IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CASE NO. 21-0313

GREGORY S. BRADLEY and JUDY JOHNSON BRADLEY,

Petitioners,

v.

Marion Co. Civil Action No. 18-C-110
Hon. Patrick N. Wilson, Circuit Judge

ANDREA DALE DYE, LARRY JONES, JR., and ROBERTA J. JONES, Individually and d/b/a JONES HAULING, and OTHER UNKNOWN DEFENDANTS,

Respondents.

RESPONDENT ANDREA DALE DYE'S BRIEF

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2. **The Circuit Court of Marion County did not err in granting summary judgment in favor of Respondent regarding Petitioners' negligence claim. The Circuit Court correctly found that Respondent did not cause or contribute to Petitioners' asserted timber trespass. At the summary judgment stage, the Circuit Court also properly found that Petitioners advanced for the first time numerous legal theories to attempt to create a duty owed by the Respondent. The Circuit Court properly found that Petitioners' newly asserted theories failed, and there is no genuine issue of material fact to permit them to survive summary judgment.**

3. **The Circuit Court of Marion County did not err in granting summary judgment in favor of Respondent because there is no evidence in the record that Respondent engaged in the requisite level of conduct necessary for the imposition of punitive or exemplary damages.**

II. STATEMENT OF THE CASE

The Circuit Court of Marion County ("Circuit Court") correctly granted summary judgement in favor of Respondent Andrea Dale Dye ("Respondent") and against Petitioners Gregory S. Bradley and Judy Johnson Bradley ("Petitioners") because Petitioners failed to produce any evidence demonstrating a genuine issue of material fact in support of their claims against her. As established in the record below and herein, it is undisputed that Respondent did not enter upon Petitioners' property to cut, damage, or carry away or cause any timber to be cut, damaged, or carried away.

Respondent also never caused co-Defendants to enter upon Petitioners' property to cause any of Petitioners' timber to be cut, damaged, or carried away.

Petitioners specifically possess no evidence to establish their claims against Respondent. When asked if he believed the Respondent physically entered upon their land to remove trees, Petitioner Gregory Bradley testified "absolutely not." JA at 200. Petitioners are only assuming Respondent bares liability because she entered into a Contract for the removal of timber from her property. JA at 200. Respondent has been Petitioners' sole target since the inception of this matter. Petitioners made no effort to prosecute claims against the co-Defendants, the parties that allegedly entered onto Petitioners' land and removed timber. See JA at 326-347.

On July 25, 2018, Petitioners filed their Complaint against Respondent, Larry Jones, Jr, and Roberta J. Jones, individually and d/b/a Jones Hauling (hereinafter "Jones Hauling") and other unknown Defendants. JA at 23-24. In their Complaint, Petitioners generally allege that:

> [T}he Defendants, or any of them, their heirs, successors, servants, agents or employees, negligently, willfully, wantonly, and without warning or authority, deliberately entered onto the Plaintiff's above-stated parcel of real estate and maliciously cut and removed valuable trees from the Plaintiffs' parcel and otherwise damaged the Plaintiffs' real estate and remining standing timber.
> ...
> [T]he Defendants, or any of them, their heirs, successors, servants, agents or employees, negligently, willfully, wantonly, and without warning or authority, deliberately entered onto the Plaintiffs' soil, surface drainage systems, fencing, and riparian buffer zones and otherwise negligently and carelessly damaged the Plaintiffs' property proximately causing damages therein.

JA at 24. Although Petitioners assert these general allegations against all Defendants, the record fails to establish Respondent entered Petitioners' property and removed timber or otherwise caused co-Defendants to do so.

The Circuit Court correctly found that Respondent neither timbered Petitioners' property nor caused Petitioners' property to be timbered. JA at 6-19. Respondent has no experience in timbering,

logging, or surveying. JA at 180-181. Respondent is a school bus driver for the Marion County Board of Education. JA at 179. Respondent owns and resides on property located at 1872 Flaggy Meadow Rd, Mannington, Marion County, WV. JA at 179-180; 258-260; 31. Respondent has resided there since 2010. JA at 179-180.

Respondent's property is one of the bordering properties around Petitioners' property, which is also bordered by two other properties. JA at 193-194[1]; 250. Respondent owns approximately 12 acres within two plots of land along Flaggy Meadow Road. JA at 250, 258-260. Her home is located on the plot containing approximately 10 acres. JA at 31; 250; 258-260. This property contains an easement/right-of-way across her property and the Petitioners' property up to a gas well. JA at 182; 258-260. The gas company maintains the gas well road and the access gate to it. JA at 196. There is a separate "cattle gate" at the bottom of the access road beside Respondent's house and cellar. JA at 261. Once passing thru the "cattle gate", persons must follow the access road across the Respondent's 10 acre property before they reach the Petitioners' property located behind and up a hill from the Respondent's property. JA at 250. The gas well access gate is located on the access road at or around the boundary line between the Petitioners' property and Respondents' property. JA at 250.

At the time Respondent purchased the property, she was told she owned up to the gas well. JA at 182. During Respondent's ownership of her property, she observed hunters and four-wheelers using the gas well access road. JA at 183. In order to curb this issue, Respondent placed no trespassing signs along this access road. JA at 183. There is no evidence indicating the signs were placed anywhere other than along the gas well easement road leading up to the gas well. JA at 183.

1 The Plaintiff's purchased the Nation Timber Partners property referenced in the survey. JA at 192; 250.

In January of 2016, Respondent was approached at her home by co-Defendant Larry Jones on behalf of Jones Hauling requesting a temporary right-of-way solely across her property. JA at 274; 181-182. Respondent was informed that the temporary right-of-way across her property was needed for use in extracting timber from a neighboring property owned by James W. E. Hayes and Joan Hayes. JA at 250; 274; 181-182. Respondent granted permission for the temporary right-of-way solely across her property. JA at 182; 274. She did not give permission to cross over anybody else's property. JA at 182. Co-Defendant Larry Jones on behalf of Jones Hauling also proposed timbering Respondent's property after completing timbering on the Hayes' property and property owned by Herbert W. Hill and Janice L. Hill. JA at 183-184, 250.

