To be Argued by:
KEVIN A. SZANYI
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New York Supreme Court

Appellate Division—Fourth Department

SAMUEL J. CAPIZZI,

Plaintiff-Respondent,

Docket No.:
CA 19-01828
CA 19-02042

– against –

BROWN CHIARI LLP, JAMES E. BROWN,
and DONALD P. CHIARI,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT IN RESPONSE TO APPELLANT JAMES E. BROWN

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Preliminary Statement

Plaintiff-Respondent Samuel Capizzi ("Capizzi") submits this brief in response to the brief submitted by Defendant-Appellant James Brown ("Brown"). Capizzi is submitting a separate brief in response to the brief submitted by Defendants-Appellants Brown Chiari LLP ("BCLLP") and Donald Chiari ("Chiari"). Brown, Chiari and BCLLP will be collectively referred to herein as "Defendants."

Brown's brief focuses *entirely* on his appeal from the lower court's September 13, 2019 order (R.4). Brown provides this Court with no argument or reason why the lower court's October 15, 2019 order (R.24) should be reversed. As such, Brown's appeal from this second order has been abandoned and should be dismissed.[1]

The September 13, 2019 order ordered and declared that "*as of the date of his resignation from [BCLLP] on January 8, 2016*, [Capizzi] was an equity partner in [BCLLP]." (R.18, emphasis added) Thus, although Capizzi was an equity partner in BCLLP *ab initio*, this appeal only concerns Capizzi's status *on January 8, 2016*.

[1] An appellant who fails to address an issue in his brief is deemed to have abandoned that issue. *Ciesinski v. Town of Aurora*, 202 A.D.2d 984 (4th Dept. 1994); *McNeil v. Deering*, 120 A.D.3d 1581, 1582 (4th Dept. 2014).

Brown's appeal rests entirely on his assertion that Capizzi cannot be an equity partner in BCLLP on January 8, 2016 because Capizzi testified *ten years earlier* in a *different lawsuit* that he did not intend to be an owner in a *different limited liability partnership*.

Counterstatement of Questions Presented

Brown's "Question Presented" asks if the Court below erred by declaring Capizzi an equity partner of *BCLLP* when Capizzi previously "affirmed under oath" that he was not an owner of "*defendants' law firm*" (emphasis added). Brown does not define "defendants' law firm," thereby attempting to mislead this Court into believing that BCLLP and "defendants' law firm" are one and the same. They are not. BCLLP did not even exist when Capizzi "affirmed under oath" that he did not consider himself an owner of *a different law firm*.

The Capizzi testimony on which Brown relies occurred *in 2005 and 2006*, and it was given in a lawsuit brought by Frank Frascogna (Frascogna") against Capizzi, Brown, Chiari and a limited liability partnership, Brown, Chiari, Capizzi & Frascogna, LLP ("the Frascogna firm"). Following a trial before Supreme Court Justice Eugene M. Fahey, the Frascogna firm was judicially dissolved on January 22, 2007 by the order of Supreme Court Justice John M. Curran (R.3498), and the Frascogna firm's status as a New York

limited liability partnership was voluntarily "terminated" by the filing of Certificate of Withdrawal by Brown shortly thereafter. (R.3674)

Brown's "Questions Presented" -- indeed Brown's entire appellate brief -- attempts to confuse this Court *by conflating two different limited liability partnerships*.

Because Capizzi has ***never*** "affirmed under oath" that he was not an owner of BCLLP -- i.e., *the legal entity involved in this lawsuit* -- the questions presented on this appeal are as follows:

QUESTION PRESENTED #1: When someone testifies he is not an owner of a limited liability partnership, is he precluded from subsequently becoming an owner of a different limited liability partnership?

ANSWER of the trial court: No.

QUESTION PRESENTED #2: Examining the parties' relationship as a whole, was Capizzi an equity partner of BCLLP when he withdrew from the partnership on January 8, 2016?

ANSWER of the trial court: Yes.

Procedural History

Capizzi commenced this lawsuit on September 13, 2016 and filed an Amended Complaint on March 27, 2018. (R.3438) Capizzi's complaint requested, *inter alia*, the dissolution of BCLLP and an accounting. Brown answered the Amended Complaint on April 24, 2018, denying that Capizzi was an equity partner in BCLLP. (R.3447)

The trial court bifurcated the case and ordered a trial "as to the partnership issues." (R.6056) The trial was conducted over a 20-day period commencing May 29, 2018. Live testimony concluded on May 29, 2019.

Brown's defense at trial focused on the statements made by Capizzi in the *Frascogna* litigation about the Frascogna firm. On September 13, 2019, the trial court rejected Brown's attempt to combine the two different legal entities, noting that its decision was based solely "on the evidence before this Court," and resolved the "partnership issues" in Capizzi's favor. Judge Walker then "ORDERED AND DECLARED, as of the date of his resignation from [BCLLP] on January 8, 2016, Plaintiff, Samuel J. Capizzi, was an equity partner in the [BCLLP] law firm." (R.4, 18)

On October 15, 2019, Judge Walker signed an order dissolving BCLLP, effective January 8, 2016. (R.24, 26)

Statement of Facts

While it is true that Capizzi, Brown and Chiari previously worked together at the Frascogna firm, discussed below, this lawsuit and this appeal concern a different partnership. The partnership *in this lawsuit* is BCLLP, a limited liability partnership "without limited partners," that was registered with the New York Department of State on May 24, 2007. (R.3671)

Capizzi withdrew from BCLLP on January 8, 2016. (R.5418) As a result, the facts relevant to this lawsuit are those which bear on the question decided by the trial count – namely, Capizzi status as an owner/equity partner in BCLLP *on January 8, 2016*.

A. BCLLP

As discussed in greater detail later in this brief, and in Capizzi's brief in response to Chiari's appeal (*see* pages 10-15), during the eight year and eight month period of BCLLP's existence (May 24, 2007 to January 8, 2016), the following facts are undisputed:

- BCLLP operated without a written partnership agreement. (R.147-48)
- Capizzi, Chiari and Brown always held themselves out as partners. (R.3169-70)

- Capizzi is not identified as a "non-equity partner" or as an "income partner" in any BCLLP documents. (R.2382-83, 3125-26)
- Capizzi, Chiari and Brown always shared 100% of the profits of BCLLP. (R.2331, 3086, 4150-51, 5425)
- BCLLP filed state and federal tax returns identifying only Capizzi, Chiari and Brown as partners. (R.4510-4751)
- BCLLP's tax returns, signed by Brown and Chiari under penalty of perjury, state that no one "own[ed], directly or indirectly, an interest of 50% or more in the profit, loss or capital of the partnership." (Exhibits 95-102, Schedule B(3)(b), R.4532, *et seq*.)
- Capizzi, Chiari and Brown were the only individuals at BCLLP to receive K-1s as opposed to W-2s, and the K-1s listed each partner's share of BCLLP's "recourse" (i.e., personal) liabilities. (R.4217-94; *see* "line K").
- Capizzi owned one-third of the real estate and buildings used by BCLLP. (R.709-10, 725, 3677-79)

- Capizzi personally guaranteed BCLLP's line of credit with M&T Bank, exceeding $1 million, which was used to pay BCLLP disbursements. (R.3741, 3745)
- Capizzi, Chiari and Brown each signed banking resolutions confirming that ***each*** of them was, *inter alia*, authorized to borrow money and to sign agreements on behalf of BCLLP. (R.3715, 3725, 3750)
- BCLLP's accountants referred to Capizzi as an owner in their internal records and in formal correspondence. (R.1281-83, 3816, 4174-75)
- In 2011, Brown drafted and circulated a "death agreement" which referred to Capizzi as a "member" of BCLLP, and proposed to pay Capizzi's estate a share of BCLLP's profits for 13 years after Capizzi's death. (R.520-26, 3756-61)
- BCLLP procured and paid for life insurance insuring only Capizzi, Chiari and Brown. (R.555)
- Starting in 2012, BCLLP modified its pension plan to benefit the owners of BCLLP. In a meeting with a new pension consultant, Capizzi was identified as an owner, and when new pension plan documents were created pursuant to ERISA

regulations, Capizzi was identified as an owner. (R.743-44, 1829, 3922)

- In correspondence with his personal accountant, Capizzi identified himself as an owner of BCLLP. (R.5422)
- In his son's Wake Forest University financial aid application, Capizzi represented to the college that he owned 20% of BCLLP. (R.2706, 5847-48)
- Capizzi participated in the management of BCLLP's business. (*See* Capizzi's brief in response to Chiari's appeal, at pp 61-67)

Mentioning only some of this evidence in his decision, Judge Walker concluded that Capizzi was an equity partner in BCLLP when he withdrew from BCLLP on January 8, 2016.

Before moving on to a discussion of the Frascogna firm and the litigation concerning that firm, there are a number of false statements contained within Brown's statement of "facts" that require a response:

- At page 9, Brown states "Capizzi had no authority to settle higher value cases without the approval of either Brown or Chiari," citing page 2969 of the record. There is no support for this claim on page 2969, or elsewhere.

- At page 9, Brown claims "Capizzi admitted he was never involved in the year-end meetings held where Brown and Chiari determined attorney and staff bonuses," citing pages 1029-31. On pages 1030-31, Capizzi testified that Chiari primarily handled this with "input" from Capizzi and Brown acting in an "advisory role."
- On page 10, Brown states "For several years leading up to 2014, the method of dividing NDI [net distributable income] utilized as a guideline the percentage received the prior year," citing page 4151. Page 4151 is the second page of a memorandum memorializing a change to the parties' prior ***agreement*** to share profits using ***fixed*** 40/40/20 percentages. (R.2331, 3086, 3097-98) It was ***not*** a "guideline."
- On page 10, Brown claims "Capizzi admitted that he did not claim at the end of 2014 to be an owner of the firm, or that he must be paid 20% of NDI pursuant to any partnership agreement," citing page 1119 of the record. Nothing on page 1119 supports this allegation and, in fact, on page 815 of the record, Capizzi testified that he ***did*** claim that he was entitled to 20% at the end of 2014.

