IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston

Case No. 21-0313

GREGORY S. BRADLEY and
JUDY JOHNSON BRADLEY,

PETITIONERS,

VS.

MARION CO. CIVIL ACTION CC-24-2018-C-110
(HON. PATRICK N. WILSON, CIRCUIT JUDGE)

ANDREA DALE DYE, *ET AL.*,

RESPONDENTS.

PETITIONERS' BRIEF

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1. The Circuit Court of Marion County erred when it granted summary judgment in favor of Respondent Dye on the Petitioners' claim of timber piracy, pursuant to W.Va. Code § 61-3-48a, insofar as it found that Respondent Dye did not violate the statute to the extent it found she did not physically enter the petitioners' property and cut down their valuable timber or cause the Petitioners' valuable timber to be cut, damaged or carried away. The Circuit Court's conclusions in this regard improperly, narrowly construed the scope of the statute and made improper factual findings over matters disputed by the record.

2. The Circuit Court of Marion County abused its discretion when it granted summary judgment in favor of Respondent Dye on the issue of negligence to the extent that it erroneously found that she owed no duty to the Petitioners to prevent the subject timber piracy, and where the factual record evinced that she caused and contributed to the same, directly or indirectly.

3. The Circuit Court of Marion County abused its discretion in granting summary judgment in favor of the Respondent Dye and against the Petitioners insofar as it improperly rendered factual conclusions concerning matters of disputed material fact in holding that Respondent Dye did not engage in the requisite level of conduct necessary for the imposition of punitive or exemplary damages.

II. STATEMENT OF THE CASE

a. SUMMARY OF CASE

The Petitioners and Plaintiffs hereinbelow, Gregory S. Bradley and Judy Johnson Bradley, husband and wife, own a parcel of real property in rural Marion County, West Virginia. *Appx. pp. 00031, 00245-00250.* That property is landlocked. *See Id.* The Respondent and Defendant hereinbelow, Andrea Dale Dye, owns the parcel of property between the road and the Bradleys' property, down the hill from the Bradleys. *See Id.* Respondent Dye's property has a residential address of 1872 Flaggy Meadow Road, Mannington, West Virginia. *Appx. pp. 00179, 00258-00260.*

The Bradleys enjoy a right-of-way across the Respondent Dye's property to access the main roadway from their property. *Appx. 00031, 00250.* That right-of-way runs along a road that runs past Respondent Dye's house up the hill and is sometimes referenced by Respondent Dye as

the "gas line road" (since there is a gas well head on the Bradleys' property that services Respondent Dye's home) and referenced by the Bradleys as the "access road." *Appx. pp. 00031, 00182, 00255, 00261.* It is the sole means of ingress and egress for the Bradleys to the property. *Appx. 00031, 00250.* The access/gas line road leads across the Bradley property to a clearing on the Bradley property near where the gas well head sits. As such, there is no means of access from the aforementioned access road to the properties of any other adjoining landowners. *Appx. pp. 00193-00194.* The border of the Bradley and Dye properties is clearly designated on that access road by a cattle gate that runs across it. *Appx. p. 00013.*

The Petitioners, Gregory S. Bradley and Judy Johnson Bradley, did not reside on the subject property. Instead, they purchased that property with the intent to timber it and planned to use the proceeds of the timber to either build a cabin on the property or make improvements to their residential home in Virginia. As such, they only occasionally visited the property. *Appx., p. 00254.*

The factual record suggests that, unbeknownst to the Bradleys, Respondent Dye was using the Bradleys' property without their authorization. The record evinces that the Dyes were entering the Bradleys' property to harvest firewood. *Appx., p. 00278.* Moreover, the record reveals that Respondent Dye may have been using the Bradleys' property and exercising control over it because she mistakenly believed that she owned it. *Id.* Respondent, Andrea Dale Dye, claimed in her deposition that she was not familiar with the boundaries of her property lines, never walked the lines, and doesn't know where her property stops, and the property of other neighbors' properties begin. *Appx., pp. 00181, 00263-00264, 00268.* Despite being unaware of whether the property was hers, Respondent Dye, nevertheless, admitted in her deposition that she went past the cattle gate separating the properties and placed "No Trespassing" signs about the property.

Appx., pp. Id., p. 00257. This would have placed Respondent Dye on the Bradleys' property by her own admission. Respondent Dye, admitted to erecting approximately 10 to 15 of these "No Trespassing" signs on the Bradleys' property. *Appx., pp. 00181, 00263-00264, 00268.* She testified that she went through the cattle gate separating her property from the Bradleys' property and "just put signs here and there just to try to keep people out." *Id.* Some of those "No Trespassing" signs expressly identified her as the owner of the Bradley property and further identified the residential mailing address for the Bradley property as her own - 1872 Flaggy Meadow Road, Mannington, West Virginia. *Appx., pp. 00271-00273, 00257.* When she was asked in her deposition how she knew that she was putting those "No Trespassing" signs on her own property, she testified that she was not certain of the same and that, "I just assumed I was." *Appx. p. 00268.* There is no evidence that the Bradleys provided Respondent Dye with written or oral permission to enter upon their property for her own personal use and they certainly did not authorize her to post the property with her name and address. In addition to posting the property with her name and address, Respondent Dye also removed the cattle gate that separated the Bradleys' property from hers. *Appx., pp. 00270.* This would have further made it appear that Respondent Dye's property and the Bradleys' property were one in the same. *Appx. pp. 00268-00270.* All of these activities on the Bradley property were done without notice to the Bradleys.

Further unbeknownst to the Bradleys, Respondent Dye began dealing with a logging company, underlying co-defendants, Larry and Robert Jones d/b/a Jones Hauling, regarding the brokering of a deal for the harvesting of timber in or about the property. As part of these dealings, Respondent Dye granted an oral and/or written easement to the Jones defendants permitting them use the gas road/access road that led onto Bradleys' property. *Appx. pp 00031, 00264.* In fact, she took the cattle gate down separating the Bradley property from the Dye property so that the same

would not have to be reopened each time the Jones defendants utilized it. *Appx. p. 00270.* Thus, it cannot be disputed that Respondent Dye permitted the Jones defendants access to the Bradleys' property *vis-à-vis* the right-of-way whether she knew it or not. Of course, Respondent Dye asserts that she only allowed the Jones defendants to cross through or upon property that belonged to her. However, those claims are grounded in her ignorance of the actual boundaries separating her property from that of the Bradleys. In fact, she testified that she was assuming that property belonging to the Bradleys leading up the access road to the gas well head and/or surrounding it belonged to her based upon representations she claims were made to her by the Nedleys who sold her the 1872 Flaggy Meadow Road property back in 2010. *Appx. pp. 00264-00265, 00274.* However, this is not true.

In addition to improperly permitting the Jones defendants to access the Bradleys' property, Respondent Dye also brokered her own deal to profit off of harvested timber from the property. Respondent Dye entered into a written contract with co-defendants, Larry Jones and Roberta J. Jones. *Appx. pp. 00275-00276.* The contract expressly indicated that it created a "partnership" between Respondent Dye and the Jones defendants. *See Id., paragraph 1.* Pursuant to the general terms of the contract, Respondent Dye provided access to real property and timber upon the property, while the Jones defendants provided their equipment and expertise in harvesting and selling raw timber, for the purposes of brokering harvested timber to third-parties, such as mills. *See Id., generally.* Pursuant to the terms of the subject contract, Respondent Dye would receive 33% of the fair market value of harvested valuable timber, while the Jones defendants would receive 67% of the fair market value of the harvested valuable timber. *See Id.*

Unbeknownst to the Petitioners, Gregory S. Bradley and Judy Johnson Bradley, the Jones defendants, with permission of entry from Respondent Dye did trespass upon the plaintiffs' lands

and remove from the property almost three hundred valuable trees without the permission of the plaintiffs, written or otherwise. *Appx., pp. 00062-00144.* The Petitioners suffered a loss of timber totaling approximately $25,420.49 (or $76,261.47 under the treble damages provision of **W.Va. Code § 61-3-48a**) as a result. *See Id., Appx. p. 63.* The Jones defendants, who were improperly permitted entry by Respondent Dye, also caused damage to trees and brush on the Bradleys' property that were not harvested; left their equipment, waste, and supplies on the subject property after the timber trespass; made roads/skid roads on the subject property and cut down additional trees and brush to gain access to valuable trees and left them there; made a trench on the plaintiffs property and/or caused slips and flooding on the plaintiffs' property due to their activities on the plaintiffs' land; and caused such additional damages to the same. *See Id.; see Appx. pp. 00145-00164.*. The Petitioners additionally suffered total property damages and restoration costs of approximately $98,972.00 as a result of the actions of Respondent Dye and the Jones defendants. *Appx., pp. 00147-00151.*