After making this proposal, Defendant Larry Jones gave Respondent co-Defendants' Timber Sale Contract ("Contract"). JA at 183-185; 201-203. The Contract specifically identifies the Respondent as the Seller and co-Defendants Larry Jones d.b.a. Jones Hauling as the Buyer. JA at 201. The introduction further refers to the Respondent as "A partnership", which she is not. JA at 201. This is the only place the Contract references a "partnership." JA at 201-203. There are no contractual provisions entering or creating a partnership between the Respondent and Jones Hauling. JA at 201-203. Rather Section Six of the Contract identifies Defendants Larry Jones d.b.a. Jones Hauling being an independent contractor. JA at 201-202. Section Seven of the Contract provides that the "Buyer is to do said work according to his methods; is to employ and pay all employees he engages to assist him in said work; is to have the sole right of control over such employees; and that he and his employees are not subject to the control of Seller." JA at 202. Section Three of the Contract says "Buyer shall pay the sum of 33% for the timber. Seller will receive payments and copies of sales receipts weekly." JA at 201. Section Five provides that "Seller makes no representations as to the present or future condition of its property in connection with operations

hereunder. Buyer hereby represents that he is personally familiar with this property, and the boundaries (sic) lines delineating the area to be logged." JA at 201. Section Eight of the Contract states that the "Buyer hereby covenants not to cut any line tree or trees on land owned by other third parties over which a right of way has not been procured." JA at 202.

After entering the Contract, Respondent believed that the co-Defendants were going to timber her property after they completed timbering the Hayes' and Hill's properties. JA at 183-184. Respondent never directed the co-Defendants where to timber. JA at 186. She never helped or had any involvement with the co-Defendants' timbering. JA at 186-187. She didn't oversee their work or day-to-day operations. *Id.* She didn't tell them how timber was to be taken from her property. *Id.* She did not have the ability to timber her property or any property. JA at 185.

Moreover, Respondent never made any representations about her property boundaries. JA at 184. Respondent only provided co-Defendants with the survey plat of all the properties. JA at 184; 250. Specifically, the affirmative evidence is as follows:

> Q: During those conversations with Mr. Jones, did you make any representations to him about what properties you owned up on the hill?
> A: No, sir.
> Q: Did he ever ask you during those conversations to confirm whether or not a particular piece of property up there belonged to you or not?
> A: He never asked me about a particular piece. He asked me if I had a property plat, which I did, and I gave it to him and that's as far as that went.
>
> He said that he would walk the property and decide and I needed to decide whether I wanted to pursue the contract with him or not.
> Q: Did you ever walk the property line with Mr. Jones?
> A: No, sir.
> Q: Did you ever go out onto the property and mark the property lines for him?
> A: No, sir.

JA at 184. Respondent never walked the property lines with co-Defendants or marked her property for them. *Id.* Respondent believed that co-Defendants knew what they were doing. JA at 185. She never thought co-Defendants would go across her property lines and take timber on someone else's

property. JA at 186. She never even thought that co-Defendants would cheat her out of her timber's value. JA at 185. Respondent relied upon co-Defendants' representations and the Contract they provided to her. JA at 185.[2]

In opposition, Petitioners ignore these facts and provide no evidence required at the summary judgment stage demonstrating a genuine issue of material fact. Instead, Petitioners hold Respondent solely responsible for the actions of others because she entered the Contract with co-Defendants for removal of timber from her property. JA at 200.[3] Notably, Petitioners made no effort to investigate their claims against the Hayes and Hills who initiated the work by Jones Hauling.[4] Petitioners did not complete any discovery upon co-Defendants Jones Hauling, Larry Jones, and Roberta Jones. JA at 326-337. Regardless, the only evidence that even connects Respondent to co-Defendants is the right-of-way agreement, the Contract, checks, and her own testimony. JA at 274-277; JA 279-286;185-189. The DNR's investigation demonstrates the Respondent was paid for timber pursuant to the Contract. JA at 278-286. However, there is no evidence to indicate she received payment for timber taken from the Petitioners' property as opposed to her own 10 acres. JA, *generally.*

Petitioners also place significant weight on a purported answer/letter from co-Defendants denying liability and pointing the finger at Respondent. JA at 51; 55. However, contrary to representations by Petitioners, this document is not signed but only contains Larry Jones' and Roberta Jones' name typed into the signature line. JA at 51; 55. This document is not a sworn affidavit or testimony. JA at 51; 55. There is no evidence or testimony in the record authenticating

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2 It is important to note that the record establishes that Respondent did not intentionally block Petitioners from accessing their property after the asserted timber trespass. *See* JA at 189. Respondent left a trailer by the aforementioned "cattle gate" on her property as she was in the process of unloading it. JA at 189.

3 During his deposition, Petitioner Gregory Bradley was questioned about whether Respondent did anything other than enter into a contract with Jones Hauling to harvest some trees. In response, Petitioner Gregory Bradley testified "[t]hat's the only assumption I'm making."

4 The Respondent filed a notice of non-party fault against the adjoining property owners. JA at 328.

this document or affirming that it is true and accurate. Even if it were accepted as evidence, the face value is not probative as to which property the Respondent allegedly said she owned. JA at 51; 55. It further confirms that the co-Defendants reviewed her deed and the boundaries of the Respondent's property matched the deed. The only reasonable inference from these unauthenticated statements is that the co-Defendants removed timber from within Respondent's actual property lines. This does not account for the trees removed from the Petitioner's property. At best, this document is insufficient to overcome a motion for summary judgment.

Additionally, Petitioners argue that Respondent is responsible due to allegedly violating various statutes and engaging in either a partnership, joint venture, or a principal-agency relationship with co-Defendants. Petitioners even go as far as to assert that Respondent aided and abetted or substantially encouraged or assisted co-Defendants in their alleged tortious conduct. These allegations, without supporting evidence, are nothing more than an attempt to circumvent West Virginia's several liability statute to attempt recover 100% against Respondent.

Although Petitioners put forth these various theories and claims of alleged liability, they failed to put forth any evidence or facts to create a genuine issue of material fact to controvert Respondent's evidence that she did not violate West Virginia Code § 61-3-48a, did not cause co-Defendants to allegedly violate West Virginia Code § 61-3-48a, wasn't negligent, and did not commit punitive and intentional actions. Accordingly, the Circuit Court correctly granted summary judgement in favor of Respondent.

