IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston

Case No. 21-0313

GREGORY S. BRADLEY and
JUDY JOHNSON BRADLEY,

PETITIONERS,

VS.

ANDREA DALE DYE, *ET AL.*,

RESPONDENTS.

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

PETITIONERS' REPLY

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I. ASSIGNMENTS OF ERROR

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

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. And 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.

III. SUMMARY OF ARGUMENT ON REPLY

The Petitioners incorporate the headnotes of the *Law & Argument* section of the brief by reference as if fully set forth herein.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners incorporate by reference the *Statement Regarding Oral Argument and Decision* set forth in the *Petitioners' Brief* as if fully set forth herein.

V. LAW & ARGUMENT

1. Despite the defendant's contentions otherwise, the admissions of fact contained in the Answer filed by the Jones defendants are admissible evidence that should have been considered by the Court and should have led to the denial of the Motion for Summary Judgment.

In her response, the Respondent, Andrea Dale Dye, denigrates the statements made by the underlying defendants, Larry Jones, Jr. and Roberta Jones d/b/a Jones Hauling, in their Answer as "an unsworn, unsigned, and unauthenticated document…". The Respondent suggests that said document is not admissible evidence and should not have been a factor in the Circuit Court's erroneous decision. However, the Respondent is incorrect. The Answer of the Jones defendants is not insignificant and the statements of fact contained therein operate as a binding admissions of fact that are admissible under the **Rules**.

The Answer of the Jones defendants was filed in this matter by Mr. and Mrs. Jones and made a part of the record of the underlying proceedings by them. *Appx., p. 00051.* That Answer was accepted by the Circuit Clerk of Marion County as the Jones defendants' Answer in the case and docketed as such. *Appx., p. 00328.* Despite not bearing a written signature, it was electronically signed and/or bears the type-written signature of the Jones defendants upon it. *Appx., p. 00051* At no point in time did the Respondent, Andrea Dale Dye, attempt to strike the Answer from the record of the case. *Appx., pp. 00326-00337.* Instead, all parties treated the Answer as the statement of the responsive contentions of the *pro se* Jones defendants in the underlying matter.

The Respondent, Andrea Dale Dye, filed a cross-claim for indemnification against the Jones defendants in this matter. *Appx., p. 00327.* The Respondent, Andrea Dale Dye, seemingly further accepted the Answer of the Jones defendants as also being duly-filed by the Joneses and

responsive to her cross-claim insofar as she did not move for an entry of default against the Joneses once that Answer was filed. *Appx., pp. 00326-00337.* Instead, Respondent Dye served a set of requests for admission to the *pro se* Jones defendants on the issues of indemnification between them. *Appx., p. 00329.* When those requests for admission were not answered, the Respondent moved the Circuit Court to deem the same admitted as between her and the Jones defendants. *Appx., p. 00331.* She then used the deemed admissions in support of a Motion for Summary Judgment she filed against the Jones defendants on her claim for indemnification. *Appx., p. 00334.* The record of this case demonstrates that all parties understood and accepted the Answer of the Jones defendants to, in fact, be their Answer.

The Answer of the Jones defendants reads as a statement and contains numerous admissions of fact therein. *Appx., p. 00051.* Those admissions of fact are binding on the Jones defendants and operate as evidence in the underlying matter. It is well-settled in West Virginia that "'[a] direct, specific admission of a fact in a pleading is binding and conclusive on the party making it.' Cobb v. Mortgage Security Corporation, 115 W.Va. 83, 174 S.E. 697, 698; Clark v. Clark, 70 W.Va. 428, 74 S.E. 234. See Greenbrier Laundry Co. v. Fidelity & Casualty Co., 116 W.Va. 88, 178 S.E. 631; Keller v. Norfolk & W. R. Co., 113 W.Va. 286, 167 S.E. 448; Ealy v. Shetler Ice Cream Co., 110 W.Va. 502, 158 S.E. 781; Keyser Canning Co. v. Klots Throwing Co., 98 W.Va. 487, 128 S.E. 280." **Hartman v. Hartman, 132 W. Va. 728, 734, 53 S.E.2d 407, 410 (1949); see also Cobb v. Mortg. Sec. Corp. of Am., 115 W. Va. 83, 174 S.E. 697 (1934).** "'An admission made during the course of judicial proceedings, whether it be direct or by inference from the position taken, the relief sought, or defense set up, will stop the one who makes it from subsequently asserting any claim inconsistent therewith.' 4 Am. & Eng. Dec. in Equity, 304. This is a judicial admission, which, unlike others, is conclusive. 1 Ency. of Evidence, 613."

