IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-220

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THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO, PLLC

Defendants below, Petitioners,

v.

Cir. Ct. Putnam Cnty.
Civil Action No. 04-C-465
(Hon. Joseph K. Reeder)

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

Plaintiff below, Respondent.

RESPONDENT'S BRIEF

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This case is about keeping your promises. Respondent James F. Humphreys & Associates, LC ("Humphreys") and Petitioners The Calwell Practice, LC and Calwell Luce diTrapano PLLC (collectively, "Calwell")[1] are parties to a fee sharing agreement in which they agreed to share in all attorney's fees awarded in the landmark "Bibb v. Monsanto" litigation. That case settled, resulting in both an initial fee award and a series of subsequent fee awards. Though Humphreys received its negotiated share of the initial fee award and several of the periodic awards that followed, Calwell concealed the existence of a final fee award. When Humphreys learned of it and demanded payment, Calwell refused. As a result, Humphreys filed this breach of contract case to recover his negotiated share of that final fee award.

The Circuit Court ultimately entered summary judgment against Calwell and for Humphreys, concluding that Humphreys had a clear contractual right to share in the disputed final fee award. In doing so, Judge Reeder considered—and rejected—Calwell's two primary defenses. First, Calwell argued that Humphreys' right to participate was contingent upon a "triggering event." But the court correctly noted that no such condition appeared in the fee sharing agreement. Second, Calwell argued that Humphreys was judicially estopped from prosecuting a breach of contract claim because the firm failed to disclose that contract in an unrelated

[1] In 2018, The Calwell Practice, LC changed its name to Calwell Luce diTrapano PLLC. The parties have stipulated that the two firms are jointly and severally liable to the extent a contractual obligation exists. The two entities are therefore treated as one for purposes of this brief.

bankruptcy proceeding. But Judge Reeder correctly observed that the contract had indeed been disclosed to and administered by the bankruptcy court.

Calwell now appeals the Circuit Court's summary judgment decision. For the reasons that follow, this Court should affirm Judge Reeder's order in all respects.

STATEMENT OF THE CASE

The Monsanto Litigation

Beginning in 2004, the Monsanto Company was the subject of fifty-five civil suits, all seeking damages based on toxic exposure from its plant in Nitro, West Virginia (the "Monsanto Litigation"). Included in the broader universe of Monsanto Litigation was *Bibb, et al.* v. *Monsanto Co., et al.*, No. 04-C-465 (Cir. Ct. Putnam Cnty.), which served as the primary class vehicle for property and personal injury claims against Monsanto.

The Fee Sharing Agreement

At the inception of the Monsanto Litigation, Calwell and Humphreys entered into a Memorandum of Understanding in which the parties agreed to share in the costs associated with investigating and prosecuting claims. Given the shared responsibility of costs, the parties also agreed to share equally in all attorney's fees awarded in the Monsanto Litigation. However, in January 2012, as a result of diverging opinions and strained relationships, Calwell and Humphreys decided to part ways. In order to effectuate this separation, the parties executed a superseding fee sharing agreement (the "Fee Sharing Agreement"). Appx. 123–25. Under the Fee Sharing Agreement, Humphreys agreed to withdraw as counsel from the Monsanto Litigation. *Id*. In exchange, and in contemplation of Humphreys' significant

financial contributions, Calwell agreed that Humphreys would thereafter receive 12.5% of any attorney's fees awarded in the "Bibb v. Monsanto" litigation. Appx. 124. Though the amount Humphreys could recover was capped, his right to share in all subsequent fee awards was otherwise unqualified. *See id*.

The Medical Monitoring Class Settlement Agreement

In February 2012, the "Bibb v. Monsanto" case settled. Appx. 126. The terms of settlement were memorialized in two separate agreements: the Property Class Settlement Agreement and the Medical Monitoring Class Settlement Agreement (Appx. 126-150), both of which were approved by the Circuit Court in January 2013. Under those agreements, Monsanto agreed to pay up to $84 million for medical monitoring claims and $9 million for property cleanup. Appx. 183-184. In consideration of this significant settlement, the trial court awarded Calwell attorney's fees and expenses in the amount of $20 million. *Id*. As required by the Fee Sharing Agreement, Calwell paid Humphreys his 12.5% negotiated share of this initial fee award. But there was more to come.