III. SUMMARY OF ARGUMENT

The Circuit Court did not err in granting Respondent's *Motion for Summary Judgment against Plaintiffs*. The factual record before the Circuit Court and this Honorable Court establishes that the Circuit Court's March 17, 2021 *Order* granting Respondent's *Motion for Summary Judgment*

against Plaintiffs should be affirmed. The factual record establishes that Petitioners' lack evidence to support their claims against the Respondent.

The only evidence in the factual record before the Circuit Court regarding Respondent's involvement with co-Defendants' timbering activities are the Contract, the right-of-way agreement, and Respondent's deposition testimony. Petitioners have no knowledge or evidence of Respondent removing timber from Petitioners' property or otherwise allegedly directing co-Defendants to remove timber from any property other than her own. Petitioners have no first-hand knowledge of the person(s) that removed the timber from the property. No witness offered any evidence by way of testimony, affidavits or otherwise of first-hand knowledge of the alleged timber trespass on Petitioners' property. Larry Jones and Roberta Jones never testified to, affirmed, verified, or authenticated the asserted letter/answer that Petitioners appear to almost entirely base their appeal upon. Again, this document is inadmissible and insufficient to overcome summary judgment.

Additionally, there is no evidentiary support in the record demonstrating a genuine issue of material fact for Petitioners' claims against Respondent to survive summary judgment. The factual record conclusively shows that Respondent did not violate West Virginia Code § 61-3-48a because she didn't physically enter the land or premises of Petitioners to cut, damage or carry away any timber, trees, or logs or cause any timber, trees, or logs to be cut, damaged, or carried away from Petitioners' property. Respondent's testimony establishes these facts, and Petitioners failed to put forth any evidence to dispute it. In making this finding, the Circuit Court did not improperly, narrowly construe West Virginia Code § 61-3-48a. The Circuit Court's Order makes it evident that it considered whether Respondent physically entered Petitioners' property as well as whether Respondent caused co-Defendants to cut, damage or carry away any timber, trees, or logs from Petitioners' property.

Even if Petitioners establish that Co-Defendants' committed the timber trespass on their property, Respondent cannot be vicariously or jointly liable for co-Defendants' alleged actions. Respondent entered into the Contract with co-Defendants to timber her property. The Contract does not create a partnership. Furthermore, Respondent's actions do not create a partnership, joint venture, or principle-agency relationship with co-Defendants. The record establishes that Respondent didn't direct or control co-Defendants' actions. The record establishes that Respondent didn't enter into a business relationship with co-Defendants to split profits. Respondent entered into the Contract to sell certain trees from her property for a price based off of the percentage value received from the trees removed. The Circuit Court correctly found that Respondent is not vicariously or jointly liable for co-Defendants' alleged actions as the record establishes that she did not enter into a partnership, joint venture, or principle-agent relationship with co-Defendants.

The Circuit Court also properly found that the record establishes that Respondent did not owe Petitioners a duty, and Petitioners failed to establish a duty was owed even through their newly asserted statutory violations. The factual record conclusively establishes that Respondent did not violate West Virginia Code § 61-3-33, West Virginia Code § 20-2-9, and West Virginia Code § 61-3-30. Respondent never damaged, destroyed, and/or defaced Petitioners' property as is required by these statutes. Respondent never willfully posted Petitioners' property with no trespassing signs resulting in damages. Even if a duty was owed, the Circuit Court correctly found that Petitioners' negligence claim failed against Respondent because Petitioners failed to put forth any genuine issue of material fact to show that Respondent's actions brought forth their damages.

Finally, the Circuit Court properly found that the record establishes that Respondent did not commit any intentional acts or willful, wanton, or reckless conduct. Respondent entered into the Contract for timbering to be conducted on her property. The factual record establishes that

Respondent did not direct co-Defendants where to timber. It establishes that Respondent did not misrepresent her property or anyone else's property to co-Defendants. It also establishes that Respondent did not control co-Defendants' actions to allegedly convert Petitioners' property for her gain as Petitioners allege.

The Circuit Court reviewed all the evidence in this case, all issues were fully briefed, and the Circuit Court correctly ruled, after a full review of the pleadings and arguments of counsel, that summary judgment was appropriate.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument of this matter is not required because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument as this action does not present any new or novel issues.

V. STANDARD OF REVIEW

On appeal, the standard of review for a trial court's decision on a motion for summary judgment is *de novo*. *L&D Invs., Inc. v. Mike Ross, Inc.*, 818 S.E.2d 872, 878 (W. Va. 2018) (*citing* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). In regard to defeating a Motion for Summary Judgment, this Court holds:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). The Court further noted that "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic."

Williams, 194 W.Va. at 60, 459 S.E.2d at 337. To avoid summary judgment the plaintiff must offer concrete evidence upon which a reasonable finder of fact could return a favorable verdict. *Id.*

VI. ARGUMENT

1. The Circuit Court of Marion County did not err in granting summary judgment in favor of Respondent Andrea Dale Dye on Petitioners' timber trespass claim pursuant to West Virginia Code § 61-3-48a.

In this matter, the affirmative evidence demonstrates Respondent never entered onto Petitioners' property to remove trees. JA at 200.[5] Furthermore, the affirmative evidence demonstrates Respondent entered into the Contract with co-Defendants for the sale of her timber. JA at 201-203. The Contract clearly states co-Defendants are independent contractors who have personal knowledge of Respondent's property's boundary lines and covenanted not to cut any tree on land owned by other third parties over which a right of way has not been procured. JA at 201-203. Although she placed no trespassing signs along an easement road leading up to a gas well, Petitioners' offer no evidence demonstrating co-Defendants relied on these no-trespassing signs when removing trees resulting in the alleged timber trespass on Petitioners' property. JA at 182; 271-273. As such, Petitioners offer no evidence that Respondent caused co-Defendants to remove trees from the Petitioners' property, or that she can be jointly liable for Co-Defendants' timbering operation.

