STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SAMUEL J. CAPIZZI,

Plaintiff,

v. Index No.: 810115/2016

BROWN CHIARI LLP
JAMES E. BROWN
DONALD B. CHIARI,

Defendants.

PROPOSED FINDINGS OF FACT

Defendants, Brown Chiari LLP, James E. Brown, and Donald B. Chiari, submit the following post-trial proposed findings of fact:

1. Mr. Brown opened his law firm in 1973. In 1989, he hired Capizzi who had just graduated law school. Capizzi was paid a salary and discretionary bonus. Within 2-3 years, Capizzi began to receive a K-1 tax form. Brown Trial Testimony, pg. 1600 (hereinafter "JBTT"). In approximately 1996, Brown hired Frank Frascogna also paying him a monthly salary, discretionary bonus, and issuing him a K-1. JBTT, pg. 1608.

2. In 1997, Mr. Chiari joined Brown's firm. He brought with him approximately 30 personal injury files. At that time, Brown's inventory consisted of approximately 300 personal injury files and a fully equipped and staffed office. Chiari Trial Testimony (hereinafter, "DCTT"), pg. 2704. Upon Chiari joining, it was determined that Brown would establish a percentage to be used as a guideline to distribute the net distributable income (NDI) to himself, Chiari, Frascogna and Capizzi on an annual basis. JBTT, pgs. 1619-1621.

3. At the conclusion of the first year, Brown determined that adherence to the guidelines would not be appropriate. Consequently, Brown elected to take no share of the NDI for that year (he was due to receive income that had been earned from files closed prior to Chiari joining). JBTT, Pgs. 1622-1624.

4. Chiari was having significant success shortly after joining the firm. Brown, recognizing both the need for Chiari to be compensated fairly and to ensure his long-term commitment to the firm, advised Chiari that he and Chiari should receive the same percentage of NDI and should share equally in the firm's future, including management responsibilities. JBTT, Pgs. 1627-1634.

5. In April of 2004, Mr. Frascogna resigned and commenced a lawsuit in August 2004 against the law firm, Brown, Chiari and Capizzi individually claiming an ownership interest beyond that of an income partner. Exhibit 135. During the litigation, Brown, Chiari and Capizzi all denied that Frascogna had an equity or ownership interest as a partner in the firm, but rather that Frascogna, like Capizzi, was an income partner only. Exhibit 160-B, Ex. E, pgs. 111-114; Exhibit 160-B, Ex.A, pg. 88; Exhibit 157, Ex.B, pg.73.

6. Capizzi specifically testified at his deposition in the Frascogna case in December 2005 and at trial in July 2006 that his agreement with Brown and Chiari concerning his partnership interest was the same as it had been prior to Frascogna's resignation two years earlier:

    Q. At the time you had this conversation [with Frascogna about his decision to resign], did you understand Mr. Frascogna to have an ownership interest in the firm?

    A. No.

    Q. And did you have an ownership interest in the firm?

    A. No.

    Q. At the time that you had this discussion, did you understand Mr. Frascogna to have an interest in the ongoing cases of the firm after he left?

    A. After he left, no.

    Q. Why is that?

    A. I didn't either.

    Q. ***Because of the relationship you had with Brown and ultimately Chiari***?

    A. Exactly. ***Same relationship I have today***. Exhibit 157A, Ex. B., pgs.89-90.

7. Litigation continued until late 2007 when Frascogna received a settlement check. Exhibit 72.

8. Capizzi admitted at the instant trial that the original agreement remained in place following Frascogna's departure in April 2004:

    Q. Ok. Do you agree that you had an agreement with [Mr. Brown and Mr. Chiari] on the distribution of income and your status as a partner after Mr. Frascogna left for the three years and one month (sic) that you operated as a law firm of three?

    A. We did. (Samuel Capizzi Trial Testimony (hereinafter, "SCTT") Pg. 929…

Q. You continued the business on the **same method, model, and mode** to use your exact words, correct?

A. That was my testimony. I'm not sure what you now are referring to in terms of timeframe.

Q. The same timeframe, right after Frank left for those two and a half years.

A. Yes. SCTT, pg. 972.

9. Throughout the Frascogna litigation, Brown, Chiari and Capizzi all testified and affirmed that Brown and Chiari owned the firm and Frascogna and Capizzi were income partners only. Capizzi specifically testified as follows:

   - "I'm a partner in the income of the firm. And no matter how many times you want to say it, that's what it is. That's how it worked **and that's how it works today** [i.e. in 2005, subsequent to Mr. Frascogna's departure]. So, I'm a partner in the income of the firm, and that's what is being represented." Exhibit 157, Ex.B, pg.78.