The Periodic Incentive Awards

The then-presiding judge of the Circuit Court, Judge Swope, also approved an additional $9.5 million for future attorney's fees, the receipt of which was contingent upon the satisfaction of certain milestones. Appx. 184. These future fee awards would be paid out of an interest-bearing escrow account (commonly referred to as the "Contingent Attorney's Fees Fund"), which was funded exclusively by the Monsanto Company. Appx. 184, 188, 368, 410. From that fund, Calwell would receive $200 in attorney's fees for each class member to register and qualify for

property cleanup. Appx. 184. Calwell would also receive $500 in attorney's fees for each class member to register and qualify for medical monitoring. *Id*. These periodic awards were commonly referred to as "periodic incentive awards." Again, in recognition of the Fee Sharing Agreement, Calwell paid Humphreys his 12.5% negotiated share of these periodic incentive awards. But, again, there was more to come.

The Triggering Event and Final Fee Award

The Medical Monitoring Class Settlement Agreement also contained a so-called "triggering event," which was tantamount to a final incentive award. Appx. 178-79. If 100 class members registered to participate in serum dioxin screening and 25% of those participants presented with defined levels of dioxin in their system, then additional benefits would be provided to the class. *Id*. And, in consideration of those additional benefits, Calwell would be awarded the remaining $6.5 million from the Contingent Attorney's Fees Fund when and if the triggering event occurred. *Id*.

The 2014 Order

Wary that Calwell would not live up to its end of the bargain, Humphreys filed a charging lien against the "Bibb v. Monsanto" settlement fund. Appx. 15. This lien was eventually the subject of a June 2014 hearing. At that hearing, Humphreys made clear that the lien was only intended to "memorialize" the Fee Sharing Agreement. Appx. 280-81. Questioning the procedural propriety of that maneuver, Judge Swope instead suggested that he replace the lien (not the Fee Sharing Agreement) with an order memorializing Humphreys' 12.5% negotiated share of

future fee awards. Appx. 280. Humphreys assented, reasoning that an order would fulfill the intended goal: memorialize the parties' fee sharing agreement in the record. Appx. 280–81. The resulting order (the so-called "2014 Order") therefore acknowledged the Fee Sharing Agreement and reiterated the parties' agreement that Humphreys was entitled to 12.5% of all future fee awards.[2] Illustrative of this overarching point, Judge Swope also stated that Humphreys shall share in any "incentive payments," as well as any fees resulting from the "triggering event." Appx. 14–15. As will be discussed below, Calwell now clings to this latter illustrative point, arguing that the trial court's order was exclusive of the circumstances in which Humphreys would share in future fee awards.

The Modified Medical Monitoring Class Settlement Agreement

Sometime later, it became evident that the "triggering event" would not occur. Appx. 31. The serum dioxin screening was unlikely to yield the necessary results to satisfy the triggering event. *Id*. To save the original fee award, Calwell questioned the reliability of those screening results. Appx. 34–35. And rather than quarrel over the screening results, the Monsanto Company and Calwell agreed to amend the Medical Monitoring Class Settlement Agreement, resulting in the Modified Medical Monitoring Class Settlement Agreement. Appx. 30-37. In that modified agreement, the Monsanto Company and Calwell agreed that, despite the

[2] Appx. 15 ("The Court FINDS and ORDERS that Mr. Calwell and Mr. Humphreys have agreed that Mr. Humphreys shall receive twelve (12) and a half percent from the attorneys' fees Mr. Calwell received as Class Counsel in both the property and medical monitoring class settlements.").

non-occurrence of the "triggering event," the class would nonetheless be afforded additional screening and Calwell would instead be awarded $3 million (rather than $6.5 million) from the Contingent Attorney's Fees Fund. *Id*. Simply put, Calwell prevailed upon the Monsanto Company to drop the required "triggering event" in exchange for a lesser fee.

In September 2017, the Circuit Court approved the modified agreement, awarding Calwell $3 million as a final fee award in the "Bibb v. Monsanto" litigation. Appx. 30–33. But, unlike the earlier fee awards, Calwell *failed* to remit to Humphreys his 12.5% negotiated share. Instead, Calwell concealed this final fee award. When Humphreys later learned of this, it demanded payment, which Calwell subsequently refused. This final fee award is the subject of the present dispute.

The Chapter 11 Bankruptcy

Prior to the final fee award, Humphreys filed for Chapter 11 bankruptcy. *See In re James F. Humphreys & Assocs., L.C.*, No. 2:16-bk-20006 (Bankr. S.D. W. Va.). James Humphreys, the individual, did not file for bankruptcy. Humphreys' bankruptcy is only relevant insofar as Calwell accuses Humphreys of concealing the Fee Sharing Agreement from the bankruptcy court and creditors. But the bankruptcy record plainly suggests otherwise.

