the introduction of further evidence is addressed to the sound discretion of the trial court and the exercise of such discretion is not subject to review by an appellate court unless there has been an abuse thereof.

Syl. Pt. 2, Jimco Supply Co. v. Neal, 166 W. Va. 794, 277 S.E.2d 626 (1981).

"We review the rulings of the circuit court concerning a new trial . . . under an abuse of discretion standard."

Gillingham v. Stephenson, 209 W. Va. 741, 745, 551 S.E.2d 663, 667 (2001).

VI. ARGUMENT

- A. The Court did not err by denying Contemporary Galleries' motion for directed verdict because there was legally sufficient evidence for a reasonable jury to conclude that Riggs was a licensed real estate broker at all times relevant to the litigation.**

Contemporary Galleries claims the Circuit Court erred in denying it's motion for directed verdict upon close of Riggs' case in chief.

West Virginia Rules of Civil Procedure Rule 50(a) provides that a party may move the court for judgment as a matter of law, also known as a directed verdict:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

W. Va. Code §30-40-25 provides that

No person may bring or maintain any action in any court of this state for the recovery of compensation for the performance of any act or service for which a broker's license is required, without alleging and proving that he or she was the holder of a valid broker's license at all times during the performance or rendering of any act or service...

Upon close of Riggs' case in chief, Contemporary Galleries moved the Circuit Court for a directed verdict based on Riggs failure to allege and prove that it held a valid real estate broker's license at all times during the rendition of services to Contemporary Galleries as required by W. Va. Code § 30-40-25. Riggs did in fact provide a legally sufficient evidentiary basis for a reasonable jury to find that it alleged and proved that it was the valid holder of a real estate broker's license at all times during the rendition of services to Contemporary Galleries. Riggs' *Complaint* alleged that it was "duly licensed to conduct business in West Virginia as a real estate broker." App. at p. 5 ¶ 4. During the testimony of Angel Moore, Riggs' owner and agent, she testified that she was a real

estate broker and such testimony was not rebutted by Contemporary Galleries. App. at p. 41.

W. Va. Code § 30-40-25 is meant to preclude "the bringing or maintaining of a civil action in the courts of this state as a penalty for an individual or entity not being properly licensed." Timber Ridge v. Hunt Country Asphalt, 222 W. Va. 784, 788, 671 S.E.2d 789, 793 (2008). The statute is not meant to preclude a duly licensed broker from otherwise obtaining its rightful fee, but to discourage unlicensed brokers from operating in this state.

It should be noted that Contemporary Galleries is not arguing that Riggs was not a licensed broker at the time it rendered services to Contemporary Galleries, only that it did not introduce enough evidence to prove it had a broker's license at that time. The great weight of case law provides that a case should be decided on its merits. In the Interest of Moss, 170 W. Va. 543, 551, 295 S.E.2d 33, 41-42 (1982).

The amount of proof required by W. Va. Code § 30-40-25 has never been interpreted by this Court. The statute fails to articulate what amount of "proof" is necessary and does not require any "magic words" to amount to constitute sufficient proof. Considering the evidence in the light most favorable to Riggs, the nonmoving party, a reasonable jury could consider the evidence provided by Riggs to be sufficient to find that it was a

licensed real estate broker at all times relevant. The issue of whether the evidence was sufficient was an issue of fact for the jury to decide, and by it's verdict clearly decided to give credence to Riggs' evidence.

B. The Court did not abuse its discretion by allowing Riggs to reopen its case to admit additional evidence that it was a licensed real estate broker at all times service was rendered to Contemporary Galleries.

Contemporary Galleries' claims that the Circuit Court abused its discretion by allowing Riggs to reopen its case to admit addition evidence that it was a licensed real estate broker.

Though Riggs asserted at trial that the allegations and evidence thereto introduced proved that it was a broker at all times during its rendition of services to Contemporary Galleries, it moved the Court to reopen its case in chief to provide additional evidence. Upon motion made by Riggs, the Circuit Court reopened Riggs' case in chief and allowed for further evidence to be presented on the matter of Riggs' broker's license.

Contemporary Galleries' motion for directed verdict was denied.