   - "[I] never had a guaranteed share of the profits of the firm or operated pursuant to a written partnership agreement. I understood this was the system as did Mr. Frascogna. He was not a Brown Chiari partner and I **never intended** to operate with him as my partner. He has no right to assets of the firm or interest in its ongoing cases." Exhibit 157, Ex. A.

   - "I thought we were well compensated and I thought the system we had in place worked very well. And I also knew that, upon Frank leaving, **he didn't have an interest in that firm in terms of files and neither did I."** Exhibit 157, Ex. C, pg. 89.

   - "Neither Frank nor I were equity partners or a partner in the assets of that firm…neither he nor I owned any part of that firm. We had a right to share in the income of that firm." Exhibit 157A, Ex. A, pg 73.

   - "At the end of each year Mr. Brown alone and then with Don Chiari determined the distribution of the firm's net distributable income…We never had a guaranteed share of the profits of the firm." Trial Exhibit 157, Ex. A.

10. During the Frascogna litigation, Chiari testified that when he **initially joined** with Brown that his partnership interest was limited to sharing in the firm's income (i.e. an "income partner") at a percentage determined by Brown: "We were going to share in the net income at the end of the year, based loosely on percentages…Jim ultimately made a decision on what the percentages were going to be…" Exhibit 160-B, Exhibit B, page 15.

11. During the Frascogna litigation, Chiari testified that "Jim had me into his office and told me, he said that he thought we should be equal. That I brought in an awful lot of business in a short period of time. And he felt that we were going to be equal from here on out." Exhibit 160-B, Exhibit B, at page 19. Chiari testified that he and Brown agreed that any new cases

the firm acquired belonged to Brown and himself. Exhibit 160-B, Exhibit B, pg. 82. Chiari testified that he and Brown agreed "that we were equal in all respects, including management of the firm." Exhibit 160-B, Exhibit C, pg. 57.

12. Capizzi specifically testified during the Frascogna litigation in December 2005 and July 2006 as follows:

- That he had no ownership interest in the assets of the firm. Exhibit 157-A, Ex. B., pg. 90.

  Q. Do you know who has ownership of the assets of the firm?

  A. That would be Jim and Don. Exhibit 157, Ex. B, pg. 79.

- That various documents designating him as partner (partnership certificate, K-1's, pension trustee, banking authority, line of credit agreement etc.) meant only that "I was a partner in the income of the firm." Exhibit 157-A, Ex. A, pgs. 24-25, 43-46, 71-73.

- That "the deal" he agreed to was that he had no claim to the assets or ongoing cases of the firm if he resigned, but that he would be permitted to leave the firm with the files he had originated Exhibit 157-A, Ex. B, pg. 90: "[Frank] was like me. If I decided to leave, I couldn't take firm files with me. I could take my files. **That's been clear to me since I joined Jim in 1989.**"]

- That the agreement as to manner in which he was compensated had remained the same since he was initially hired by Brown, which involved a monthly draw and a bonus at the end of the year in an amount that Brown determined, and in later years, that Brown and Chiari jointly determined. Exhibit 157-A, Ex. A, pg. 57; Exhibit 157-A, Ex. B, pgs.77-78.

- That the guidelines established by Brown for the distribution of income were guidelines that were subject to change and were not guaranteed: "There is no guarantee, there has never been a guarantee since the day I started with Jim Brown." Exhibit 157-A, Ex. A, pgs. 74-75; "[I] never had a guaranteed share of the profits of the firm." (Exhibit 157, Ex. A, ¶ 6).

- Capizzi specifically testified that his compensation agreement was not tied to a specific guaranteed percentage:

  Q. So, in a sense, if the net dollars are reasonable, it doesn't really matter what the percentage is, is that correct?

  A. I would believe so, yes." (Exhibit 157-A, Ex. B, pg. 134.

13. The sworn testimony by Brown, Chiari and Capizzi in 2005 and 2006 during the Frascogna litigation describes their mutual agreement governing their relationship. Their respective intentions are fully described under oath therein.

14. During the instant trial, Capizzi introduced certain documents into evidence most of which were marked as exhibits in the Frascogna litigation. The documents reflected that Capizzi received a K1 tax form, held a capital account, was a trustee of the firm's pension plan, that the bank considered him to have check signing authority, was a signatory on the line of credit and that he was involved in procuring insurance on behalf of the firm. .However, Capizzi admitted at the instant trial that he had the same involvement at the time he testified in the Frascogna case that he was not an owner. SCTT, pgs. 682-696, 940-941, 980-86, 1008-1011. In fact, during the Frascogna case, Capizzi specifically refuted Frascogna's contention that those same documents were indicative of Frascogna being an owner. Capizzi testified in the Frascogna case that he was a trustee of the pension plan for "convenience" because "I was asked to do it by Jim. And I figured Jim had enough to do running the firm, so I certainly did it." Exhibit 157-A, Ex A, pgs 44, 46.