- On page 10, Brown alleges that "Capizzi further admitted that… he never communicated to Brown or Chiari any dissatisfaction with the process by which he was evaluated and compensated" in 2014, citing pages 1109-10 and 1131. On page 1109, referring to year-end 2014, Capizzi was asked by Brown's counsel if he complained about "the process" when Capizzi told Chiari "it's not fair," and Capizzi responded "I was talking about the process…" And on page 1131, Brown's attorney asked Capizzi "so you knew from your experience in 2014 or at least it was your perception that the process that was followed in the end of 2014 wasn't fair to you, correct?" Capizzi responded "There wasn't a process followed." Thus, it is ***absolutely false*** to say that Capizzi "never communicated any dissatisfaction with the process."
- On page 12, Brown claims the reason Capizzi did not withdraw prior to the end of 2015 is that he wanted to make sure he got his year-end "bonus," citing pages 1135-36. The word "bonus" does not appear on these pages, and Brown knows full well that Capizzi never received a "bonus." As explained later in this brief, the parties always had agreements on how to divide the

firm's "*profits,*" and Brown is simply trying to be clever by using the word "bonus."

- On page 13, Brown claims that "Capizzi never informed Brown or Chiari [that he was an equity partner] until he abruptly resigned to join a competitor [on January 8, 2016]," citing pages 4793 and 5950. Page 4793 is Capizzi's withdrawal letter dated January 8, 2016, and page 5950 is a page from Capizzi's deposition where he was asked if he told Brown or Chiari that he "thought" he was an equity partner "by virtue of Judge Fahey's decision." These citations clearly do not support Brown's claim and, in fact, on page 1040, Capizzi testified that he told Brown and Chiari "many times" that he considered himself to be an equity partner of BCLLP. This is consistent with Capizzi's deposition testimony, at pages 5969-70, where Capizzi testified he had "many discussions" with Brown and Chiari about ownership.

B. The Frascogna Firm And The *Frascogna* Litigation

Brown's brief contains almost no discussion of relevant events that occurred from May 24, 2007 through January 8, 2016. Instead, Brown focuses on events *prior to* BCLLP's creation – events which concern a different law firm (the Frascogna firm) and a different lawsuit (the *Frascogna* lawsuit).

Given Brown's heavy reliance on the Frascogna firm and the *Frascogna* litigation, Capizzi will provide this Court with an accurate chronicle of events related to that law firm and that litigation, which concluded in 2007.

On December 16, 1997, a certificate of registration was filed with the New York Department of State for a limited liability partnership named Brown, Chiari, Capizzi & Frascogna LLP (as defined previously, "the Frascogna firm"). (R.3663)

On March 20, 2002, the Frascogna firm filed a Business Certificate for Partners ("d/b/a" certificate) to conduct business under the name "Brown, Chiari." (R.3666)

On April 21, 2004, Frank Frascogna ("Frascogna") withdrew from the Frascogna firm (R.3504 ¶17) and, on August 18, 2004, he commenced a lawsuit against the Frascogna firm, Brown, Chiari and Capizzi to dissolve the Frascogna firm. (R.3501) In his complaint, Frascogna alleged that *all four* men – *including Capizzi* – were general (i.e., equity) partners in the Frascogna firm.

(R.3503 ¶8) Capizzi was also specifically alleged to be "a necessary party to the relief requested" (i.e., dissolution). (R.3502 ¶6)

On December 29, 2004, the name of the Frascogna firm was formally amended and changed to "Brown Chiari, LLP" (with comma) by the filing of a Certificate of Amendment with the New York Department of State. (R.3669) Because this was only an amendment/ name change, the legal entity (referred to herein as "the Frascogna firm") remained the same.

Following a bench trial, on December 22, 2006, Supreme Court Justice Eugene Fahey issued a 43 page decision in Frascogna's favor, concluding that Frascogna was a general (i.e., equity) partner in the Frascogna firm and entitled to an accounting. (R.3395-3437)

In support of his conclusion that Frascogna was an equity partner in the Frascogna firm, Justice Fahey specifically identified five documents which "*support the existence of a partnership with four partners*" – namely, (1) partnership tax returns identifying *all four men* as partners; (2) bank resolutions whereby *all four men* signed off on broad authority for each other to conduct transactions with the bank; (3) a $500,000 line of credit guaranteed by *all four men*; (4) a "draft" of a "death-agreement" wherein *each of the four men* agreed to pay the others full and then decreasing shares of income for up to eight years following the death of any of the four men; and

(5) the d/b/a business certificate signed by *all four men*. (*See* page 35 of Justice Fahey's decision, R.3429, emphasis added)

Although all five documents were obviously significant, Justice Fahey added that Frascogna's "responsibility for obligations and liabilities" of the Frascogna firm was a "particularly" compelling fact supporting ownership. (R.3436)

Brown, Chiari and Capizzi all testified in Frascogna's lawsuit, and all denied that Frascogna was an equity partner.

As noted *ad naseum* by Brown, Capizzi also testified that he did not consider himself an equity partner in the Frascogna firm. Capizzi has never denied giving this testimony in 2005 and 2006 and he has never attempted to "recant" this testimony. As he explained to Judge Walker, Capizzi did not consider himself an equity partner at the Frascogna firm because he had not made a "cash" capital contribution, and because he did not have any management responsibilities. (R.661-667) It bears repeating that Capizzi's testimony was *prior to* Justice Fahey's decision concluding that the Frascogna firm was a "partnership with four partners." Thus, Capizzi's testimony about his status at the Frascogna firm must necessarily be viewed under two different lights: what Capizzi knew and thought *before* Justice Fahey's decision, and what he knew and thought *after* Justice Fahey's decision.

When Justice Fahey was appointed to this Court, Justice Curran signed an order striking "any denial of Frascogna's status as a general partner with Brown, Chiari and Capizzi." (R.3498)

A notice of appeal was filed, but no steps were taken to perfect the appeal. As Capizzi explained, "[i]t was really just for leverage. There was no intent to pursue it." (R.1186) Or, as Judge Walker observed, "[l]awyers file notices of appeal every day, not because they think necessarily they have a strong argument on appeal, but as a negotiating tool." (R.899)

In the weeks that followed the filing of Justice Curran's order dissolving the Frascogna firm, the parties to the *Frascogna* litigation, including Capizzi, attended settlement conferences. (R.680) During this time, Capizzi, Chiari and Brown had "a conversation or two or three about Judge Fahey being correct" (R.902) before ultimately agreeing to pay Frascogna $400,000 to resolve his claims (R.681). All three agreed the settlement was a "great deal." (R.683)

The $400,000 settlement to Frascogna was paid out of *the BCLLP operating account* in September and December 2007, i.e., after BCLLP was established on May 24, 2007. (R.164, 219, 683) As discussed later in this brief, at pp. 33, 34, Capizzi paid $80,000, or 20%, of the $400,000 paid to Frascogna.

The limited liability partnership referred to herein as the Frascogna firm continued to exist until it was dissolved by Justice Curran's order on January 22, 2007 (R.3498) and "terminated" by the filing of the Certificate of Withdrawal on May 29, 2007. (R.3674)

C. Brown's And Chiari's Testimony In The *Frascogna* Litigation

Brown claims that Capizzi's testimony in the Frascogna case is "directly relevant to this lawsuit" (Page 5). Conspicuously absent from Brown's brief, however, is any discussion of the testimony offered by Brown and Chiari during the *Frascogna* litigation *concerning Chiari's status at the Frascogna firm*, before and after Frascogna left in 2004.

Chiari was also not an owner of the Frascogna firm, according to Brown's and Chiari's testimony in the *Frascogna* lawsuit. Chiari's testimony from the *Frascogna* lawsuit is set forth in Capizzi's brief in response to Chiari's appeal. (*See* pages 31-35) Brown testified that Chiari's status at the Frascogna firm changed in 1999 or 2000 but, according to Brown, that did *not* mean that Chiari was given an ownership interest in the Frascogna firm. Brown testified that Chiari was *not* given "an owner interest" in the firm's files; that Chiari did *not* make a capital contribution; and that Chiari did *not* "acquire any assets." (R.5517-22) And when asked a second time if Chiari's designation as a "partner" signified "anything" in terms of ownership," Brown responded by

stating that Chiari had "not really" acquired any assets because Chiari did not pay any money to Brown, and if someone wanted to acquire some of these assets from Brown, they "absolutely" had to give him some money. (R.5523-24)

Chiari's and Brown's testimony that Chiari was not an equity partner in the Frascogna firm, before and after Frascogna's departure, is exactly the same thing Capizzi said about himself -- testimony which Brown claims should prevent Capizzi from being an equity partner at BCLLP. Apparently, however, the fact that Brown and Chiari testified that Chiari was not an equity partner in the Frascogna firm does not preclude Chiari from being an equity partner at BCLLP, because Brown now claims that Chiari *is* an equity partner at BCLLP. Brown's hypocrisy is palpable. If Chiari's and Brown's testimony in *Frascogna* does not undermine Chiari's status as an equity partner at BCLLP, the same is true for Capizzi.

D. BCLLP Was Established ***Because*** The Frascogna Firm Was Dissolved And Terminated

At page 8, Brown asserts as "facts" that the Certificate of Registration which established BCLLP on May 24, 2007 (R.3671), and the Certificate of Withdrawal for Frascogna firm on May 27, 2007 (R.3674), were filed for reasons *unrelated* to Justice Fahey's decision and Justice Curran's order dissolving the Frascogna firm. Brown cites pages 2015-16 of the record as support for these claims, but none exists. Brown's explanation for these events is also disputed by both Capizzi ***and Chiari***, and by common sense.