A. The Circuit Court's Order establishes that it did not improperly, narrowly construe West Virginia Code § 61-3-48a. The Circuit Court correctly found that Respondent did not violate West Virginia Code § 61-3-48a and Petitioners failed to put forth a genuine issue of material fact to establish that she did or that she was liable for the alleged acts of co-Defendants.

"The primary object in construing a statute is to ascertain and give effect to the intent of the

5 Petitioners contend in their opening brief that the Respondent personally harvested firewood and trail cameras indicate she continued to trespass on the property. However, the DNR report states a "family member" was pulling firewood by a lawn mower. JA at 278. Furthermore, the individuals in the trail camera photos referenced by Petitioners as evidence of Respondent's trespass are actually unidentified and are likely the very trespassers the

Legislature." *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, 836 S.E.2d 456, 463 (W. Va. 2019); *quoting,* Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r.*, 219 S.E.2d 361 (W. Va. 1975). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Div. of Justice & Cmty. Servs., supra*; *quoting, Martin v. Randolph Cyt. Bd. of Educ.*, 465 S.E.2d 399, 414 (W. Va. 1995). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Div. of Justice & Cmty. Servs., supra; quoting,* Syl. Pt. 2, *Crockett v. Andrews*, 172 S.E.2d 384 (W. Va. 1970). West Virginia Code § 61-3-48a states, in pertinent part, that:

> 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.

W. Va. Code § 61-3-48a. Based upon the clear and unambiguous language of West Virginia Code § 61-3-48a, the Circuit Could correctly construed it and applied the record to it.

The Circuit Court recognized that West Virginia Code § 61-3-48a requires that Respondent "physically entered the land or premises of [Petitioners] to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, or logs." JA at 7. In addition, the Circuit Court gave consideration as to whether Respondent was in violation for causing the alleged timber theft. JA at 8. Specifically, the Circuit Court's Order states that:

> There is no evidence in the record to put forth a genuine issue of material fact to support Plaintiffs' position that Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or or the Co-Defendants' employees and/or agents **relied upon any action of Defendant Dye to cause Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or or the**

Respondent was trying to keep out of the property. JA at 287-292.

Co-Defendants' employees and/or agents to cut, damage or carry away any timber, trees, or logs.

At the summary judgment stage, the Court cannot rely upon assumptions or what ifs as to what Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or Co-Defendants' employees and/or agents may or may not have relied upon in committing their alleged violation of West Virginia Code § 61-3-48a. Rather, the Court must rely upon the facts developed within the record before it.

JA at 8 (emphasis added).

The Circuit Court's Order makes it evident that it did not improperly, narrowly construe West Virginia Code § 61-3-48a as Petitioners assert. The Circuit Court's Order also establishes that it didn't misapply rules of statutory construction. The Circuit Court did not construe West Virginia Code § 61-3-48a to require an intentional act, limit the types of damages permitted by the Statute, or limit the scope of it as Petitioners contend. The Circuit Court did not limit Petitioners from attempting to develop facts for their asserted claims pursuant to West Virginia Code § 61-3-48a. Rather, as shown herein, the Circuit Court correctly applied the law to the record before it, which establishes the Respondent did not cut, damage or carry away or cause to be cut, damaged or carried away any of Petitioners' timber. JA at 6-9.

B. The Circuit Court did not err in concluding that Respondent did not violate West Virginia Code § 61-3-48a. The factual record does not evince that Respondent is strictly liable for the alleged violation of West Virginia Code § 61-3-48a.

West Virginia Code § 61-3-48a states, in pertinent part, that:

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.

W. Va. Code § 61-3-48a. As previously shown, the Circuit Court did not limit its finding that

Respondent did not violate the Statue due to not entering Petitioners' property. JA at 7-8. Rather, the Circuit Court correctly found that Respondent didn't physically enter the land or premises of Petitioners to cut, damage or carry away any timber, trees, or logs. JA at 7. The Circuit Court also correctly found that Respondent didn't cause any timber, trees, or logs to be cut, damaged, or carried away from Petitioners' property. JA at 7-8. The record establishes that Circuit Court did not err. JA at 6-9.

The record establishes that Respondent never entered upon Petitioners' property to cut, damaged, or carried away any timber or trees. JA at 5; 185-186. Petitioner Gregory Bradley even testified that he believes Respondent did not engage in such acts. JA at 5; 200. When specifically asked whether he thought Respondent physically went on to his property and cut down trees, Plaintiff Gregory Bradley testified "Oh, absolutely not." *See Id.*

Additionally, the record establishes that Respondent did not cause Petitioners' timber to be cut, damaged, or carried away. JA at 3-5. The Contract does not render Respondent liable as Petitioners assert. The Contract was for timbering solely on Respondent's property. JA at 3; 201-203. The Contract only permitted co-Defendants to cut Respondent's trees on Respondent's property, which co-Defendants were responsible for determining. JA at 201. Additionally, it is undisputed that Respondent did not have control over co-Defendants' actions just like the other landowners whose land was timbered. JA at 4-5; 187; 201-203. Respondent did not give permission to cut timber on any other properties or access any other properties. JA at 4; 201-203; 183.

Furthermore, the record does not evince that Respondent asserted control over Petitioners' property. *See Id.* Nor did she mislead or misrepresent to co-Defendants that she owned Petitioners'

property. JA at 4; 184.[6] Respondent did not designate her property's boundaries to co-Defendants. JA at 4-5; 184; 186. Respondent did not control co-Defendants' actions. JA at 4; 187. Respondent did not direct co-Defendants where to timber. JA at 4; 187. These are indisputable facts from the actual record. JA at 3-5. The fact that she did not know her boundary lines in and of itself is not evidence that she told co-Defendants she owned Petitioners' property. There is no evidence to support Petitioner's argument that Respondent directed or otherwise caused co-Defendants to allegedly remove the timber from Petitioner's property.

Moreover, these facts align with the Contract between Respondent and co-Defendants. Section Five of the Contract provides that "Seller makes no representations as to the present or future condition of its property in connection with operations hereunder. Buyer hereby represents that he is personally familiar with this property, and the boundaries (sic) lines delineating the area to be logged." JA at 201. Section Eight of the Contract states that the "Buyer hereby covenants not to cut any line tree or trees on land owned by other third parties over which a right of way has not been procured." JA at 202. Section Seven of the Contract provides that the "Buyer is to do said work according to his methods; is to employ and pay all employees he engages to assist him in said work; is to have the sole right of control over such employees; and that he and his employees are not subject to the control of Seller." JA at 202.