15. It was not Brown's nor Chiari's intention to indicate that Capizzi owned the law firm or to give him an ownership interest by virtue of his involvement with these activities: "I just asked him to do some administrative things that needed to be done…I did it because I knew I could rely on him to do it; not because of creating any ownership interest, just if I asked him to do things, he did them." JBTT 1991-1992.

16. On December 22, 2006, Justice Fahey issued a Memorandum Decision. Justice Fahey's Decision states that he is deciding a limited issue: "A trial was held…on the single question: Was Plaintiff Frascogna a general partner in the law firm of Brown, Chiari, Capizzi and Frascogna, LLP? Court Exhibit 1, pg. 2;

17. Justice Fahey made a "Finding of Fact" that Frascogna and Chiari intended to be partners. Nowhere in the decision does Justice Fahey state that Capizzi had the same intent, nor could he given Capizzi's sworn affidavit that he never intended to be an owner, not to mention his testimony at deposition and trial that he was not an owner. Court Exhibit 1, pg. 37; Exhibit 157A, Ex. A, pg 73; Exhibit 157, Ex.B, pg.78.

18. On January 11, 2018, during his deposition in the instant case, Capizzi "did a 180" by reconstructing his prior testimony in the Frascogna litigation. He claimed in his deposition that in spite of his intentions, in spite of his agreement with Brown, in spite of his conduct, in spite of his efforts to deny Frascogna an ownership interest in the firm, in spite of his own prior testimony, that Judge Fahey nevertheless decided to make him (Capizzi) an owner of the firm:

    Q. Is it your testimony now that you believe that you were an owner of that firm?

A. I believe Judge Fahey determined that I was. And it was a partnership, and we were equity partners. My legal conclusion was wrong.

Q. You thought you were giving a legal conclusion when you testified in that case?

A. My conclusion, whether you want to say it's legal or not, was mistaken. The judge ruled against us…

Q. Do you believe that Judge Fahey's ruling applied to you?

A. I do because of several comments by the judge during the case, and **maybe even** in his written decision about the identity of interest of Frank and me, or at least the similarity of our positions.

Q. So when was it that in your mind you concluded that you were in fact a partner in the Brown, Chiari, Capizzi Frascogna firm?

A. The decision came out in December of 2006. And that would be it.

Q. And that was the day you concluded that you were a partner in the firm?

A. Equity partner, yes. (Exhibit 201, pgs. 18-19, 20).

19. In spite of Capizzi's new-found fortune (i.e. that he began to believe he was "maybe even"an owner after reading Justice Fahey's decision), he admits that he never related his thoughts to Brown or Chiari:

Q. Okay. After the Fahey decision came out did you have any discussions with Jim Brown and Don Chiari about your status?

A. We just continued to work the way we had worked before.

Q. Did you tell them you thought, by virtue of Judge Fahey's decision, that you were an equity partner?

A. **No**, and neither did they tell me that they thought I was or was not either. **We never discussed it.** Just continued doing what we were doing. And my role in the management increased.

Q. Well, they had your testimony where you said you were not an equity partner.

A. Absolutely.

Q. Okay. But you didn't send them an email or say I wonder if Judge Fahey's decision makes me a partner, what do you guys think?

A. No.

Q. Did you ask them to memorialize that you were an equity partner at that time?

A. No, neither did they ask—neither did they memorialize that I wasn't. (Exhibit 201, at pages 32-33).

20. Although 10 years transpired between Justice Fahey's decision in 2006 and Capizzi's departure in 2016, he admits he **never** told Brown or Chiari that he considered himself an owner and takes the position that Brown and Chiari **should have known** by reading Justice Fahey's decision:

Q. Did you ever tell Mr. Brown or Mr. Chiari that you thought your conclusion given in your testimony in the Frascogna case was mistaken?

A. No, it was pretty evident by Judge Fahey's Decision. (Exhibit 201, pg. 47). …

Q. All right. Do you think Mr. Brown and Mr. Chiari were entitled to rely on the testimony that you had given in the Frascogna case where you indicated that you did not consider yourself an owner or member of the firm?

A. Not after Judge Fahey's Decision. Not at all.

Q. You didn't have any conversations with them about your position in that regard, did you?

Mr. Szanyi: Object to the form. It's been asked and answered. Multiple times.