Brown offers two reasons for the filings in May of 2007 – namely, (1) to "clarify that Frascogna was not associated with the firm," and (2) "to be consistent with ongoing advertising." Regarding the first explanation, Frascogna left the firm *more than three years earlier*, in April 2004, and this is precisely why the firm's name was formally amended and changed from "Brown, Chiari, Capizzi & Frascogna LLP" to "Brown Chiari, LLP" ***on December 29, 2004***. (R.3668) In other words, Frascogna's absence was "clarified" 37 months earlier when his name was ***formally*** removed from the firm's name.

The second purported purpose, advertising, is equally illogical because the Frascogna firm had been doing business and advertising under the name "Brown Chiari" ***for at least five years*** prior to May 2007, while

Frascogna was still at the firm (R.169, 657-58, 2427), as evidenced by the d/b/a certificate filed *on March 19, 2002*. (R.3665)

It was no coincidence that a document was filed with the New York Department of State formally terminating the partnership that had been dissolved by Justice Curran, and it was also no coincidence that a completely new legal entity was created at the same time. As Capizzi explained at trial, once Justice Curran dissolved the Frascogna firm, the protection afforded to the partners *of that firm* by the Limited Liability Partnership Laws ceased to exist, along with the law firm itself. (R.685) In fact, even Chiari has conceded that the filing of the Certificate of Registration for BCLLP on May 24, 2007 was "*obviously because of the dissolution*" ordered by Justice Curran. (R.3164-67)

At page 34, Brown claims Capizzi "recalls no discussion concerning" the May 24, 2007 Certificate of Registration for BCLLP. This is another false statement by Brown. Brown cites pages 5952-53 as support for his claim. These are pages from Capizzi's deposition. But at page 5952, Capizzi testified: "I know we had a discussion about new paperwork having to be filed because the former firm was dissolved."

Burden Of Proof/ Standard Of Review

A. The Burden Of Proof Was On Brown

As Judge Walker correctly concluded (R.16-17), where, as here, Capizzi, Brown and Chiari shared 100% of the partnership's profits, filed tax returns identifying each other as partners, and held themselves out to the public as partners, *the burden of proof shifted to Defendants, as the parties opposing partnership*, to demonstrate that Capizzi *was not* an equity partner. *Kirsch v. Leventhal*, 181 A.D.2d 222, 224 (3d Dept. 1992); *see also Frascogna,* at page 39 (R.3433) ("in the absence of a written partnership agreement… the filing of partnership income tax returns, the actual sharing of profits and the parties' holding themselves out as a law partnership… amount to a *prima facie* showing that there is a partnership and… the burden of proof them (sic) shifts to the parties opposing the accounting.")

B. The Standard Of Review

Capizzi does not dispute that this Court has "the power to set aside the trial court's findings if they are contrary to the weight of the evidence and to render the judgment… warranted by the facts." *Brown v. State*, 144 A.D.3d 1535, 1538 (4th Dept. 2016), *aff'd*, 31 N.Y.3d 514 (2018). "That power may be appropriately exercised, however, only after giving due deference to the court's evaluation of the credibility of witnesses and quality

of the proof." *Id.; see also Farace v. State*, 266 A.D.2d 870 (4th Dept. 1999) ("On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence."); *Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest.*, 169 A.D.2d 829, 830 (2d Dept. 1991) ("…the trial court's determination will generally not be disturbed on appeal unless it is obvious that the conclusions could not be reached under any fair interpretation of the evidence").

Argument

Point I. Brown Attempts To Conflate Different Partnerships

The goal of Brown's brief is to blur the Frascogna firm's demise and the creation of BCLLP so that he can transpose Capizzi's statements about the former to the latter. This effort is highlighted by Brown's use of the terms "the law firm" and "defendants' law firm" interchangeably throughout his brief without identifying the specific partnership. For example, at page 25 of his brief, Brown states "…there is no direct or better evidence than Capizzi's own testimony that he is not and never considered himself to be an owner of defendants' law firm." Which "law firm" is Brown referring to? The Frascogna firm? BCLLP? Why does he not tell us?

The answer, of course, is that Brown is *intentionally* conflating the different law firms in a misguided attempt to convince the Court that Capizzi was giving testimony about BCLLP when, in fact, BCLLP did not even exist when Capizzi testified in the *Frascogna* lawsuit.

The Frascogna firm and BCLLP are undeniably separate and distinct legal entities. Judge Walker recognized this fact *on the very first day of trial* when he instructed Brown's counsel to specifically identify which firm he would be talking about during trial. (R.63, *et seq.*) Arrogantly, Brown has ignored that reasonable instruction on appeal and this Court is therefore cautioned, respectfully, to keep these distinctions in mind when reading Brown's brief.

Related to his effort to conflate the Frascogna firm and BCLLP, Brown claims that by "disregarding" Capizzi's testimony in *Frascogna*, Judge Walker ignored "the practical and legal reality that the departure of a single attorney, even a partner in a firm, does not eradicate and void the agreement between those remaining." (Page 27) This is an incorrect statement of the law in New York. When an partner withdraws from a partnership without a written partnership agreement and requests dissolution, the partnership dissolves *by operation of law*, and the dissolution *does indeed* "eradicate and void" the agreement of those remaining. *See* NY Partnership Law § 62.

Burger, Kurzman, Kaplan & Stuchin v. Kurzman, 139 A.D.2d 422 (1st Dept. 1988) is on point. There, the partners entered into a written partnership agreement in 1973. The agreement included a restrictive covenant prohibiting a departing partner from performing services for a client of the partnership. Following the death of a partner in 1979, the three surviving partners continued to operate the business until 1983, when two of the partners advised the third that the partnership would dissolve. The lower court in *Burger* concluded that "the parties' conduct in continuing the business as an ongoing concern, with no attempt made to wind up the partnership, evidenced an intention of the partners to continue the partnership agreement." *Id.* at 423 (internal quotations omitted).

The First Department reversed. Because the original partnership agreement had no contingency for the death of a partner, the death of one of the original four partners in 1979 dissolved that partnership by operation of law. The continuation of the business by the three surviving partners, the court held, "did not revive that dissolved entity. Despite the fact that many incidents of the ongoing business endured, the three remaining partners created a new relationship among themselves, a relationship which of necessity must differ from the pre-existing arrangement containing rights and obligations *vis-a-vis* the now deceased partner Burger." *Id.* Thus, a new

partnership among the surviving partners was created when the partner died, and the court held that this new, separate partnership, ended when the partners terminated their relationship in 1983. The *Burger* court cited its decision in *Ruzicka's v. Rager*, 277 A.D. 359, 360 (1st Dept. 1950), where the court explained as follows:

> A partnership is a contractual relation dependent upon the personality of its members. The admission or withdrawal of a member so radically changes the contractual rights *inter se* as to produce essentially a new relation even though the parties contemplate no actual dissolution of the firm and continue to carry on business under the same name, under the original articles and with the same account books.

Id.

For these same reasons, Brown is also mistaken when he states, at pages 36-37, that courts have "[c]onsistently… held that public filings are merely 'notice to the public' and 'in no way' affect the contract or agreement among the parties." Although he represents that courts have "consistently" ruled in this manner, Brown cites only <u>*one case*</u>, from 106 years ago. The case is *Weinstein v. Welden*, 160 A.D. 554 (1st Dept. 1914). But the "public filing" in *Weinstein* did not create a new corporate entity at all; it was "merely" a <u>*d/b/a certificate*</u>. Documents which formally terminate and create legal entities, like the ones Brown filed in this case (R.3674, 3671) are, obviously, much different

from a document advising the public that partners are doing business under an assumed name.

Point II. The Court Must Examine The Parties' Relationship As A Whole And Consider All Relevant Factors; No One Factor Is Determinative

As this Court has stated many times, "Where, as here, there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact. The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge." *Hammond v. Smith*, 151 A.D.3d 1896, 1897 (4th Dept. 2017) (citations omitted); *Fasolo v. Scarafile*, 120 A.D.2d3d 929 (4th Dept. 2014); *Bianchi v. Midtown Reporting Serv., Inc.*, 103 A.D.3d 1261 (4th Dept. 2013).

Brown's brief focuses almost exclusively on the first factor -- by relying on expressions of intent <u>*concerning a different partnership*</u> -- claiming that nothing else matters because this Court has held "that evidence demonstrating the intention of the parties is controlling," citing *Hammond* (Brown's brief at page 18). This is a mischaracterization of this Court's holding in *Hammond*, because in *Hammond* and in several other cases before

it, this Court stated that "No single factor is determinative; a court considers the parties' relationship as a whole." *Hammond*, 151 A.D.3d at 1897 (*citing Fasolo*, 120 A.D.3d at 930, and *Griffith Energy, Inc., v. Evans*, 85 A.D.2d 1564, 1565 (4th Dept. 2011)); *see also* Justice Fahey's decision in *Frascogna* at pages 38-39 (R.3432-33).

Brown's heavy reliance on a case that pre-dates New York's 1919 adoption of the Uniform Partnership Act by 23 years is equally misplaced because the First Department's decision in *Heye v. Tilford*, 2 A.D. 346, 352 (1st Dept. 1896), *aff'd,* 154 N.Y. 757 (1897), is easily distinguished. The individual involved in that case, Lawrence, had previously denied ownership of *the same partnership* that *his estate* was now claiming that he owned, and "during all the years" that the partnership existed, Lawrence "took no part in the transaction of the business of the firm." *Id*. at 352. *See also* Capizzi's brief in response to Chiari's appeal (at pages 25 -27) for a further discussion of *Heye*.

A. The First Factor, Intent

Brown begins his discussion of intent by falsely claiming "there is clear and unequivocal testimony… from Capizzi himself manifesting his intent to be a non-equity partner of BCLLP." (Page 17) There is no such testimony, and that is precisely why Brown provides no supporting citation to the record. If Brown is referring to the "testimony" Capizzi gave in 2005 and 2006 in the

Frascogna case, that testimony could not possibly have concerned BCLLP because *BCLLP did not even exist at that time*. Respectfully, it is one thing to argue that Capizzi's testimony about the Frascogna firm is *relevant* to BCLLP (it is not), but it is quite another to falsely represent that Capizzi has provided "clear and unequivocal testimony… manifesting an intent to be a non-equity partner of BCLLP." The former is argument; the latter is dishonest.