Clark v. Clark, 70 W. Va. 428, 74 S.E. 234, 236 (1912); see also Keller v. Norfolk & W. Ry. Co., 113 W. Va. 286, 167 S.E. 448, 448 (1932). In fact, admissions in pleadings are so binding and conclusive that even "[f]raud may be established by admissions in pleadings filed by a party against whom such charge is made." **Syl. Pt. 3, Calhoun Cty. Bank v. Ellison, 133 W. Va. 9, 10, 54 S.E.2d 182, 184 (1949).** Moreover, as this Court reasoned **in Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498, 505, 625 S.E.2d 260, 267 (2005),** "'[...]factual assertions in pleadings ..., unless amended, are considered judicial admissions conclusively binding on the party who made them.' *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir.1988). *See also Wheeling–Pittsburgh Steel Corp. v. Rowing,* 205 W.Va. 286, 302, 517 S.E.2d 763, 779 (1999) (' "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them." ') (quoting *Keller v. United States,* 58 F.3d 1194, 1198 n. 8 (7th Cir.1995))." No matter how the Respondent attempts to impugn the statements of fact in the Answer, the fact remains that those admissions operate as binding admissions and evidence in the case.

In addition to operating as admissions on the part of the Jones defendants, those statements are likewise admissible evidence in the case. Once again, in **Aluise at 505, 625 S.E.2d at 267**, this Court found that "'an admission by a party-opponent is a statement which is not hearsay and thus, is admissible as substantive evidence.' *McCloud v. Salt Rock Water Pub. Serv. Dist.,* 207 W.Va. 453, 456, 533 S.E.2d 679, 682 (2000) (per curiam)." As this Court is aware, pursuant to **W.Va. R. Evid 801(d)(2)**, a statement is not hearsay if "[t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; [or] (B) is one the party manifested that it adopted or believed to be true...." As **Aluise** reasoned, an admission of fact in a pleading falls squarely within the scope of **Rule 801(d)(2)** and should have

been treated as evidence by the Circuit Court. The statements therein clearly admit and infer that the Jones defendants were on the Petitioners' property and removed trees from the same. *See Appx., p. 00051.* They blame the Respondent, Andrea Dale Dye, for the same. However, the Jones defendants' Answer operates as an admission against their interests to the extent that it exposes them to pecuniary or monetary liability for violation of a strict liability statute, **W.Va. Code § 61-3-48a**. Thus, even if the admissions in the Answer were hearsay, they would still be admissible evidence insofar as they operate as a statement against interests pursuant to **W.Va. R. Evid 804(b)(3)**. The fact that those admissions operate to the financial detriment of the Jones defendants makes them even more reliable as evidence.

The Respondent, Andrea Dale Dye, also mistakenly argues that the admissions of fact in the Answer of the Jones defendants are not to be considered as evidence against her Motion for Summary Judgment to the extent that the same is contained in a pleading. However, **W.Va. R. Civ P. 56(c)** expressly instructs, in relevant part and with emphasis added, that "[t]he judgment sought shall be rendered forthwith if **the pleadings**, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The pleadings are a critical and express component to the summary judgment assessment insofar as the same may contain admissions and/or statements of fact that are binding upon the parties.