Contemporary Galleries argues that the Court abused its discretion by reopening Riggs' case in chief to allow it the opportunity to introduce further evidence to prove it was a licensed broker. A motion to reopen a case lies within the sound discretion of the court:

'Whether a motion to reopen a case should be granted after the moving party has rested lies within the sound discretion of the court' Syl. Pt. 3, State v. Johnson, 159 W. Va. 682, 226 S.E.2d 442 (1976). 'It is within the sound discretion of the court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purposes of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed.' Syl. Pt. 4, State v. Fischer, 158 W. Va. 72, 211 S.E.2d 666 (1974); see also State v. Daggett, 167 W. Va. 411, 280 S.E.2d 545 (1981). 'The court is not justified in closing the case until all the evidence offered in good faith and necessary to the end of justice has been heard When in doubt, reopen.' State v. Daggett, supra, at 553. Reopening may be ordered on motion of either party. State v. Fischer supra, at 667. The basic reason for denying a motion to reopen is to avoid unfair surprise to one of the parties.

In the Interest of Moss, 170 W. Va. 543, 551, 295 S.E.2d 33, 41-42 (1982).

In Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., the court properly allowed defendant to reopen its case after both parties had rested to admit further evidence and testimony:

After both parties had rested, the plaintiff made a motion for a directed verdict asserting, among other grounds, that the landowner had failed to prove the necessity and reasonableness of the amount alleged to have been expended in repairing and restoring the swimming pool. The court thereupon granted Shannondale permission to reopen the case and to permit further testimony concerning the reasonableness and necessity of the costs incurred in the repair and restoration of the swimming pool.

Whether a plaintiff will be allowed to introduce further evidence after the taking of testimony has been concluded is ordinarily within the discretion of the trial court and the exercise of such discretion will rarely be ground for reversal. Payne v. Kinder, 147 W. Va. 352, 362, 127 S. E. 2d 726, 734 (1962); Edmiston v. Wilson, 146 W. Va. 511, pt. 10 syl., 120 S. E. 2d 491 (1961); Janssen v.

Carolina Lumber Company, 137 W. Va. 561, pt. 1 syl., 73 S. E. 2d 12 (1952); Weaver v. Wheeling Traction Company, 91 W. Va. 528, pt. 4 syl., 114 S. E. 131 (1922); 88 C. J. S., Trial, Section 106, page 221.

Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 152 W. Va. 549, 559, 165 S.E.2d 113, 120 (1968).

"The basic reason for denying a motion to reopen is to avoid unfair surprise to one of the parties." Moss, *supra*.

In State v. Fischer, after the defense moved the trial court for a directed verdict, the trial court permitted the prosecution to reopen the case in order to place before the jury the full meaning of a witness' testimony. Id. at 78. This Court noted that it "is particularly appropriate in this case for the reason that the defendant had not yet presented any of its evidence and there was no peril of surprise which the defendant would not have an opportunity to answer." Id.

Contemporary Galleries cannot claim to be surprised that Riggs would move the Court to reopen its case because it was a natural response to Contemporary Galleries' motion for a directed verdict. Contemporary Galleries had not yet presented any evidence, so there was no peril of "surprise" that it would not have an opportunity to answer. The broker licenses introduced into evidence by Riggs are of no surprise: West Virginia real estate broker licenses are public records and Angel Moore had already testified that she was a licensed broker.

Unfair surprise to one of the parties is a reason to deny a motion to reopen a case. In the Interest of Moss, 170 W. Va. 543, 551, 295 S.E.2d 33, 41-42 (1982). The trial court did not deny Riggs' motion to reopen its case; the motion to reopen was granted. Surprise to Riggs is of no moment because it was the movant to reopen the case. It is "within the sound discretion of the court in the furtherance of the interests of justice" to permit reopening of a case by either party, after that party has rested, for further admission of evidence. State v. Fischer, 158 W. Va. 72, 211 S.E.2d 666 (1974).

The great weight of case law provides that a case should be decided on its merits. Moss, *supra*. Contemporary Galleries portrays the Circuit Court's grant of Riggs' motion to reopen as giving Riggs' a "mulligan", but that is not the case. Permitting Riggs to reopen its case was in the interests justice and allowed the case to be decided on its merits. The Circuit Court was justified under West Virginia law in reopening Riggs' case in chief to allow it to introduce additional evidence. Contemporary Galleries' argument that the Circuit Court abused its discretion in reopening Riggs' case in chief has no basis in fact or law.