At pages 16-30, Brown purports to address Capizzi's "intent" to be a non-equity partner at BCLLP, but the only "evidence" discussed *on all 15 pages* is Capizzi's testimony from 2005 and 2006.[2] Not once does Brown address the parties' relationship during the eight years and eight months that BCLLP existed, other than to acknowledge Judge Walker's comment that the partners continued to operate as they had while members of the Frascogna firm (i.e., they continued to operate in the manner that Justice Fahey found to be consistent with partnership[3]).

At page 27, Brown asserts "the trial court failed to undertake any examination of the parties' intent in this matter." This is not true. Quoting from this Court's decision in *Bianchi*, Judge Walker acknowledged his

[2] Brown also improperly mentions a pre-BCLLP, post-trial submission from the *Frascogna* case that Judge Walker *excluded* from evidence in this case. *See* the discussion at pp. 57-63, *infra*.

[3] As discussed in detail in Capizzi's brief in response to Chiari's appeal, at pages 45-68, there were also a significant number of changes that occurred from 2007 through 2015 that confirmed Capizzi's status as an owner of BCLLP.

obligation to "examine whether a partnership existed 'from the conduct, *intention* and relationship between the parties.'" (R.17, emphasis added) And although Judge Walker did not compartmentalize the factors established by this Court in his decision, he clearly analyzed the parties' express and implied intent by relying on indicia of ownership that fits squarely into the intent bucket.

Judge Walker listed 24[4] "findings of fact [that] support a determination that Capizzi was an equity partner in Brown Chiari LLP, at the time of his resignation on January 8, 2016." (R.8-13, 15) A majority of these findings can *only* be described as evidence of intent. For example, Judge Walker found:

- BCLLP's tax returns identify Capizzi as a partner and he received a K-1 with a capital account.
- BCLLP procured and paid for life insurance solely for Brown, Capizzi and Chiari.
- In 2012 and 2015, BCLLP implemented a pension plan that distinguished owners from employees and plan documents identified Capizzi as an owner.

[4] Judge Walker lists 20 findings on pages 5-10 of his decision (R.8-13) and four more on page 15 (R.18).

- Capizzi was identified on an IRS Form as an owner of BCLLP and the form was approved by Chiari or Brown.
- Capizzi testified that he heard Brown tell a pension consultant [Spina] that Capizzi was an owner, which Brown did not dispute.
- In 2015, Capizzi submitted an Application for Federal Student Aid [FAFSA] identifying himself as a 20% owner of BCLLP.
- While there are numerous documents identifying Capizzi as an "owner" of BCLLP, there is not even one BCLLP document that identifies Capizzi as an "income" partner.

Of course, there can be no better evidence of Brown's "intent" than Brown telling a third party that Capizzi was an owner, and there can be no better evidence of Capizzi's "intent" than his representations to the federal government that he owned 20% of BCLLP.

Judge Walker listed only *some* of the indicia of intent relied upon by Capizzi at trial, but there were many more indicia not mentioned in the decision. Two examples not mentioned by Judge Walker are particularly indicative of both Brown's and Chiari's "intent" to have Capizzi as a co-owner of BCLLP.

In 2011, Brown drafted and presented Capizzi with a "death agreement," referring to Capizzi as a "member" of BCLLP, referring to Capizzi's "share of equity" in the firm, and proposing to distribute 20% of BCLLP's profits to Capizzi's estate for 13 years after Capizzi's death. The agreement is identified by Brown at pages 520-26 of the record and by Capizzi at 730-35; and it can be found at pages 3756-61. Respectfully, it is simply unfathomable that Brown would make such a proposal in the absence of "intent" on the part of Brown for Capizzi to be a co-owner.

Chiari's June 30, 2014 memorandum (R.4150-51) is also clear evidence that Capizzi was an equity partner. As discussed in greater detail in Capizzi's brief in response to Chiari's appeal (*see* pages 47-50), from 2007 through 2013, Chiari, Brown and Capizzi had an agreement to share profits using fixed, 40/40/20 percentages. This memorandum memorialized a modification of the 40/40/20 agreement and confirmed that evaluations by the three men of each other would now be used to determine the distribution of profits at BCLLP. Initially, the fact that Capizzi was at the meeting and a party to this agreement is clear evidence of his ownership interest. But the fact that Brown and Chiari ***agreed*** in writing that their own shares of the firm's profits ***were going to be determined by Capizzi's evaluation of them*** is indisputable evidence that they "intended" for him to be an equity partner.

Chiari's testimony was as follows:

> Q. -- you're telling the Court that you expected Sam Capizzi, who you say is a non-owner in your law firm, to evaluate you and Jim Brown, both of whom you say are owners of the law firm; is that -- what I understand, correct?
>
> A. That was our agreement on the compensation.

(R.3099)

For a more thorough discussion of the significant evidence Capizzi presented at trial on the issue of "intent," the Court is respectfully referred to Capizzi's brief in response to Chiari's appeal. (*See* pages 45-46)

B. <u>The Second Factor, Joint Control And Management</u>

Capizzi presented substantial evidence at trial documenting his control over aspects of BCLLP's business, and his involvement in management decisions.

As determined by Judge Walker (R.8), Brown and Chiari signed "Partners' Authority Resolutions" in 2012 and 2013 representing to M&T Bank that Capizzi was authorized to execute, *inter alia*, loan agreements, promissory notes and mortgages "in the name of [BCLLP]." By signing these documents, Brown and Chiari also represented to M&T Bank that the bank "may conclusively rely" on Capizzi's signature <u>*alone*</u> to bind the partnership. (R.3715, 3725, 3750) Capizzi also signed loan agreements on behalf of BCLLP

(R.3707, 3716, 3726, 3734) and he was authorized to sign checks as well. (R.1967-69)

Concerning management responsibilities, Exhibit 82 (R. 4065-4170) contains all of BCLLP's "internal memoranda concerning [BCLLP's] management." (R.265-67) Contained within this exhibit are numerous memoranda documenting "partner meetings" involving *only* Capizzi, Chiari and Brown. Equally significant, Exhibit 82 *does not* include memoranda documenting partner meetings of Chiari and Brown *that did not include Capizzi*.

The documents in Exhibit 82 are summarized and described in Capizzi's brief in response to Chiari's appeal (at pp. 63 - 66), and document Capizzi's significant involvement with BCLLP's line of credit and other expenses, the hiring of attorneys, managing associate attorneys, renovations of BCLLP offices, insurance coverage issues, advertising, etc.

C. The Third Factor, Sharing Of Profits And Losses

It is an undisputed fact that Capizzi, Chiari and Brown *always* shared 100% of the profits of BCLLP. This was confirmed by the partnership's tax returns. (R.4510-4751) Partnership is the *default* status of "an association of two or more persons to carry on as co-owners a business for profit." Partnership Law § 10(1).

At page 29, Brown acknowledges that "loss sharing" is an "especially" important factor when determining if an individual is an equity partner. Justice Fahey said the same thing in his decision in *Frascogna*. (R.3436, finding Frascogna's "responsibility for obligations and liabilities of the firm" compelling evidence of ownership)

Here, as Judge Walker determined, there was substantial evidence that Capizzi was ***personally*** responsible for BCLLP's debts. In his decision (R.8-10, 18), Judge Walker noted:

- Capizzi's payment of $80,000 to Frascogna to settle the *Frascogna* litigation;
- Capizzi's personal guarantee of BCLLP's line of credit with M&T Bank;
- Brown and Chiari sued Capizzi in an effort to recover a BCLLP debt ***after*** Capizzi withdrew from the partnership[5].
- BCLLP's tax returns listed "recourse" liabilities for Capizzi, meaning that Capizzi was personally responsible for BCLLP's debts.

[5] *See* the discussion at pages 53 – 57 of this brief for additional information concerning Brown's counterclaim suing Capizzi for a BCLLP debt.

Regarding Capizzi's "recourse" obligations, BCLLP's accountant David Barrett, CPA, testified at trial that Capizzi's recourse obligations are ***not*** consistent with Defendants' claim that Capizzi was merely a non-equity partner. (R.1335-36)

Chiari has also admitted that Capizzi's responsibility for BCLLP's debts is ***not*** consistent with Defendants' claim that Capizzi is merely an "income," or non-equity, partner.

> Q. And you didn't include it in the definition I just asked you now, but in your deposition, when I asked you about an income partner, you told me that an income partner is not responsible for the debts of the firm. Do you remember saying that?
>
> A. That's true.

(R.3111)

D. The Fourth Factor, Combined Property, Skill Or Knowledge

As recognized by Judge Walker, Capizzi's interest in the Frascogna firm was not distributed to Capizzi; instead, it became a capital contribution in the new partnership, BCLLP. (R.8) Capizzi's $80,000 payment to Frascogna from his share of the profits at BCLLP can also be considered "property" contributed to BCLLP.

Capizzi also contributed financially to the significant advertising that BCLLP utilized from 2007 through 2015 by virtue of the fact he, Brown and Chiari were the only three partners at BCLLP who shared in the firm's profits. Advertising expenses, along with all of the firm's other expenses, reduced Capizzi's share of the profits. (R.690-91, 1193-94, 1213) The amount spent on advertising varied, ranging from a low of $1,118,000 in 2007 to a high of $1,589,000 in 2015. (R.2473-75) At 20%, Capizzi's share of this single expense easily exceeded $2 million over this time.

