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 APPELLANTS DONALD P. CHIARI AND BROWN CHIARI LLP

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Preliminary Statement

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

Appellants provide this Court with no arguments or reasons why the lower court's October 15, 2019 order should be reversed. As such, Appellants' appeal from this order has been abandoned and should be dismissed.

Appellants' brief focuses *entirely* on their appeal from the lower court's September 13, 2019 order (R.4), which declared "*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*, the issue to be decided on this appeal only concerns Capizzi's status *on January 8, 2016*.

Appellants' appeal can be summarized as follows: Because Capizzi said he was not an equity partner *ten years prior* to January 8, 2016, in a *different lawsuit* involving a *different limited liability partnership*, he cannot be an equity partner in BCLLP, even though BCLLP is a completely separate limited liability partnership established after the prior firm was dissolved.

Appellants' argument is really as simple as this. As correctly recognized by the trial court, however, the proper focus is not on what happened in a different case involving a different law firm ten years earlier but, rather, on Capizzi's status *on January 8, 2016*, and Capizzi respectfully submits that the *relevant* evidence overwhelmingly supports his claim, and the trial court's determination, that Capizzi was an equity partner in BCLLP at the time of his withdrawal on January 8, 2016.

Counterstatement Of Questions Presented

Appellants submit a "Question Presented" which asks if Capizzi can be an owner of "*a law firm*" when he previously "declared" that he was not an owner of "*the firm*" (emphasis added). By using the terms "a law firm" and "the firm," Appellants conflate two different partnerships. The testimony referenced in Appellants' question was given in 2005 and 2006 in a lawsuit styled *Frascogna v. Brown, Chiari, Capizzi & Frascogna, LLP, et al.,* Erie County Index No. 2004/8335 ("*Frascogna*"), and it concerned a limited liability partnership previously known as Brown, Chiari, Capizzi & Frascogna, LLP ("the Frascogna firm").

The Frascogna firm was judicially dissolved on January 22, 2007 by the order of Supreme Court Justice John M. Curran (R.3498) following a decision from Supreme Court Justice Eugene M. Fahey. (R.3395) The Frascogna firm's status as a New York limited liability partnership was also voluntarily "terminated" by the filing of a Certificate of Withdrawal on May 29, 2007. (R.3674)

By contrast, the limited liability partnership involved *in this litigation*, BCLLP, did not even exist until May 24, 2007 (R.3671), almost a year after Capizzi testified in the *Frascogna* lawsuit. In other words, Appellants' "Question Presented" -- indeed Appellants' entire appellate brief --

attempts to confuse this Court *by conflating two different limited liability partnerships* and by simply referring to the two distinct legal entities *collectively* as the "law firm."

Because Capizzi has *never* "declared" that he was not an owner of BCLLP -- i.e., *the legal entity involved in this lawsuit* -- the questions presented on this appeal are much different. They are:

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 requests, *inter alia*, the dissolution of BCLLP and an accounting. Defendants answered the Amended Complaint on April 24, 2018, denying that Capizzi was an equity partner. (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 and ending on May 29, 2019.

On September 13, 2019, the trial court resolved the "partnership issues" in Capizzi's favor and "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)

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

Statement Of Facts

This appeal only concerns Capizzi's status at BCLLP *on January 8. 2016*. Nevertheless, given Appellants' heavy reliance on the *Frascogna* litigation, Capizzi will begin this discussion almost 20 years earlier.

A. The Frascogna Firm And The *Frascogna* Litigation

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 "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 or about August 18, 2004, he commenced a lawsuit against the Frascogna firm, Brown, Chiari and Capizzi to dissolve the Frascogna firm. (R.3501) Frascogna alleged that *all four* men – *including Capizzi* – were general (i.e., equity) partners in the Frascogna firm. (R.3503 ¶8) Capizzi was specifically alleged to be "a necessary party to the relief requested." (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. (R.3669) Because this was merely an amendment/name change, the legal entity (i.e., 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)

Frascogna relied upon a number of factors to support his ownership claim. Of particular significance to Justice Fahey were five documents identified on page 35 of the decision (R.3429) – namely, (1) 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 death-agreement" wherein *each of the four men* agreed to pay the others shares of income for up to eight years following the death of any of the four men; and (5) the d/b/a certificate.