Finally, Contemporary Galleries claims that Riggs did not introduce into evidence a brokerage license for Angel Moore that was active during the period of September 2016 through early

spring 2017, during which the events concerning this litigation took place. This is false. After this Court reopened Riggs' case in chief, Riggs put into evidence Angel Moore's broker licenses for all years beginning on January 29, 2016, the date of Ms. Moore's first licensure, through June 30, 2020. App. at pp. 137-139. Ms. Moore testified that she has been licensed as a broker in West Virginia since January 29, 2016, and has been so licensed at all times since. Ms. Moore held an active West Virginia broker license at all times during the events concerning this litigation and at all times since her first licensure. Contemporary Galleries introduced no evidence that Ms. Moore did not hold an active broker license. Riggs has met the requirements of W. Va. Code § 30-40-25 and has proven to a jury that it was a licensed broker at all times relevant.

C. The Court did not err by denying Contemporary Galleries' renewed motion for directed verdict.

Contemporary Galleries' claims that the Circuit Court erred by not granting Contemporary Galleries' renewed motion for directed verdict.

After reopening its case in chief, Riggs submitted Angel Moore's broker's licenses into evidence and took additional testimony from Angel Moore. Contemporary Galleries argues that Angel Moore's licenses and her testimony are not sufficient proof that she was a licensed real estate broker at all times during the rendition of services to Contemporary Galleries as required

by W. Va. Code § 30-40-25. Contemporary Galleries argues that no license was produced for the period of July 1, 2016 through June 30, 2017, the time in which Riggs rendered services to Contemporary Galleries. This is false.

The first brokerage license entered into evidence states that Angela Rae Moore, Riggs Commercial Realty, LLC is "duly authorized to operate from the broker's business address until June 30, 2016..." and in the top right hand corner of the license it states "2015-2016." App. at p. 137. This license does not provide a beginning date of the license, however, it does show the date "01/29/2016", which Angel Moore testified was the date she was initially licensed.

The second brokerage license entered into evidence states that Angela Rae Moore, Riggs Commercial Realty, LLC is "duly authorized to operate pursuant to WV Code Chapter 30, Article 40 until June 30, 2018..." and in the top right hand corner of the license it states "2017-2018." App. at p. 138. This license also does not provide a beginning date, but again shows the date Angel Moore was initially licensed on "01/29/2016."

The third brokerage license entered into evidence states that Angela Rae Moore, Riggs Commercial Realty, LLC is "duly authorized to operate pursuant to WV Code Chapter 30, Article 40 until June 30, 2020..." and in the top right hand corner of the license it states "2019-2020." App. at p. 139. This

license does not provide a beginning date, but again shows the date Angel Moore was initially licensed on "01/29/2016."

Angel Moore testified that she has been a continuously licensed real estate broker since she became licensed on January 29, 2016. App. at pp. 110, 118. Contemporary Galleries provided no evidence that Angel Moore's broker's license has ever lapsed, been revoked, or forfeited at any time since she was initially licensed. The amount of proof required by W. Va. Code § 30-40-25 has never been interpreted by this Court, and as discussed above, the statute fails to articulate what amount of "proof" is necessary. The question whether Riggs proved that it held a valid broker's license was a question of fact for the jury.

Considering the evidence in the light most favorable to Riggs, the nonmoving party, a reasonable jury could, and actually did, consider the evidence provided by Riggs to be sufficient to prove that it was a licensed real estate broker. The Circuit Court did not err in denying the renewed motion for directed verdict.

D. The Court did not abuse its discretion by denying Contemporary Galleries' motion for new trial.

Contemporary Galleries does not separate its arguments that the denial of its renewed motion for directed verdict and its motion for new trial were erroneous as a matter of law. However, unlike *de novo* review of the denial of the directed

verdict, the standard of review for a denial of a new trial is abuse of discretion.

When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. Syl. Pt. 3, in part, In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994); Syl. Pt. 2, Tennant v. Marion Health Care Found., Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

Puszkarczuk v. 340 Def. Range & Training Ctr., Ltd. Liab. Co.,

No. 15-0130, 2016 W. Va. LEXIS 213, at *7-8 (Apr. 8, 2016).

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Syl. Pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983).

Id. at *8.

In it's order, the Circuit Court found that "the jury reviewed the evidence and rendered a judgment consistent with finding Ms. Moore was duly licensed during the requisite period." App. at p. 172. In considering all evidence, conflicts, facts,

and inferences in favor of Riggs, it was clear to the Circuit Court that the jury verdict should not be disturbed. The Circuit Court did not abuse its discretion in denying Contemporary Galleries a new trial under these circumstances.