In February 2016, Humphreys filed its *Schedule of Assets and Liabilities and Statement of Financial Affairs*. Appx. 198–225. There, Humphreys disclosed "referral/joint representation agreements" as one of the various classes of assets available for administration. Appx. 222. In November 2016, Humphreys filed its

Combined Plan of Reorganization and Disclosure Statement, which proposed, among other things, that the reorganized firm assume all "Co-Counsel Agreements" as a part of its reorganization.[3] *See In re Humphreys*, Dkt. 770. In February 2017, the bankruptcy court approved Humphreys' disclosure statement—finding that it contained "adequate information"—and confirmed the plan of reorganization. *Id*. at Dkt. 1217.

Relatedly, during the pendency of the bankruptcy, Humphreys received a single periodic incentive award from the "Bibb v. Monsanto" litigation. Appx. 226–228. To ensure that this May 2016 payment was properly administered by the bankruptcy court, Humphreys communicated to Calwell, through their respective bankruptcy counsel, that payment should be made to the debtor entity, rather than Mr. Humphreys personally. *Id*. As such, Calwell paid the debtor entity its $500,000-share of the fee award. Appx. 229. That payment was then deposited into the debtor's trustee-supervised bank account and reflected in the Monthly Operating Report, which Humphreys filed with the bankruptcy court on July 19, 2016. Appx. 232–244.

Procedural History

In May 2020, Humphreys filed this case against Calwell in the Circuit Court of Kanawha County. *See James F. Humphreys & Assoc. L.C. v. The Calwell Practice, LC, et al.*, No. 20-C-413 (Cir. Ct. Kanawha Cnty.). Humphreys brought a single

[3] Calwell urges this Court to take judicial notice of the bankruptcy proceedings. Pet. Br. at n.5. Humphreys agrees judicial notice is appropriate.

breach of contract claim, alleging that Calwell failed to pay Humphreys its 12.5% negotiated share of the final fee award. Appx. 557–68. After Calwell lost two separate motions to dismiss and a motion to stay discovery, Calwell sought a new venue. Appx. 353-88. And so, Calwell moved to transfer the case to Judge Swope in Putnam County who had presided over the "Bibb v. Monsanto" litigation. Appx. 353–88. Judge Swope was best suited to handle this dispute, Calwell argued, because he authored the 2014 Order, which Calwell claims limited Humphreys' right to payment. *Id*. Judge Swope agreed to take the case, ordering that it be consolidated with the long-closed "Bibb v. Monsanto" litigation. Appx. 389–90.

But that was short lived. Soon realizing that Judge Swope was skeptical of its arguments, Calwell then moved to *disqualify* him for "prejudging" its defense, which turned on Calwell's interpretation of the 2014 Order. Appx. 391–405. Apparently, Judge Swope had committed the grave sin of interpreting his own order, which, ironically, Calwell asked him to do in the first place. (Calwell, of course, simply did not like the answer it received). Although Judge Swope denied any improper bias, he nonetheless requested that the case be reassigned due to his obligations in the Mass Litigation Panel's opioid cases. Appx. 542.

In June 2022, the case was reassigned to Judge Reeder. Appx. 545. Thereafter, the parties filed dueling motions for summary judgment and appeared for oral argument.[4] On May 2, 2023, Judge Reeder entered summary judgment

[4] Calwell states that it "requested an opportunity for discovery against Humphreys" but "such request was refused." Pet. Br. 14. More accurately, Judge Reeder rejected Calwell's request to *reopen* discovery after the discovery deadline

against Calwell, awarding Humphreys $375,000, which represented the underlying contractual obligation, along with pre- and post-judgment interest. Appx. 1–8. From this final order, Calwell now appeals.

SUMMARY OF ARGUMENT

Judge Reeder correctly granted summary judgment against Calwell, concluding that Humphreys had a clear contractual right to share in the disputed final fee award. Calwell cries error, arguing that (1) Humphreys' right to participate was contingent upon a "triggering event" that never occurred, and (2) Humphreys is judicially estopped from prosecuting a breach of contract claim because it failed to disclose that contract in bankruptcy. The court considered—and properly rejected—both arguments. Appx. 1–8. This Court should do the same and affirm.

