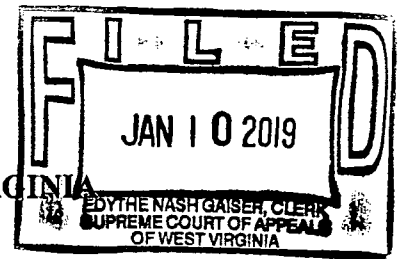


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0791

**CARL A. MASCIOLI,
ALBERT J. MASCIOLI,
MBD COMPANY, LLC and
MASCIOLI BROTHERS DEVELOPMENT,**

Defendants Below/Petitioners,

v.

**Appeal from the Circuit Court of
Monongalia County, West Virginia:
Civil Action No. 15-C-722**

**LOUANN MASCIOLI,
as Personal Representative
of the Estate of Paul Mascioli,**

Plaintiff Below/Respondent.

PETITIONERS' BRIEF

A handwritten signature in cursive script, appearing to read "Charles C. Wise III".

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ASSIGNMENTS OF ERROR

- 1) The circuit court erred in granting summary judgment in favor of Respondent because: a) law and equity supplement West Virginia's Revised Uniform Partnership Act, meaning the lower court should have considered the conduct of the parties before determining that a partnership existed and b) there was no change in material evidence before the court after it had repeatedly denied summary judgment.
- 2) The circuit court erred to the extent that it entered an order against the individual Petitioners, jointly and severally.
- 3) In the event that a partnership did exist, the circuit court erred in finding that the valuation of Respondent's interest was \$1,010,000 because: a) it failed to consider all evidence regarding the value of the alleged business and b) it failed to consider that Carl Mascioli is first entitled to a settlement of his partnership account because of his contributions.
- 4) The circuit court erred in granting Respondent \$245,158.46 in attorney's fees because Petitioners acted in good faith in this matter and because the amount awarded is not equitable in proportion to the value at stake in this case.
- 5) The circuit court erred in determining that an oral offer of a jury trial was not supported as a matter of law.

STATEMENT OF THE CASE

This is an unfortunate family dispute over eight real estate properties purchased and maintained by Carl Mascioli. Three brothers—Carl, Albert, and Paul Mascioli—worked together for twenty years in their family's supermarket. Appendix 873. That was the full extent of any shared business relationship, though now, years later, LouAnn Mascioli, as the representative of the Estate of Paul Mascioli, claims there was something more. The facts underlying the issues span several decades of interactions and undertakings, making for a long, complicated history.

When the Mascioli brothers' father died, he left his supermarket, Shop n' Save, to Carl and Albert only, hoping that the eldest brother, Carl, who had never married, would take care of the youngest brother, Paul. In that vein, Carl brought Paul into the supermarket business in 1989. Appendix 886. Thereafter, in 1993, the three brothers, Albert's wife, and LouAnn Mascioli executed a buy-sell agreement to memorialize their rights in the supermarket business. Appendix 897.

Bringing Paul into the supermarket business was but one display of brotherly affection Carl showed his younger brothers, as he always worked hard knowing that Albert and Paul had families to support and he did not. Other examples include financing the supermarket with more of his life insurance than his brothers did, assuming debts of the supermarket, declining to accept profits from the supermarket between 1989 and 2010, and purchasing eight real estate properties between the years of 1989 and 2003. Appendix 885-91.

Carl purchased these properties solely with his funds and with the plan to leave them to his brothers when he died. Appendix 886. The only documents, receipts, and financing information available that show individual contributions to these eight properties show Carl's name. Appendix 1420. Appendix 885. While the properties are titled in the name of either

Mascioli Brothers Development or MBD Company, LLC, Carl did this with the thought that he might involve his brothers in future development of the eight properties. He never did.

In 2012, Paul passed away. Appendix 1421. Although Paul and Albert worked side-by-side with Carl in the supermarket for over twenty years, neither participated as a partner in any sort of real estate business. Neither questioned that Carl owned the eight properties. There was no partnership agreement. Neither made a claim as a partner-owner of the properties. Nor did Paul or Albert contribute to the value of the properties or make any decisions concerning the properties. Carl made all the decisions. Nor did the three brothers share any profits or losses. Significantly, Albert has testified that he believes no partnership existed among the brothers. Appendix 892. Albert's interests in this case are identical to Paul's.

Petitioners do not dispute that there were certain conveyances of utility easements, rights of way, etc. concerning a few of the properties. However, Respondent can point to only two transactions from 1989 to 2014 as examples of shared profits: a tax deduction from a land donation in 1992 and shared royalties in a mineral lease two years after Paul died. Appendix 894-95, 1420. Albert claims these were gifts from Carl as he believes he had no interest in the properties. Appendix 308. Likewise, Albert and Paul performed minor services regarding the eight properties, such as responding to telephone inquiries concerning the properties while Carl was working late nights at the supermarket. Appendix 885.