Mr. Rupp: Different question.

Mr. Szanyi: No, it's not.

The Witness: What do you mean by my position in that regard?

Q. Well, you've been giving testimony in that case twice under oath, indicating that you did not consider yourself to be an owner or member of the firm?

A. That's accurate, given under what I knew at the time.

Q. I didn't ask you that. I asked you if you gave that testimony?

A. Absolutely.

Q. Were you, Mr. Brown and Mr. Chiari aware of that testimony?

A. They were there.

Q. Okay. And did any time after you gave that testimony, did you disavow it?

Mr. Szanyi: Object to the form.

Mr. Rupp: In any way?

Mr. Szanyi: It's been asked and answered specifically in that form. Go ahead.

The Witness: No.

Q. Did you take any steps whatsoever, conversations, memos, emails, in any respect to indicate to Mr. Brown and Mr. Chiari that you now considered yourself an equity partner in the firm?

A. There was no reason to disavow my prior testimony. Exhibit 201, pgs.53-54). …

Q. Was it your belief that Mr. Brown and Mr. Chiari knew in May and June of 2007 that you were an equity partner?

A. Yes.

Q. And what was your belief that they knew that?

A. Our continued carrying on of the business in the manner it was carried on while it was Brown, Chiari, Capizzi & Frascogna? The fact that we had changed absolutely nothing other than now I was more involved in the management, and now I was more involved in the firm. So we took no steps to undo what Judge Fahey decided. Exhibit 201, pg. 51.

21. Shortly after his resignation in January 2016, at Brown's suggestion, he and Capizzi had dinner at a local restaurant. Brown remarked to Capizzi at dinner "you know you're not an owner" and Capizzi replied "Fahey said I was…you paid Frank." SCTT 1122-1123; JBTT 4/17/19, pg. 69. Capizzi did not tell Brown that he had been made an owner on May 24, 2007 as Capizzi alleges in his complaint. JBTT, 4/17/19, pg. 69.

22. Capizzi admitted at trial that he told Mr. Brown at dinner that "Fahey said I was" an owner and that he told Mr. Brown that he **expected** any ownership claim he made would be contested. SCTT 1122-1123.

23. During the course of his entire **direct** testimony during the instant trial, Capizzi never mentioned any alleged "conversation" or any other communication he had with Brown or Chiari whereby it was agreed that he was an owner of the law firm.

24. It was not until the second day of Capizzi's cross examination that he sought to imagine that a conversation occurred after Justice Fahey's Decision that somehow conferred him an ownership interest:

Q. And do you agree [that in the Frascogna litigation when you testified] 'it's still variable', you were talking about your percentage of the profits at the firm of three that you had with Jim Brown and Don Chiari after Frank Frascogna left?

A. Yes.

Q. And you had an agreement with those individuals and you had had an agreement now with them now for over two years by the time you gave that testimony, correct?

A. Yes.

Q. And the agreement that you had with Jim Brown and Don Chiari two years into your partnership with them as partnership of three, was that your percentage of the income was still variable, meaning it could change?

A. Our agreement was that it went up, that's what I was referring to, it went up and could change. I agree with you.

Q. Is it your testimony then that your agreement with Don Chiari and Jim Brown was that your percentage of income could never go down?

A. Can you say that again?

Q. Mr. Rupp. Can I have that read back please. (Whereupon, the above requested [question] was then read back by the reporter).

A. I don't think I thought about it at that time, so I don't know.

Q. Well, if you didn't think about it, Mr. Capizzi, you certainly can't point to any agreement that gave you a guaranteed floor for your percentage, can you?

Mr. Szanyi: I'll object to the relevance of this Firm 2, whether it is or not, it's irrelevant.

Mr. Rupp: Judge, if I may. This is when there are three of them. This goes directly to the intent and the agreement between the three of them. SCTT, pgs. 925-926.

Question: Did you sit down with Jim Brown and Don Chiari on May 24th of 2007 and renegotiate the terms of your agreement with them that you had been operating under for three years and one month? (sic)

Mr. Szanyi: Just object to the form of the question because it assumes facts not in evidence. This agreement on Firm 2, there's been no evidence there was an agreement on Firm 2, and your questions about that were stricken as irrelevant.

Mr. Rupp: Judge, we believe there was an agreement that carried over beyond May 24th of '07. Their position may be different, but our position is valid and should be heard. This is cross examination. The terms of the agreement and the intent of the parties is critically relevant to this case, and we believe that that agreement and those terms were negotiated between the three men when there were three of them after Mr. Frascogna departed.

The Court: Okay. Ask a question that doesn't draw a form objection and you'll probably get an answer.