Petitioners ignore these facts from the record because they could not develop any evidence to even attempt to create a genuine issue of material fact as the Circuit Court correctly found. JA 6-16. Petitioners never subpoenaed co-Defendants to appear for a deposition or served any discovery on co-Defendants. JA at 326-337. Petitioners were not prevented from engaging in written discovery

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6 The only sworn testimony in the record regarding this issue is that of the Respondent. Petitioners produced no testimony or affidavits contradicting her testimony. *See* JA at 2-5.

with co-Defendants to investigate potential issues of material fact. Just as the Circuit Court correctly found below, Petitioners present no admissible evidence to rely upon to demonstrate a genuine issue of material fact. JA at 6-19.

Instead, Petitioners rely upon an unsworn, unsigned, and unauthenticated document allegedly from co-Defendants answering the Complaint. JA at 55; 287-292. This unsworn, unsigned, and unauthenticated document purportedly from co-Defendants in an answer to the Complaint is insufficient to invalidate the Circuit Court's Order and overturn its summary judgment finding in favor of Respondent. "[A] party is not entitled to resist a motion for summary judgment by relying only upon the pleadings." *City of Morgantown v. W. Va. Univ. Med. Corp.*, 193 W. Va. 614, 620, 457 S.E.2d 637, 643 (1995); *citing, Crain v. Lightner*, 178 W. Va. 765, 768, 364 S.E.2d 778, 781 (1987). "If a denial in a pleading should be given the effect of creating an issue a mere denial alone at any time could defeat the remedy afforded by the summary judgment proceeding." *Employers' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W. Va. 1062, 1079, 158 S.E.2d 212, 221 (1967). Moreover, "[s]ummary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." Syl. Pt. 5, *City of Morgantown, supra*; *quoting,* Syl. Pt. 6, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 346 S.E.2d 788 (1986).

Furthermore, the record does not corroborate this document as Petitioners contend. The record is void of any evidence from the co-Defendants beyond entering into the Contract with Respondent to timber her property and obtaining the temporary right-of-way solely across her property. JA at 2-5; 274; 181-182. When Respondent granted permission for the temporary right-of-way across her property, she did not give permission to cross over anybody else's property. JA at 182. Respondent was informed that the temporary right-of-way across her property was needed for

use in extracting the Hayes' timber. JA at 274; 181-182. The Respondent did not grant the co-Defendants access to Petitioners' property as they contend. JA at 182; 274. The record is void of any evidence to support this position. JA at 2-5.

Similarly, there is no factual evidence in the record to support Petitioners' position that co-Defendants relied upon no trespassing signs. Respondent's property contains an easement/right away across her property up to a gas well. JA at 183. To attempt to prevent hunters and four-wheelers' from using the easement/right away, Respondent placed no trespassing signs along this easement road. JA at 183. Petitioners produced photographs of three no trespassing signs. JA at 271-273. However, there is no evidence indicating the signs are placed anywhere other than along the easement road leading up to the gas well. JA at 183. The signs do not delineate the Petitioners' property, only the road leading up to the gas well. Most importantly, there is no evidence that co-Defendants relied upon these signs. Only unsupported inferences from Petitioners.

Finally, there is no evidence that Respondent entered Petitioners' property on her own and cut and/or carried away timber. JA at 4-5; 268; 200. Petitioners even know that Respondent didn't enter their property. JA at 200. The sworn deposition testimony in this matter establishes this fact. JA at 4-5; 268; 200. However, Petitioners seek to rely upon trail camera photographs after the asserted timbering took place, which don't depict unidentified individuals that are not the Respondent. JA at 50[7]; 287-292.

The Circuit Court did not err in finding that Respondent did not violate West Virginia Code § 61-3-48a. JA at 6-9. The Circuit Court relied upon the record before it. Respondent's testimony is the only evidence regarding the transaction between herself and the co-Defendants, the Contract, right-of-way, and the actions of co-Defendants involving her and her property. The only other

individuals deposed were Petitioners. Petitioners do not have any knowledge of Respondent's actions, the Contract, right-of-way, the actions of co-Defendants involving Respondent and her property, or even co-Defendants. JA at 200.

Accordingly, the Circuit Court did not err or abuse its discretion or violate the Rule 56 of the *West Virginia Rules of Civil Procedure* standard of review as Petitioners contend. Thus, the Circuit Court did not err in granting summary judgment to Respondent.

C. The Circuit Court correctly found that Respondent cannot be held jointly or vicariously liable for the co-Defendants' alleged violation of W. Va. Code §61-3-48a because the factual record establishes that Respondent was not engaged in a partnership, joint venture, and/or principal-agency relationship.

1. A partnership does not exist between Respondent and the co-Defendants.

West Virginia Code § 47B-1-1(7) defines "partnership" as meaning "an association of two or more persons to carry on as co-owners of 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." W. Va. Code § 47B-1-1(7). In determining whether a partnership is formed, West Virginia Code § 47B-2-2(c) provides that 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 co-owners 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 an independent contractor or of wages or other compensation to an employee:
> (iii) of rent;

7 It is important to note that this letter doesn't even specifically identify the property being referred to within it.

> (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(c). The West Virginia Supreme Court has recognized that "[a]n essential element of a partnership or joint venture is the right of joint participation in the management and control of the business[.]" *Armor v. Lantz,* 535 S.E.2d 737, 745 (W. Va. 2000).

Here, the Circuit Court correctly found that the Contract does not establish a partnership between Respondent and co-Defendants. JA at 10-12. The Contract does not expressly state that it is a "partnership" as Petitioners contend. JA at 3; 10-12; 201-203. Petitioners are relying upon to two words coming after Respondent's name in the Contract as it defines the Seller in the Contract. JA at 201. A plain reading of the Contract shows that these two words do not create a partnership. First, the Contract states, in pertinent part, that:

> This agreement made and entered into on 1-10-16 by and between Andrea Dye **A partnership**, hereinafter referred to as Seller, and Larry Jones Jr. DBA: Jones Hauling 2630 Picken Paw Road Smithfield, WV 26437 hereinafter referred to as Buyer.