In the concluding paragraph of his decision, Justice Fahey added that Frascogna's "responsibility for obligations and liabilities" of the Frascogna firm was a "particularly" compelling fact supporting Frascogna's claim of ownership. (R.3436)

Brown, Chiari and Capizzi all testified in the *Frascogna* lawsuit, and all three denied that Frascogna was an equity partner. Capizzi and Chiari also testified that they did not consider themselves equity partners in the Frascogna firm[1]. As he explained to Judge Walker, Capizzi did not consider himself an equity partner *in the Frascogna firm* until after December 22, 2006, when Justice Fahey issued his decision finding that the Frascogna firm was "a partnership *with four partners*," including Capizzi. (R.3429) Capizzi also told Judge Walker *why* he did not believe he was an equity partner in the Frascogna firm when he testified in 2005 and 2006. He explained that the attorney hired by Brown to represent all of the defendants in that case, including Capizzi, had explained to him that he could not be an equity partner because he had not made a "cash" capital contribution, and because he did not have any management responsibilities at the Frascogna firm. (R.661-667)

[1] *See* discussion at pages 31-35, *infra*.

Although Capizzi testified that he did not consider himself an equity partner in the Frascogna firm, Justice Fahey disagreed when he concluded that all four men were equity partners. When Justice Fahey was appointed to the Appellate Division, Justice Curran signed an order striking "any denial of Frascogna's status as a general partner with Brown, Chiari and Capizzi" and dissolving the Frascogna firm. (R.3498)

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

B. BCLLP

The limited liability partnership that is the subject of this lawsuit, BCLLP, was created and registered with the New York Department of State on May 24, 2007. (R.3671) The Certificate of Registration for BCLLP states that it is a limited liability partnership "without limited partners." (R.3672)

Following the formation of BCLLP in May 2007, no efforts were made to change or "undo" any of the facts that Justice Fahey had relied upon when he concluded that the Frascogna firm was "a partnership *with four partners*," including Capizzi. (R.3429) In this respect, BCLLP, at least initially, continued to operate in the same manner as the Frascogna firm, as noted by Judge Walker. (R.8) In other words, BCLLP's tax returns listed Capizzi as a partner and he received a K-1; Brown, Chiari and Capizzi signed new banking authorizations confirming that Capizzi was authorized to borrow money and mortgage property on behalf of the new firm; Capizzi personally guaranteed BCLLP's line of credit, etc.

As discussed in detail later in this brief (*see* pp. 45-68), however, shortly after BCLLP was created, things began to change. And the changes that occurred establish beyond even a reasonable doubt that Chiari and Brown accepted Capizzi as their equity partner. For example, after BCLLP was established, among other things: Capizzi immediately became heavily

involved in the management of BCLLP's business; the three men immediately entered into a new "deal" to split 100% of BCLLP's profits using fixed percentages (40/40/20), and then honored the "deal" until they got together and changed it in 2014; in 2011, Brown drafted and circulated a proposed agreement which referred to Capizzi as a "member" of BCLLP, and called for Capizzi's estate to receive a share of BCLLP's profits for 13 years after Capizzi's death; BCLLP procured and paid for life insurance insuring the lives of [only] Capizzi, Chiari and Brown; starting in 2012, BCLLP modified its pension plan to differentiate "owners" from "employees" so that owners could be treated more favorably, and Capizzi was identified as an "owner" in meetings, in emails, in IRS forms and in formal pension plan documents mandated by ERISA.

C. The Demise Of BCLLP

In 2014, other things also began to change at BCLLP. Brown starting memorializing partner meetings with Capizzi and Chiari, and Chiari and Capizzi followed suit. Examples of these memoranda, or "minutes" of partner meetings, are contained within Exhibit 82. (R.4065-4172) Brown was 67 years old (R.2128) in 2014 and he was starting to talk about leaving BCLLP. For example, on March 25, 2014, Brown documented a meeting with Capizzi and Chiari where the three "discussed [Brown's] status with the office"

and some "other opportunities" that Brown was considering. (R.4130) A week later, Brown indicated that he had "met someone in Arizona" and that he was "thinking about" opportunities in that state. (R.4132-33)

Both Capizzi and Chiari began documenting partner meetings as well. For example, on May 23, 2014, Chiari responded to Brown's minutes from a partner meeting days earlier in a memorandum addressed to Capizzi and Brown. (R.4139) In this memorandum, Chiari tells Brown and Capizzi that he (Chiari) will now be in charge of things like "attorneys, paralegals and expansion in general," declaring that "the writing has been on the wall for years." Specifically addressing Brown, Chiari added "Jim, this is in no way a criticism of you taking time off, you have that right, but I have been here twelve months of each year…"

On June 24, 2014, Chiari documented another partner meeting involving only Capizzi, Chiari and Brown, in which Chiari asked Brown "what his intentions were with regard to how much time he will spend at the office and, in general, how much time he will be in Buffalo…", adding that "this necessarily touched upon the idea of compensation, retirement, and/or semi-retirement..." (R.4148)