Q. Mr. Capizzi, is it your contention in this case that when the form that formed Firm 3 was filed in Albany on May 24, 2007, you sat down with Jim Brown and Don Chiari on that day and negotiated the terms of a new agreement?

A. Not that day.

Q. Okay. Do you agree that you had an agreement with them on the distribution of income and your status as a partner after Mr. Frascogna left for the three years and one month that you operated as a firm of three?

A. We did.

Q. And did some, Mr. Capizzi if not all of the terms of the agreement carry over beyond the filing of the May 24, 2007 certificate of registration?

A. No.

Q. Well, if you didn't renegotiate them on May 24, 2007, how did you know what you were going to receive as a draw check in June of 2007?

A. We had talked about it but I don't know when. We talked about going 40/40/20 as being the deal.

Q. And when did you have that conversation?

A. That's what I can't tell you.

Q. Did you flush out any of the other terms of your agreement with Mr. Brown and Mr. Chiari on or around May 24 of 2007, such as whether you would own the desks and equipment and computers?

A. My recollection is that we hashed out 40/40/20, that was the deal, that was the firm, that was the share of the income, and that's the portion of the firm that we owned—excuse me—owned.

Q. Owned, or was that the share of the income, Mr. Capizzi?

A. Both.

Q. And when did you have that conversation?

A. I can't tell you. I don't recall. SCTT, pgs. 928-930.

25. Capizzi was then questioned further by Mr. Rupp, and then the Court, concerning the alleged conversation:

Q. I didn't ask you what we all knew, I asked you about specific conversations where you were told you were going to be a twenty percent owner of the firm formed by the three of you following Frank Frascogna's departure, when did that meeting take place?

A. I just said, it was after Judge Fahey's Decision of December 22, 2006. I don't remember the exact date.

Q. Do you recall where it took place?

A. In our office.

Q. And who, between Mr. Brown and Mr. Chiari told you now you were going to go from an income partner, which you'd been in Firms 1 and 2, you were going to become an owner and equity partner in the firm?

A. Nobody said it that way—SCTT, pgs. 963-964…

Q. All right. So your answer was they didn't day it in as many words. So where is it that you came to the belief, as you have expressed to this Court, you were made an owner of the firm as opposed to an income partner?

A. I just told you, in a discussion that we had after Judge Fahey's decision of December 22nd.

The Court: Let's try it a different way. Tell me the discussion.

The Witness: We have this opinion—excuse me—decision from Judge Fahey. We got to pay Frank. We got to get together, we have to figure out what we're going to do in the future. This firm's going to be dissolved. In other words, Firm 2 and Firm 1 is going to be dissolved. We're going to go forward with the 20/20/40 (sic) with respect to income and that we are now partners as Judge Fahey has indicated. SCTT, pgs. 964-965.

26. The Court then questioned Brown and Chiari whether they agreed that such a conversation occurred. Brown told the Court that after Frascogna resigned "we had an agreement that at that time the percentages would be changed because Frank was no longer there, and we talked about 40/40/20, that that's what we would work with. Yes. The Court: In terms of sharing the profits? Mr. Brown: Sharing the profits, yes. And there was no mention of ownership or anything, that was pure fantasy." The Court then questioned Chiari who agreed with Brown. JBTT, pg. 968; Donald Chiari Trial Testimony (hereinafter, "DCTT"), pg. 968.

27. Capizzi's counsel repeatedly sought to claim that Capizzi's NDI distribution increased to 20% because of Justice Fahey's decision. Trial Transcript, 4/17/19, pg. 116. However, documentary evidence proves that Capizzi first received NDI of 20% in 2005 (one year prior to the decision) and that his distribution of 20% of NDI in 2006 occurred prior to the decision being issued. Exhibits 192, 187; Court Exhibit 1.

28. A Notice of Appeal of Justice Fahey's Memorandum Decision was filed on behalf of the firm and Brown, Chiari and Capizzi. Capizzi testified at trial that he participated with Brown, Chiari and Richard Sullivan, Esq. in the decision to appeal Justice Fahey's Memorandum Decision. SCTT 868.

29. Justice Fahey was appointed to a higher court shortly following the issuance of the Memorandum Decision, and the case was transferred to the Honorable John M. Curran. Justice Curran issued an order on January 22, 2017 "upon the Memorandum Decision of this Court dated December 22, 2006." Justice Curran specifically indicated that his order was not a judgment by crossing out the words "and judgment" and initialing it. Court Exhibit 5.

30. In April 2007 (approximately 4 months **after** Judge Fahey's Decision) Frascogna brought a motion seeking Brown, Chiari and Capizzi to purchase a $3,000,000 undertaking/bond. Court Exhibits 13, 14, 15.