Paying for expenses was not the only way that Capizzi "combined" his property, skill or knowledge. As this Court noted in *Griffith Energy*, this fourth factor also includes an analysis of a party's "input of expertise and labor." 85 A.D.2d at 1566. In this regard, substantial evidence was presented at trial establishing Capizzi's significant contributions to the firm. For example, Capizzi reviewed all of the appeals handled by BCLLP (R.4106), directed attorneys concerning indemnification and hold harmless agreements (R.4102), handled the firm's insurance (R.4079), reviewed and managed notices of claim for the firm (R.4088, 4090, 4105), and reassigned cases within the office (R.4093-94). These are only a few examples of the types of activities that Capizzi handled at BCLLP. Additional examples can be found within Trial Exhibit 82. (R.4065)

It is also undisputed that, while at BCLLP, Capizzi "brought in a lot of business" (R.2456) and resolved cases for millions of dollars. For example, Capizzi was responsible for verdicts and settlements totaling $8,756,500 in 2012, $8,418,500 in 2013, and $9,492,500 in 2014. (R.3330, 5423)

E. Brown Ignores The Factors Relied Upon By This Court

Conspicuously missing from Brown's brief is an analysis of the 24 findings of fact relied upon by Judge Walker – evidence this Court has also consistently relied upon to determine partnership claims where, as here, there is no written partnership agreement. In fact, Brown *criticizes* Judge Walker for "undertak[ing]" what Brown characterizes as "an unnecessary and inappropriate analysis of various other factors – referred to as 'indicia' to determine if Capizzi was an equity partner in BCLLP."[6] (Page 14) Brown then proceeds to falsely tell this Court that "all of the cited criteria" relied upon by Judge Walker were "also present during *Frascogna*." (Brown's brief at page 14).[7]

[6] Note the hypocrisy of this statement when compared to Brown's criticism of Judge Walker for "fail[ing] to undertake any examination of the parties' intent in this matter." (Brown's brief at page 27)

[7] This statement is not correct, as discussed in detail in Capizzi's brief in response to Chiari's appeal (*see* pages 45-68). As explained there, more than half of the "factors" cited by Judge Walker in his decision were not discussed or did not exist in *Frascogna*, and the factors that did exist in both cases do not help Brown's case in any event.

Thirty pages later in his brief, at pages 53-54, Brown purports to provide this Court with a few examples of the evidence relied upon by Judge Walker that allegedly also existed in *Frascogna*.

One such "example" is emblematic of the lack of veracity in Brown's entire brief. At page 54, Brown states: "The trial court noted that Capizzi is listed as a trustee of the benefit plan (R.10); same as 2005 and 2006." Brown refers this Court to page 10 of the record (page 7 of the trial court decision) as support for his claim. But *the word "trustee" does not appear on this or any other page of the decision*. In fact, Capizzi has *never* claimed that his position as a trustee is a "factor" to be considered when determining ownership. *Brown knows this* because, both during trial and in his post-trial submissions, Capizzi advised Judge Walker *and Brown* that he was *not* relying on this as evidence of ownership. Capizzi's post-trial Proposed Findings of Fact state:

> Defendants claim Capizzi is relying on the fact he was a trustee from 2007 to 2010 [R.1411] "as some sort of indicia" of ownership. [R.176] They are wrong; Capizzi has *never* attempted to rely on this to support his claims. "Anyone" can be a trustee [R.1445] so it would be fruitless for Capizzi to rely on this. By the same token, it is irrelevant that Brown and Chiari were trustees on the pension plan(s) from 2010-2015.

(R.6001, emphasis original)

What *is* "noted" in Judge Walker's decision, starting on page 10 of the Record, is a discussion of the *uncontroverted* evidence establishing that BCLLP's pension plan was amended starting in 2012 -- i.e., *six years after Capizzi's testimony in Frascogna* -- to distinguish "owners" from "employees," "to benefit the owners." (R.1829-30) During this process, as "noted" by Judge Walker, Capizzi was identified as an "owner" of BCLLP *by Brown* during a meeting with the firm's pension consultant *and* in writing when the plan documents were finalized and circulated as required by ERISA.

Point III. Capizzi Did Not "Abandon The Theory He Advanced At Deposition"

Relying on quotes from Capizzi's deposition and trial testimony in this case, Brown boldly asserts that Capizzi "abandoned the theory he advanced at deposition," and that there was a "substantial change in [Capizzi's] testimony." (Page 37-38) Brown's assertion is premised upon *selective* quotes from Capizzi's deposition. Most notable, on page 43, Brown quotes from deposition testimony where Capizzi was asked: "Did you tell [Brown and Chiari] you thought, by virtue of Judge Fahey's decision [on December 22, 2007], that you were an equity partner?" To this question, which clearly asked if Capizzi told Brown that Capizzi "thought" that he was an equity partner *in the Frascogna firm* "by virtue of Judge Fahey's decision,"

Capizzi responded "We never discussed it." We know that *this question concerned the Frascogna firm* because, quite obviously, Justice Fahey could not possibly have determined Capizzi's status in BCLLP, a partnership that did not even exist when Justice Fahey's decision was released on December 22, 2006.

Brown then attempts to contrast this deposition testimony *about the Frascogna firm* with trial testimony by Capizzi concerning discussions *about BCLLP*. (R.38-39) To these questions, asking *about BCLLP*, Capizzi testified that the parties *did* have discussions that occurred after Justice Fahey's decision.

Clearly, there was never a change, substantial or otherwise, in Capizzi's testimony. In fact, when asked *at his deposition* about discussions *regarding ownership of BCLLP*, Capizzi testified that there were "many" such discussions. Conspicuously missing from Brown's brief, however, are the quotations from this deposition testimony where Capizzi was asked about discussions *relating to BCLLP*, to which he responded "[w]e had many discussions especially in 2014 about ownership… there were certainly many discussion along the way." (R.5969-70) This deposition testimony is entirely consistent with the trial testimony quoted by Brown.

Concerning Capizzi's testimony confirming discussions "about ownership," "especially in 2014," it is worth mentioning again that the only issue decided by Judge Walker, and only the issue relevant to this appeal, is Capizzi's status *on January 8, 2016* when he withdrew from BCLLP. Although it is and remains Capizzi's position that he was an equity partner at BCLLP *ab initio*, the only relevant date is January 8, 2016.

Oddly, Brown claims that "[t]he trial court did not accept Capizzi's belated pivot and changed testimony… [b]ecause the decision makes no reference to any such new agreement or discussion among the three [men]." Brown's premise (i.e., that there was a "positional pivot") is incorrect, and there is no requirement for a trial judge to comment on everything that is said during trial, especially one that lasts 20 days and consumes more than 3,000 pages of testimony. And Judge Walker obviously *did* "accept" Capizzi's testimony as evidenced by the result.

Point IV. Capizzi Is Not Judicially Estopped From Claiming Ownership Of BCLLP

At Point III of his brief, pages 30-33, Brown relies on the doctrine of judicial estoppel, claiming that because Capizzi testified that he was not an equity partner *in the Frascogna firm*, he "is prohibited from taking a contrary position" in this case. Stated differently, Brown claims that if you deny that you own one thing, you can never own anything else, ever, in the future. The argument is illogical, and the doctrine of judicial estoppel says no such thing.

"The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position may not subsequently assume a contrary position because [the party's] interests have changed.'" *Jones v. Town of Carroll*, 177 A.D.3d 1297, 1298 (4th Dept. 2019), *quoting Reynolds v. Krebs*, 143 A.D.3d 1256, 1256 (4th Dept. 2016).

Initially, Capizzi's "position" in this litigation – i.e., that he is an equity partner *in BCLLP* – is not "contrary" to the position he took in the *Frascogna* lawsuit, because his testimony in the *Frascogna* lawsuit concerned an entirely different partnership. Simply, judicial estoppel does not apply when you are talking about two different things. *See, e.g., American Motorists Ins. Co. v. Obrien-Kreitzberg & Assocs., Inc.*, 234 A.D.2d 30 (1st Dept. 1996).

Judge Walker recognized this obvious fact when Brown attempted to rely on judicial estoppel during trial:

> **THE COURT** [addressing Appellants' counsel]: And if this just were the same firm, start to finish, as a matter of law, despite Judge Fahey's decision, you may be right. That's not our case.

(R.1619)

In addition, judicial estoppel only applies when a party ***prevails*** on his position in the first proceeding. Where a party does not prevail in the first proceeding, judicial estoppel cannot apply. *Jones*, 177 A.D.3d at 1298 ("Here, although the Jones plaintiffs previously took the position that the causes of action had already been finally determined, that position did not prevail, as evidenced by our [earlier] determination…, and thus 'all of the elements of judicial estoppel are not present.'"), *quoting Grove v. Cornell Univ.*, 151 A.D.3d 1813, 1817 (4th Dept. 2017).

Within the judicial estoppel section of his brief, Brown relies on this Court's decision *Bar Ass'n of Erie County v. Gelman*, 285 N.Y.S.2d 691 (4th Dept. 1967). The words "judicial estoppel" do not appear in *Gelman*. In *Gelman,* an attorney attempted to "disavow" his prior testimony about conduct leading to his suspension in an effort to obtain a different outcome. Here, Capizzi is not attempting to disavow the testimony he gave in the *Frascogna* case (and never has) because he believed it to be true when he

testified. Capizzi has also accepted the court's determination in the *Frascogna* case and, unlike Gelman, he is not attempting to obtain a different outcome. Finally, Gelman was attempting to disavow testimony concerning the same conduct at issue in both proceedings, whereas Capizzi's testimony concerned a different case and a different partnership.

Point V. Judge Walker's Discussion Of Collateral Estoppel Is *Dictum*

Brown devotes an entire section of his brief (Point V, pages 47-51) to collateral estoppel and argues he should not be bound by Justice Fahey's decision which held that the Frascogna firm was partnership with four partners including Capizzi, or by Justice Curran's order in *Frascogna* which struck any denial of Frascogna's status as an equity partner with Capizzi. Without conceding that Brown is correct in his legal analysis of the law on collateral estoppel, it simply does not matter, because Judge Walker's determination in this regard is *dictum*.