On June 30, 2014, Chiari documented additional partner meetings involving only Capizzi, Chiari and Brown. In this memo, Chiari confirmed "compensation and/or buy-out options regarding Jim Brown." Specifically, Brown offered Chiari and Capizzi two options – namely, Capizzi and Chiari could "buyout" Brown's interest in BCLLP for $2 million, or Brown would "continue to work for three additional years with an objective analysis of his value as a lawyer and then a percentage of profit." (R.4150-51) During this meeting, the three men ultimately agreed to modify their prior "deal" to split profits using fixed 40/40/20 percentages. The modified agreement was documented by Chiari and included two components – namely, for a portion of the firm's profits, "instead of distributing the profits in accordance with prior years, we would instead evaluate each contribution and distribute accordingly," and the rest of the "funds would go into a profit pool to be distributed by percentage at the end of the year." (R.4151) "By percentage," meant 40/40/20. (R.2952)

Although Chiari's memo states that it "was a little confusing" even to him, Chiari nevertheless confirmed in writing that the first aspect of the new agreement *required* each of the three men to "*evaluate each contribution*" by the others.

Chiari testified:

> 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)

Given Brown's well-documented plans to work less, Capizzi naturally expected that the modified agreement would result in Brown's share of profits decreasing and Capizzi's and Chiari's shares increasing (R.1097-98), but he was also "concerned" that the new agreement might cause "dissension amongst the three," as stated in the memo. (R.4151)

Capizzi's fears of dissension ultimately proved well-founded when Chiari ignored the parties' agreement to "evaluate each contribution" and, instead, simply dictated how the firm's profits would be distributed at the end of 2014 and 2015. (R.810-15, 830-840) Chiari also unilaterally decided to give himself a "floor" profit distribution of $1.5 million in both 2014 and 2015, even though Capizzi never agreed to it (R.813-17), and it was not part of the parties' June 30, 2014 agreement on compensation. (R.4151)

When Capizzi received only 14% of BCLLP's profits in 2014 and only 11% in in 2015 (R.5425) -- percentages significantly lower than the 20% he received every year from 2007 through 2013 (R.5425) -- he voluntarily withdrew from BCLLP and requested an accounting in a letter dated January 8, 2016. (R.4793)

Parenthetically, in their statement of "facts," on page 9, Appellants claim that Capizzi's January 8, 2016 letter to Brown and Chiari was "the first time ever that he considered himself an owner of the firm." This is demonstrably false. Defendants subpoenaed Capizzi's financial aid applications to his sons' colleges hoping to find proof that Capizzi *denied* an ownership interest in BCLLP. Instead, they uncovered Capizzi's federal student aid application (FAFSA) from February 2015, wherein Capizzi represented to the federal government and Wake Forest University that he owned 20% of BCLLP. (R.2706, 5848) As noted by Appellants (at page 46), this application was completed by Capizzi "at the time when his financial interests were not at issue" and, therefore, is reliable evidence that Capizzi "considered himself an owner of the firm" long before January 8, 2016. As discussed later in this brief, Capizzi also confirmed his ownership interest in BCLLP in writing to his personal accountant and to BCLLP's accountants.

D. Defendants Sued Capizzi For A BCLLP Debt

On April 24, 2018, more than two years after Capizzi withdrew from BCLLP, Defendants asserted a counterclaim against Capizzi seeking to recover amounts owing on *BCLLP's line of credit.* (R.3470-71) In other words, Defendants have sued Capizzi *personally* to recover a debt owed *by BCLLP*, as acknowledged by the trial court. (R.9-10, 462) This alleged "responsibility for obligations and liabilities" is precisely the type of evidence that Justice Fahey found to be "particularly" compelling proof of ownership in his decision in the *Frascogna* lawsuit. (R.3436)

Burden Of Proof/ Standard Of Review

A. The Burden Of Proof Was On Appellants

Partnership Law §10(1) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership." Although a court must consider the totality of the parties' relationship, the sharing of profits is *prima facie* evidence of partnership. Partnership Law §11(4) ("The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business…").

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 shifts to Defendants, as the parties opposing partnership*, to demonstrate that Capizzi *is not* an equity partner. *Kirsch v. Leventhal*, 181 A.D.2d 222, 224 (3d Dept. 1992) (citing evidence of "partnership income tax returns, the actual sharing of profits and the parties' holding themselves out to the public as a law partnership," the court held that "the burden shifted to defendant to submit evidentiary proof to create a triable issue of fact on whether a partnership ever came into being."); *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.")