31. Capizzi filed a Consent to Change Attorney in April 2007 asking Jim Mucklewee to represent him. Court Exhibit 12.

32. The reason Capizzi obtained separate counsel is there were discussions amongst Chiari, Brown and Capizzi that because Capizzi was not an owner of the firm it was unfair that he could potentially be obligated to purchase a bond and should be separately represented. DCTT, pg. 2813-2814. Although Capizzi retook the stand after Chiari's testimony in order to refute portions of it, Capizzi never attempted to refute the testimony concerning the reason he was separately represented nor to disavow his representations to Judge Curran.

33. Capizzi's counsel submitted papers on his behalf opposing Frascogna's motion. Capizzi's submission to Judge Curran provides the following:

- "Justice Fahey was at pains to make clear, he decided one, and only one, question: 'Was Plaintiff Frascogna a general partner in the law firm of Brown, Chiari Capizzi and Frascogna LLP?" Court Exhibit 14, Para. 3.

- "It has consistently been the position of the defendants that in the circumstances of this case, *and based upon the understandings that were had among the parties to this dispute at the time the firm was established*, the plaintiff has no interest in any file that remained at the firm subsequent to his departure…since it has not yet been established that Mr. Frascogna has any interest in income generated by the firm subsequent to his date of withdrawal, it is respectfully suggested that a ruling on these items should be held in abeyance pending resolution of that issue." Court Exhibit 14, Para. 4.

34. Settlement conferences took place before Judge Curran and Capizzi participated in those settlement negotiations without revealing to Justice Curran, Justice Fahey, Brown, Chiari, Mr. Sullivan or any other person that he no longer believed Frascogna was not an owner and that he himself believed he was an owner of the firm. SCTT, pgs. 867-870.

35. On or about May 24, 2007 a Certificate of Registration for Brown Chiari LLP (no comma) was filed in Albany. Exhibit 138. The certificate was filed because Frascogna was no longer associated with the firm and the firm had been advertising without using a comma in the name. JBTT, pgs. 2015-16.

36. The May 24, 2007 certificate was not intended to reflect or symbolize any change to the existing agreement between Brown, Chiari and Capizzi concerning their respective interests in the law firm. JBTT, pgs. 1999-2001.

37. On June 4, 2007, the New York State Department of Taxation and Finance sent a "LLC/LLP Request for Information" form seeking information concerning the owners of the partnership. Exhibit 141. Chiari understood the State to be requesting information concerning ownership

and identified himself and Brown as the only owners. DCTT, pgs. 2842-2844. Chiari signed the form on June 15, 2007 in order for it be filed with the State.

38. On January 8, 2016Capizzi resigned from the firm by leaving a note in the offices of Brown and Chiari at approximately 5 a.m. on January 8, 2016 without prior notice informing Brown and Chiari for the very first time that he considered himself an owner of the firm. Exhibit 140. The note indicates that he had already retained Mr. Szanyi as legal counsel and that he immediately would begin working at a competitor firm. Id.

39. Despite his complaint in the instant case that his ownership interest began upon the filing of the May 24, 2007 certificate, Capizzi admitted:

- That he never saw the May 24, 2007 certificate prior to the instant litigation. Exhibit 201, pg. 35;

- That he recalls no discussion concerning the May 24, 2007 certificate. Exhibit 201, pg. 34;

- That he assumes he discussed it with Brown or Chiari, but that he does not know when. Id.

- That prior to departing the firm, he obtained copies of all the 2014 memorandums and agreements involving himself, Brown and Chiari and maintained them because "they involved me, and my future interest in the firm, my ability to continue there." Exhibit 201, pgs. 36-37. However, he admitted he did not obtain a copy of the May 24, 2007 filing relative to Brown Chiari LLP upon which he bases his claim of ownership. Id.

- Even though the resignation note referenced above indicates he had already retained legal counsel, the note itself does not reference the current name of the firm as of May 24, 2007, but rather the predecessor name with the comma included. Exhibit 140.

- At the dinner meeting referenced above, Capizzi did not refer to the May 24, 2007 filing, instead referring to Justice Fahey's decision as the basis of his ownership claim.

- Even as late as 2014, when attempting to obtain money from the bank, Capizzi is still making reference to firm's name including a comma despite his complaint in this case asserting that eight years earlier he had been made an owner in the Brown Chiari LLP (no comma) firm. Exhibit 85.

40. Capizzi admittedly was never involved in the annual end of the year meetings held between Brown and Chiari where attorney and staff compensation was decided. SCTT, pgs. 1003-4.