At pages 11-12 of his decision (R.14-15), Judge Walker discusses collateral estoppel before concluding that Defendants are estopped from denying Capizzi's status as an equity partner <u>*in the Frascogna firm*</u>. He continues, however, and immediately thereafter states that he is deciding <u>*this case*</u> – i.e., *Capizzi v BCLLP* – on its own merits.

Describing Judge Walker's decision, Brown claims that Judge Walker concluded that Capizzi was an equity partner *in BCLLP* *simply because* Justice Fahey had concluded that Capizzi was an equity partner in the Frascogna firm. Specifically, Brown represents to this Court that Judge Walker's finding that Frascogna was an equity partner in the Frascogna firm was "'controlling' and collateral estoppel" *as to Capizzi's status in "the firm."* Once again, Brown simply uses the term "the firm" in this sentence, but he is presumably talking about BCLLP. (Pages 13-14, emphasis added). If Brown is referring to BCLLP, he is not correct. Judge Walker *did not* conclude that Justice Fahey's decision or Justice Curran's order was "controlling" on his decision in this case. (R.15) What Judge Walker actually said was that Justice Fahey's decision, as opposed to Capizzi's testimony, is what is "controlling" *in the Frascogna case*. Judge Walker *never* said that Justice Fahey's decision was "controlling" in the present case. In fact, Judge Walker specifically stated that he was *not* deciding *this case* based on Justice Fahey's decision in *Frascogna*. He stated "*Notwithstanding* the Fahey decision and the Curran order, *and based on the record before this Court*, the determination is the same." (R.15, emphasis added)

Simply because Judge Walker and Justice Fahey reached similar conclusions – i.e., that the two different plaintiffs in these two different lawsuits were equity partners in two different law firms – it does not follow that one decision was "controlling" of the other, especially where, as here, Judge Walker stated that his determination was made "notwithstanding" Justice Fahey's decision.

Judge Walker gets the analysis exactly right. He states that Justice Fahey's conclusion in *Frascogna* is what counts as opposed to Capizzi's testimony, but he then quickly adds that it doesn't really matter because this issue (i.e., whether Capizzi was an equity partner *in the Frascogna firm*) is "irrelevant" -- i.e., *not* "controlling" -- to the issue Judge Walker was deciding (i.e., whether Capizzi is an equity partner *in the BCLLP firm*).

It is worth emphasizing here that Capizzi's claim of ownership in BCLLP is *not* dependent on Justice Fahey's decision in Frascogna, and Capizzi is *not* claiming he is an equity partner in BCLLP "by virtue of the *Frascogna* decision" as alleged by Brown on page 40 of his brief. Rather, Capizzi is an owner of BCLLP by virtue of what transpired between May 24, 2007 and January 8, 2016.

Point VI. Justice Fahey's Decision Is Compelling Precedent And Provided Clear Notice To Appellants That Capizzi Would Be Considered An Equity Partner In The Absence of Dramatic Changes

Justice Fahey's decision was and remains compelling *precedent*, and it certainly provided Brown and Chiari with *notice* that the factors discussed in the decision are the hallmarks of an equity partnership. Justice Fahey's decision remains one of the few decisions concerning an oral law firm partnership, and the fact that the *Frascogna* decision was decided by a jurist as respected as Judge Fahey, currently an Associate Judge of the Court of Appeals, only adds to its precedential value.

No doubt because he recognized that Justice Fahey's decision was "correct" (R.902), Chiari admitted in his deposition and at trial that Defendants *would need to make changes* going forward if they wanted to avoid a similar situation in the future. Specifically, Chiari acknowledged that he intended to "not make the same mistakes [he] made with [Frascogna]," such that "when something would come up that somebody tried to use to show ownership in the past, [he] would try to correct it." (R.174-76)

Brown and Chiari also learned from Justice Fahey that, moving forward, *the burden of proof would be on them* in situations like those involving Frascogna, where there is *prima facie* evidence of partnership.

Justice Fahey spelled this out for Brown and Chiari as follows: "In the absence of a written partnership agreement… the filing of partnership income tax returns, the actual sharing of profits and the parties' holding themselves out as a law partnership… amount[s] to a *prima facie* showing that there is a partnership and… the burden of proof them (sic) shifts to the parties opposing the accounting." (R.3433)

Yet, despite all this, and despite Brown's and Chiari's understanding that the evidence relied upon by Justice Fahey in deciding that Frascogna was an equity partner in the Frascogna firm applied equally to Capizzi, none of those evidentiary benchmarks changed when BCLLP was established. In fact, with respect to Capizzi, just the opposite was true. Whenever they had the opportunity to do something to *confirm* Capizzi's ownership interest in BCLLP, *they did*. [*See* the discussion above and, also, Capizzi's brief in response to Chiari's appeal, at pages 45-68, listing the significant changes that were made *after* BCLLP was established on May 24, 2007.]

Point VII. Judge Walker's "Findings of Fact" That Allegedly "Support A Determination That Capizzi Was Not an Equity Partner" Are Not Supported By The Record Or Are Irrelevant

After listing 24 "findings of fact [that] support a determination that Capizzi *was* an equity partner in [BCLLP]" (R.8-13), Judge Walker lists five things which he believes "support a determination that Capizzi was not an equity partner in [BCLLP]" (R.13-14). But the five "findings" cited by Judge Walker are not supported by the record, or are irrelevant to Capizzi's ownership status.

The first "finding" cited by Judge Walker was a "Request for Information," for which Judge Walker stated: "Chiari *responded* by identifying himself and Brown." (R.13, emphasis added) In fact, the evidence at trial plainly established that Chiari did *not* "respond" to this request. At pages 9 and 35 of Brown's brief, and page 31 of Chiari's brief, it is alleged that Chiari "completed" this document, and "certified" to New York State that Brown and Chiari were the only owners of BCLLP. Both statements are false. There was no evidence received by the court below establishing that the document was "completed" at all and, because the document was never completed and returned to New York State, nothing was "certified."

The document (R.5412) purports to be a "Request for Information" concerning a "New Business[8]" from the New York State Tax Department. Contrary to Brown's representation, Chiari -- whose handwriting appears on the document -- admitted at trial that *the document was not completed*. (R.2860, 3126, 3168) The document requests the names, addresses and Social Security numbers for "*all* members, owners, *partners*, or officers" (emphasis added). As plainly evident from the document, it is only *partially* completed because the document does *not* contain Brown's address or Social Security number, and it also does not contain Capizzi's name, address or Social Security number. Without question, Capizzi *"was always a partner* [in BCLLP] from '07 until the day he left" (R.3169) and his information, along with Brown's, would have been necessary before the document could be deemed "completed," much less "certified."

Regarding Judge Walker's finding that Chiari "responded" to the document, and Chiari's claim that he "certified" something to New York State, *Chiari admitted at trial that he did not respond to the request*. Rather, Chiari testified that he gave the *incomplete* document to his assistant. (R.2859-60)

[8] Hypocritically, Defendants attempt to rely on this document while at the same time disputing that BCLLP was a "new business" at all; instead arguing that BCLLP is the same "law firm" as the Frascogna firm, with a "comma" or a "word" changed "here" or "there." *See* discussion at pp. 21 - 25 of this brief, and Chiari's brief at p. 22.

But his assistant, Kasperek, testified that she did not recognize the document, and she had no memory of completing or mailing it. (R.585)

In addition, ***Capizzi*** subpoenaed records from the New York State Tax Department to determine if this document was actually received by the State. The agency responded and produced voluminous records, but this document was ***not*** included with the records produced. (R.2069)

For all these reasons, the trial court ***refused*** to admit the document into evidence, other than "for a limited purpose" -- namely, Chiari partially "filled it out and intended to send it" (R.2856). Notably, neither Brown nor Chiari have challenged Judge Walker's evidentiary ruling on this appeal. Judge Walker obviously overlooked the fact that he had admitted the document into evidence for this limited purpose. Thus, Judge Walker's statement that Chiari "responded" to New York State ***is not correct***. Likewise, Brown's claim that the document was "completed" and Chiari's claim that he "certified" something to New York State ***are also not correct***.

The second and third "findings" mentioned by Judge Walker – namely, Capizzi's lack of involvement in setting attorney and staff compensation (other than his own and Brown's and Chiari's) and the fact that he did not review tax or financial records – are not correct and have no bearing on his status as an owner of BCLLP in any event. Chiari was the firm's

managing partner and Capizzi was a minority (20%) owner. As Capizzi explained at trial, he left administrative functions like these to Chiari, although Capizzi did play an "advisory role" and provided "input" on attorney and staff salaries and bonuses. (R.1030-31). Regardless, there is simply no need for *every* equity partner to be personally involved in *every* aspect of a partnership's operations.

The fourth "finding" mentioned by Judge Walker – i.e., that "Capizzi received case assignments from Brown and Chiari"[9] – was obviously accepted from Defendants' post-trial Proposed Finding of Fact, ¶ 43, which states "As with all other attorneys at the office, Capizzi received his case assignments from Brown and Chiari." (R.6034) As support for this proposed finding of fact, Defendants directed Judge Walker to pages 2864-2865 (R.2891-92) of the trial transcript. But these pages of the trial transcript do not support the proposed finding,[10] or Judge Walker's conclusion. The testimony on these pages is by Chiari, and there is no mention of Brown or Chiari assigning cases at all.

[9] At page 55 of his brief, Brown claims that Judge Walker concluded that Capizzi received "all" of his case assignments from Brown and Chiari. The decision *does not* say this. (R.14)

[10] Judge Walker directed the parties to simultaneously submit proposed findings of fact and did not permit responses. (R.3384) Thus, Respondent was unable to highlight errors in Appellants' submissions.

Capizzi does not dispute that, starting in 2014, Chiari attempted to take over the assignment of ***all*** the files at BCLLP. On May 20, 2014, Brown sent a memorandum to Capizzi and Chiari summarizing a meeting of the three partners. (R.4137). In his memorandum, Brown notes that ***Capizzi*** had been "assigning" files as they came in or handling them himself. Brown also indicated that he (***Brown***) "should be involved in assignments." Chiari responded to Brown's memorandum on May 23, 2014, unilaterally asserting that he (***Chiari***) "will be in charge of assigning… all of the files," adding "I cannot imagine that there would be any problem with this," before telling Brown that "[t]he writing has been on the wall for years." (R.4139) It was exactly this type of dictatorial approach to managing the firm that ultimately led to Capizzi's departure.