JA at 201(emphasis added). The words "a partnership" refer to Respondent only as the "seller." *See Id.* This does indicate Respondent and co-Defendants are a partnership; nor that they are entering into a partnership. JA at 201. Additionally, Section Six of the Contract specifically states that "Buyer agrees and covenants that he is an independent contractor[.]" JA at 201. Section Seven provides that Buyer has the sole control of the methods and employees. JA at 202. Accordingly, it cannot be disputed that Respondent did not control co-Defendants' actions. Respondent did not direct co-Defendants were to timber. JA at 4 Furthermore, Respondent was not receiving profits from co-

Defendants' business. JA at 201. Rather, Respondent was receiving payment for the trees that she was selling to the co-Defendants. See JA at 201[8].

Accordingly, the Circuit Court correctly found that the record establishes there was not a partnership between Respondent and co-Defendants, and Petitioners failed to put forward a genuine issue of material fact to establish otherwise. JA at 10-12. "[W]here the facts are undisputed, or susceptible of only one inference, the question as to whether a partnership exists between particular persons is one of law for the court." *Pruitt v. Fetty*, 134 S.E.2d 713, 716 (W. Va. 1964). Thus, the Circuit Court did not err.

2. The Circuit Court also correctly found that Respondent and the co-Defendants were not engaged in a joint venture.

This Court previously held:

> A joint venture . . . is an association of two or more persons to carry out a single business enterprise for profit, for which purposes 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. 5, *Armor v. Lantz*, 535 S.E.2d 737 (W. Va. 2000). This Court has emphasized that an agreement to share in the profits and losses of the enterprise is a distinguishing feature of a joint venture. *See Armor, supra* at 743; *see also, Pyles v. Mason County Fair, Inc.,* 806 S.E.2d 806, 812 (W. Va. 2017) (The Court recognizing that "the focus on the 'presence or absence of an agreement to share in the profits and losses of an enterprise' remains a critical component of the joint venture analysis today."). In order to establish a joint venture, this Court has also recognized that "joint venturers have equal control over the common commercial pursuit." *Armor*, 535 S.E.2d at 745. This Court has emphasized that "[p]ossibly the most important criterion of a joint venture is joint control and management of the property used in accomplishing its aims." *Id.*

8 Respondent received payment by check from co-Defendants. JA at 279-286. There is no indication she received

Here, the Contract does not check all of the boxes for a joint venture as Petitioners assert. There is no agreement between Respondent and co-Defendants to share in any of the losses or profits generated by co-Defendant's timbering actions. JA at 201-203; 180. Rather, the Contract establishes that Respondent was selling her timber. JA at 201-203. Additionally, the Contract provides that "Buyer is to do said work according to his methods; is to employ and pay all employees he engages to assist him in said work; is to have the sole right of control over such employees; and that he and his employees are not subject to the control of Seller." JA at 201-203. The Contract also provides that Buyer is an independent contractor. JA at 201.

Additionally, the record establishes that Respondent was not combining her property, money, effects, skills, and knowledge as Petitioners allege with co-Defendants for profit. As Petitioners recognize, Respondent didn't have a business or experience in the timbering industry. *See Petitioners' Brief* at p. 22; *see also,* JA at 180. Respondent didn't have the ability to timber her property. JA at 185. Respondent did not have any control over co-Defendants or any employees or agents of them. *Id.* at 186-187. Respondent was not involved in any timbering on Petitioners' property and did not have any control over Co-Defendants' actions. *Id.*

Furthermore, the Circuit Court did not ignore facts within the record. Rather, the record lacks any facts through written discovery, depositions, affidavits or otherwise that co-Defendants were misled by Respondent into logging property that did not belong to her. There are no facts in the record that Respondent set the property lines and marked the boundaries for Co-Defendants. There are no facts demonstrating the co-Defendants relied upon the no trespassing signs along the gas well access road. There are no facts that Respondent directed or controlled the locations of the timbering. There are not even facts in the record that Respondent profited from Petitioners' trees.

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payment for trees allegedly removed and sold from the Petitioners' property.

The Circuit Court did not ignore facts. Rather, the Circuit Court consider the facts before it, and correctly found in favor of the Respondent. JA at 12-13. Thus, Circuit Court did not err in finding that Respondent was not engaged in a joint venture with Co-Defendants.

3. A principal-agent relationship does not exist between Respondent and Co-Defendants.

The terms "principal and agent," "master and servant," and "employer and employee" are used interchangeably in cases involving *respondeat superior*. *Zirkle v. Winkler*, 585 S.E.2d 19 (W. Va. 2003). The doctrine of *respondeat superior* itself is sometimes referred to as "imputed" or "vicarious" liability. *Id.* It is the burden of the proponent of vicarious liability to make a "*prima facie* showing of the existence of a master-servant relationship." *Zirkle v. Winkler*, 585 S.E.2d 19, 22 (W. Va. 2003) (quoting *Sanders v. Georgia-Pacific Corp.*, 225 S.E.2d 218, 222 (W. Va. 1976)).

"There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of *respondeat superior*: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative." Syllabus Point 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990). See also *Shaffer v. Acme Limestone*, 206 W.Va. 333, 340 (W. Va. 1999). The West Virginia Supreme Court of Appeals has established that the determinative feature is the power of control. *Paxton,* 400 S.E.2d 245. "An essential element of the agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." Syl. Pt. 3, *Teter v. Old Colony*, 190 W. Va. 711, 441 S.E.2d 728 (W. Va. 1994). This power is defined as power over the process, not just the outcome, that "demonstrates the essential feature of control" such that a relationship

exists. *Robertson v. Morris*, 546 S.E.2d 770, 773 (W. Va. 2001). "The power of control factor refers to control over the means and method of performing the work." *Shaffer, supra.*

Again, it indisputable that the Respondent had no control over the co-Defendants or any employees or agents of them. JA at 201-203. Additionally, the record establishes that Respondent was not involved in any timbering on Petitioners' property and did not have any control over co-Defendants' actions. JA at 201-203; 186-187. The record also establishes Respondent made no representations as to her property, yet alone misrepresentations as to her property lines and boundaries. JA at 184; 186. Because the record clearly establishes that Respondent did not exercise any control over the co-Defendants, the Circuit Court correctly found that a principal-agent relationship did not exist. JA at 13-14.