The Respondent's argument confuses judicial admissions in an Answer with factual allegations in a Complaint. "The party *opposing a motion for summary judgment* may not rest on allegations of *his or her unsworn pleadings* and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial. *Powderidge Unit*

Owners Ass'n v. Highland Properties, Ltd., 196 W.Va. at 698 nn. 10, 11, 474 S.E.2d at 878 nn. 10, 11." **Crum v. Equity Inns, Inc., 224 W. Va. 246, 254, 685 S.E.2d 219, 227 (2009)(emphasis added)**. As this Court may easily see, the Petitioners' Complaint is not evidence upon a Motion for Summary Judgment. However, there is a distinct difference between a hopeful, unproven allegation of fact in a plaintiff's Complaint and an admitted or stipulated fact contained in a defendant's responsive pleading. The admissions of the defendants in their Answers are evidence. Furthermore, if the Respondent's contentions were correct and the judicial admissions in the Jones defendants' Answer could not be considered by the Court as a binding admission or evidence in the case, then why do we even engage in the pleading process? To find that a statement or admission of fact in a pleading is not evidence in a case would render the pleading process nothing more than a meaningless, antiquated formality.

In sum, Respondent Andrea Dale Dye's assertion that the admissions in the Answer of the Jones defendants are meaningless, inadmissible facts is incorrect. The statements of fact therein are binding judicial admissions by the *pro se* Jones defendants that may serve as evidence in the case. The Circuit Court's failure to acknowledge the impact of these admissions or to address the same in its Order below was clear error as the factual admissions therein contravene the Respondent's self-serving deposition testimony.

2. The factual record reveals that the Circuit Court of Marion County erred in granting summary judgment on all issues as, at a bare minimum, disputes of material fact permeate each and every liability issue in this case precluding an entry of summary judgment against the Petitioners.

The Circuit Court of Marion County erred in granting summary judgment in the instant matter to the extent that Respondent Dye's self-serving claims of innocence stand in contrast to the factual record. As the Court may see from the Circuit Court's *Order* and the Respondent's brief, Respondent Dye's defense against the underlying claims was and is largely based upon her

own self-serving deposition testimony. The general theme of that testimony is a claimed lack of knowledge on the part of Respondent Dye regarding the activities of the Jones defendants and their conduct on the Petitioners' property. Again, the Circuit Court essentially adopted Respondent Dye's self-serving deposition testimony as the facts of the underlying case. However, Respondent Dye's testimony and claims of ignorance are directly contradicted by the factual record, despite the Respondents contentions.

In contradiction to Respondent Dye's assertions, the judicial admissions of fact of the *pro se* Jones defendants in the Answer instruct that Respondent Dye claimed ownership to them of the Petitioner's property. *Appx. P. 00051.* In fact, the Jones defendants claim that Respondent Dye instructed them that would stand by that word. *Id.* The Jones defendants assert that Respondent Dye set the property line boundaries for them. *Id.* That document clearly indicates that the Jones defendants relied upon the representations of Respondent Dye irrespective of her self-serving deposition testimony to the contrary.

The judicial admissions of the Jones defendants are also consistent with and corroborated by other facts within the record evincing Respondent Dye had a habit and practice of exercising improper control over the Petitioners' property. For example, the record reveals that Respondent Dye posted the Petitioners' property with signs bearing her name and address. *Appx., pp. 00181, 00263-00264, 00268.* Not only is that likely a crime, but it is also a clear exercise of authority over the Petitioners' property or evince that Respondent Dye was confused about whether the property belonged to her. Either way, this is a fact that militates in favor of a finding that she claimed the Petitioners' property as her own during the timbering process. The record further reveals that she removed the cattle gate providing entrance to the Petitioners' property, yet another exercise of improper control over the Petitioners' land. *Appx., p. 00270.*

The investigation by the W.Va. Division of Natural Resources further revealed that Respondent Dye was using the Petitioners' property without permission to harvest firewood on the property. *Appx., p. 00278.* That is not an insignificant finding. Not only does that fact demonstrate that it was more likely than not that the Respondent was asserting control over and using the Petitioners' land as her own, but it also makes it more likely than not that she instructed the Jones defendants that the land belonged to her. The investigation of the W.Va. Division of Natural Resources suggests that Respondent Dye claimed ownership of the property to others, or at least unlawfully assumed that she owned the Petitioners' property. *Id.* That record reveals that Respondent Dye's aunt claimed that Respondent Dye did own the property. Once again, this makes it more likely than not that she believed she owned and represented the same to others. *Id.* Lastly, the record further reveals that after Respondent Dye was placed on notice of the Petitioners' claims of timber trespass, she blocked access to the road leading to the property requiring the Petitioners to seek an injunction from the Circuit Court. Her conduct is consistent with a guilty conscience or belief that she owned the Petitioners' property.