It is undisputed that neither Respondent Dye, nor the Jones defendants, were provided written permission (or any permission) to enter the Bradleys' property and harvest valuable timber. However, the Jones defendants asserted in a statement provided to the Court purporting to be an Answer to the Complaint that they were told by Respondent, Andrea Dale Dye, that she owned the Bradley property stating, "I have all my employees or workers, that can testify she said she owned it. Any they will." *Appx. pp., 00051-00059.* The Jones defendants further asserted that "Andrea Dye said she was sure she owned it and she would take care of it. She would stand 100 % legally responsible if she was wrong." *See Id.* Moreover, the Jones defendants claimed that Respondent Dye set the property lines and that they were to stay in the boundaries she set. *Appx., pp. 00051, 00055.* The erection of the unauthorized "No Trespassing" signs on the Bradley property by

Respondent Dye and upon which she wrote her name and address would have corroborated the Jones defendants' assertions in this regard. *Appx, pp. 268, 271-273.*

In the Summer of 2017, the Petitioners, Gregory S. Bradley and Judy Johnson Bradley, arrived at their property for a random visit. They were shocked to discover that their property was occupied by logging equipment, as well as extensive waste and damages to the premises from logging operations. They also noticed that numerous valuable trees had been removed from their property. *Appx., pp. 00254-00256.*

The Petitioners, Gregory S. Bradley and Judy Johnson Bradley, angered and distressed by their findings, immediately contacted local law enforcement and/or the W.Va. Division of Natural Resources to report their damages and the equipment, waste, and supplies found on the property. *Appx., p. 278.* The W.Va. Division of Natural Resources, Officer Jeremiah S. Clark, conducted an investigation of the timber theft against the Bradleys. *Id.* Officer Clark inspected the Bradleys' property and found that it had, in fact, been recently logged. *Id.* He observed posted signs on the Bradley property containing Respondent Dye's name and address on them. *Id.* Officer Clark also found equipment, waste, and supplies on the plaintiffs' property which he concluded were left by the Jones defendants. *Id.* Officer Clark's investigation further revealed some additional surprising facts. He interviewed Respondent Dye's aunt about the Bradleys' complaint. *Id.* She told Officer Clark that her niece [Respondent Dye] owned the Bradley property. *Id.* She also admitted the subject property been logged in the year prior. *Id.* Officer Clark's investigation further revealed that the Dyes had been going onto the Bradley property with a lawn mower and trailer and harvesting the Bradleys fallen trees and limbs for their own use as firewood. *Id.* Officer Clark's investigation lastly revealed that Respondent Dye had received over Ten Thousand Dollars

($10,000.00) in payments from the Jones defendants from the subject timber harvesting enterprise. *Appx., pp. 00279-00286*

As a result of the investigation, the W.Va. Division of Natural Resources, by Officer Clark, ordered the Jones defendants to remove their equipment, waste, and supplies from the Bradleys' property, which they allegedly did in part. *Appx., p. 278.* After being instructed that the Dyes were trespassing onto the Bradley property and using it for their own benefit, such as harvesting firewood, the Bradleys set up a trail camera on their property. The Bradleys' trail camera revealed that, even after the W.Va. Division of Natural Resources investigated this timber trespass, trespasses on the property continued. *Appx., pp 00287-00292.*

Officer Clark had advised the Bradleys that their matter was a civil one. Accordingly, the Petitioners hired counsel. The Petitioners, by counsel notified Respondent Dye of their timber piracy claim. *Appx., pp. 00029, 00032.* After doing so, Respondent Dye blocked the right-of-way road leading to the Petitioners' property denying them access to the same. *Appx. 00027-00034.* As a result, the Bradleys were compelled to file the underlying civil action in the Circuit Court of Marion County, seeking recovery of damages for the timber theft by Respondent Dye and the Jones defendants, property damages, and other general and/or special damage caused to them. The Petitioners also sought an injunction from the Circuit Court to prevent the continued blocking of their access road.

b. RELEVANT PROCEEDINGS AND RULINGS BELOW

The Petitioners and Plaintiffs hereinbelow, Gregory S. Bradley and Judy Johnson Bradley, filed their *Complaint* with the Circuit Court of Marion County on July 25, 2018 against defendants Andrea Dale Dye, and Larry Jones and Roberta Jones d/b/a Jones Hauling, seeking recovery for a timber piracy and property damages resultant from the same. *Appx., pp. 00023-00025.*

Contemporaneously with the filing of the *Complaint*, the Petitioners filed a *Motion for Preliminary Injunction* seeking a Court order commanding the Respondent, Andrea Dale Dye to cease and desist blocking the Petitioners' sole access their property by blocking off the subject right-of-way road. *Appx., pp. 00027-00034.* On August 30, 2018, Respondent and defendant hereinbelow, Andrea Dale Dye, filed *Defendant Andrea Dale Dye's Answer and Affirmative Defenses to Plaintiffs' Complaint and Crossclaim Against All Other Defendants. Appx., pp. 00036-00047.* On October 1, 2018, an *Agreed Order Regarding Plaintiffs' Motion for Preliminary Injunction* was entered granting the Petitioners request for injunction. *Appx., pp. 00049-00050.* On October 22, 2018, insurer for the Respondent, Andrea Dale Dye, Intervenor hereinbelow, Farmers & Mechanics Mutual Insurance Company of West Virginia, filed a *Motion to Intervene* seeking to file a third-party complaint for declaratory judgment on issues of insurance coverage. *Appx., p. 00328.* On December 11, 2018, a signed statement was filed by *pro se* defendants, Larry and Robert Jones, purporting to be an *Answer. Appx., pp. 00051-00054.* On December 13, 2018, a copy of the signed statement filed by *pro se* defendants, Larry and Robert Jones, that was served upon Petitioners' counsel was filed with the Court. *Appx., pp. 00055-00059.* On February 19, 2019, the Court entered an *Agreed Order Granting Farmers & Mechanics Mutual Insurance Company of West Virginia's Motion to Intervene. Appx. p. 00328.* On February 19, 2019, Intervenor hereinbelow, Farmers & Mechanics Mutual Insurance Company of West Virginia, filed its *Third-Party Complaint for Declaratory Judgment. Appx. p. 00328.* An *Answer* to the same was filed by Respondent Dye and the Petitioners on March 7, 2019 and March 14, 2019, respectively. *Appx., pp. 00328-00329.* On October 1, 2019, Intervenor hereinbelow, Farmers & Mechanics Mutual Insurance Company of West Virginia, filed its *Motion for Summary Judgment* on various coverage issues. *Appx., p. 330.* The aforesaid *Motion* was fully briefed by all parties.

Id. On January 9, 2020, the Circuit Court denied Intervenor Farmers & Mechanics Mutual Insurance Company of West Virginia's *Motion for Summary Judgment* and actually entered declaratory judgment against the Intervenor on numerous issues of coverage for the claims against Respondent Dye. *Appx., p. 00331.* On October 9, 2020, *Defendant Andrea Dale Dye's Motion for Summary Judgment Against Plaintiffs* with supporting documentation. *Appx., pp. 00161-00207.* On December 28, 2020, *Plaintiffs' Response in Opposition to Defendant Andrea Dale Dye's Motion for Summary Judgment* with supporting documentation was filed. *Appx., pp. 00268-00292.* On January 20, 2021, *Defendant Andrea Dale Dye's Reply to Plaintiffs' Response in Opposition to Defendant Andrea Dale Dye's Motion for Summary Judgment Against Plaintiffs. Appx., pp. 00293-00324.* On January 25, 2021, oral argument was held on the aforesaid *Motion* as well as some additional motions. *Appx., p. 00336.* The parties submitted proposed findings of fact and conclusions of law regarding said *Motion.* On March 17, 2021, the Circuit Court entered a variation of the proposed order submitted by. Respondent Dye as its *Order Granting Defendants' [sic] Motion for Summary Judgment Against Plaintiffs. Appx., pp. 00001-00021.* It is from this *Order* the Petitioners appeal.