In spite of the above, LouAnn Mascioli, Paul's wife and representative of his estate, now claims that the brothers shared equally in a real estate partnership. She admits she has no knowledge concerning agreements the brothers may or may not have made. Appendix 535-36. She also demanded a business accounting from Carl even though neither Paul nor Albert kept such an accounting, no one believed an accounting was necessary, and no one requested an accounting during Paul's lifetime, from 1989 through 2012. Appendix 886.

Prior to the litigation, in hopes of resolving financial issues with the Respondent, Carl and Albert also agreed LouAnn Mascioli could receive \$583,000 under the life insurance policy as part of the buy-sell agreement. Appendix 889. This was \$183,000 more than the \$400,000 specified in the buy-sell agreement. Appendix 889, 897. Carl had already assumed more than \$300,000 in supermarket debt. Appendix 889. The parties also underwent mediation throughout the litigation period. Appendix 1.

The Circuit Court of Monongalia County, after considering all of the above facts, legal arguments, pleadings, and affidavits regarding the lack of shared profits, and lack of accounting by any party, either denied or withheld summary judgment on June 29, 2017, September 11, 2017, and March 27, 2018. Appendix at 442, 1203. Then, without any change in the material evidence before the circuit court, it granted summary judgment on the day of trial, July 10, 2018. Appendix 1441-42. The *Order Confirming the Entering of Plaintiff's Proposed Order* (the "Order") is against the alleged businesses, as well as Carl Mascioli and Albert Mascioli as individuals, jointly and severally. Appendix 1416. The hearing transcript suggests the lower court based its ruling on a claim of document spoliation—documents that pertained to the supermarket and were shredded while Paul was still living and still had access to the documents. Appendix 1655.

The circuit court granted summary judgment without a trial and without hearing the testimony of Albert or Carl. At the conclusion of a status/settlement conference on June 28, 2018, the circuit judge offered the parties a jury trial. Appendix 1244. This occurred even though the parties had previously stipulated to a bench trial. Appendix 1222. After reflection, Petitioners notified the lower court that they accepted its offer of a jury trial. Despite the offer and acceptance, the circuit judge found that her offer of a jury trial was not supported by law. Appendix 1428.

The valuation of the alleged partnership, \$3,030,400, was provided by a valuation expert retained by Respondent. The valuation was based solely on an appraisal of the eight properties without consideration of any other business factors. Appendix 1426. The amount awarded was \$1,010,000, or one-third of the valuation, which did not take into account any contributions of the brothers. Appendix 1427. The court also awarded Respondent \$245,158.46 in attorneys' fees. Appendix 1444. These amounts were determined without consideration of evidence or testimony from Carl or his personal accountant, Peggy Galloway, who reviewed all documents that exist pertaining to the eight properties. Facts in the record also show that Carl, unlike the other brothers who contributed nothing to the properties, paid \$1,156,000 to purchase the properties, as well as all taxes, insurance, repairs, and maintenance. Appendix 1089. Carl estimates his net contribution to be about \$725,000, not including interest, over the years. Appendix 1647.

The Petitioners thus appeal the Monongalia County Circuit Court's August 10, 2018 final Order. In addition to contesting summary judgment as a matter of law in this very complicated matter, Petitioners also contest the failure to credit Carl for his contribution, the judgment against Carl Mascioli and Albert Mascioli, jointly and severally as individuals, the valuation and award amounts, the award of attorneys' fees, and the denial of a jury trial.

SUMMARY OF ARGUMENT

Because many genuine issues of material fact exist in this family dispute, the circuit court erred granting summary judgment. In eventually finding that a partnership existed between the three brothers—after repeatedly finding that this dispositive issue was debatable—the court ignored the importance of law and equity. West Virginia's Revised Uniform Partnership Act, ("RUPA") in its language, expressly states that law and equity supplement this chapter. W. Va. Code § 47B-1-4(a).

In this case, law and equity dictate that the Court should have considered the Mascioli brothers' conduct over twenty-three years before determining whether they carried on as coowners of a business and shared profits. The determination of this issue rests on the testimony and credibility of the two living brothers regarding what the brothers did and did not do, and this is a question for the trier of fact. Had the court considered their conduct as evidence, it would have necessarily found that a genuine issue existed as to whether the brothers ever shared business profits—the key component of a partnership under RUPA. W. Va. Code § 47B-1-1(7).

Moreover, the circuit court repeatedly stated that genuine issues exist in this case and twice denied summary judgment based on the same facts that rest before the Supreme Court of Appeals of West Virginia today. Appendix 378, 442, 1200. The lower court apparently changed its mind based on no new information—and instead granted summary judgment on a faulty and belated claim of spoliation. Appendix 1402.

The circuit court also made multiple procedural and discretionary errors notwithstanding the faulty dispositive order. First, regarding the posture of the final order itself, the judgment should not have been against Carl Mascioli and Albert Mascioli as individuals. While individuals may be liable for partnership debts in relation to third parties, this case is among alleged partners, which is governed under W. Va. Code § 47B-7-1(a). This section does not speak to a judgment against individual partners, but only against the partnership, as is the case here.