The fifth "finding" cited by Judge Walker – i.e., that "Capizzi did not have authority to settle higher value cases without Brown or Chiari's approval," again appears to have been simply an instance of Judge Walker trusting Brown's Proposed Findings of Fact, this one from ¶ 44 which reads "Capizzi did not have authority to settle higher value cases without the approval of Brown or Chiari." (R.6034) Judge Walker's trust, however, was misplaced because the transcript pages cited for this proposed finding -- pages 2201-02 and 2942 (R.2228-29 and 2969) -- do not support this

conclusion. Simply, there is no support on these pages, or elsewhere, for Judge Walker's finding.

Point VIII. Defendants Are Barred By The Doctrine Of Tax Estoppel From Denying Capizzi Was An Equity Partner

Brown claims that Judge Walker "focused on the firm's tax returns, above all other indicia" to decide this case. (Page 55) There is no support for this statement in Judge Walker's decision, nor is there any indication that BCLLP's tax returns were more important to Judge Walker than any other evidence. In fact, Judge Walker's discussion of the tax returns is *immediately* preceded by this statement: "In determining whether a partnership exists, no one factor is determinative, and the court shall examine the parties' relationship as a whole." (R.14, *citing Fasolo*, 120 A.D.3d at 930)

Nevertheless, BCLLP's tax returns confirm Capizzi's ownership interest. BCLLP's accountant, David Barrett CPA ("Barrett"), testified that the "recourse" obligation contained on Capizzi's K-1 -- i.e., a BCLLP obligation for which Capizzi is *personally* responsible (R.1262) -- *is not* consistent with Brown's claim that Capizzi is merely a non-equity partner.

During questioning by Judge Walker, Barrett testified:

> Q. All right. And would [an allocation of ordinary business income on box one of Schedule K-1], Mr. Barrett, be consistent or inconsistent with an agreement that is

basically just an agreement to share in profits after expenses?

A. It would be consistent.

THE COURT: How do you reconcile then the fact that some of these documents reflect a share of liability commensurate with the twenty percent profit sharing, with a recourse obligation of the firm?

[BARRETT]: I don't.

THE COURT: They're inconsistent, aren't they, under those IRS guidelines that we just spent the last fifty minutes reviewing?

[BARRETT]: Would seem to be inconsistent.

THE COURT: All right. That's what I've been thinking myself.

(R.1335-36)

Brown completely ignores this testimony by Barrett and, instead, claims that Capizzi's recourse liability is limited to the firm's line of credit, and that "Capizzi had no real economic risk" because Brown pledged assets to secure a portion of the line of credit. But Brown's pledged assets do not mean that Capizzi "had no real economic risk," because the bank can pursue any or all guarantors if the loan is not paid.

More significantly, as Judge Walker noted, after Capizzi left BCLLP, Brown and Chiari asserted a counterclaim against Capizzi, which is still pending, to recover what is owed on the firm's line of credit. (R.9-10, 3470) In other words, Brown tells this Court that Capizzi had "no real economic risk" for the firm's line of credit *while at the same time* Brown is suing Capizzi to recover money owed on the very same line of credit.

Judge Walker relied on the Court of Appeals decision in *Mahoney-Buntzman v. Buntzman,* which states "A party to litigation may not take a position contrary to a position taken in an income tax return." 12 N.Y.3d 415, 422 (2009). Brown is doing exactly what the Court of Appeals held is not allowed – namely, taking a position in this case that is contrary to what is stated on the tax returns Brown swore to be "true, correct and complete" "under penalties of perjury." (For example, Capizzi's Schedule K-1 from BCLLP's 2012 return, showing "recourse liability" of $305,945, is in the Record at page 4260; Brown's IRS e-file Signature Authorization for this 2012 return is at page 5391.)

This Court's decisions in *Rizzo v National Vacuum Corp*., No. 19-00145, 2020 WL 4876810 (4th Dept. 2020) and *Amalfi v. 428 Co.,* 153 A.D.3d 1610 (4th Dept. 2017) are on point.

Rizzo, a case decided by this Court on August 20, 2020, was also a dispute involving an ownership interest. Plaintiff Julianne Rizzo claimed that she was a 20% owner of a company and, as here, she relied on a tax form signed by a defendant under penalty of perjury. The tax form confirmed Rizzo's claim, and this Court held that the defendants were "thereby estopped from denying Rizzo's ownership interest."

In *Amalfi*, a plaintiff alleged defendants improperly sold a commercial building without honoring its agreement to provide plaintiff a right to first refusal to match any "bona fide" offer. Defendants contended that the sale was not a bona fide transaction because the property was bought by, and sold to, an entity controlled by the same person. Relying on tax documents certifying that "the sale was *not* 'between related companies or partners in business,'" this Court held that the defendants were estopped from denying the sale was a bona fide transaction. Relying on the same tax documents, this Court also held that defendants were estopped from claiming the purchase price included various mortgage assumptions worth over $2 million (a price plaintiff could not match), citing instructions for the tax document requiring assumed mortgages to be included in the "Full Sale Price" and a lower value reported in the tax documents, which plaintiff was indisputably ready, willing, and able to match. *See also Levy v. Levitt,* 3 F.

App'x 944, 948 (10th Cir. 2001) (estopping a defendant from denying he was a partner because he claimed partnership losses on tax returns, holding "a party holds himself out as a partner if he claims partnership losses on his tax returns.")

BCLLP's tax returns were signed under penalty of perjury by Brown and Chiari. (R.1233, 1237-38, 5385-98) Brown is also represented to be the "Tax Matters Partner" on BCLLP's tax returns. (R.1235-36) BCLLP's tax returns (R.4510-4751) and Schedule K-1s (4184-4407) identify Capizzi as a partner; represent that no partner owns "50% or more" of BCLLP's profit, loss or capital (Exhibits 95-102, Schedule B(3)(b), R.4532, *et seq*.); identify Capizzi's ownership interest as "21.19%" (R.4533); and, as discussed above, allocate a "recourse obligation" to Capizzi (R.1262) that BCLLP's accountant testified *is not* consistent with Brown's claim that Capizzi is merely a non-equity partner. (R.1335-36)

Given these undisputed facts, Defendants are estopped from denying Capizzi's ownership interest in BCLLP.

The cases cited by Brown on pages 57 and 58 are easily distinguished. In *Bhanji v. Baluch,* 99 A.D.3d 587 (1st Dept. 2012), the corporation in which the petitioner claimed ownership filed *inconsistent* state and federal tax returns for the same year. In one return, the petitioner was

listed as owning 50% of the corporation and in the other 0%. In *D'Esposito v. Gusrae, Kaplan & Bruno PLLC,* 44 A.D.3d 512 (1st Dept. 2007), plaintiff was identified as a "partner" on the firm's tax return, but he was not responsible for losses (i.e., he did not have recourse liabilities like Capizzi). There was also a partnership agreement in *D'Esposito*, which the plaintiff did not sign. In *Dundes v. Fuerisch,* 13 Misc. 3d 1223(A) (Sup. Ct. N.Y. Cnty. 2006), defendants attempted to rely on *the absence of tax returns*. And, finally, in *Barrison v. D'Amato & Lynch, LLP*, 2019 NY Slip Op. 30905(U) (Sup. Ct. N.Y. Cnty. 2019), "K-1s were plaintiff's sole basis for believing he was a partner," and he admitted that he received a K-1 while he was "of counsel" (i.e., was not an equity partner) *at the same firm*.

Point. IX. Brown's Reliance On Material *Excluded* From Evidence

Remarkably, Brown relies heavily on documents that were *excluded* from evidence during trial. They include an affirmation from James Mucklewee ("Mucklewee") and a memorandum of law signed by Mucklewee. (R.3586, 3645) Both documents are from the *Frascogna* litigation, submitted *after* the defendants in that case filed a notice of appeal "for leverage" (R.1186), but *before* the Frascogna firm was officially "terminated" by Brown's filing of the Certificate of Withdrawal on May 29, 2007. (R.3674-76) The memorandum is undated, but Mucklewee's accompanying affidavits reference

the memorandum and are dated May 10, 2007 (R.3586, 3594), thereby establishing that the documents were submitted in this interim period *after* Justice Curran's order but *before* Brown, Chiari and Capizzi accepted the court's determination and formally terminated the Frascogna firm.

Brown quotes from and/or relies on these documents on pages 7, 13, 20, 28, 36, 37, 40, 41 and 42 of his brief, and Chiari quotes from and/or relies on the documents on pages 7, 23, 32 and 33. The title of Point IV(B) of Brown's brief (at page 40) also specifically refers to these "court filings."

The documents were marked as Exhibits 183 and 185 and offered into evidence by Defendants' counsel. Capizzi objected to the documents being used or introduced into evidence for a number of independent reasons, and the objections were *sustained*. (R.2614-59) Defendants attempted to introduce the documents *a second time* later in the trial, but the trial court reiterated its original decision and again refused to accept the documents in evidence. (R.2843-44)

Although he *sustained Capizzi's objections to the memorandum and excluded it from evidence*, Judge Walker directed that the documents be marked *as Court Exhibits* (Court Exhibits 13 and 15) and included in the Record on Appeal in this case so that his ruling could be challenged on this appeal *if Defendants elected to do so*.