First, the Fee Sharing Agreement provides Humphreys an unqualified right to share in all fees awarded in the "Bibb v. Monsanto" litigation. Appx. 123–24. Nowhere in the Fee Sharing Agreement is Humphreys' share of attorney's fees limited by a "triggering event." *See generally* Appx. 123–25. Because the governing instrument contains no such limitation, Calwell is left to manufacture one—a gambit Judge Reeder rejected. To that end, Calwell points to the 2014 Order, which

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had long passed. In the nearly two years that the case had been pending, Calwell did not serve a single discovery request or notice a single deposition. Instead, Calwell moved twice to *preclude* discovery. Only once that Judge Reeder was prepared to decide the merits of this case did Calwell ask to reopen discovery and delay this matter further. To the extent it matters, Calwell has neither assigned the Circuit Court's discovery decision as an error in this appeal much less noticed that decision for appeal. In any event, Judge Reeder's refusal to permit Calwell to further delay this case was not an abuse of discretion.

it claims somehow supplanted the Fee Sharing Agreement and made future payments to Humphreys contingent upon the "triggering event." Appx. 12–20. Not so. As is clear from the hearing transcript, the 2014 Order was intended to memorialize—not replace—the Fee Sharing Agreement. Appx. 280–81. Thus, any reference to the "triggering event" in the 2014 Order was illustrative—not exclusive—of the circumstances in which Humphreys would be entitled to share in future fee awards. Had Judge Swope intended to *rewrite* the parties' agreement (even if theoretically permissible), then surely he would have said so. But he didn't because that was never contemplated. Like Judge Reeder below, this Court should reject Calwell's attempt to engraft new limitations on the Fee Sharing Agreement based on an unreasonable and strained interpretation of the 2014 Order.

Second, Calwell suggests that Humphreys is judicially estopped from bringing a breach of contract claim under the Fee Sharing Agreement because that agreement was not disclosed in bankruptcy. The trial court correctly concluded that Calwell's central premise was mistaken: the Fee Sharing Agreement *had* been disclosed to and administered by the bankruptcy court. Appx. 6–7. The fact of disclosure is shown by several pieces of documentary evidence. For instance, the bankruptcy disclosure statement clearly identified referral/joint representation agreements as a class of assets available for administration, Appx. 222; communications between bankruptcy counsel demonstrated open discussion of the Fee Sharing Agreement amongst interested parties, Appx. 226-28; a bank statement demonstrated that certain proceeds from the Fee Sharing Agreement

were deposited into a trustee-supervised bank account, Appx. 240; and a Monthly Operating Report, filed with the bankruptcy court, confirms that proceeds from the Fee Sharing Agreement were administered by the bankruptcy court for the benefit of creditors, Appx. 232-44.

Because it cannot genuinely dispute the *fact* of disclosure, Calwell disputes its *sufficiency*. But this Court need not (and should not) wade into the exclusive province of the federal bankruptcy court and relitigate the sufficiency of that disclosure because Calwell's defense fails for another independently sufficient reason: Calwell failed to prove intentional deceit, which Calwell recognizes as a requisite element of judicial estoppel. Pet. Br. 27–28. So, even if the relevant disclosure were wanting of more detail, Humphreys' actions (via his counsel) in bankruptcy are not indicative of an intent to conceal. And because Calwell failed to present any evidence of intentional deceit—relying instead on pure speculation and unreasonable inference—this Court should likewise reject Calwell's judicial estoppel defense.

STATEMENT REGARDING ORAL ARGUMENT

This appeal is suitable for Rule 19 argument because it involves assignments of error regarding the application of settled law and arguments of insufficient evidence or a result against the weight of the evidence. *See* W. Va. R. App. P. 19. Calwell invokes questions of first impression, but those turn on the application of bankruptcy law, which is the exclusive province of the federal court.

ARGUMENT

Because Calwell appeals the trial court's summary judgment order, this Court applies a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

I. Judge Reeder correctly concluded that the Fee Sharing Agreement is the governing instrument and provided Humphreys an unqualified right to share in the disputed fee award.

Calwell does not dispute the validity of the Fee Sharing Agreement. Nor does it challenge the plain meaning of the Fee Sharing Agreement, which affords Humphreys an unqualified right (save a limitation on amount) to share in all attorney's fees awarded in the "Bibb v. Monsanto" litigation. Because its terms are clear and unequivocal, Calwell is left to argue that the 2014 Order, instead, dictates and creates new limitations not found in the Fee Sharing Agreement. For the reasons that follow, Calwell is mistaken on both fronts.