III. SUMMARY OF ARGUMENT

The Circuit Court of Marion County in its March 17, 2021 *Order* committed error in granting Respondent Dye's *Motion for Summary Judgment Against Plaintiffs*. The Circuit Court improperly and narrowly construed **W.Va. Code § 61-3-48a** in its application to the underlying timber theft. **W.Va. Code § 61-3-48a** is a strict liability remedial statute that should have been liberally construed by the Circuit Court to effectuate its intended purpose of providing full compensation to the Bradleys, rather narrowly construing the same to protect a landowner who was unjustly enriched by her false claim to their property. The Circuit Court further committed

error by failing to recognize that Respondent Dye owed the Bradleys multiple legal duties including, but not limited to, duties to refrain from causing injury to their property generally, to refrain from trespassing on their property, to refrain from exercising control over their property or misrepresenting ownership of their property, to refrain from converting their trees to profit for her benefit, and/or to refrain from acts and/or omissions that caused the Jones defendants to harm the Bradleys' property. The factual record evinces that Respondent Dye violated multiple legal duties owed toward the Bradleys, caused or contributed to the Jones defendants' violations of the same, and/or that she is vicariously liable for the harm caused by Jones defendants. Lastly, the Circuit Court erred in granting summary judgment on the Petitioners' claim for punitive damages against Respondent Dye, when the factual record evinced that her conduct may meet the applicable standards for the same and/or insofar as she may be vicariously liable for the imposition of the same against the Jones defendants.

As this Court will see, the aforementioned errors by the Circuit Court were, in part, caused by the Circuit Court's adoption of a favored set of facts in the case. The Circuit Court abused its discretion in rendering its decisions in its March 17, 2021 *Order* by adopting the deposition testimony and positions of Respondent Dye as the facts of the case when her self-serving testimony was contradicted or disputed by other facts in the record. It is fundamental condition precedent for granting a motion for summary judgment that the relevant material facts are not in dispute. In fact, that principal is so axiomatic that the Courts of this State have held that "[s]ummary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' " **Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.1951)).** By adopting a favored set of factual conclusions and inferences, the Circuit Court

invaded the province of the jury. The result of that abuse of discretion is a decision where a victim of timber piracy in West Virginia is left without the ability to seek compensation from a benefactor of the timber theft, who not only profited from the illegal harvesting of timber, but may also be directly responsible for causing the same.

The factual record clearly supports the conclusion that Respondent Dye caused and/or contributed to the piracy of the Petitioner's timber. The record supports the conclusion that she misled or misrepresented to the Jones defendants, negligently, recklessly or even intentionally, that she owned the Bradley property when she didn't. The record supports the conclusion that Respondent Dye exercised control over the Petitioners' property, harvested firewood from it, and/or posted it with "No Trespassing" signs with her name and address on it, potentially misleading others to believe that she owned it. In addition to the same, she tried to exclude the Petitioners from their own property after being notified of their claims, requiring the Petitioners to seek judicial intervention to force Respondent Dye to unblock their right-of-way.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The instant case is suitable for oral argument pursuant to **W.Va. R. App. P. 20** for multiple reasons. This case presents a matter of fundamental public importance to the extent that it may impact all real property owners in the State of West Virginia and their right to make a recovery for the theft, taking, and/or conversion of the valuable timber upon their real property from all persons or entities who are responsible for the same and/or who profit from such a theft, taking, and/or conversion. This case also appears to present a matter of first impression to the extent as it regards, in part, the application of the timber trespass (or conversion) statute, **W.Va. Code § 61-3-48a**, to adjacent landowners who cause and/or profit from timber piracy in conjunction with a logging contract. Accordingly, **Rule 20** argument is appropriate.

V. LAW & ARGUMENT

RULE 56 STANDARD OF REVIEW

Our cases have made clear that "[a] circuit court's entry of summary judgment is reviewed *de novo.*" Syl. pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). Insofar as " 'appellate review of an entry of summary judgment is plenary, this Court, like the circuit court, must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.' " *Provident Life and Accident Ins. Co. v. Bennett,* 199 W.Va. 236, 238, 483 S.E.2d 819, 821 (1997) (quoting *Asaad v. Res–Care, Inc.,* 197 W.Va. 684, 687, 478 S.E.2d 357, 360 (1996)). We have made clear that "summary judgment is appropriate [only] if 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' " *Pritt v. Republican Nat'l Committee,* 210 W.Va. 446, 452, 557 S.E.2d 853, 859 (2001) (quoting W. Va.R.Civ.P. 56(c)). Further, "[s]ummary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' " *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting *Pierce v. Ford Motor Co.,* 190 F.2d 910, 915 (4th Cir.1951)). "The essence of the inquiry the court must make is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Williams,* 194 W.Va. at 61, 459 S.E.2d at 338 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986)). Moreover, "[a] nonmoving party need not come forward with evidence in a form that would be admissible at trial in order to avoid summary judgment. However, to withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party." *Williams,* 194 W.Va. at 60–61, 459 S.E.2d at 337–

338 (citations omitted). **Wilson v. Daily Gazette Co., 214 W. Va. 208, 213, 588 S.E.2d 197, 202 (2003).**

1. The Circuit Court of Marion County erred when it granted summary judgment in favor of Respondent Dye on the Petitioners' claim of timber piracy, pursuant to W.Va. Code § 61-3-48a, insofar as it found that Respondent Dye did not violate the statute to the extent it found she did not physically enter the petitioners' property and cut down their valuable timber or cause the Petitioners' valuable timber to be cut, damaged or carried away. The Circuit Court's conclusions in this regard improperly, narrowly construed the scope of the statute and made improper factual findings over matters disputed by the record.

The Circuit Court of Marion County erred when it held that Respondent Dye may not be held liable pursuant to **West Virginia Code § 61-3-48a**, the timber theft statute. As a matter of law, Respondent Dye may be held liable for the same both directly and vicariously. Nevertheless, the Circuit Court of Marion County erroneously held that Respondent Dye may only be held liable under the timber theft statute where she physically entered the property herself and cut down the stolen trees. In reaching this determination, the Circuit Court of Marion County narrowly construed **§ 61-3-48a**, despite its remedial nature, to be applicable only to individuals who physically cut or damaged the Petitioners' trees, ignored pertinent portions of the factual record evincing that Respondent Dye caused the cutting or damaging of Petitioners' trees, and improperly held that Respondent Dye could not be held vicariously liable for any timber theft by virtue of her legal relationship with the Jones defendants.

W.Va. Code § 61-3-48a renders Respondent Dye strictly liable to the Petitioners for improperly harvesting and profiting from Petitioners' trees.

The Circuit Court of Marion County should have denied Respondent Dye's Motion for Summary Judgment as **W.Va. Code § 61-3-48a** does not require her to physically enter the plaintiffs' property and cut the plaintiffs' trees to be within the scope of individuals who may be held civilly liable for a timber theft. The Circuit Court of Marion County construed the statute in

such a narrow fashion. In doing so, the Circuit Court misapplied the relevant rules of statutory construction and ignored pertinent facts in the record regarding Respondent Dye's conduct.