In this case, it is *undisputed* that (a) Capizzi shared in the profits of BCLLP from the day the firm was established in 2007; (b) that BCLLP filed tax returns identifying Capizzi as a partner; and (c) that Capizzi was always held out to the public as a partner.

For these reasons, Appellants' contention (at pp. 12-13) that Capizzi bore the burden of proof at trial, and their reliance on the ***general*** rule concerning burden of proof, as described in *F & K Supply, Inc. v Willowbrook Dev. Co.*, 304 A.D.2d 918 (3d Dept. 2003), is misplaced. Given the ***undisputed*** facts of this case, it was Defendants, not Capizzi, who had the burden of proof at trial.

B. The Standard Of Review

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 Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest.*, 169 A.D.2d 829, 830 (2d Dept. 1991) ("Where, as here, a case is tried without a jury, our power to review the evidence is as broad as that of the trial court, bearing in mind, of course, due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the credibility of the witnesses.").

Appellants cite *Kalt v. Ritman*, 50 A.D.3d 469 (1st Dept. 2008) for the undisputed premise that an appellate court's "reach in reviewing the evidence in a nonjury trial is as broad as that of the trial court," but they conspicuously omit a majority of the sentence from which the quote was taken. The compete sentence is as follows: "While *the conclusions of a fact-finding court should not be disturbed on appeal unless they obviously could not have been reached under any fair interpretation of the evidence*, especially when the findings rest in large measure on witness credibility, our reach in reviewing the evidence in a nonjury trial is as broad as that of the trial court." (Citations omitted, emphasis added). *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,* 169 A.D.2d at 830 ("…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. BCLLP And The Frascogna Firm Are Separate Legal Entities

A. Appellants' Conflation Of BCLLP With The Frascogna Firm

Appellants use the term "the firm" 70 times, and the term "the law firm" on 21 additional occasions. Not once, however, are these terms defined, thereby making it difficult if not impossible for this Court to know which "firm" they are discussing. This is intentional. By drafting their brief in this manner, Appellants attempt to mislead this Court into believing that the Frascogna firm and BCLLP are the same "firm," so they can transpose Capizzi's testimony about the Frascogna firm into testimony about BCLLP.

This is not the result of sloppy drafting, or an innocent mistake. Early on in the trial of this case, Judge Walker instructed counsel to be precise when referring to these different partnerships, so that he -- and by extension this Court -- would know exactly which entity was being discussed. (R.63, *et seq.*) Defendants' counsel (at that time, Defendants were all represented by Appellants' counsel) was reminded to maintain this distinction on multiple occasions (*e.g.,* R.1566-67, 2015), and he was admonished by the trial court when he attempted to ignore the court's instructions. (R.1619) Ultimately, counsel conceded that the Frascogna firm is legally distinct from BCLLP:

> **THE COURT**: I want to understand something. Are you seriously debating the enforceability and the legality of Justice Fahey's decision and Judge Curran's judgment dissolving one of those firms?
>
> **RUPP**: No, I am not, Judge.

(R.2015)

B. Separate Legal Forms Must Be Respected

In support of their effort to conflate the Frascogna firm with BCLLP, Appellants cavalierly characterize the official documents filed with New York State terminating the Frascogna firm and establishing BCLLP as "documents that are filed in state or county clerks' offices to change a comma here or delete a word there." (Page 22) They are much more than that. New York courts have consistently recognized that separate partnerships are indeed separate, and the distinction is important. The dissolution of a partnership marks the end of that partnership, and even where a second partnership begins and the business is continued by some or all of the partners there is no merger with, or revival of, the first partnership.

This rule was explained in *Burger, Kurzman, Kaplan & Stuchin v. Kurzman*, 139 A.D.2d 422 (1st Dept. 1988). There, partners entered into a written partnership agreement in 1973. The agreement included a restrictive covenant prohibiting departing partners from performing services for clients of the partnership. Following the death of one of the original partners 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 of the former partnership by the 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 was created when the partner died in 1979, and the court held that this separate partnership ended when the partners terminated their relationship in 1983. The *Burger* court relied upon its decision in *Ruzicka's v. Rager*, 277 A.D. 359, 360 (1st Dept. 1950):

> 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.