Second, as to the amounts awarded, the court also wrongfully failed to consider evidence referenced in the record. When determining the valuation of the alleged partnership, the court should have considered information from Carl as to the value the eight properties upon Paul's death. Furthermore, Carl's contributions should have been taken into account because W. Va. Code § 47B-4-1(a) states that all partners are entitled to accountings upon the winding up of partnerships. Despite the lack of formality of Carl's proof of contributions, the proof is in the

record, and equity dictates that the circuit court should have considered it. Appendix 886-86. Moreover, it is patently unfair not to ask for an accounting from 1989 through 2012, and then demand documents that are no longer available.

Third, attorneys' fees should not have been awarded. The Petitioners acted only in good faith when defending their interests in this complex case spanning several decades. Merely defending their interests in this suit does not amount to bad faith behavior. *Yost v. Fuscaldo*, 185 W. Va. 493, 500, 408 S.E.2d 72, 79 (1991). Furthermore, had the circuit court taken into account the valuation and contribution testimony as it should have, it should have concluded that the amount of attorneys' fees awarded was unreasonable in proportion to the amount at stake in this controversy.

Finally, the circuit court erred in finding that a jury trial was not supported by law. Even though a waiver of jury trial was executed, the circuit court offered the Petitioners a jury trial and was fully within its discretion to do so. Appendix 1222; W. Va. R. Civ. P. 39. To make such an offer, which was accepted, and then change its mind the day before trial was unfair as a matter of policy and unjust as a matter of law.

Accordingly, in this appeal Petitioners contend that many genuine issues of material fact do exist in the case, and respectfully request this court to reverse summary judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves a family dispute involving a course of conduct among three brothers over twenty-three years. The threshold legal question is whether a partnership entity existed among the brothers as a matter of law. Petitioner believes that oral argument is appropriate under Rule 19 because the appeal involves assignments of error involving application of settled law and unsustainable exercises of discretion against the weight of evidence.

ARGUMENT

1. Standard of Review.

On appeal, the Supreme Court of Appeals of West Virginia reviews a circuit court's final order and ultimate disposition under an abuse of discretion standard; challenges to findings of fact under a clearly erroneous standard; and conclusions of law under a de novo standard. *W. Va. Dep't of Transp. v. Newton*, 235 W. Va. 267, 274, 773 S.E.2d 371, 378 (2015). "A circuit court's entry of summary judgment is reviewed de novo." *Sugar Rock, Inc. v. Washburn*, 237 W. Va. 347, 351, 787 S.E.2d 618, 622 (2016) (citing Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)).

Here, the following conclusions of law should be reviewed with a de novo standard: that summary judgment was proper as a matter of law, that the order was against individuals jointly and severally as a matter of law, and that Carl is not entitled to a settlement of his partnership account as a matter of law. The abuse of discretion standard is appropriate for the assignments of error regarding the awarding of attorneys' fees and the denial of a jury trial. Finally, a clearly erroneous standard is appropriate for findings of fact regarding the valuation of the supposed partnership and the amount of attorneys' fees awarded.

2. **There is a genuine issue of material fact as to whether a partnership existed among the three Mascioli brothers.**

Summary judgment is only proper in cases where there are no genuine issues of material fact and the movant shows that she is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56(c). A summary judgment determination is based on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.* "At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 (1986); *See also Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995).

Further, a party opposing the motion is entitled to have his or her version of the facts accepted as true and, moreover, to have all internal conflicts resolved in his or her favor. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). In reviewing the evidence, a court must neither resolve disputed facts nor weigh the evidence (*Russell v. Microdyne Corp.*, 65 F.3d 1229, 1239 (4th Cir. 1995), nor make determinations of credibility. *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986).

In this case, the circuit judge initially determined that genuine issues did exist when it denied two motions for summary judgment. Appendix 388, 422, 1204. The circuit court then changed its mind without any change in material evidence before it. Appendix 1418. This abrupt change in opinion is both unjust and wrong as a matter of law, and is not supported by or reflected in the record. Before ruling, the court should have considered relevant case law in addition to West Virginia's Revised Uniform Partnership Act ("RUPA").

Further, the pleadings, discovery, and affidavits show a genuine dispute exists on the threshold issue of whether a partnership existed between Carl, Albert, and Paul. The two living brothers steadfastly maintain, as supported in their affidavits, that no brother believed that a partnership existed. Appendix 851, 855. Their version of facts, which the court should have accepted as true, is contrary to summary judgment and should have been resolved by a trier of fact. Thus, for the various reasons set forth below, trial was the appropriate method for considering these facts and summary judgment was improperly granted.

A. The Summary Judgment Order does not accurately reflect the rulings of this Court regarding the law of partnership formation because law and equity supplement RUPA.

RUPA itself states that, “[u]nless displaced by particular provisions of [RUPA], the principles of law and equity supplement [RUPA].” W. Va. Code § 47B-1-4(a). Therefore, common law that is not expressly displaced by RUPA remains valid. In other words, RUPA is a “gap filler” to the extent that an agreement can be determined from the conduct of the parties.