West Virginia Code § 61-3-48a instructs:

> Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

§ 61-3-48a is a strict liability statute. It requires no specific intent, knowledge, plan, or motive to trigger liability. Unintentional and intentional conversions of another's timber are treated the same under the statute. Likewise, taking trees of another even with oral permission results in liability. Oral permission is not a defense, only written permission. Other states who have passed similar legislation typically require a certain level of intent to recover treble damages for timber takings, but not West Virginia. **Footnote 15, Penix v. Delong, 473 S.W.3d 609, 620 (Ky. 2015)(surveying the scope of timber trespass statutes in the United States).**[1] Rather, West Virginia affords victims treble damages for their stolen timber regardless of state of mind of the responsible parties. Innocent, negligent, and malicious trespassers are all treated the same under

[1] "We should note that treble damages is not an uncommon penalty for timber piracy—in other words, the General Assembly's change from 'punitive damages' to 'treble damages' is not at all unique within the statutory provisions for the unauthorized cutting of trees found in the law of sister jurisdictions. Likewise, strict liability—absent color of title or title in fact—is not uncommon. *And* nearly universal is the notion that claims for timber piracy are based in *trespass. See, e.g.,* A.C.A. § 18–60–102 (ARKANSAS) (awarding treble damages *unless* timber pirate has probable cause to believe logged land is his); A.S. § 09.45.730 (ALASKA) (operates similar to Arkansas); Ann. Cal. C.C.P. § 733 (CALIFORNIA) (strict liability with treble damages, unchanged since its enactment in *1872);* V.A.M.S. 537.360 (MISSOURI) (single damages recoverable *only* if timber pirate had probable cause to believe land belonged to him); McKinney's R.P.A.P.L. § 861 (NEW YORK) (strict liability; mitigate damages by showing color of title or title in fact, essentially); 13 V.S.A. § 3606 (VERMONT) (not strict liability, but treble damages); R.C.W.A. 64.12.030 & 64.12.040 (WASHINGTON); W.Va.Code § 61–3–48a (WEST VIRGINIA) (strict liability and treble damages). In our own statutes, more importantly, we see some instances of treble damages for trespass. *See, e.g.,* KRS 150.690–.700."

the statute. Surveying the timber piracy statutes of other states reveals that West Virginia's timber trespass statute unequivocally affords the broadest, strictest, and harshest remedy in the United States to victims of timber theft. **See Id.**

The plain language of **§ 61-3-48a** identifies two distinct types of liable parties – ones who enter and harvest themselves, and those that "cause to be cut, damaged or carried away" the timber. **See Id.** By including the phrase "or cause to be cut, damaged or carried away[,]" the Legislature was clearly attempting to broaden the application of the statute to hold liable all persons directly or indirectly involved in the improper removal of another's trees, not just those physically involved in the cutting or hauling.

The harshness of **§ 61-3-48a** is reflective of its intended purpose to ensure that victims of timber piracy are fully compensated for the conversion of their trees. This purpose was acknowledged by this Court in **Bullman v. D & R Lumber Co., 195 W. Va. 129, 464 S.E.2d 771 (1995)**. The **Bullman** Court found that the treble damages afforded by **§ 61-3-48a** were not penal in nature. Rather, at **Syl. Pt. 1, Id.,** the Court held that the purpose of "[t]he treble damage award available under W.Va.Code, 61–3–48a (1983), is to provide compensatory damages to landowners for damaged or removed timber, trees, logs, posts, fruit, nuts, growing plants, or product of any growing plant. By allowing such increase in recovery from the market value of the item removed, the Legislature provided a remedy that would more adequately compensate landowners. The overriding purpose of the treble damage provision is to award the victim adequate compensation. Its amerciable effect, if any, is secondary."

The **Bullman** Court further expressly found **§ 61-3-48a** to be remedial in nature. **Footnote 4, Bullman at 130–31, 464 S.E.2d at 772–73 (" We find this statute to be remedial in nature and, as a remedial statute, it should be liberally construed to effect the purpose of the**

Legislature. ***See State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.,*** **194 W.Va. 770, 461 S.E.2d 516 (1995)).** In fact, the remedial nature of the treble damages award in **§ 61-3-48a** was so clear that the **Bullman** Court found that recovery of treble damages under the statute did not foreclose on a victim's recovery of punitive damages under other tort theories in the same case. **See Syl. Pt. 2, Id.**

It is well-settled that "[w]here an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended. *Kisamore v. Coakley,* 190 W.Va. 147, 437 S.E.2d 585 (1993) (per curiam); *Hubbard v. SWCC and Pageton Coal Co.,* 170 W.Va. 572, 295 S.E.2d 659 (1981); *Wheeling Dollar Savings & Trust Co. v. Singer,* 162 W.Va. 502, 250 S.E.2d 369 (1979)." **State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995).** "It is well established that '[t]hat which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed.' Syl. pt. 1, *Hasson v. City of Chester,* 67 W.Va. 278, 67 S.E. 731 (1910). *Accord, Pristavec v. Westfield Insurance Co.,* 184 W.Va. 331, 337, 400 S.E.2d 575, 581 (1990); syl. pt. 1, *State v. Kerns,* 183 W.Va. 130, 394 S.E.2d 532 (1990)." **State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling, 185 W. Va. 380, 383, 407 S.E.2d 384, 387 (1991).**

As the Court may see, **§ 61-3-48a** is a strict liability statute with a harsh automatic remedy that is designed to provide complete and adequate compensation to the victims of timber piracy, even where the conversion of another's timber made by innocent mistake. As a strict liability remedial statute, the Circuit Court of Marion County was required to construe and apply it as liberally as possible so as to effectuate its recognized purpose and design to provide the Bradleys

with full compensation. Instead, it narrowly construed the statute in violation of those principals and looked for reasons to avoid its application to Respondent Dye. In doing so, the Circuit Court simply took Respondent Dye's deposition testimony as fact, despite it being contrary to other facts and evidence in the record of the proceedings that demonstrated that Respondent Dye may be directly or vicariously liable for violation of the statute.

The factual record evinces that Respondent Dye is directly liable for violation of § 61-3-48a.

The Circuit Court of Marion County erroneously found that Respondent Dye was not liable to the Bradleys for violation of **§ 61-3-48a** because it believed both that she did not physically enter the property and cut down the trees and that the same was a prerequisite to liability under the statute. This conclusion is a strained one as the factual record revealed both that Respondent Dye did physically enter the property for the purpose of harvesting timber and further did cause the trees to be cut, damaged or carried away.

The mere fact that Respondent Dye engaged the Jones defendants in a contractual relationship for the purposes of harvesting trees for profit that resulted in the Jones defendants cutting and harvesting the Bradleys' trees should, in and of itself, render Respondent Dye liable under the statute. The Bradleys' loss is a direct fruit of that contractual relationship. Insofar as **§ 61-3-48a** is a strict liability statute, there is no question that the Respondent Dye directly or indirectly caused the Bradleys' loss by engaging in the aforementioned contractual relationship and profiting from it.[2]

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[2] The Supreme Court of Kentucky reasoned that the execution of a timbering contract is clearly an indirect cause of a timber taking. **See Penix v. Delong, 473 S.W.3d 609, 614 (2015)("There is no question that the contracting by Penix with Hunt to cut timber on his property was at least an indirect cause of timber being cut on Delong's property.").** However, the same did not factor into its decision in that case as Kentucky's timber trespass statute is not a strict liability statute and requires proof of intent to recover treble damages. Regardless, under West Virginia's strict liability statute, execution of a timbering contract by Respondent Dye is undoubtedly a cause of the cutting, damaging, and carrying away of the Bradleys' trees sufficient to hold her liable under the same.

However, even if simply engaging the Jones defendants in a logging deal was not enough to invoke liability under **§ 61-3-48a**, the factual record suggests that Respondent Dye caused or contributed to the Bradleys' losses. The record evinces that Respondent Dye asserted control over the Bradleys' property and misled or misrepresented to others her ownership interest in the same. As previously indicated, the Jones defendants claimed that Respondent Dye expressly misrepresented to them that she owned the Bradleys' property and would stand 100% responsible for that claim. *Appx., pp. 00051-00059.* The Jones defendants further stated that she set and marked the boundary line they were to follow. *See Id.* These misrepresentations and acts by Respondent Dye would have clearly misled the Jones defendants into believing that the Bradleys' property was her own, and allowing her to profit from harvested timber from the Bradley property.