A. The Fee Sharing Agreement controls this contract dispute.

Calwell argues that the 2014 Order replaced the Fee Sharing Agreement. But this argument is wholly at odds with the record. The 2014 hearing (and, by extension, the 2014 Order) were prompted by Humphreys, who filed charging liens against the settlement fund. Appx. 15. At that hearing, Humphreys made clear that the charging liens served a singular purpose: to memorialize the Fee Sharing Agreement in the record.[5] But, rather than using charging liens to effectuate that

[5] "Mr. Barber: All I was doing here is -- Mr. Calwell has accurately stated that we have 12-and-a-half percent coming. All I did as a lawyer representing my client to memorialize that in a lien. That's so if Mr. Calwell drops dead or I do or somebody,

goal, Judge Swope agreed to an order of similar effect. Judge Swope stated, "All I want to do is replace the lien"—not the Fee Sharing Agreement—"with an order." Appx. 280. And, so there was no mistaking the item being replaced, Judge Swope repeated, "I want to replace the lien with an order." Appx. 280. Humphreys assented, reasoning that an order would fulfill his intended goal: memorialize the parties' agreement in the record.[6] Calwell's argument that Judge Swope instead *superseded* the Fee Sharing Agreement with an order is plainly contradicted by Judge Swope's own statements in the hearing transcript. Even aside from Judge Swope's stated intentions, there is no textual indication from the order indicating an intent to rewrite or replace the written agreement. Had Judge Swope intended to rewrite the parties' agreement by adding new terms (or replacing the agreement altogether), then presumably he would have stated that in his order. But the order contains no such indications—because that was never contemplated. As such, Judge Reeder correctly concluded that the Fee Sharing Agreement remains the operative instrument for this breach of contract action.

B. Even if the 2014 Order is the governing instrument, it nonetheless confirms Humphreys' entitlement to fees.

Even if the 2014 Order were the controlling document for purposes of the breach of contract claim, it does not afford Calwell its desired outcome because the

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that something is down there in writing in a court proceeding that everyone knows about. Now, that's why I filed the thing." Appx. 280-81.

[6] Appx. 281 ("Mr. Barber: If the Court wants to replace that with a direct order that we get 12-and-a-half percent for both the property and the medical monitoring, great. That's fine. It's a court order. It would have the same effect certainly as a lien, and I have no problem with that at all.").

2014 Order *itself* affirms Humphreys' right to share in all attorney's fees awarded in the "Bibb v. Monsanto" litigation. Arguing otherwise, Calwell focuses on a single sentence from the 2014 Order:

> 16) The Court FINDS and ORDERS that Mr. Calwell and Mr. Humphreys have agreed that Mr. Humphreys shall receive twelve (12) and a half percent from the attorneys' fees Mr. Calwell receives as Class Counsel in both the property and medical monitoring class settlements. The Court further ORDERS that Mr. Humphreys receive twelve (12) and half percent of any incentive payments Mr. Calwell receives for the number of Class Members who register for medical monitoring or property clean-up benefits. Once a level of five hundred (500) participants are registered, the Court will release the incentive fee payments to Mr. Calwell in the amounts of Five Hundred Dollars ($500) for each medical monitoring participants and Two Hundred Dollars ($200) for each property remediation participants. These fees will be released at each interval of 500 persons registered and at the end of the Registration Period. Finally, the Court ORDERS that Mr. Humphreys receive twelve (12) and a half percent of any attorneys' fee payments that Mr. Calwell receives based upon the occurrence of the triggering event. Mr. Calwell must also reimburse Mr. Humphreys for his costs.

Appx. 15–16 (highlights added).

Referring to the red-highlighted text, Calwell suggests that Humphreys may only share in attorney's fees arising from the "triggering event." But Calwell wholly ignores the green-highlighted text, which prefaces the illustrative points that follow. As evidenced by the green-highlighted text, the operative command of Judge Swope's order was that Humphreys share in *all* attorney's fees deriving from the property and medical monitoring class settlements (i.e., the "Bibb v. Monsanto" litigation). The red-highlighted text is merely illustrative—not exhaustive—of the circumstances in which Humphreys may share in future fee awards. Reading the red-highlighted text in isolation, as Calwell urges, would do two things: first, it

would render the green-highlighted text wholly gratuitous and, second, it would create new qualifications not found in the Fee Sharing Agreement. Such an interpretation would also be contrary to the stated purpose of the 2014 Order and its context, which was to *memorialize* the Fee Sharing Agreement.

It also bears emphasis that Calwell's argument necessarily turns on the intended purpose of the 2014 Order.[7] Calwell claims to have divined the 2014 Order's true purpose, yet Calwell's interpretation apparently cannot bear scrutiny from the author of that order. Though Calwell originally insisted that this case be transferred to Judge Swope—after all, he wrote the order—Calwell moved to disqualify him before he could reach the merits of this case. That Calwell sought to disqualify Judge Swope for "prejudging" Calwell's defense—a defense that required him to interpret his own order—pretty much says it all.

Accordingly, the Circuit Court correctly concluded that, even if the 2014 Order is the operative instrument, it "plainly provides Humphreys an unqualified right to share in all fee awards in the Monsanto Litigation." Appx. 6. This Court should reach the same conclusion and affirm.