The circuit court’s *Order Granting Plaintiff’s Motion for Summary Judgment on Findings of Fact and Conclusions of Law* (“Order”) misstates and misapplies well-established West Virginia law regarding the formation of partnerships. The Order takes this Court’s language in *Valentine v. Sugar Rock* entirely out of context when it quotes this Court as stating that “any discussion regarding the ‘common law of general partnerships is purely historical and academic’ due to the legislature’s adoption of RUPA.” Appendix 1430. Here is the full quotation from *Valentine v. Sugar Rock*:

Hence, much of *the following discussion* on the common law of general partnerships is purely historical and academic. But understanding the primordial rules of general partnership law leads to an understanding of *how mining partnerships came to exist*, and why real property ownership by the partners is critical to the formation of a *mining partnership*.

Valentine v. Sugar Rock, Inc., 234 W. Va. 526, 534, 766 S.E.2d 785, 793 (2014) (emphasis added). Clearly, this Court was not stating that *any* discussion regarding the common law of general partnerships is purely historical and academic, but was in fact leading into a historical and academic discussion of how *mining partnerships* came to exist. *Id.* The distinction here is crucial.

Hence, Petitioners do not claim, and have never claimed, that RUPA is inapplicable. Petitioners merely presented a complete picture of West Virginia law regarding partnership

formation, including both RUPA and pertinent common law that remains valid because it has not been displaced by RUPA. Thus, as discussed below, the principals outlined in several of this Court's decisions are relevant in analyzing whether the three Mascioli brothers conducted themselves as a partnership.

For these reasons, the court erred because its Order does not accurately reflect this Court's commentary and rulings on the pivotal issue of partnership formation, that is, the sharing of profits and losses. Unless displaced by RUPA, a court must look to case law when evaluating if a partnership exists, and the circuit court failed to do so in this case. Thus, Respondent was not entitled to summary judgment.

B. The Circuit Court wrongly failed to consider the conduct of the Mascioli brothers over the course of twenty-three years when determining whether a partnership existed among them.

RUPA defines a partnership as "an association of two or more persons *to carry on as coowners a business for profit*. . . ." W. Va. Code § 47B-1-1(7) (emphasis added). The authorities suggest that sharing in profits and losses is the most important factor in determining whether a partnership was formed. Whether or not individuals carry on as coowners and share profits can only be determined by their actions. West Virginia's common law and statutes permit a partnership to be written, oral, or implied from the conduct and dealings of the partnership's members. Syl. pt. 2, *Duffield v. Reed*, 84 W. Va. 284, 99 S.E. 481 (1919) ("A Partnership, as to the parties thereto, springs from their intention, which need not be expressed in writing, but may be by oral agreement, or may be implied from their conduct and dealings with one another."); W. Va. Code § 47B-1-1(8).

Furthermore, the burden is on a plaintiff to prove the existence of a partnership when the existence of a partnership or the state of accounts of a partnership is disputed. *Hinkson v. Ervin*, 40 W.Va. 111, 20 S.E. 849 (1894). In proving the existence of a partnership, this Court teaches

that evidence must be stronger between alleged partners than when third parties assert it. Syl. pt. 1, *Lipscomb v. Ballard*, 106 W. Va. 694, 146 S.E. 826 (1929). Only when the facts are undisputed, or susceptible to only one inference, is the question of whether a partnership exists between particular persons one of law for the court. *Pruitt v. Fetty*, 148 W. Va. 275, 279, 134 S.E.2d 713, 716 (1964).

Here, the facts on the record are susceptible to more than one inference. The Order relies on certain factors, but fails to recognize that Respondent offered *no evidence that Albert, Carl, and Paul shared in any profits and losses of the business*. Notably, there was no written partnership agreement, and neither Albert nor Paul, by his estate could provide their own accountings of the alleged partnership—even though Respondent contends that they were also partners. Appendix 889.

The conduct of the parties indicates that the brothers *did not* in fact carry on a business to share profits and losses: Carl made the decision to purchase, and did purchase, all of the properties: all property leases in the record were payable to Carl only; all invoices for property maintenance in the records were paid by Carl; Carl made all material decisions concerning the properties; Carl realized all the expenses concerning the properties; Carl paid all the property taxes for the properties; and Carl paid all the insurance concerning the properties. Appendix 851-52, 914-21, 922-32, 946-57, 958-991, 1000-1010, 1016-1021, 1025-1032.

The fact that the three brothers executed a buy-share agreement for the Shop n' Save Store shows that they knew how to formalize their respective rights in a shared business, but did not do so in the case of the alleged partnership. Appendix 897. Moreover, a shared tax deduction from a land donation and shared royalties in a mineral lease after Paul's death were not shared profits—they were gifts. Appendix 308, 894-895. They were gifts from Carl, who worked with and looked out for his younger brothers and their families. This is consistent with his course of

conduct over two decades. In sum, Respondent has not met her burden of showing there is only one inference concerning the existence of a partnership. The actions of the parties do not conclusively show that the brothers carried on a business to share profits and losses; thus, which means this important factor in determining the existence of a partnership is in genuine dispute.