As this Court may see, the claims by Respondent Dye in her deposition that she was ignorant of the Jones defendants' scope of activities on the Petitioners' property are directly contradicted by the factual record. There is evidence that Respondent Dye both made representations to others, including the Jones defendants, regarding her ownership of the Petitioners' property. Moreover, there is evidence that she engaged in affirmative conduct that would have led others to believe or be misled that she owned the Petitioners' property. There is also evidence that she was using and trespassing on the Petitioners' property and taking their trees.

The value of the circumstantial evidence in the record also should not be ignored. Respondent Dye knew when she provided her deposition testimony that she was alleged to have

caused a timber trespass. It should come as no surprise that she would claim ignorance and lack of knowledge as to what had occurred on the Petitioners' property during her deposition testimony. The circumstantial evidence of her control and use of the Petitioners' property both demonstrates that her testimony is unreliable and that the Jones defendants' admissions may be correct. As this Court has held, "there is no qualitative difference between direct and circumstantial evidence..." **State v. Guthrie, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995); Bowyer v. Hi-Lad, Inc., 216 W. Va. 634, 644, 609 S.E.2d 895, 905 (2004)**. Causes of action involving timber theft should be expected to heavily rely upon circumstantial evidence as the nature of the claim regards deceit. In fact, had the Petitioners not come to the property at the moment they did and witnessed the equipment and waste upon their property, they likely would had to have relied solely upon circumstantial evidence to prove their claim.

At a bare minimum, the factual record when compared to Respondent Dye's inconsistent testimony should have resulted in the denial of the Respondent's underlying Motion. The degree of control exercised by Respondent Dye over the Petitioners' property, over the Jones defendants' work, and over the setting of boundary lines for the logging work of the Jones defendant create material disputes of fact over nearly every potential manner for which Respondent Dye may be held liable for the Petitioners' timber theft. The factual record evinces that Respondent Dye caused the Jones defendants to cut, damage or carry away the Petitioners' timber in violation of **West Virginia Code § 61-3-48a**. Likewise, the record reveals that Respondent Dye engaged in affirmative conduct in asserting improper ownership or control of the Petitioners' property that she knew or should have known would result in the Petitioners' trees to be taken and property damaged and/or which substantially encouraged and/or assisted the Jones defendants in causing said damages. **See Syl. Pt. 10, Price v. Halstead, 177 W. Va. 592, 593-597, 355 S.E.2d 380,**

382-386 (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.").

Evidence of Respondent Dye assisting the Jones defendants in setting property line boundaries for timbering and/or engaging in affirmative conduct that may have misled the Jones defendants into believing she owned the timbered property further evinces that she exercised a degree of control over the Jones defendants' work and further evincing a joint venture between the parties. Likewise, even if the Jones defendants were independent contractors, the factual record evinces that Respondent Dye contributed to their wrongful or unlawful conduct insofar as she misrepresented ownership of the Petitioners' property or misled the Jones defendants into believing she owned said property. **See Syl. Pt. 6, Shaffer v. Acme Limestone Co., 206 W.Va. 333, 338, 524 S.E.2d 688, 693 (1999); Syl. Pts. 5-6, L. v. Phillips, 136 W. Va. 761, 762–63, 68 S.E.2d 452, 454 (1952).** Furthermore, the factual record suggests that Respondent Dye could be liable to punitive damages to the Petitioners as she may have caused the Petitioners' damages by and through her conscious, reckless or malicious claims to the property. **Syl. Pt. 12, Jordan v. Jenkins, No. 19-0890, 2021 WL 2432094, at *2 (W. Va., June 15, 2021).**

As the Court may see, the underlying facts of this case are in dispute. Summary judgment should never have been granted as a result. The contradictory claims of the defendants and the credibility of Respondent Dye's claims of innocence and ignorance are matters for Jury determination, and it was error for the Circuit Court to have adopted her self-serving contentions as the facts of this case. The result of the Circuit Court's decision was to release Respondent Dye from liability to the Petitioners despite the fact that she committed both wrongdoing and was

unjustly enriched from the profits of the sale of trees belonging to the Petitioners. Thus, Respondent Dye's Motion for Summary Judgment should have never been granted as both a matter of law and equity.