41. Capizzi admitted to never receiving information concerning the compensation paid to attorneys and staff. SCTT, pgs. 1004-1005.

42. Capizzi admittedly never reviewed the firm's books or tax records. Id.

43. As with all other attorneys at the office, Capizzi received his case assignments from Brown and Chiari. DCTT, pgs. 2864-2865

44. Capizzi did not have authority to settle higher value cases without the approval of Brown or Chiari. DCTT, pg. 2942; JBTT, pg. 2201-2.

45. By 2014, the office dynamics were changing. Brown had begun to receive fewer construction case referrals and therefore Capizzi, who worked primarily under Brown, was generating less revenue. JBTT, 4/17/19, pgs. 38-39. Capizzi was not involved in the firm's medical malpractice and was uninvolved in the nursing home practice. DCTT, pgs. 2854-2857.

46. Consequently, in 2014, a discussion occurred among Chiari, Brown and Capizzi wherein an understanding was reached regarding a new method of distributing NDI, as documented in an internal memorandum dated June 30, 2014. Exhibit 82.

47. The memorandum states that rather than using a percentage as a guideline that respective contributions would be evaluated and NDI distributed accordingly. It was further agreed that if any funds remained they would be divided 40/40/20. Id.

48. The memorandum concludes by stating "This method seems to have been agreed upon. Please feel free to comment on this memo…" Id.

49. Capizzi testified at trial that that he received the memo and that it reflected an agreed departure from the prior method of distributing profits. SCTT, pgs. 1060-61.

50. Capizzi acknowledged that his only response to the memorandum, either in writing or verbally, was a memorandum he wrote nine days later stating in its entirety that "I just want to follow up on Don's June 30, 2014 memo. The only thing I wanted to add is that I expressed an interest in being in more of the television commercials." SCTT, pgs. 1061-1062.

51. Brown testified that he and Chiari retained the ability, irrespective of the June 2014 memorandum changing the method of income distribution, to determine the amount of Capizzi's compensation because "the agreement that [Capizzi and I reached] reached many, many years ago, provided that I could determine the amount to be distributed, and to whom at the end of the year, and subsequently, after Don had been with me for a period of time, it changed to Don and myself. It's Sam's testimony in the Frascogna case. It was [Sam's]

testimony in 2005, in 2006 when the Frascogna firm didn't even exist, and it's been the practice ever since, it was always that way." JBTT, pgs. 2195-2196.

52. In November 2014, Capizzi applied for a refinance mortgage of his home. The loan officer, in seeking to establish proof of income potential, required a statement proving Capizzi's ownership interest in the firm for the loan to be approved. Exhibit 85. Capizzi did not ask Brown or Chiari to describe his interest in the firm, and instead contacted Sandra York, a Junior Accountant at the accounting practice utilized by the firm, requesting that she send a letter to M&T Bank that Capizzi drafted stating that Capizzi "is the owner of 20% of the law firm partnership of Brown Chiari, LLP." Id.

53. Sandra York copied Capizzi's proposed letter verbatim and sent it M&T Bank and the mortgage was approved that same day. Id.

54. Mr. David Barrett, the Senior Accountant at the accounting practice utilized by the firm, testified he was Sandra York's supervisor. He testified that Capizzi never contacted him and that he was unaware that Sandra York had communicated with Capizzi. He further testified that the accounting firm, including Ms. York, lacked sufficient information to make that representation to M&T Bank. Barrett Trial Testimony, pgs. 1311-1313.

55. Although M&T bank believed Capizzi's right to income was linked to a percentage ownership interest, Capizzi did not inform M&T Bank that in June 2014 his method of compensation was dependent upon his contribution to the firm and would in any event be independent of any ownership interest. Zaleski Trial Testimony, pgs. 1917-18; 1965.

56. In December 2014 a meeting was held between Chiari and Capizzi with Brown participating by telephone. Capizzi provided Chiari a list of cases he claimed to have been involved with. Exhibit 150. After discussion a distribution of profit was made.

57. Although Capizzi now claims he was entitled to 20% of NDI, he admits that he made no such claim or representation at the time of the 2014 distribution or thereafter:

    Q. Exhibit 155, at page 85, line 2. Referring to that meeting, you were asked: At any time did you tell Mr. Chiari in sum or substance, or Mr. Brown, I'm a twenty percent equity partner in this firm, you can't unilaterally decide to pay me less than twenty percent of the profits? Your answer was: I did not, because I had to continue to work. I didn't have any place to go. Did you give that testimony back on January 11 of 2018, Mr. Capizzi?