Because common law not displaced by RUPA remains valid, the circuit court erred in failing to consider the actions among the brothers over time. The conduct of Carl, Albert, and Paul created a genuine dispute as to whether the brothers acted as coowners of a business or shared in profits and losses and this should have been considered by the trier of fact. Therefore, summary judgment was not appropriate as a matter of law.

C. The Circuit Court erred in granting Summary Judgment on the day of trial after denying the same motion more than four months earlier without any change in material evidence in the matter.

On June 29, 2017, the circuit court denied partial summary judgment, calling the case “complicated.” Appendix 378. On September 11, 2017, the circuit court found a “question of fact as to whether or not there is a partnership.” Appendix 442. On March 27, 2018, the circuit court again found summary judgment inappropriate, stating “I believe the supreme court could construe that there are issues of fact, which will be resolved at trial.... I have no doubt.” Appendix 1200. Nor was summary judgment granted at a hearing on June 28, 2018. Appendix 1285. Nevertheless, during the pre-trial hearing on July 9, 2018, the circuit court decided to look at the matter “with new eyes.” Appendix 1383. The next day, the first day of trial, the circuit court granted summary judgment, with the final Order entered on August 10, 2018. Appendix 1441-42, 1416. In granting summary judgment, the lower court appears to have relied on an alleged spoliation of evidence assertion and not on any additional substantive evidence or any new information. Appendix 1427.

In *Tracy v. Cottrell*, the West Virginia Supreme Court held that a trial court is not permitted to impose sanctions (such as summary judgment) against a party for spoliation of evidence without considering the following:

(i) the party's degree of control, ownership, or authority over the destroyed evidence; (ii) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (iii) the reasonableness of anticipating that the evidence would be needed for litigation; and (iv) if the party controlled, owned, possessed, or had authority over the evidence, the party's degree of fault in causing the destruction of evidence.

Tracy v. Cottrell ex rel. Cottrell, 206 W. Va. 363, 374, 524 S.E.2d 879, 890 (1999).

The Fourth Circuit has held that, for dispositive sanctions, the court must “be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.” *Silvestri v. Gen Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

None of four factors in *Tracy v. Cottrell* were discussed in the Order—and none of the four factors apply to this case. With regard to the first factor, control, the documents at issue, if Carl’s deposition is taken as true, were shredded during Paul’s lifetime; therefore, all of the brothers were in control and possession of the documents. Appendix 1655. The second factor, prejudice, is not satisfied because the documents were related to the Shop n’ Save supermarket and not to the eight properties at issue. Without any relevance, a document cannot be prejudicial to a party. Respondent’s claims do not rest on a single missing document, as indicated by her continuous claims that they are entitled to summary judgment even without it.

The third factor is not satisfied because the Shop n’ Save documents were allegedly shredded prior to Paul’s death and prior to any claims made by Respondent. Appendix 1655. The

dispute as to the existence of a partnership further bolsters the inapplicability of the third factor because neither Carl nor Albert could not have anticipated litigation about a partnership they did not believe existed. Finally, the fourth factor regarding degree of control is not supported because there is not sufficient evidence to support that any brother had greater possession over the documents at the time of destruction. Therefore, Petitioners did not conduct egregious spoliation of any relevant document.

Because the circuit court cited the shredding of documents in the order, it erred in not analyzing the *Tracy* factors before granting summary judgment. However, even if it had analyzed the factors, the circuit court was not permitted to impose summary judgment as a sanction because none of the factors apply and because Respondent was not denied the ability to support her claim. Rather, because the lower court was correct the first two times it determined that genuine, substantive issues exist in this case, summary judgment is not appropriate as a matter of law.

3. The Circuit Court erred in entering an order against the individual Petitioners, jointly and severally, because the action was among alleged partners.

In the Order, the circuit court initially finds that “Mascioli Brothers Development and MBD Company, LLC” are required to pay Respondent. Appendix 1438. However, the Order’s Conclusion states that recovery may be made against Carl Mascioli and Albert Mascioli, jointly and severally. Appendix 1442. Although Petitioners disagree that the statutes require any judgment, the proper parties are those listed in paragraph 137 in the Order. Appendix 1438.

Because this action is one by an alleged partner against a partnership, any award would necessarily be due from the partnership and not from the individual members. Appendix 1442. Under West Virginia’s Uniform Partnership Act, the “partnership shall” buyout or pay for a dissociated partner’s interest if a partnership is not wound up after such dissociation. W. Va.

Code § 47B-7-1(a). Further, RUPA provides that a *partner* may maintain an action against the *partnership*. W. Va. Code § 47B-7-1(i) (emphasis added).