E. Any arguments regarding hearsay are not properly before this Court because such arguments were not included in Contemporary Galleries' assignments of error and the record before this Court is insufficient.

Contemporary Galleries mentions in it's Brief that it believes that the Circuit Court improperly admitted evidence of statements made by Leo Russell, deceased owner and agent of Contemporary Galleries, because it was hearsay. Contemporary Galleries did not include this claim in its assignments of error in its Notice of Appeal or Brief. This Court has repeatedly held that: "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Judges are not like pigs, hunting for truffles buried in briefs." Carr v. Veach, 851 S.E.2d 519, 524 n.3, 2020 W. Va. LEXIS 792, 11 n.3 (W. Va. 2020).

Rule 10(c) of the Rules of Appellate Procedure provides "The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein." "Issues not raised on appeal or merely mentioned in passing are deemed waived." Canterbury v. Laird, 221 W. Va. 453, 655 S.E.2d 199 (2007). "In its discretion, the Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide." W. Va.

R. App. Proc. R. 10(c). In the case at bar, Contemporary Galleries did not file a transcript of the alleged hearsay testimony as a part of the record. Because it was not claimed as an assignment of error, and the record is insufficient to consider this claim, it is not properly before this court. Nevertheless, Riggs responds to these hearsay allegations to preserve its rights.

That said, the Circuit Court did not err in finding that the statements were not hearsay.

At the trial of this matter, witness Quintie Smith testified that Leo Russell promised him Contemporary Galleries would pay Riggs a commission for its work selling and leasing Contemporary Galleries' real estate. At the time of this verbal exchange, Quintie Smith was an employee of Riggs and Leo Russell was an owner and agent of Contemporary Galleries. After Riggs filed its Complaint against Contemporary Galleries and during the pendency of this matter, Leo Russell unfortunately passed away. Contemporary Galleries alludes that the testimony given by Quintie Smith is hearsay under the West Virginia Rules of Evidence.

The West Virginia Rules of Evidence (the "Rules") are logically organized. The "800s" article of the Rules provide for dealing with hearsay. It begins with Rule 801 which defines what statements are hearsay and what statements are *not* hearsay. Rule

802 provides that hearsay evidence is not admissible except as otherwise provided by the Rules. Rules 803 and 804 are *exceptions* to inadmissible hearsay that allow certain evidence to be admitted that otherwise would have been excluded under Rule 802's bar on hearsay evidence. Rules 803 and 804 do not have any application on statements that are *not* hearsay.

Rule 801(d) defines statements that are not hearsay:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

. . .

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

W. Va. R. Evidence R. 801(d).

Statements made by the opposing party's agent on a matter within the scope of that relationship while it existed is not hearsay. W. Va. R. Evidence R. 801(d)(2)(D). During the trial of this matter, Contemporary Galleries' counsel conceded that Leo Russell was the agent of Contemporary Galleries and that Leo Russell was acting within the scope of that agency relationship

in the sale and lease of Contemporary Galleries' real estate.¹ Likewise, Mary Russell testified that Leo Russell ran the company during his lifetime. Under 801(d)(2)(D), the testimony of Quintie Smith as to statements made by Leo Russell regarding the brokerage and sale of Contemporary Galleries' real estate are not hearsay because such statements were made by an opposing party's agent.

"Admissions by a party-opponent are not within the hearsay rule at all and for this reason are admissible as substantive evidence unless some other exclusionary rule applies." Canterbury v. West Va. Human Right Comm'n, 181 W. Va. 285, 288, 382 S.E.2d 338, 341 (1989) *quoting* Heydinger v. Adkins, 178 W. Va. 463, 360 S.E.2d 240, 245 (1987). A statement is not hearsay if the statement is offered against a party and is a statement by his [or her] agent or servant concerning a matter within the scope of his [or her] agency or employment, made during the existence of the relationship. Syl. Pt. 3, Canterbury v. West Va. Human Right Comm'n, 181 W. Va. 285, 382 S.E.2d 338 (1989) *citing* W. Va. R. Evidence. 801(d)(2)(D). In a case with strikingly similar facts as the case at bar, Rocco Enterprises, Inc. v. Continental Casualty Co., the United States District Court for the Western District of Virginia, Harrisonburg

¹Contemporary Galleries did not order a complete trial transcript including transcript of the alleged hearsay testimony.