The factual record corroborates the Jones defendants' assertions. The record reveals that Respondent Jones permitted the Jones defendants to use the Petitioners' right-of-way that led across Respondent Dye's property and continued over the Bradley property. That right-of-way did not lead to any location other than the Bradley tract of property, and Respondent Dye knew or should have known that.[3] The record further reveals that she admitted to improperly posting the Bradleys' property with "No Trespassing" signs. *Appx., pp. 00257, 00263-00264, 00268.* She even admitted that she wrote her name and address as the owner of the property on some of the "No Trespassing" signs. *See Id.* The investigation by the W.Va. Division of Natural Resources acknowledged these signs and also discovered that Respondent Dye had claimed an ownership

[3] The Circuit Court seemingly misunderstood the layout of the Dye and Bradley properties. The Circuit Court took Respondent Dye's assertion that she did not provide the Jones defendants with a right-of-way across the Bradley property at face value. However, the Circuit Court failed to understand that the road she gave the Jones defendants access to is the Bradleys' right-of-way, which leads to only one place – the entrance of the Bradley property, and that road continues across the Bradley property. The fact that the Jones defendants' logging equipment and waste was found all over the Bradley property at the end of that road further evinces the same.

interest in the Bradley property to other family members. *Appx., p. 00278.* Moreover, there is evidence that she further used the Bradley property to harvest firewood without authorization. *See Id.* Furthermore, when the Petitioners placed Respondent Dye on notice of their claim of timber piracy, Respondent Dye blocked entrances of the right-of-way to prevent the Petitioners' entrance requiring the Petitioners to seek an injunction from the Circuit Court. *Appx., pp. 00027-00034.*

It should be additionally noted that the factual record also technically evinces that Respondent Dye physically entered the property on her own and cut or carried away timber from the Bradley property herself without written permission and without the Jones defendants' assistance. *Appx., p. 00278.* As previously indicated, the reports of the W.Va. Division of Natural Resources revealed that, in interviews, a member of Respondent Dye's family specifically indicated that Respondent Dye was going onto the Petitioners' property for her own selfish purposes and harvesting firewood. *Id.*

It is clear to see that the Circuit Court of Marion County erred in concluding that Respondent Dye was not directly liable for violating **§ 61-3-48a**. **§ 61-3-48a** renders those who cause timber to be taken from another without written permission to be held strictly liable. The factual record contained ample evince from which one may conclude that Respondent Dye caused the Bradley trees to be taken, regardless of whether she physically cut down the trees herself. Despite this, the Circuit Court of Marion County chose Respondent Dye's self-serving deposition testimony as the facts of the case it liked best. The Circuit Court's actions amounted to an abuse of its discretion and a violation of the **Rule 56** standard of review. The Circuit Court should have denied Respondent Dye's motion for summary judgment as the issue of whether Respondent Dye is directly liable for violation of **§ 61-3-48a** was a matter for jury determination insofar as there

existed disputes of material fact precluding summary judgment on this issue. As such, the Circuit Court's grant of summary judgment was in error.

The factual record evinces that Respondent Dye is vicariously liable for violation of § 61-3-48a.

The Circuit Court of Marion County further erred in concluding that Respondent Dye was not vicariously liable for the Jones defendants' harvesting of the Bradleys' trees. The Circuit Court rejected the Bradleys' contentions that Respondent Dye was liable to them for violation of **§ 61-3-48a** under joint venture, partnership and/or agency theories. In rejecting these contentions, the Circuit Court concluded that, despite the fact that Respondent Dye wrongfully profited from the venture between her and the Jones defendants, she could not be held liable under said theories.

It cannot be disputed that the "person[s]" to which **§ 61-3-48a** includes principals, partners, and/or co-venturers. The statute does not define the "person" to which it applies. As such, the general definition in the **West Virginia Code** applies. The **West Virginia Code** defines "person" as it is used throughout the **Code** in a broad manner. Pursuant to **W.Va. Code § 2-2-10(i)**, "[t]he following rules shall be observed in the construction of statutes, unless a different intent on the part of the Legislature is apparent from the context:.... (i) The word "person" or "whoever" includes corporations, societies, associations and partnerships, and other similar legal business organizations authorized by the Legislature, if not restricted by the context..." **W.Va. Code § 2-2-5** also instructs that "[w]hen a statute requires an act to be done by an officer or person, it shall be sufficient if it be done by his agent or deputy, unless it be such as cannot lawfully be done by deputation." As the Court may see, the rules of construction for the **West Virginia Code** expressly instruct that the term "person" as used in the **Code** means more than a singular individual, but would also include partnerships, joint ventures, corporations, principal-agent relationships, etc.

The few cases that exist on the subject matter reveal logging companies who are sued for timber trespass where their employees or agents cut the trees of another. **See generally, Bullman v. D & R Lumber Co., 195 W. Va. 129, 464 S.E.2d 771 (1995); Chesser by Hadley v. Hathaway, 190 W. Va. 594, 439 S.E.2d 459 (1993).** If the term "person" as used in **West Virginia Code § 61-3-48ab** limited liability for violations of the statute to only those who physically enter the property and cut, the plaintiffs in those cases would be limited to suing the employees and/or agents under the statute and could not have sued their employers and/or principals. However, we clearly see the employer or principal being sued in those case insofar as the statute plainly extends liability beyond only individuals who enter and cut.

In the instant matter, there is no dispute that defendant Dye has a contract with the co-defendants, Jones Hauling and/or Larry Jones. *Appx., pp. 00275-00276.* That contract expressly states that the relationship between Jones and Dye is one of "[a] partnership..." *See Id, 1st paragraph.* Thus, the parties clearly intended it to establish a legal partnership. That contract created a relationship between defendants Jones and Respondent Dye wherein Dye provides access to land and timber to Jones, while Jones will use its resources to harvest the timber and sell it to third-parties. The contract provided the Respondent Dye and defendant Jones would split the profits 33/67. *See Id.*

"(7) 'Partnership' means an association of two or more persons to carry on as coowners a business for profit formed under section two, article two of this chapter, predecessor law, or comparable law of another jurisdiction and includes, for all purposes of the laws of this state, a registered limited liability partnership. (8) 'Partnership agreement' means the agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement." **W. Va. Code § 47B-1-1(7),(8).** It should be noted that defendant

Dye does not claim to have a "business," and has no experience in the timbering industry. This may very likely be correct. However, for the purposes of legal partnership liability, one does not have to have an actual "business" or even intend to create one. Rather, where the get paid partnership liability is presumed by statute. As the statute provides, "(a) Except as otherwise provided in subsection (b) of this section, 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**....(c) In determining whether a partnership is formed, the following rules apply: (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the coowners share profits made by the use of the property[;] (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived[;] (3) **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: (i) Of a debt by installments or otherwise; (ii) For services as an independent contractor or of wages or other compensation to an employee; (iii) Of rent; (iv) Of an annuity or other retirement or health benefit to a beneficiary, representative or designee of a deceased or retired partner; (v) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value derived from the collateral; or (vi) For the sale of the goodwill of a business or other property by installments or otherwise. **W. Va. Code § 47B-2-2.**

The **West Virginia Code** instructs that "(a) [a] partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable

conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership. (b) If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss." **W. Va. Code § 47B-3-5.** "(a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." **W. Va. Code § 47B-3-6.** "If such person is acting in the ordinary course of the business in the partnership, or with the authority of his copartners at the time the tort is committed, the partnership is liable to the injured third party. Not only is the person who committed the tort or wrongful act liable but all of the partners are liable to the injured third party." **Pruitt v. Fetty, 148 W. Va. 275, 280, 134 S.E.2d 713, 717 (1964).** "The question as to what constitutes a partnership depends upon all the facts and circumstances considered together in any given case and no one fact or circumstance can be used as a conclusive criterion. Where the evidence is conflicting as to whether a partnership exists, the question is one for jury determination under proper instructions of the court, but if the facts are undisputed or susceptible of only one inference, the question is one of law for the court." **Syl. Pt. 1, Id.**

As the Court may see, the contract between Respondent Dye and Jones defendants establishes a partnership to engage in timbering even if no actual business existed or was intended to have been created. The contract between the defendants expressly states that it is a "partnership," but, contract aside, the fact that Respondent Dye profited from her relationship with the Jones defendants creates a *legal presumption* that she is, in fact, a partner of the Joneses in the underlying transactions. That legal partnership renders her jointly and/or vicariously responsible

for the damages caused to the plaintiffs by her co-partners. To the extent that there is any doubt about that presumption, the issue of partnership is one for the Jury, and summary judgment in favor of Respondent Dye on this issue was inappropriate.