    A. That's exactly right. SCTT, pgs. 1107-1108.

58. Capizzi admitted at trial that he never communicated to Brown or Chiari any dissatisfaction with the process by which the evaluation meeting at the end of 2014 occurred. SCTT, pgs. 1082-1083, 1104.

59. Capizzi was aware at the end of 2014 that the evaluation process agreed upon resulted in a substantial income reduction to Brown as compared to the prior year. SCTT, pg. 1094.

60. Capizzi now claims that only Brown, and not himself, should ever receive a lower percentage of the firm's profits than had been received the prior year. SCTT, pgs. 1070-1071.

61. Despite now claiming that he was deprived of his legally entitled income, Capizzi admittedly never told Brown or Chiari until he sued the instant case. To the contrary, in April 2015, Capizzi emailed Brown expanding upon discussions they engaged in relative to bringing in new business to increase their respective contributions and income. Exhibit 84. Capizzi begins the email stating "I have been thinking about new sources of business since our discussions last year" and describes several new sources of revenue Capizzi states he is interested in pursuing, most of which involved a significant departure from his prior practice. Id.

62. Capizzi has admitted to having undisclosed secret discussions and meetings with William Collins about joining his firm, but claimed that those discussions did not occur until October 2015 SCTT, pg. 800. However, in September 2015, Capizzi asked Brown to meet in the office with a potential client who was considering retaining the firm. JBTT, 4/17/19, pgs. 45-49. The client was approximately 20 years old and had been a passenger in a severe auto accident sustaining significant spinal injuries requiring extensive surgery. Id. Capizzi was having difficulty getting the potential client to sign the retainer agreement and asked Brown to come into the meeting with the client. Id. Brown met with the client and the client agreed to sign the retainer. After the meeting, Capizzi asked Brown to acknowledge in writing on the retainer agreement that Capizzi had originated the case. Id. Brown wrote on the retainer agreement "This is actually a referral to Sam Capizzi, and not to me" intending the notation to ensure that Capizzi would receive credit for originating the case. Id.; Exhibit 169.

63. Capizzi acknowledged in his trial testimony that that he did not have much time to work on office files in 2015. He told this Court that 2015 was a "very very busy year for me to being in my own work" and that "I really didn't have much time to do other work." SCTT, pg. 1101.

64. The files that Capizzi spent so much time originating in 2015 that he didn't' have time to do other work, including the file Capizzi asked Brown to document that Capizzi originated referenced above, were transferred to the Collins firm following Capizzi's resignation.

65. Capizzi testified at trial that he was "ninety-nine percent sure" he was leaving the firm to join Mr. Collins when he left for Italy on December 19, 2015 and that the "main reason" he did

not resign prior to the end of the year is that he wanted to make sure that he got his end of the year checks. SCTT, pgs. 1108-09.

66. Capizzi admitted that did not request that the end of the year evaluation meeting occur prior to his departure to Italy and he did not contact Mr. Brown or Mr. Chiari while in Italy concerning the evaluation meeting. SCTT, pgs. 1111-12.

67. In January 2015, eight years after Justice Fahey's Decision, Capizzi still described his interest in the law firm as an agreement to share income after payment of expenses. This was documented in an email Capizzi wrote to his accountant that was obtained from his computer at Brown Chiari subsequent to his departure. Exhibit 87. The email informs his accountant that the government seeks information regarding his assets as part of an aid application for college financial aid. Capizzi inquired of his accountant "Can I answer 0 for the law partnership because there is no market for it? I can't sell, mortgage or exchange my interest in the law partnership. **Really, it's just an agreement to share the profits after we pay expenses,** and as we know from the past few years, income is all over the place." Id.

68. Almost ten years prior to the above mentioned email, during the Frascogna litigation, Capizzi described his interest in the law firm the same way: **"Really, [I'm compensated] the same way I'm compensated today, out of the net income of the firm, usually at the end of the year**." Exhibit 157-A, Ex. B, pgs.77-78.

Respectfully submitted,

Dated: August 1, 2019
Buffalo, New York

RUPP BAASE PFALZGRAF CUNNINGHAM LLC
Attorneys for Defendants

By: /s R. Anthony Rupp III
R. Anthony Rupp III, Esq., of Counsel
James Graber, Esq., of Counsel
1600 Liberty Building
Buffalo, New York 14202
(716) 854-3400

PRINTING-SPECIFICATIONS STATEMENT

I hereby certify that the foregoing document was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	12
Line spacing:	Single

The total number of words in this document, pursuant to the word count of Microsoft Word, inclusive of point headings and footnotes, and exclusive of the caption, signature block, and this statement, is 6,866.

Dated: August 1, 2019
Buffalo, New York