Notably, partners may be jointly and severally liable as agents of the partnership for obligations under article three of the RUPA chapter. W. Va. Code § 47B-3-6. However, article three pertains only to acts carried out in the ordinary course of business or authorized by other partners with regard to *outside persons* dealing with the partnership and not among partners. *Id.* (emphasis added). This is not the case here because Respondent, the Estate of Paul Mascioli is claiming a share of the partnership interest of Paul. Thus, if a partnership is found to have existed, § 47B-7-1(a) applies, and Respondent must be paid from the partnership. Individual petitioners are not liable jointly and severally as a matter of law.

4. **In the event that a partnership did exist, the amount of the award is improper because the Circuit Court failed to consider Petitioners' evidence regarding valuation and contribution.**

In considering facts regarding the value of the partnership, the circuit court judge should have weighed testimony from the two living Mascioli brothers regarding the “going concern,” and not only the Respondent’s appraisal values. Further, in determining the award, the calculation should reflect a reduction of the amount contributed by Carl individually.

- A. **The Circuit Court erred in finding the valuation of Respondent’s interest was \$1,010,000 without considering additional testimony from the parties regarding the alleged partnerships “going concern.”**

RUPA states that “[t]he buyout price of a dissociated partner’s interest is what would have been distributable” . . . “if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern.” W. Va. Code § 47B-7-1(b). Generally, going concern value is defined as the value “of a commercial enterprise’s assets or of the enterprise itself as an active

business with future earning power, as opposed to the liquidation value of the business or its assets.” *Going-concern value*, Black’s Law Dictionary (10th edition, 2014).

This Court has held that the method used for going concern value shall be determined on a case by case basis. *Bluefield Tel. Co. v. Pub. Serv. Comm’n of W. Va.*, 102 W. Va. 296, 135 S.E. 833, 835 (1926) (agreeing with a finding that “the value of a going concern as such could not be fixed by a rule applicable to all cases, and that much of what should properly be considered as going concern value was included in the value given the physical property”). In doing so the court cited to various state’s public service commissions’ valuations of utility businesses. *Id.* (“depends on the surrounding circumstances of each individual case,” “var[ies] with the particular circumstances,” “depend[s] on the features of the particular utility [business]”). The court also cited the Supreme Court of the United States of America regarding valuation. *Id.* (“each case must be controlled by its own circumstances”).

In granting summary judgment, the court relied on a valuation of the eight properties which provided that the fair market value of a one-third ownership interest as of December 20, 2012, for Mascioli Brother Development and MDC Company, LLC was \$1,010,000.00. Appendix 1438. The record indicates that the valuation expert simply borrowed the appraised values, added them together, and assigned that total as the “going concern.” Appendix 1089. This methodology is an oversimplified reproduction of the appraisals and does not take into account the value of the alleged business undertaking. Nor is there evidence that the expert even talked to Carl or Albert, the two individuals most knowledgeable about how the “business” was conducted over twenty-three years.

The lower court did not provide Petitioners the opportunity to cross-examine Respondent’s expert and show that the valuation is flawed. Petitioners had retained accountant Peggy Galloway who provided an accounting summary based on every document that Petitioners

had in their possession from 1989, when the first property was purchased, through 2012. Appendix 422-23. Petitioners were prepared to testify that the values of the properties in 2012 was much lower than the values in the appraisals.

As this Court has previously held, there is no fixed rule for determining going concern value, and the method used should be evaluated on a case by case basis. When a genuine issue of material fact exists, the court should not simply adopt as fact a valuation offered by a party without considering and weighing different evidence. The fact that going concern value shall be determined on a case by case basis, and greatly depends on the surrounding circumstances of the case, shows that a genuine issue of material fact exists as to the valuation evidence in this case. Therefore, it was improper to grant summary judgment because a genuine issue of material fact existed as to the valuation of the alleged partnership.

B. The Circuit Court erred in finding that Carl Mascioli was not entitled to a settlement of his partnership account.

The Order directly quotes RUPA when it notes that each partner is entitled to a settlement of all partnership accounts during the buyout process. Appendix 1435; W. Va. Code § 47B-8-7(b). Under RUPA, an account is calculated as follows:

Each partner is deemed to have an account that is: (1) Credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities as provided in section six, article three of this chapter, *the partner contributes* to the partnership and the partner's share of the partnership profits; and (2) Charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

W. Va. Code § 47B-4-1(a) (emphasis added). The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership. W. Va. Code § 47B-8-7(e).

The Order also directly quotes case law regarding partnership accounts,¹ discussing the duties of a partner to keep correct accounting of items in his or her partnership account with which he seeks to charge the partnership and noting that such items may be “dates,” “vouchers,” or “other satisfactory evidence” to show to whom disbursements have been made. Appendix 1436 (quoting *Gay v. Householder*, 71 W. Va. 277, 76 S.E. 450 (1912)).

Here, the circuit court found that the petitioners had “no accountings” and determined that Carl was not entitled to any credits in determining the award amount. Appendix 1436-37. In fact, Carl did provide documents, receipts with dates, and other satisfactory evidence showing his specific entitlements in a settlement account. Appendix 914-1039. While these items may not have been a formal “accounting,”² they did constitute a bookkeeping prepared by an accountant. Appendix 421. More importantly, Albert was prepared to testify that Carl paid for everything concerning the eight properties. Their testimony was uncontradicted. Thus, the court ignored the testimony of a majority of the “partners.”