Judge Walker said:

> Exhibit Number 183, an affidavit in opposition…
>
> * * *
>
> …I've reviewed the affidavit. It says nothing about any statements on behalf of, or by Mr. Capizzi, that would contradict anything he's testified in – testified to in this trial.
>
> * * *
>
> *It will not be admitted into evidence* and you will not examine the witness on it.
>
> * * *
>
> Exhibit 185, a memorandum of law, also submitted by Mucklewee at the Brown Chiari law firm in connection with the bond application.
>
> It all dealt with Frank Frascogna and his position, and it relies on the trial testimony that was referenced in Mucklewee's affidavit in opposition to the bond, which is Exhibit 184 for identification.
>
> Again, I find nothing in there that wasn't already available to Rupp and his clients before today.
>
> This is a collateral issue.
>
> *Exhibit 185 will not be admitted into evidence*, and the witness will not be examined on it.
>
> *Each of these four will also be marked as Court exhibits, so that they're part of the record in the case for any appellate review*.

(R.2662-65, emphasis added)

Neither Brown nor Chiari has challenged Judge Walker's evidentiary rulings excluding these documents from evidence on this appeal. As such, the documents remain *excluded* from evidence and should *never* have been mentioned by Brown or Chiari in their briefs, much less discussed and quoted from *extensively*. *Puccini v. DiNapoli*, 91 A.D.3d 1182 (3d Dept. 2012)

("The internal department reports referenced by petitioner as the only proof of timely notice of the April 6, 2006 incident were not admitted into evidence at the hearing and are, therefore, not properly a part of the record herein."); *Williams v. Hooper*, 82 A.D.3d 448, 449 (1st Dept. 2011) (noting that plaintiff may not rely on an investigatory report not admitted into evidence during trial); *see also Timothy V. v. Sarah W.*, 144 A.D.3d 1423, 1424 (3d Dept. 2016) (finding that lower court erred in relying on documents it excluded from evidence in making factual findings).

Because Defendants have not challenged Judge Walker's evidentiary rulings excluding these documents, they have abandoned any argument that his rulings were erroneous (they were not). *Romilly v. RMF Prods., LLC*, 106 A.D.3d 1465, 1467 (4th Dept. 2013) (deeming issue abandoned where party fails to raise issue in their brief on appeal); *McNeil v. Deering*, 120 A.D.3d 1581, 1582 (4th Dept. 2014); *Ciesinski v. Town of Aurora*, 202 A.D.2d 984, 984 (4th Dept. 1994). And it would be beyond improper if Defendants attempt to challenge Judge Walker's evidentiary rulings in their reply briefs.

Because the documents were excluded from evidence, they were never addressed by Capizzi during trial. There was simply no reason for Capizzi to explain why the documents – which were not prepared or signed by

Capizzi, but by an attorney hired by Brown and Chiari[11] – were submitted or why the relief requested was abandoned. By quoting from and relying on the documents extensively in their briefs, Defendants have therefore placed Capizzi in the position of having to respond to documents that were not addressed at trial <u>because they were excluded from evidence</u>. Yet Capizzi has no choice but to respond given Defendants' improper actions.

Brown relies on the excluded documents in two ways. First, by misrepresenting the content of the documents and, second, by misrepresenting the significance of what is contained in the documents.

Brown represents to this Court that the documents from May 10, 2007 contain admissions by Capizzi that he was not an equity partner in the Frascogna firm and that he did not intend to be an equity partner with Brown and Chiari in 2007. <u>*Brown's representations are false*</u>. Specifically,

- Brown refers this Court to pages 3645 and 3648 of the record as support for his statement on page 13 that Capizzi made "clear and unequivocal post-trial submissions in May of 2007 that [Capizzi] was not an equity partner." <u>*Nowhere*</u> on these two pages, or elsewhere, does Mucklewee state that Capizzi

[11] Judge Walker noted "… Capizzi hires another attorney from the same firm that somehow he's supposed to be distancing himself from, in terms of posting a bond. That just seems odd to the Court." (R.2842)

"was not an equity partner" *at all*, and certainly not in "clear and unequivocal" language.

- On page 20, Brown states that Mucklewee's "post-trial submissions made in 2007" "described [Capizzi's] intentions regarding his relationship and agreement with Brown and Chiari." But Brown provided this Court with no reference to the Record as support for this statement, and none exists.
- On page 28, Brown represents to this Court that "Capizzi affirmed in 2005, 2006 and 2007 that he was an income partner only with no guaranteed percentage of net income." Brown cites pages 5431, 5434 and 5485 of the record as support for this claim, but these three pages contain *only* statements from 2005 and 2006. Brown's reference to 2007 is a reference to the excluded Mucklewee document but, as demonstrated above, the document does not say this at all.

Thus, as shown here, Brown has (1) relied on documents he acknowledges were *excluded* from evidence by the trial court, and (2) compounded his misdeed by misrepresenting to this Court what is contained within the excluded documents.

Both Brown and Chiari have relied on these documents which Judge Walker excluded from evidence. Chiari brazenly *ignores* Judge Walker's rulings, thereby misleading this Court into believing that the documents are in evidence. Brown, on the other hand, acknowledges *in a footnote* (footnote 1, at page 7) that "Judge Walker refused to admit [the documents] into evidence," before proceeding to cavalierly *disregard* the court's rulings and quote from and rely upon the documents repeatedly. It is difficult to say which approach is more egregious, but they are both outrageously improper, and those portions of Defendants' briefs which rely on the excluded documents should be disregarded. In fact, it would be reasonable for the Court to reject Defendants' entire briefs, and dismiss their appeals, as a sanction for this conduct.

Point X. Capizzi's Email To His Accountant Supports His Claim Of Ownership

At pages 11 and 59 of Brown's brief, and pages 46-47 of Chiari's brief, Defendants quote *one sentence* from an email sent by Capizzi to his personal accountant (R.5422), and then allege that this one sentence is an admission by Capizzi that he is not an owner of BCLLP. By only quoting this one sentence, however, Defendants have grossly distorted the email.

The email in question was sent by Capizzi on January 30, 2015 in connection with financial aid applications for Capizzi's sons, who were attending Georgetown and Wake Forest Universities. (R.747) As stated in the email, Capizzi advised his accountant that he had nearly completed the applications, but he was "having difficulty answering a few questions." Capizzi's "questions" concerned *valuations for the businesses he owned*, including BCLLP. The preface to Capizzi's questions reads: "*First I am asked if I am self-employed, and they define that as owning a business either as a sole proprietor or partnership, so I think that has to be yes*." Capizzi then continues:

> Then I am asked for the approximate market value of the business or actually my part of it. 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 distribute the profits after we pay expenses, and as we know from the past few years, income is all over the place.

(R.5422)

Defendants only quote the *portion* of this email which reads "Really, it's just an agreement to distribute the profits after we pay expenses" in an effort to mislead this Court into believing that it completely describes the parties' relationship. Clearly, it does not.

The email from Capizzi to his accountant is focused on the "market value" of BCLLP, a law firm which all parties agree distributes 100% of its profits at the conclusion of each calendar year. Thus, Capizzi's statement is correct and entirely consistent with his ownership interest.

Parenthetically, Defendants also fail to tell this Court that, in 2006 during the *Frascogna* litigation, Chiari described the distribution of profits at the Frascogna firm – a firm in which Chiari *now* claims he was an equity partner – exactly the same way that Capizzi described it to his accountant in 2015. This was Chiari's testimony in *Frascogna*:

> Q. And did Mr. Brown ever indicate to you that you'd be something other than a partner?
>
> A. It was always our understanding that we were sharing net income based on a percentage. So – that's my answer. That's – that was the understanding from day one.

(R.5513)

In addition to omitting the highly significant preface to Capizzi's statement ["*First I am asked if I am self-employed, and they define that as owning a business either as a sole proprietor or partnership, so I think that has to be yes*"], Defendants also conspicuously fail to advise the Court that, immediately following the email to his accountant, Capizzi did in fact complete

the "FAFSA" and "CSS" financial aid applications referenced in the email – applications which Defendants subpoenaed to court for trial.

The Wake Forest financial aid application is dated February 22, 2015 – just three weeks after the email from Capizzi to his accountant – and it was admitted into evidence as Exhibit 180. (R.5838+) This application contains the questions referenced in Capizzi's email to his accountant, along with Capizzi's answers, which included the name of the business owned by Chiari ["Brown Chiari LLP"], and the current market value of this business ["0"]. In addition, the application asked for Capizzi's "percent of ownership," which Capizzi listed as "20[%]." (R.5847-48)

Referencing the October 30, 2015 email from Capizzi to his accountant, Chiari tells this Court that this email is a reliable indication of Capizzi's ownership interest because it was "written at the time when his financial interests were not at issue." (Chiari's brief at p. 46) Capizzi agrees. By the same token, the same can be said for Capizzi's February 22, 2015 financial aid application to Wake Forest University, in which Capizzi confirmed his 20% ownership interest in BCLLP.

Conclusion

This is an appeal from an order which declared that, "as of the date of his resignation from [BCLLP] on January 8, 2016, [Capizzi] was an equity partner in [BCLLP]." (R.18) Thus, although it is Capizzi's position that he was an equity partner in BCLLP *ab initio*, the issue to be decided on this appeal concerns only Capizzi's status *on January 8, 2016*.

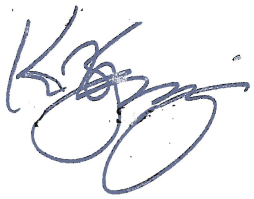
Brown's brief focuses almost exclusively on events occurring in 2005 and 2006, before BCLLP even existed, and essentially ignores the significant events that occurred during next nine years of the parties' relationship. But it is those events that define the parties' relationship and establish, beyond question, that Capizzi was an equity partner when he withdrew from BCLLP on January 8, 2016.

The evidence supporting Capizzi's ownership is quite literally overwhelming; especially where, as here, Brown bears the burden of proving that Capizzi *is not* an owner (*see* discussion at page 20, *supra*).

For all these reasons, it is respectfully requested that the order of September 13, 2019 be affirmed, with costs, and the appeal from the order of October 15, 2019 be deemed abandoned or, alternatively, the order affirmed, with costs.

Dated: August 25, 2020

WEBSTER SZANYI LLP
Attorneys for Samuel J. Capizzi



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