3. **This Court should find W.Va. Code § 61-3-48a and/or other tort theories asserted by the Petitioners to provide a remedy to the Petitioners against all persons or entities who were in any manner involved in, unjustly enriched by, and/or profited from the fruits of a timber theft upon the Petitioners' property as substantial public policy concerns dictate that result.**

As previously asserted, the effect of the Circuit Court of Marion County's March 17, 2021 *Order* was to provide a windfall to the Respondent, Andrea Dale Dye, as the beneficiary of the timber removed from the Petitioners' property. The Circuit Court denied a remedy to the Petitioners against the Respondent, effectively allowing her to keep the fruits of a timber trespass upon the Petitioners' property and benefiting from the damages left to that property.

"The law abhors allowing a wrong without a remedy." **Bender v. Glendenning, 219 W. Va. 174, 190, 632 S.E.2d 330, 346 (2006)(J. Starcher, concurrence).** It is the public policy of this State to provide a remedy for every wrong. **See generally, Fleshman v. McWhorter, 54 W. Va. 161, 46 S.E. 116, 118 (1903).** Similarly, the law abhors a windfall. **See generally, Kenney v. Liston, 233 W. Va. 620, 626, 760 S.E.2d 434, 440 (2014).** As the Court stated in **Prudential Ins. Co. of Am. v. Couch, 180 W. Va. 210, 215, 376 S.E.2d 104, 109 (1988)** in discussing the application of the doctrines of restitution and unjust enrichment, "...a person should not be unjustly enriched because of another's mistake[.]" "The theoretical basis for this principle is that it would be unjust to allow a person to retain money on which he had no valid claim. He would be unjustly enriched thereby, when in equity and justice it should be returned to the payor." **Id., at 214, 376 S.E.2d at 108.**

The West Virginia Legislature has demonstrated a clear intent to hold the perpetrators of a timber theft and all who cause the same strictly accountable. **See West Virginia Code § 61-3-48a; see also Footnote 15, Penix v. Delong, 473 S.W.3d 609, 620 (Ky. 2015)(acknowledging the W.Va. timber trespass statute as a strict liability statute).** Moreover, the Legislature has, likewise, demonstrated a clear intent to ensure that the victims of timber trespass receive full and complete compensation for their losses, including a treble damages multiplier in the statute to guarantee that result. **See Id.; see also Bullman v. D & R Lumber Co., 195 W. Va. 129, 464 S.E.2d 771 (1995).**

It is clear to see that the substantial public policy of this State weighs in favor of providing compensation and a remedy to all victims of timber trespass against all persons who were involved in or benefit from such an illegal transaction. Accordingly, substantial public policy considerations weigh in favor of a construction of **West Virginia Code § 61-3-48a** that provides a remedy against the Respondent, Andrea Dale Dye. At the very least, some remedy must be provided against her as upholding the March 17, 2021 *Order* of the Circuit Court of Marion County would result in the Respondent profiting from a wrong to the detriment of the Petitioners.

VI. CONCLUSION

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 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.

The result of the aforesaid abuse of discretion is a decision where a victim of timber piracy in West Virginia, a strict liability tort pursuant to **W.Va. Code § 61-3-48a**, is left without the ability to seek compensation from a financial beneficiary of the timber theft, who not only was unjustly enriched from the illegal harvesting of timber, but may also be directly responsible for causing the same. A remedy should be provided to Petitioners against Respondent Dye as a result.

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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BY: _____

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing **PETITIONERS' REPLY** was served this 22nd day of September, 2021, via U.S. Mail, First Class Postage Prepaid, to the following:

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