4. The record establishes that co-Defendants were independent contractors.

This Court recognized that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servant." *Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 340, 524 S.E.2d 688, 695 (1999); *citing, Pasquala v. Ohio Power Co.*, 187 W. Va. 292, 302, 418 S.E.2d 738, 748 (1992); *quoting, Peneschi v. National Steel Corp.*, 170 W. Va. 511, 521, 295 S.E.2d 1, 11 (1982). In *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990), this Court established the test for whether an independent contractor relationship exists. In *Paxton*, this Court held that:

> [t]here are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative.

Syl. Pt. 5, *Paxton, supra.*

The Circuit Court correctly found the Respondent had no control over the co-Defendants' operation to establish a principal-agent relationship. JA at 13-14. This further establishes the independent contractor defense. The record also demonstrates Respondent did not have control over co-Defendants' actions, that she did not timber Petitioners' property, and that she specifically did not engage co-Defendants to timber any property. JA at 186-187; 201-203. Petitioners failed to develop any facts in the record establishing that Respondent directed or controlled anyone to trespass or timber on Petitioners' property. There is no evidence supporting Petitioners' argument that Respondent misrepresented ownership or mislead co-Defendants to believe that Petitioners' property was allegedly hers. Petitioners' arguments are based upon unsupported inferences and inadmissible hearsay.

The Contract between Respondent and co-Defendants further establishes co-Defendants' status as an independent contractor. The Contract specifically states that the co-Defendants were independent contractors. JA at 201-203. The Contract was for timbering solely on Respondent's property. JA at 201-203. Moreover, the Contract provides that co-Defendants would not cut any trees on land owned by other third parties, and that they were familiar with Respondent's property and the boundaries lines delineating the are to be logged. JA at 201-203. Accordingly, the Circuit Court correctly found that Respondent is not directly, jointly, or vicariously liable for the alleged violation of West Virginia Code § 61-3-48a.

2. The Circuit Court correctly granted summary judgment in favor of Respondent on the issue of negligence because the factual record before the Circuit Court did not evince that Respondent owed Petitioners a duty or caused or contributed to Petitioners' asserted timber trespass.

In order to establish a negligence claim under West Virginia law, a plaintiff is required to prove the following four elements: (1) that the defendant owed the plaintiff a legal duty; (2) that the

duty was breached; (3) that the plaintiff was injured; and (4) that the injury was proximately caused by the negligence. *Neely v. Belk, Inc.*, 668 S.E.2d 189, 197 (W. Va. 2008). Moreover, the West Virginia Supreme Court has recognized that "a common law negligence theory cannot proceed unless there is a duty owed by the alleged culpable person to the injured person. No action for negligence will lie without a duty broken." *Yourtee v. Hubbard*, 474 S.E.2d 613, 619 (W. Va. 1996). Ultimately, the determination of whether a defendant owes a duty to the plaintiff is a determination to be rendered by the court as a matter of law. Syl. Pt. 5, *Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000).

A. Respondent did not engage in affirmative conduct creating an unreasonable risk of harm to another as Petitioners now assert in this matter.

"One 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." Syl. Pt. 2, *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983); Syl. Pt. 10, *Price v. Halstead*, 355 S.E.2d 380 (W. Va. 1987). Here, the Circuit Court correctly found Respondent did not owe Petitioners a duty of care. JA at 8-10. Again, Respondent did not claim ownership to Petitioners' property. Respondent did not misrepresent or mislead co-Defendants in believing that Petitioners' property belonged to Respondent. JA at 4-5; 184. The factual record does not evince that Respondent mislead co-Defendants into believing she owned Petitioners' property and profited from this alleged misrepresentation. JA at 4-5; 185.

B. Respondent did not cause co-Defendants' to allegedly trespass on Petitioners' property bringing forth damages.

"An encroachment by one person on the land of another is a trespass, although the damage may be negligible." Syl. Pt. 3, *EQT Prod. Co. v. Crowder*, 241 W. Va. 738, 740, 828 S.E.2d 800, 802 (2019); *quoting,* Syl. Pt. 2, *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 34 S.E.2d 348

(1945). Here, the Circuit Court correctly found that Respondent did not substantially encourage or aid or abet co-Defendants' alleged actions, which would include an alleged trespass. JA at 14-16. Regarding the legal theory of substantial encouragement also known as aiding and abetting a tort, this Court has recognized that:

> [f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.

Courtney v. Courtney, 413 S.E.2d 418, 426 (W. Va. 1991); *quoting, Price v. Halstead*, 355 S.E.2d 380, 386 (W. Va. 1987). This Court recognized the following six criteria to consider when determining whether a person can be liable for assisting or encouraging a tort:

> a. the nature of the act encouraged; b. the amount of assistance given by the defendant; c. the defendant's presence or absence at the time of the tort; d. the defendant's relation to the other tortfeasor; e. the defendant's state of mind; and f. the foreseeability of the harm that occurred.

Courtney, supra.

The record establishes that Respondent did not claim ownership to the Petitioners' property. JA at 4; 184; 186. The record establishes that the Respondent did not misrepresent or mislead co-Defendants in believing that Petitioners' property belonged to Respondent. *See Id.*. The factual record before the Circuit Court does not suggest co-Defendants allegedly trespassed upon Petitioners' property at the direction or misrepresentation of Respondent. *See Id.* These facts from the record further establish that Respondent didn't commit conversion of Petitioners' property.[9]

C. The Circuit Court correctly found Respondent did not violate the alleged criminal statutes the Petitioners asserted for the first time in response to the

9 Although never asserted in the Complaint or in Response to Respondent's Motion for Summary Judgment, Petitioners appear to now assert in footnote 4 of Petitioners' Brief some type of potential claim for conversion to attempt to create that Respondent allegedly owed them a duty, which was breached. *See Petitioners' Brief* at p. 32 ft. nt. 4.

Motion for Summary Judgment.