Even if there were uncertainty as to whether Respondent Dye and the Jones defendants were engaged in a legal partnership, it is clear that the contract between them created a joint venture that also renders her liable for defendant Jones's conduct. "A joint venture 'is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.' Syl. pt. 2, *Price v. Halstead,* 177 W.Va. 592, 355 S.E.2d 380 (1987). *See also* syl. pt. 4, *Sipple v. Starr,* 205 W.Va. 717, 520 S.E.2d 884 (1999); syl. pt. 2, *Johnson v. State Farm Mut. Auto. Ins. Co.,* 190 W.Va. 526, 438 S.E.2d 869 (1993); *Nesbitt v. Flaccus,* 149 W.Va. 65, 73–74, 138 S.E.2d 859, 865 (1964). While this Court has frequently likened a joint venture to a partnership, *e.g., Price,* 177 W.Va. at 595, 355 S.E.2d at 384, we have nevertheless distinguished the two: '[A] partnership relates to a general business ... while [a] joint adventure relates to a single business transaction.' *Nesbitt,* 149 W.Va. at 74, 138 S.E.2d at 865. *See also Lilly v. Munsey,* 135 W.Va. 247, 254, 63 S.E.2d 519, 523 (1951) (joint venture 'is sometimes called a limited partnership; not limited as to liability, but as to its scope and duration') (citation omitted); *Gelwicks v. Homan,* 124 W.Va. 572, 578, 20 S.E.2d 666, 669 (1942) ('Joint adventure is akin to partnership, and one of the distinctions is that, whereas a partnership relates to a general business of a certain type, joint adventure relates to a single business transaction.') (citing *Kaufman v. Catzen,* 100 W.Va. 79, 130 S.E. 292 (1925))." **Armor v. Lantz, 207 W. Va. 672, 677–78, 535 S.E.2d 737, 742–43 (2000).** "Because of the basic similarities between these two forms of business

association, joint ventures and partnerships are governed generally by the same basic legal principles. *See generally,* 46 Am.Jur.2d *Joint Ventures* § 3, at 22 (2d ed. 1994) ('The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships.') (footnotes omitted). Thus, since all partners are jointly liable for all debts and obligations of a partnership, *see* W. Va. Code § 47B–3–6(a) (1996), members of a joint venture are likewise jointly and severally liable for all obligations pertaining to the venture, and the actions of the joint venture bind the individual co-venturers." **Id.**

Stated differently, a joint venture is "'a single, isolated business pursuit which ... may be likened to a partnership....' *Price,* 355 S.E.2d at 384....When a joint venture is created, 'a fiduciary relationship is established among the interested parties, and the same rights and duties are created and imposed as if a ... partnership existed.' *Pownall v. Cearfoss,* 129 W.Va. 487, 40 S.E.2d 886, 894 (1946); *Gelwicks v. Homan,* 124 W.Va. 572, 20 S.E.2d 666, 669 (1942). Like partners, joint venturers are 'entitled to share in the profits of the enterprise and in the liability for losses.' *Pownall,* 40 S.E.2d at 894. It is clear that in West Virginia a joint venture is considered to be essentially the equivalent of a general partnership and a joint venturer's liability for the obligations of the joint venture is to be determined in accordance with partnership principles. Under West Virginia partnership law, general partners are jointly and severally liable for partnership obligations. *Roberts v. Toney,* 100 W.Va. 688, 131 S.E. 552, 553 (1926); *Weimer v. Rector,* 43 W.Va. 735, 28 S.E. 716, 717 (1897); *Lee v. Hassett,* 41 W.Va. 368, 23 S.E. 559, 560 (1895). This rule has been codified in the West Virginia Uniform Partnership Act, West Virginia Code § 47B–1–1 *et seq.,* which provides, in pertinent part, that 'all partners are liable jointly and

severally for all obligations of the partnership....' W.Va.Code § 47B–3–6(a) (1999)." **Holland v. High Power Energy, 98 F. Supp. 2d 741, 745–46 (S.D.W. Va. 2000).**

As the Court may see, the contractual relationship between Respondent Dye and the Jones defendants checks all of the boxes when it comes to the elements of joint venture liability. Their relationship arises out of an express contract. *Appx., pp. 00274-00275.* The contract regards their combining of property, money, effects, skill, and knowledge for a profit to be split amongst the joint venturers 33/67. *Id.* Respondent Dye was paid handsomely under this agreement. Respondent Dye and defendant Jones was/were engaged in a classic joint venture relationship. *Appx., pp. 00279-00286.* To the extent that a joint venture clearly exists, Respondent Dye is liable under for a timber trespass pursuant to **W.Va. Code § 61-3-48a** even if she did not physically enter the property herself. As such, summary judgment in favor of Respondent Dye was inappropriate.

The Circuit Court improperly found that neither of the foregoing principals of vicarious liability applied to the Bradleys' claims. Rather, the Circuit Court opined that Respondent Dye was not engaged in a partnership with the Jones defendants, generally did not exercise the requisite degree of control over the work of the Jones defendants to trigger joint venture liability, and further held that no agency relationship existed between those parties. These conclusions ignored the facts contained in the record to the contrary. The Circuit Court ignored that Respondent Dye profited from the Bradleys' trees. The Circuit Court ignored facts in the record evincing that Respondent Dye misled the Jones defendants into logging property that did not belong to her. Moreover, the Circuit Court further ignored the fact that the Jones defendants claimed that Respondent Dye set the property line for them and marked the boundaries, thereby directing or controlling to location of the timber harvest. Instead, the Circuit Court picked the set of facts it liked best – Respondent Dye's self-serving testimony. It gave no credence to facts that disputed or contradicted her claims.

The misrepresentations made by Respondent Dye to the Jones defendants causing them to timber the Bradleys' property is and/or should be actionable in West Virginia under the aforesaid theories and/or theories of agency generally. In West Virginia, "'[a]n agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of his employment, then his principal or employer may also be held liable.' Syllabus point 3, *Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981)." **Syl. Pt. 3, Barath v. Performance Trucking Co., 188 W. Va. 367, 368, 424 S.E.2d 602, 603 (1992)**. "It is generally recognized that if an agent commits an negligent tort in the scope of his employment then his principal may be held liable under the doctrine of *respondeat superior Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981); *Cremeans v. Maynard,* 162 W.Va. 74, 246 S.E.2d 253 (1978); *Griffith v. George Transfer & Rigging, Inc.*, 157 W.Va. 316, 201 S.E.2d 281 (1973); *Porter v. South Penn Oil Co.*, 125 W.Va. 361, 24 S.E.2d 330 (1943). It is also recognized that: 'When the evidence is conflicting the questions of whether the relation of principal and agent existed and, if so, whether the agent acted within the scope of his authority and in behalf of his principal are questions for the jury.' Syl. Pt. 2, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894 (1958). Syllabus, *Cremeans v. Maynard, supra.*" **Holliday v. Gilkeson, 178 W. Va. 546, 547–48, 363 S.E.2d 133, 134–35 (1987).**

Even if the Jones defendants were not her agents, Respondent Dye may be held liable for the acts as an independent contractor, where she contributed to their wrongful or unlawful conduct. As the Court explained at **Syl. Pt. 6, Shaffer v. Acme Limestone Co., 206 W.Va. 333, 338, 524 S.E.2d 688, 693 (1999)**, "[t]he independent contractor defense is unavailable to a party employing an independent contractor when the party (1) causes unlawful conduct or activity by

the independent contractor, or (2) knows of and sanctions the illegal conduct or activity by the independent contractor, and (3) such unlawful conduct or activity is a proximate cause of an injury or harm." Similarly, the Court held at **Syl. Pt. 5, L. v. Phillips, 136 W. Va. 761, 762–63, 68 S.E.2d 452, 454 (1952),** "Ordinarily an employer of a competent independent contractor to perform work not unlawful or intrinsically dangerous in character, who exercises no supervision or control over the work contracted for, is not liable for the negligence of such independent contractor or his servants in the performance of the work; but if such work is intrinsically dangerous in character or is likely to cause injury to another person if proper care should not be taken, such employer can not escape liability for the negligent performance of such work by delegating it to such independent contractor." Moreover, it has been recognized that "'[t]he defense of independent contractor has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable though the negligence is that of an employee of the independent contractor.' Point 2, syllabus, Trump v. Bluefield Water Works & Improvement Co., 99 W.Va. 425 [129 S.E. 309]." **Syl. Pt. 6, Id.**

This is a principal of law echoed in other jurisdictions, even in the timbering context. For example the New York Superior Court held that "[t]he fact that a logger trespasses while working as an independent contractor for an adjoining landowner "does not provide [the adjoining landowner] with an impenetrable shield for it has long been the law of this [s]tate that property owners are not protected from liability for a trespass committed by an independent contractor if they directed the trespass or such trespass was necessary to complete the contract"' (*Axtell v.*