Division, held that witnesses were allowed to testify to out-of-court statements made by a deceased agent of the opposing party because such statements were not hearsay under the Federal Rules of Evidence Rule 801(d)(2). Rocco Enterprises, Inc. v. Continental Casualty Co., 1991 U.S. Dist. LEXIS 15833 (W. D. Va. 1991). The Comment on Rule 801 of the West Virginia Rules of Evidence states "Rule 801 is taken verbatim from the current federal rule. The changes are stylistic." W. Va. R. Evidence. 801.

In its Motion for New Trial, Contemporary Galleries claimed that the testimony of Quintie Smith regarding statements made by Leo Russell to Quintie Smith are hearsay. Contemporary Galleries set forth why the hearsay exception of Rule 804(b)(5), statements of a deceased person, does not apply to such statements. What Contemporary Galleries apparently fails to comprehend is that such exception was meant to apply only to statements that were otherwise hearsay and not to statements that were not hearsay. As discussed above, the statements made by Leo Russell are not hearsay and therefore, Rule 804(b)(5) has no application. The evidence was properly admitted by this Court at the trial of this matter.

VII. Conclusion

Contemporary Galleries' claim that the Circuit Court erred in not granting its motion for a directed verdict is

baseless. W. Va. Code §30-40-25 does not specify what level of proof is necessary to "bring or maintain an action" to recover compensation for services for which a real estate broker's license is required. Riggs alleged in its *Complaint* that it was "duly licensed to conduct business in West Virginia as a real estate broker." App. at p. 5 ¶ 4. During the testimony of Angel Moore, Riggs' owner and agent, she testified that she was a real estate broker and such testimony was not rebutted by Contemporary Galleries. App. at p. 41. W. Va. As set forth in more detail above, Riggs introduced enough evidence in its case in chief that it was a licensed real estate broker that a reasonable jury could find it "proved" as much. Nevertheless, it was within the Circuit Court's discretion to permit Riggs to introduce further evidence to prove it was a licensed real estate broker after it had rested its case in chief.

The Circuit Court did not abuse its discretion by allowing Riggs to reopen its case in chief to introduce further evidence that it was a licensed real estate broker at all times service was rendered to Contemporary Galleries. Reopening a case after a party has rested is within the sound discretion of the Circuit Court in "furtherance of the interests of justice." Syl. Pt. 4, State v. Fischer, 158 W. Va. 72, 211 S.E.2d 666 (1974). Furthermore, Contemporary Galleries has not shown that it suffered any "surprise" by the introduction of further testimony

of Angel Moore and the introduction of her real estate broker's licenses into evidence. Contemporary Galleries had not yet begun its case in chief when the Circuit Court allowed Riggs to reopen its case. Contemporary Galleries had every opportunity to answer the evidence after Riggs introduced it. Contemporary Galleries provided no evidence that Riggs was not a licensed broker. Contemporary Galleries provides no case law that "surprise" to Riggs has any calculus in the Circuit Court granting its motion to reopen its case in chief.

Contemporary Galleries' renewed motion for directed verdict was properly denied by the Circuit Court. Angel Moore testified that she has continuously been licensed as a real estate broker since January 29, 2016. She produced her real estate broker's licenses spanning several years including the time period at issue-which had been hanging on the wall of her office-and they were entered into evidence. The Circuit Court did not err in denying Contemporary Galleries' renewed motion for directed verdict because a reasonable jury could find that there was sufficient evidence that proves Riggs held a real estate broker's license at all times relevant. Indeed, a jury believed Riggs was a real estate broker and found for Riggs.

The Circuit Court did not abuse its discretion by denying Contemporary Galleries' motion for new trial. In considering all evidence, conflicts, facts, and inferences in

favor of Riggs, it is clear that the jury verdict should not be disturbed.

RIGGS COMMERCIAL REALTY, LLC

By Counsel

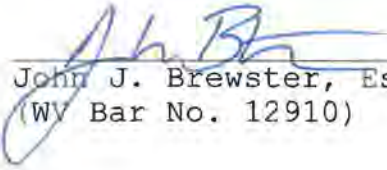


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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent Riggs Commercial Realty, LLC certifies that on May 20, 2021, service of the foregoing "**Respondent's Brief**" was served upon the parties via United States mail, postage prepaid, to the following counsel of record:

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