C. The disputed fees were awarded in the Monsanto Litigation and therefore subject to the Fee Sharing Agreement.

Assuming this Court declines Calwell's invitation to ignore the Fee Sharing Agreement, then Calwell argues that the disputed fees nonetheless derive from

[7] There, of course, remains the question of whether Judge Swope even possessed the legal authority to rewrite or replace the parties' prior written agreement under these circumstances. Calwell advances no reasons to support the legitimacy of such an action.

separate claims outside the scope of that agreement. Judge Reeder correctly rejected this argument as well, reflecting on the obvious origin of the disputed fees.

First, the order awarding the disputed fees bears the "Bibb v. Monsanto" case heading. Appx. 422. *Second*, the disputed fees were paid pursuant to the Modified Medical Monitoring Class Settlement Agreement, which, together with the original settlement agreement, were created and approved in the context of the "Bibb v. Monsanto" litigation. Appx. 126-50, 151-86, 424-31. *Third*, the disputed fees were paid from the Contingent Attorney's Fees Fund, which, likewise, was created and approved in the context of the "Bibb v. Monsanto" litigation. Appx. 425. *Fourth*, the Contingent Attorney's Fees Fund was funded exclusively by the Monsanto Company, nobody else. Appx. 184, 188. *Fifth*, the disputed fees were awarded in consideration of benefits granted to the original members of the "Bibb v. Monsanto" medical monitoring class. Appx. 126-50, 424-31. *Sixth and finally*, these were the same benefits originally contemplated by the original Medical Monitoring Class Settlement Agreement in the "Bibb v. Monsanto" litigation. Appx. 136-37, 424-31.

Taken together, there is no genuine dispute that the fees were awarded in the "Bibb v. Monsanto" litigation and therefore subject to the Fee Sharing Agreement. That Calwell was able to negotiate the removal of the triggering event for a lesser fee does not remove that lesser fee award from the scope of the Fee sharing Agreement.

To confuse the genesis of the disputed fees, Calwell offers *The Affidavit of Thomas J. Hurney, Jr.* But the affidavit adds nothing of actual substance. The

affidavit explains in unnecessary detail that Thomas Health received a subpoena concerning the screening protocol. Appx. 262-65. The affidavit then explains in unnecessary detail Thomas Health's efforts to quash that subpoena. *See id*. But at no point does the affidavit actually provide support of the proposition that the disputed fees were a product of some new case and controversy. Quite the opposite. As a factual matter, the affidavit actually *confirms* (i) that no separate claims were brought against Thomas Health; (ii) that the disputed fees resulted from negotiations between Calwell and the Monsanto Company; and (iii) that Thomas Health did not contribute to Contingent Attorney's Fees Fund from which the disputed fees were paid. *See id*. Calwell does not otherwise explain the import of the Affidavits of Thomas V. Flaherty and Scott Partridge, both touching on issues wholly extraneous to the actual issue: whether the disputed fees derived from the "Bibb v. Monsanto" litigation.

Lacking legal justification for its failure to pay, Calwell then suggests that it should be *absolved* of his contractual duties as a matter of generic fairness. In particular, Calwell complains that Humphreys did not contribute time or money towards Calwell's most-recent effort to modify the Medical Monitoring Class Settlement Agreement, which resulted in the disputed $3 million fee award. But Humphreys' extrication from the Monsanto Litigation was the impetus for the Fee Sharing Agreement. Calwell cannot negotiate Humphreys' exit from the case—in which Humphreys invested considerable time and money—only to suggest that his failure to participate in some subsequent effort is grounds to avoid the parties'

agreement. Calwell's "fairness" defense is supported by neither law nor fact.[8] It is perfectly fair to be held to the bargain made. That's called the rule of law.

Accordingly, Judge Reeder correctly concluded that the disputed fees were a product of the "Bibb v. Monsanto" litigation and therefore subject to the Fee Sharing Agreement. This Court should reach the same conclusion.

II. The Circuit Court correctly rejected Calwell's judicial estoppel defense.

If all else fails, Calwell argues that Humphreys is judicially estopped from asserting a breach of contract claim based on the (incorrect) assertion that Humphreys supposedly failed to disclose the Fee Sharing Agreement in its 2016 federal bankruptcy proceeding. But, as noted by Judge Reeder, Calwell's defense fails for two independently sufficient reasons.