Moreover, neither Albert nor Paul requested an accounting from Carl from 1989 until Paul’s passing in December of 2012. It is patently unfair and inequitable to require Carl to produce documents that most likely no longer exist. Even so, Carl produced everything he had. It is not disputed that the eight properties were paid for by someone, and Albert and Carl agreed that the payer was Carl. Appendix 885-96.

To ignore this evidence before the court and to deny Petitioners an opportunity testify as to their contents was in error. In the event a partnership did exist, these items making up the

¹ By citing the 1912 case, the circuit court impliedly incorporated the argument made in Part 2A of this brief; that is that case law remains relevant in supplementing RUPA for equity’s sake.

² Notably, neither Paul, by this estate, nor Albert could provide the circuit court with a formal accounting either, the negative inference of which is that no brothers deemed formal accountings necessary because they did not consider their relationship a partnership.

account of Carl are relevant to the final award. Accordingly, the award amount was not proper even if a partnership did exist.

5. The Circuit Court abused its discretion in ordering attorney's fees, and the amount awarded was clearly erroneous.

Petitioner contends that, based on West Virginia's Revised Uniform Partnership Act and the specific facts and circumstances of this case, the circuit court judge abused its discretion in awarding attorneys' fees and that the amount awarded is clearly erroneous.

A. The Circuit Court erred in finding that Respondent is entitled to attorney's fees and costs because there is no evidence that Petitioners acted arbitrarily, vexatiously, or not in good faith.

The Order Granting Plaintiff's Motion for Attorney Fees and Costs, in the amount of \$245,158.46, was entered November 2, 2018. Appendix 1609. The court may assess reasonable attorney's fees and the fees and expenses of appraisers and other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. W. Va. Code § 47B-7-1(i). The finding may be based on the partnership's failure to tender payment or an offer to pay. *Id.* An arbitrary act is one without consideration or regard for facts, circumstances, fixed rules, or procedures. *Arbitrary*, Black's Law Dictionary (10th edition, 2014). A vexatious act is one made to a goal to harass or annoy. *Vex*, Black's Law Dictionary (10th edition, 2014).

In considering if there is sufficient evidence of "bad faith, vexatious, wanton, or oppressive conduct to support an award of reasonable attorney's fees," this Court does as follows:

- 1) consider the evidence in the light most favorable to the prevailing party, 2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party, 3) assume as proved all facts which the prevailing party's evidence tends to prove, and 4) give to the prevailing party the benefit of all

favorable inferences which reasonably may be drawn from the facts proved.

McClung v. Marion Ct. Comm'n, 178 W. Va. 444, 453, 360 S.E.2d 221, 230 (1987) (citing *Sly*, pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983)). In this analysis, however, the Court must first find a sufficient amount of evidence to consider, assume, and infer before considering specific conduct. *Id.* Moreover, this Court has pointed out that actions done in “defending an action to . . . protect one’s economic or property interests does not *per se* constitute” such conduct. *Yost v. Fuscaldo*, 185 W. Va. 493, 500, 408 S.E.2d 72, 79 (1991) (finding that even fraud does not meet this standard).

The Order points to *no* specific evidence that Petitioners or their counsel acted arbitrarily, vexatiously, or not in good faith. Notably, a reliance on alleged spoliation is not appropriate evidence to this end, given that Carl did not shred any documents after he could have anticipated litigation. Appendix 1655. All of Petitioners’ acts were supported by facts, circumstances, rules, and procedure because, as explained in Part 2 above, there are genuine issue of material fact as to whether a partnership or LLC existed—and to defend a legal argument is not arbitrary. Further, there is no evidence that Petitioners acted in a way to harass or annoy Respondent. The fact that Petitioners share a last name and mutual love and affection for Paul further display that it was neither their intent nor their manor to vexatiously harass LouAnn Mascioli. Accordingly, there is a lack of sufficient evidence for even considering the *McClung* factors, let alone the conduct of the Petitioner.

Finally, just because this matter was not settled prior to litigation or during mediation does not mean that no offers to pay Respondent were made. In fact, Petitioners made several offers to pay Respondent before the lower court erroneously found that a partnership existed. Appendix 894, 1365-66. These offers are examples of Petitioners’ honest, good faith attempts to

resolve this unfortunate family lawsuit. Because there is no evidentiary basis in the lower court's findings that Petitioners acted in bad faith or failed to offer payments, W. Va. Code § 47B-7-1(i) does not apply, and the circuit court's awarding of attorney's fees was an abuse of discretion.

B. The Circuit Court erred in granting \$245,158.46 in attorney's fees because the amount is not reasonable considering all the facts of the case.