Kurey, 222 A.D.2d 804, 805, 634 N.Y.S.2d 847 [1995], *lv. denied* 88 N.Y.2d 802, 644 N.Y.S.2d 688, 667 N.E.2d 338 [1996]; *see Spellburg v. South Bay Realty, LLC,* 49 A.D.3d 1001, 1002, 854 N.Y.S.2d 563 [2008]; *cf. Brown v. Arcady Realty Corp.,* 1 A.D.3d 753, 755, 769 N.Y.S.2d 606 [2003], *lv. denied* 3 N.Y.3d 606, 785 N.Y.S.2d 23, 818 N.E.2d 665 [2004]).[]" **Jones v. Castlerick, LLC, 128 A.D.3d 1153, 1154–55, 8 N.Y.S.3d 727, 729–30 (2015).** Similarly, the Washington Supreme Court found that "[i]t is true that as a general rule, where a trespass is committed upon the rights or property of another, *by the advice or direction* of a defendant, it is wholly unimportant what contractual or other relation exists between the immediate agent of the wrong and the person sought to be charged. 27 Am.Jur. 518,27 Am.Jur. 518, § 40." **Bill v. Gattavara, 24 Wash. 2d 819, 837, 167 P.2d 434, 443 (1946).**

In sum, the Circuit Court of Marion County erred by finding that Respondent Dye was not vicariously liable for the violation of **W.Va. Code § 61-3-48a** by the Jones defendants insofar as the facts inferred such a legal relationship. Moreover, regardless of the existence of such a relationship, Respondent Dye may still be held liable even where the Jones defendants were found to be independent contractors who pirated the Bradleys' trees as a result of misrepresentations of ownership or misleading conduct by Respondent Dye. The Circuit Court should have denied Respondent Dye's motion for summary judgment, as the issue of whether Respondent Dye was indirectly or vicariously liable for violation of **§ 61-3-48a** was a matter for jury determination insofar as there existed disputes of material fact precluding summary judgment on this issue. As such, the Circuit Court's grant of summary judgment was in error.

2. The Circuit Court of Marion County abused its discretion when it granted summary judgment in favor of Respondent Dye on the issue of negligence to the extent that it erroneously found that she owed no duty to the Petitioners to prevent the subject timber piracy, and where the factual record evinced that she caused and contributed to the same, directly or indirectly.

As previously outlined, the factual record evinces that Respondent Dye misled the Jones defendants into believing that she owned the Bradleys' property and profited from the same. *Appx., pp. 00051-00059.* Despite this, the Circuit Court held that Respondent Dye owed the Bradleys no duty under the circumstances and could not be held liable for negligence. By holding such, the Circuit Court permitted Respondent Dye to be unjustly enriched by the Bradleys' trees and further permitted her to retain significant financial gains secured from her misrepresentations. Respondent Dye's Motion for Summary Judgment should have denied as she owed the Bradleys a general common law duty of ordinary care not to cause them harm as well as a duty not to violate or cause to be violated the statutes of the State of West Virginia.

The Circuit Court failed to recognize that Respondent Dye owed a common law duty of care to the Bradleys not to claim ownership to the Bradleys' property or to misrepresent or mislead, negligently or intentionally, her ownership in the same to a logger insofar as the same would be reasonably foreseeable to lead to potential timber piracy. In West Virginia, "'[o]ne who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.' Syllabus Point 2, *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983)." **Syl. Pt. 10, Price v. Halstead, 177 W. Va. 592, 593, 355 S.E.2d 380, 382 (1987); see also Syl. Pt. 13, Anderson v. Moulder, *infra.* ("A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.").** Similarly, one is further obligated not to substantially encourage and/or assist others in committing tortious harm. **See Price at 597, 355 S.E.2d at 386.** Violation of these legal duties exposes one to a claim of negligence. Respondent Dye's conduct and comments as

previously described could have certainly led to the Jones defendants to be misled as to the Respondent Dye's ownership of the Bradleys property, exposing them to unnecessary harm, and it was error for the Circuit Court to discount those facts.

Likewise, the Circuit Court failed to recognize that the defendants had a duty not to trespass upon the Petitioners' property. There is no question that the Jones defendants trespassed upon the Bradleys' property and Respondent Dye likely trespassed thereupon herself. "Trespass is defined in its limited sense as: '* * * an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property'. 3 Blackstone's Commentaries, 209. " **Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 591–92, 34 S.E.2d 348, 352 (1945).** "'This Court has defined 'trespass' as 'an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.' *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 591-92, 34 S.E.2d 348, 352 (1945) (quoting 3 *Blackstone's Commentaries* 209).[12] 'In every case where one man has a right to exclude another from his land, the common law encircles it, if not inclosed already, with an imaginary fence. And to break such imaginary fence, and enter the close of another, is a trespass[.]' *Haigh v. Bell*, 41 W.Va. 19, 21, 23 S.E. 666, 667 (1895) (citation omitted)." **EQT Prod. Co. v. Crowder, 241 W. Va. 738, 744, 828 S.E.2d 800, 806 (2019).** It is no defense to an act of trespass that one was without the requisite knowledge of the trespass or to assert that they were relying upon the advice or information of another. Intent only factors into a trespass action with regard to the degree of damages afforded to the victim. As the West Virginia Supreme Court of Appeals instructed "'[a] trespasser who does so intentionally or recklessly with intent to 'take an unconscientious advantage of his victim' commits a willful or bad faith trespass and is liable for damages in a greater amount than an innocent trespasser.' *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W.Va. 804, 809, 310 S.E.2d

870, 876 (1983) (quoting *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W.Va. 368, 381, 125 S.E. 226, 231 (1924))." **EQT Prod. Co. v. Crowder, at 744, 828 S.E.2d at 806.** The factual record suggests that the Jones defendants may have trespassed upon the Bradley property at the direction or misrepresentation of Respondent Dye, innocently or intentionally. Once again, this is an act or omission she has a duty of ordinary care to avoid. And, as previously indicated, West Virginia would recognize liability on Respondent Dye for causing or condoning the Jones defendants to engage in such unlawful or improper conduct. **See Shaffer v. Acme Limestone Co., *supra*; L. v. Phillips, *supra*.**[4]

The Circuit Court also failed to recognize that there existed numerous provisions of the **West Virginia Code** which evinced a duty upon Respondent Dye to refrain from causing harm to the Bradleys' property. "'Violation of a statute is *prima facie* evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury.' Syllabus Point 1, *Anderson v. Moulder,* 183 W.Va. 77, 394 S.E.2d 61 (1990)." **Syl. Pt. 3, Courtney v. Courtney, 186 W. Va. 597, 599, 413 S.E.2d 418, 420 (1991).** "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages." **W. Va. Code Ann. § 55-7-9**. The factual record evinces that Respondent Dye violated **W.Va. Code § 61-3-48a,** which would also provide a basis for finding her liable for negligence. Moreover, the record suggests that Respondent Dye violated the

[4] Note also that a timber trespass smacks of the tort of conversion. "Any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights, or inconsistent therewith, may be treated as a conversion and it is not necessary that the wrongdoer apply the property to his own use. And when such conversion is proved the plaintiff is entitled to recover irrespective of good or bad faith, care or negligence, knowledge or ignorance." Syllabus Point 3, *Pine & Cypress Mfg. Co. v. American Eng'g & Constr. Co.,* 97 W.Va. 471, 125 S.E. 375 (1924). **Syl. Pt. 17, Rodgers v. Rodgers, 184 W. Va. 82, 86, 399 S.E.2d 664, 668 (1990).**

general trespass statute and/or caused her agent or co-venturer to violate the same. Similarly, her individual acts and/or omissions (or the acts and/or omissions of her agent) as previously discussed may have violated provisions of the West Virginia Code with respect to the destruction of property[5] and the posting of lands of another.[6] Respondent Dye's (or her agent's) violation of these statutes constitutes *prima facie* evidence of negligence.