A. Humphreys disclosed the Fee Sharing Agreement in federal bankruptcy court.

As a threshold matter, the Circuit Court observed that Calwell's defense is based on a mistaken factual premise: that Humphreys somehow failed to disclose the Fee Sharing Agreement in bankruptcy. Appx. 6. The trial court's conclusion—that Humphreys did indeed make the requisite disclosure—was based on several

[8] In its conclusion section, Calwell halfheartedly suggests that West Virginia Rule of Professional Conduct 1.5—which proscribes the charging or collecting of unreasonable fees—absolves him of his contractual obligations. Calwell's argument has been expressly rejected by the Supreme Court of Appeals of West Virginia. *See* Syl. Pt. 1, *Watson v. Pietranton*, 178 W. Va. 799, 364 S.E.2d 812 (1987) (providing that a lawyer or law firm which enters into and honors a fee-splitting agreement with another lawyer may not later raise the Rules of Professional Conduct as a bar to enforcement of the agreement."). Nonetheless, Rule 1.5 is meant to protect the unwary client—not the recalcitrant competing law firm.

pieces of documentary evidence and cannot be genuinely disputed. *First*, Humphreys produced its *Schedule of Assets and Liabilities and Statement of Financial Affairs*, which clearly disclosed "referral/joint representation agreements" as one of the various classes of assets available for administration. Appx. 222. Calwell has not pointed to anywhere in the bankruptcy record where the creditors, the trustee, or the court required a specific itemization of that category of agreements or any other category of agreements. *Second*, Humphreys produced a Monthly Operating Report and bank statement, which were filed with the bankruptcy court, confirming that proceeds from the Fee Sharing Agreement were deposited into a trustee-supervised bank account. Appx. 232-44. *And third*, Humphreys produced his bankruptcy counsel's communications with Calwell, directing payment into the trustee-supervised bank accounts, rather than to James Humphreys personally. Appx. 226-29. Taken together, there is no genuine dispute that the Fee Sharing Agreement was disclosed to and administered by the federal bankruptcy court.

On the other side of the ledger, the only "evidence" Calwell produced below was a single-page excerpt from Humphreys' global notes and general disclaimers. Appx. 43. Calwell did not explain the import, if any, of that one-page excerpt. Nor could it. The single page of global notes and general disclaimers has zero bearing on whether Humphreys discharged his reporting duty elsewhere. And though Calwell appears to abandon this specific example on appeal, Calwell continues to cite

irrelevant disclosure sections and then feign indignation when the relevant disclosure cannot be found.

For example, pointing to the "accounts receivable" section of Humphreys' disclosures, Calwell criticizes Humphreys for disclosing receivables from asbestos settlements but not from the Monsanto Litigation. Pet. Br. 23-24. But the concept of a "receivable" appears to evade Calwell. As the term indicates, a receivable refers to amounts then due and owing. The final fee award did not actually become due (and was thus not owed) until September 2017 when the medical monitoring settlement agreement was modified. Appx. 424. The disclosure statement (Feb. 2016) and plan confirmation (Feb. 2017) predate that event by months, meaning at no point during the bankruptcy was the final fee award an "account receivable." All that to say, it's no surprise that the Fee Sharing Agreement was not referenced in the "accounts receivable" section.

In the end, the the Circuit Court correctly concluded that Humphreys did indeed disclose the Fee Sharing Agreement such that Calwell presented no material facts supporting the defense of judicial estoppel. Even then, any uncertainty on this point breaks against Calwell because it failed to present sufficient evidence to invoke the defense in the face of Humphreys' motion for summary judgment, as was *Calwell's* burden. *See Hetzel v. Pac. Mut. Life Ins. Co. of Cal.*, 108 W. Va. 22, 150 S.E. 385, 387 (1929) (providing that defendants bear the burden of proving affirmative defenses).

B. Judicial estoppel nevertheless requires proof of intent to deceive, an element for which Calwell failed to present any evidence.

Like the Circuit Court, this Court need not second guess the sufficiency of Humphreys' federal bankruptcy court disclosure because Calwell's judicial estoppel defense fails for yet another, independent reason: Calwell failed to prove intentional deceit, which even Calwell recognizes is a required element of judicial estoppel. Pet. Br. 27. Far from suggesting intentional deceit, Judge Reeder found that the evidence actually suggests "the opposite." Appx. 7. Again, the trial court's reasoning was grounded in documentary evidence. The disclosure statement clearly identified referral/joint representation agreements as a class of assets available for administration; the communications between bankruptcy counsel demonstrated open discussion of the Fee Sharing Agreement, Appx. 222; the bank statement demonstrated that the resulting proceeds were administered by the bankruptcy court for the benefit of creditors, Appx. 240; and the Monthly Operating Report reaffirms all these points, Appx. 232-44. This evidence is hardly suggestive of some nefarious plan to conceal the Fee Sharing Agreement and any future payments thereunder.