Petitioners contend that \$245,158.46 in attorney's fees is not reasonable considering all the facts of the case. Should the Court determine that a partnership or LLC existed, Respondent is not entitled to a distribution of one-third of the court ordered value of assets of such partnership. This is because neither Paul nor Respondent contributed in any material way to such partnership. *See supra* Part 4B. The circuit court did not make a detailed evaluation of each partner's respective contribution; rather, it simply assigned a one-third value for each partner. By doing so, the circuit judge ignored the testimony of the two remaining "partners." Moreover, the total gross valuation of the eight properties, \$3,030,400.00, was inflated by more than \$1,000,000.00. *See supra* Part 4A. Had summary judgment been withheld, Petitioners were prepared to testify at trial that a more realistic liquidation value of the assets (that is, evidence of a going concern) is most likely less than \$2,000,000.00. *See supra* Part 4A.

Unlike Paul or Respondent, Petitioner Carl did materially contribute to the benefit of the partnership/properties. *See supra* Part 4B. Accordingly, Carl is entitled to a credit of his net contributions to any partnership, including the purchase, maintenance, insurance, and tax payments, among other expenses for the eight properties in question over the course of several decades. Carl was prepared to testify such net amount was approximately \$725,000.00. *See supra* Part 4B. Further, Petitioners contend that a realistic net value of the partnership assets is approximately \$1,275,000.00, after calculating a reduction of Petitioner Carl's contributions. *See supra* Part 4A. Even if Respondent was entitled to one-third of this value, such amount is

approximately \$425,000.00. By this calculation, an award of \$245,158.46 in attorney's fees is over one-half of the amount that Respondent would be entitled. Petitioners contend that such a proportion is unreasonable given the amounts at stake throughout this litigation.

6. The Circuit Court erred in finding that a jury trial was not supported by law after the Court orally offered Petitioners a jury trial because the Court has discretion to order a trial by jury at any time.

On April 4, 2018, a waiver of jury trial signed by both parties was filed with the circuit court. Appendix 1222. Nevertheless, during a settlement conference on June 28, 2018, the circuit court judge stated:

“And you still remember it's a bench trial. If you change your mind, let me know, so that we can call a jury in. But I don't anticipate that you will, so, I will see you Tuesday, July 10 at 1 o'clock. We're adjourned.”

Appendix 1308.

Thereafter, Petitioners considered the court's offer and determined that they wanted a jury trial. Undersigned counsel contacted the court's secretary to notify the court of their desire to accept the offer for jury trial just after July 4, 2018. Appendix 1365.

A hearing was held on July 9, 2018, whereupon the Court denied the request for a jury trial stating:

“I am going to rule that the Defendants are not at this time entitled to request nor receive a jury trial in this matter. While I recognize and am a very vocal proponent of Constitution and the rights contained therein, there are certain times when other things apply. One is dilatoriness. I believe in asserting rights. The other is I think § 47B-7-1 is a trump card in this matter.”

Appendix 1379-80.

In its Order, the circuit court noted that it denied the motion for jury trial on grounds of untimeliness and prejudice to the Respondent, admitting: “The Court acknowledges that at a prior hearing the Court did mention to Defendants that they could request a jury trial. However,

after researching the issues regarding the same and hearing parties' arguments, the Court determined that granting a jury trial was *not supported by law*." Appendix 1416 (emphasis added).

Rule 39(b) of the West Virginia Rules of Civil Procedure provides that "notwithstanding the failure of a party to demand a jury trial in an action in which a demand might have been made of right, the court upon motion or of its own initiative *may* at any time, order a trial by a jury of any or all issues." W. Va. R. Civ. P. 39 (emphasis added). Moreover, policy-wise, the right of a trial by jury is valued—and preserved "inviolable"—in our justice system. W. Va. R. Civ. P. 38.

Here, at the conclusion of a settlement conference, the lower court judge made a specific offer for a jury trial. Appendix 1222, 1308. Petitioners accepted that offer. Appendix 1365. To label that acceptance "untimely" when the acceptance was in swift response to the circuit court's recent offer is inaccurate. Appendix 1416. Furthermore, to determine that granting a jury trial was not supported by law, when Rule 39 clearly gives judges discretion to order a jury trial in spite of any prior waiver, is an inaccurate interpretation of the law. Any prejudices could be caused by a continuance. Accordingly, as a matter of law and in consideration of important judicial policy, the circuit court should have considered Petitioners' request for a jury trial.

CONCLUSION

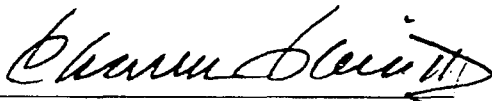
The foregoing arguments show that genuine issues of material fact exist in this case, the facts of which span many decades. Most importantly, contradictory facts exist as to whether a partnership existed among the three Mascioli brothers. Furthermore, even if a partnership did exist, the circuit court should have considered these facts as presented by the testimony of a majority of the partners before determining the percentage of ownership, and the valuation of the eight properties. The circuit court also erred in entering an order against individual Petitioners, in

its attorneys' fees award, and in its finding that a jury trial was not supported by law. Thus, Petitioners respectfully request that this Honorable Court reverse summary judgment.

Respectfully submitted,

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