The Circuit Court of Marion County committed error when it held that Respondent Dye owed no duty to the Bradleys under the circumstances. The facts of this case, when construed in a light most favorable to the Bradleys, plainly demonstrate that Respondent Dye may be held liable for negligence, both on an individual basis and by virtue of the application of doctrines of joint and vicarious liability. Regardless, claims of negligence are generally not ripe for decision on a motion for summary judgment. " ' "Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." Syl. pt. 1, *Ratlief v. Yokum* [167 W.Va. 779], 280 S.E.2d 584 (W.Va.1981), *quoting,* syl. pt. 5, *Hatten v. Mason Realty Co.,* 148 W.Va. 380, 135

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[5] **W. Va. Code Ann. § 61-3-33**, "If any person shall, without the consent of the owner or occupier thereof, enter upon the inclosed lands of another and do any damage, or shall, without such consent, pull down in whole or in part, or injure, any fence of another, or without permission open and leave open the gate or drawbar of another, or enter upon the inclosed lands of another after being forbidden so to do, or enter thereon and curse, or insult, or annoy, the owner thereof or any person rightfully there, he shall be guilty of a misdemeanor, and, upon conviction, be fined not less than five nor more than one hundred dollars; and, in default of the payment of the fine, the offender may, in the discretion of the judge or justice, be committed to jail for not less than five days. He shall, moreover, be liable to the party injured for the damages sustained by such injury; and it shall be no defense to any prosecution or suit under this section, that such fence was not a lawful fence." **See also W. Va. Code § 61-3-30.**

[6] **W. Va. Code § 20-2-9** instructs that Respondent Dye committed a misdemeanor offense by posting property that did not belong to her, as that section provides that "[i]t shall be unlawful and shall constitute a misdemeanor offense for any person or his agent or employee willfully to post any notice or warning or willfully to ward, drive or attempt to drive any person off, or prevent his hunting or fishing on, any land not owned or lawfully occupied by such person, his agent, or employee, unless such land is a lawfully established game or fish preserve." **See also W.Va. Code § 20-2-10.**

S.E.2d 236 (1964).' Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983)." **Syl. Pt. 17, Anderson v. Moulder, 183 W. Va. 77, 81, 394 S.E.2d 61, 65 (1990).** The Circuit Court supplanted its judgment for that of the jury when it decided the facts of the case. In doing so, the Circuit Court not only abused its discretion, but also rewarded Respondent Dye for causing or contributing to the Petitioners' damages, allowing her to be unjustly enriched and profit from her wrongful conduct or the wrongful conduct of her agent or co-venturer. Respondent Dye's motion for summary judgment should have been denied as there existed disputes of material fact precluding summary judgment.

3. The Circuit Court of Marion County abused its discretion in granting summary judgment in favor of the Respondent Dye and against the Petitioners insofar as it improperly rendered factual conclusions concerning matters of disputed material fact in holding that Respondent Dye did not engage in the requisite level of conduct necessary for the imposition of punitive or exemplary damages.

The Circuit Court of Marion County committed error when it held that Respondent Dye could not be liable to the Bradleys for punitive damages under the circumstances. The evidentiary record reveals conduct on the part of Respondent Dye that may be construed to be the kind and type that may support an award of punitive damages.

It should be noted that the Circuit Court reviewed the issue of punitive damages under its traditional common law scope. **See Kelly v. Checker White Cab, 131 W.Va. 816, 822-23, 50 S.E.2d 888, 892-93 (1948).** However, since the Circuit Court's March 17, 2021 *Order,* this Court has clarified that the passage of **W.Va. Code § 55-7-29(a)** modified the traditional scope of conduct for which punitive damages may be assessed. This Court held that "[p]ursuant to West Virginia Code § 55-7-29(a) [2015], an award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual

malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." **Syl. Pt. 12, Jordan v. Jenkins, No. 19-0890, 2021 WL 2432094, at *2 (W. Va. June 15, 2021).**

Regardless of whether the old common law standard or new statutory standard of punitive damages applied, the factual record evinces that granting Respondent Dye's summary judgment on this issue of punitive damages was unwarranted. As argued at length in this brief numerous times, the factual record reveals that Respondent Dye engaged in a series of acts whereby she asserted control over the plaintiffs' property and/or trespassed upon the same illegally. She posted the Bradleys' property illegally and in violation of statute. She represented to the Jones defendants that she owned the plaintiffs' property, amongst other wrongful acts, such as using the Petitioners' property to harvest firewood. While defendant Dye claims ignorance over her trespasses or over the trespasses of the Jones defendants, it is a reasonable conclusion from the factual record that her acts were malicious. In fact, her conduct in blocking the Petitioners' access to their property is consistent with that conclusion. Even if her acts or omissions did not rise to the level of malice, her reckless and ignorant claims of ownership or control over the Petitioners' property were acts against their welfare and the welfare of their real property. Any reasonable person should appreciate the harm that could be caused to the actual owners of the subject property by virtue of a reckless claim to the ownership of parcel real property made to a logger. Furthermore, as previously asserted, Respondent Dye's liability for punitive damages need not be premised upon a violation of a legal duty individually by her. Instead, to the extent that she may have a principal-agent relationship with the Jones defendants or was otherwise be engaged in a venture with the Jones defendants she may be held vicarious liable for their malicious or reckless acts.

In sum, the Circuit Court erred in granting Respondent Dye's motion for summary judgment on the issue of punitive damages. The Circuit Court supplanted its judgment for that of the jury when it decided the facts of the case, abusing its discretion. Respondent Dye's motion for summary judgment should have been denied as there existed disputes of material fact precluding the same.

VI. CONLCUSION

The Circuit Court of Marion County in its March 17, 2021 *Order* committed error in granting Respondent Dye's *Motion for Summary Judgment Against Plaintiffs*. The Circuit Court improperly and narrowly construed **W.Va. Code § 61-3-48a** in its application to the underlying timber theft. **W.Va. Code § 61-3-48a** is a strict liability remedial statute that should have been liberally construed by the Circuit Court to effectuate its intended purpose of providing full compensation to the Bradleys, rather narrowly construing the same to protect a landowner who was unjustly enriched by her false claim to their property. The Circuit Court further committed error by failing to recognize that Respondent Dye owed the Bradleys multiple legal duties including, but not limited to, duties to refrain from causing injury to their property generally, to refrain from trespassing on their property, to refrain from exercising control over their property or misrepresenting ownership of their property, to refrain from converting their trees to profit for her benefit, and/or to refrain from acts and/or omissions that caused the Jones defendants to harm the Bradleys' property. The factual record evinces that Respondent Dye violated multiple legal duties owed toward the Bradleys, caused or contributed to the Jones defendants' violations of the same, and/or that she is vicariously liable for the Jones defendants' harm caused to them. Lastly, the Circuit Court erred in granting summary judgment on the Petitioners' claim for punitive damages against Respondent Dye, when the factual record evinced that her conduct may meet the applicable

standards for the same and/or insofar as she may be vicariously liable for the imposition of the same against the Jones defendants.

The aforementioned errors by the Circuit Court were, in part, caused by the Circuit Court's adoption of a favored set of facts in the case. The Circuit Court abused its discretion in rendering its decisions in its March 17, 2021 *Order* by adopting the deposition testimony and positions of Respondent Dye as the facts of the case when her self-serving testimony was contradicted or disputed by other facts in the record. The factual record clearly supports the conclusion that Respondent Dye caused and/or contributed to the piracy of the Petitioner's timber; that she misled or misrepresented to the Jones defendants, negligently, recklessly or even intentionally, that she owned the Bradley property; and that she exercised control over the Petitioners' property, harvested firewood from it, and/or posted it with "No Trespassing" signs with her name and address on it potentially misleading others to believe that she owned it. She also tried to exclude the Petitioners from their own property, requiring the Petitioners to seek judicial intervention to force Respondent Dye to unblock their right-of-way.

ACCORDINGLY, the Petitioners respectfully request that this Court reverse the Circuit Court of Marion County's grant of summary judgment in favor of Respondent Dye in its March 17, 2021 *Order*, remand this matter to the Circuit Court of Marion County further proceedings, and provide such additional favorable relief as it deems just and appropriate.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing **PETITIONERS' BRIEF** was served this 19th day of July, 2021, via U.S. Mail, First Class Postage Prepaid, to the following:

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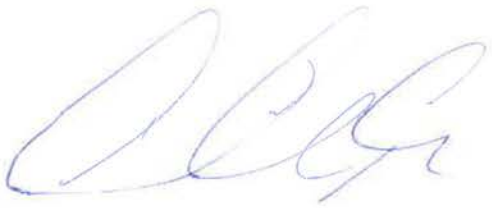

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