Acknowledging that there is no evidence of intentional deceit, Calwell instead endeavors to prove motive, which can serve as a proxy for intent. But Calwell fares no better on this front. Calwell fails to present any evidence of motive, much less a cogent theory of pecuniary incentive. In particular, Calwell simply asserts, without any further support or explanation, that "Humphreys undisputedly had a financial motive to conceal its potential additional financial fees from its creditors." Pet. Br.

29. Not only is this pure speculation, but the suggested inference also elides the differences between Chapter 7 liquidation and Chapter 11 reorganization.

In a Chapter 7 liquidation, the debtor's assets are liquidated and paid out to creditors. This typically results in a zero-sum game in which every dollar reserved to the debtor is one less dollar available to creditors. In such circumstances one might presume the existence of a pecuniary motive to conceal assets. On the other hand, Chapter 11 reorganization generally allows for the continuity of business, which generates future cash flow, which is then used to make payments on a court-approved payment plan. That payment plan is based on a multitude of factors, including what the debtor has on hand, what the debtor can reasonably afford, and what the debtor is expected to generate in the future. Given that payment plans are formulated based on a multitude of case-specific factors, Calwell does not (and cannot) say whether the Fee Sharing Agreement altered the trajectory of Humphrey's reorganization. And because it is impossible to say what impact, if any, the Fee Sharing Agreement played, pecuniary motive to conceal cannot be so freely assumed. At a minimum, Calwell was obliged to explain *how* Humphrey's actually stood to benefit from the supposed deceit. *See Hetzel*, 150 S.E. at 387 (providing that defendants bear the burden of proving affirmative defenses). But it failed to do so. And because Calwell failed to establish at least one of the requisite elements of its defense, Judge Reeder properly dispensed with Calwell's judicial estoppel defense.

C. This Court should decline Calwell's invitation to relitigate the sufficiency of federal bankruptcy disclosures.

Calwell's defense distills to a challenge against the *sufficiency* of Humphreys' disclosure rather than the *fact* of disclosure, requiring this Court to recreate the circumstances of that bankruptcy and divine the motivations previously at play. Recognizing the perils of that effort, the Circuit Court sensibly declined "to step into the shoes of the bankruptcy court and second guess the sufficiency of that disclosure." Appx. 323. And for good reason. If this Court decides to relitigate the sufficiency of Humphreys' federal court disclosure, as Calwell urges, then it must first navigate at least two threshold issues.

First, Calwell's challenge amounts to a collateral attack on the bankruptcy court's prior order approving the disclosure statement and is therefore barred by res judicata. Before the bankruptcy court can approve a plan of reorganization, it must first approve the debtor's disclosure statement. *See* 11 U.S.C. § 1125(b). In Humphreys' case, the bankruptcy court approved the disclosure statement, finding that it contained "adequate information" enabling creditors to make an informed decision on the proposed reorganization plan. *See In Re James F. Humphreys & Associates, LC*, No. 16-bk-20006, Doc. 1217 (Bankr. S.D.W. Va.). Calwell now urges a state court order finding the exact opposite.[9]

[9] *See Browning v. Prostok*, 165 S.W.3d 336, 348 (Tex. 2005) (barring the litigation of issues that were or could have been litigated in a prior bankruptcy proceeding when that subsequent litigation would have the effect of avoiding the prior court order or judgment); *Wallis v. Justice Oaks II, Ltd.*, 898 F.2d 1544, 1552 (11th Cir. 1990) (order confirming a plan of reorganization is entitled to preclusive effect

Second, there is a mechanism for objecting to disclosure statements. Once a disclosure statement is filed, interested parties have 28 days to file an objection. *See* Fed. R. Bankr. P. 2002(b); Fed. R. Bankr. P. 3017(a). Interested parties in the bankruptcy case could have requested an itemization of all "referral/joint representation agreements" if they thought it necessary. But they didn't. And Calwell cannot now end-run the process for identifying and resolving supposed deficiencies in the bankruptcy disclosures. If Calwell would be foreclosed from raising such objections in bankruptcy court, then surely it is precluded from doing so here or elsewhere.

Fortunately, this Court need not delve into these bankruptcy issues because Humphreys did indeed disclose the Fee Sharing Agreement and that should end the matter. And even if the disclosure is now wanting of more detail, it is a moot point because Calwell has failed to present any evidence of intentional deceit, which is a requisite element of its judicial estoppel defense. Because Judge Reeder got it right, this Court should affirm his summary judgment order in every respect.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's May 2, 2023 Order, which granted summary judgment in favor of Humphreys and against Calwell.

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on all claims or issues which were raised or could have been raised in the confirmation proceedings).

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, **Respondent's Brief** was filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie
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