Although a violation of statute can create a prima facie evidence of negligence, there must actually be a violation and such violation must be the proximate cause of Petitioners' alleged injuries. *See* Syl. Pt. 3, *Courtney v. Courtney*, 413 S.E.2d 418 (W. Va. 1991). In Petitioners' *Response* to Respondent's *Motion for Summary Judgment*, Petitioners alleged for the first time that a duty was established based upon alleged various statutory violations. JA at 23-24; 235-237. Specifically, Petitioners asserted that Respondent had violated West Virginia Code § 61-3-33, West Virginia Code § 20-2-9, and West Virginia Code § 61-3-30. After considering the record before it, the Circuit Court correctly found the Respondent did not violate these Statutes, and Petitioners provided no evidence demonstrating genuine issues of material fact to establish otherwise. JA at 16-18.

The Circuit Court correctly found that Respondent did not damage, deface, or destroy Petitioners' property. JA at 16-18. It also found Respondent did not enter Petitioners' property and damage it or remove or leave open any gate or fence. JA at 16.[10] Circuit Court also correctly found that Respondent did not willfully post no trespassing signs on Petitioners' property. JA at 18.

The factual record establishes that Respondent placed no trespassing signs along the easement on the gas well road in hopes of preventing people from hunting and riding four-wheelers on the road and around the gas well, which she was instructed to service every winter to keep her gas from freezing. *See* JA at 183; 196. While Petitioners provided evidence of three no trespassing signs along the gas well easement indicating it was her property, the Petitioners provided no evidence to establish the co-Defendants relied upon these signs in their timbering operations. JA at

10 Petitioners allege Respondent removed the cattle gate to provide access to their property. Petitioners incorrectly identify the cattle gate as the gate providing access to the gas well road. JA at 196. The cattle gate is the gate located on Respondent's property almost directly beside her home on Flaggy Meadow Road. JA at 182; 261.

271-273. Even further, the co-Defendants were provided the plat showing the boundary lines. See JA at 184, 250.

Accordingly, the Circuit Court correctly found Petitioners provided no evidence creating a genuine issue of material fact that Respondent's actions allegedly violated these Statutes creating a duty owed to them in a manner that proximately caused their alleged damages. JA at 16-18. Thus, the Circuit Court did not err in finding that these alleged statutory violations did not permit Petitioners' negligence claim to survive summary judgment.

3. The Circuit Court did not err in granting Respondent summary judgment on Petitioners' claim of punitive damages.

West Virginia's punitive damage statute states as follows:

> 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.

W. Va. Code § 55-7-29(a). West Virginia's punitive damage jurisprudence requires that there be first "a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award." Syl. pt. 11, *Cmty. Antenna Serv. V. Charter Communs. VI, LLC*, 712 S.E.2d 504 (W. Va. 2011); citing, Syl. pt. 7, *Alkire v. First Nat. Bank of Parsons*, 475 S.E.2d 122 (W. Va. 1996). This Court previously held, "[p]ursuant to West Virginia Code § 55-7-29(a), 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).

Here, the Circuit Court correctly found that Respondent never engaged in any actions that would permit punitive damages to be considered against her or that she engaged in conduct "with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." JA at 18-19. As shown throughout, the record establishes that Respondent never engaged in a series of acts whereby she asserted control over Petitioners' property and/or trespassed bringing forth co-Defendants' alleged actions or Petitioners' asserted damages. Respondent did not use Petitioners' property to harvest firewood.[11] Respondent did not represent to co-Defendants that she owned or controlled Petitioners' property. Respondent entered into the Contract for timber to be removed from her property. The Circuit Court correctly found that Petitioners failed to put forth any evidence at the summary judgment stage to attempt to establish that Respondent acted in the requisite level of conduct necessary for the imposition of punitive or exemplary damages. JA at 18-19.

VII. CONCLUSION

The Circuit Court's March 17, 2021 *Order* granting Respondent's *Motion for Summary Judgment against Plaintiffs* should be affirmed. The factual record before the Circuit Court and this Court establishes that Petitioners' claims cannot survive judgment as the Circuit Court correctly found. The record establishes that Respondent did not violate West Virginia Code § 61-3-48a because she did not enter upon Petitioners' subject property to cut, damage, or carry away or cause to be cut, damaged or carried away, any timber from the property. Respondent also did not violate West Virginia Code § 61-3-33, West Virginia Code § 20-2-9, and West Virginia Code § 61-3-30. After considering the record before it, the Circuit Court correctly found that Respondent didn't violate these Statutes, and there are no genuine issues of material fact for Petitioners to put forward

11 The DNR report only indicates an Aunt told the DNR Officer that another family member took firewood. JA at

to establish otherwise. The Circuit Court correctly found that Respondent did not owe Petitioners a duty of care in which she breached. Even if she did owe Petitioners a duty, she didn't breach any duty that proximately caused Petitioners' asserted damages. Additionally, the record establishes that Respondent is not jointly or vicariously liable for co-Defendants' alleged actions because she did not engage in a partnership, joint venture, and/or principal-agency relationship with co-Defendants. Finally, the record establishes that Respondent did not commit any intentional acts or willful, wanton, or reckless conduct.

Based upon the factual record and the arguments herein, the Circuit Court correctly found that there is no factual basis for Petitioners' claims, and that Respondent was entitled to summary judgment. Accordingly, Respondent respectfully requests that this Honorable Court affirm the Circuit Court Court's March 17, 2021 *Order* granting Respondent's *Motion for Summary Judgment against Plaintiffs*, and provide such additional favorable relief to Respondent as it deems just and appropriate.

Respectfully submitted,
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CASE NO. 21-0313

GREGORY S. BRADLEY and JUDY JOHNSON BRADLEY,

Petitioners,

v.

Marion Co. Civil Action No. 18-C-110
Hon. Patrick N. Wilson, Circuit Judge

ANDREA DALE DYE, LARRY JONES, JR., and ROBERTA J. JONES, Individually and d/b/a JONES HAULING, and OTHER UNKNOWN DEFENDANTS,

Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **"RESPONDENT ANDREA DALE DYE'S BRIEF"** was served upon the following parties by U.S. Mail on this 2nd day of September, 2021:

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