Likewise, in *Schwartz v. Lois Assocs.*, the court held that an accounting claim by the estate of a deceased partner was untimely where it was commenced more than six years following the partner's death. 149 A.D.2d 307, 309-10 (1st Dept. 1989). The court held that the "partnership as a legal entity was dissolved" when the decedent died, and the estate's time to commence an accounting commenced on that date. The "fact that the surviving partners continued operating the business of the former partnership did not revive that dissolved entity." *Id.*

Appellants claim, on page 5, that Capizzi's testimony in 2005 and 2006 describing the "post-Frascogna working relationship between himself, Brown and Chiari… is directly relevant to this lawsuit." In other words, because Frascogna had already departed when Capizzi testified in that case, Appellants contend that Capizzi's description of his "working relationship" with Brown and Capizzi necessarily continued *after* the Frascogna firm was

dissolved/terminated, and after BCLLP was established in May 24, 2007. Appellants are not correct. What Capizzi (and Chiari and Brown) said about their "working relationship" prior to the dissolution and termination of the Frascogna firm, and the establishment BCLLP, does not matter, because it "is at variance with established principals of partnership law." *Burger*, 139 A.D.2d at 423 (rejecting the IAS court's conclusion 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.'") This is precisely why Judge Walker concluded that Capizzi's testimony in *Frascogna* was "irrelevant." (R.15)

By the same token, Appellants incorrectly claim that "Judge Walker based his decision on Justice Fahey's 2006 decision" (at page 7), and that Judge Walker "permitted Capizzi to disavow his prior testimony" (at page 46). Judge Walker *did not* "base his decision" on Justice Fahey's findings in the *Frascogna* case. In fact, Judge Walker specifically stated that he was *not* doing this. He said "*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)

It is also absolutely incorrect to say that Judge Walker "permitted Capizzi to disavow his prior testimony." Capizzi has *never* "disavowed" his prior testimony. According to Merriam-Webster, "disavow" means to "deny responsibility for" or "refuse to acknowledge or accept."[2] Capizzi has *never* denied what he said, and he has never refused to acknowledge or accept what he said in the *Frascogna* case. As Capizzi explained at trial, he had "no reason to" disavow what he said in the *Frascogna* case because he believed it to be true when he testified. (R.1038) And Judge Walker never "permitted him" to disavow his prior testimony, because Judge Walker found Capizzi's testimony *irrelevant* after Justice Fahey's decision.

Point II. Capizzi's Testimony In The *Frascogna* Litigation Does Not Define The Parties' Relationship At BCLLP

A. Appellants' Heavy Reliance On *Heye v. Tilford* Is Misplaced

As support for their argument that Capizzi never intended to be an equity partner in BCLLP, because of his testimony in the *Frascogna* lawsuit, Appellants rely primarily on an 1896 decision from the First Department, *Heye v. Tilford*, 2 A.D. 346, 352 (1st Dept. 1896), *aff'd,* 154 N.Y. 757 (1897).

[2] "Disavow." *Merriam-Webster.com*. 2020. https://www.merriam-webster.com/dictionary/disavow (July 27, 2020).

Describing the *Heye* case, Appellants claim that "the Court of Appeals (sic[3]) identified Lawrence's intent conclusively from his prior sworn testimony." (R.16) In that case, however, Lawrence had previously provided testimony stating that "never had any interest in" the partnership that was the defendant in the litigation. In other words, Lawrence had denied ownership of *the same partnership* that his estate (i.e., not Lawrence) was claiming he owned. It is also not correct to say that the court in *Heye* identified Lawrence's intent "conclusively from his prior sworn testimony," because the First Department also noted several additional factors including, for example, that, "during all the years" that the firm existed prior to his death, Lawrence "took no part in the transaction of the business of the firm." *Id*. at 352.

The *Heye* case is easily distinguished from this case. Unlike Lawrence, Capizzi *never* denied ownership in BCLLP, and Capizzi actively participated in BCLLP's business during all the years that it existed.

Regarding Appellants' claim that "the Court of Appeals (sic) held that intent reigns supreme" (Page 15), this is clearly not the exclusive test of partnership in the Fourth Department. As this Court has stated on many occasions, intent is one of several factors to be considered when determining

[3] *Heye* was decided by *the First Department*, but Appellants' brief erroneously, and repeatedly, attributes quotations and holdings in *Heye* to the Court of Appeals.

partnership, and "[n]o one factor is determinative but, rather, it is necessary to examine the parties' relationship as a whole." *Hammond v. Smith*, 151 A.D.3d 1896, 1897 (4th Dept. 2017), c*iting Fasolo*, 120 A.D.3d at 930, and *Griffith Energy, Inc., v. Evans*, 85 A.D.2d 1564, 1565 (4th Dept. 2011); *Bianchi v. Midtown Reporting Serv., Inc.,* 103 A.D.3D 1261, 1262 (4th Dept. 2013); *see also* Justice Fahey's decision in *Frascogna* at pages 38-39 (R.3432-33).

B. There Can Be No Judicial Estoppel Based On Capizzi's Testimony In The *Frascogna* Action

Starting at page 23, Appellants rely on the doctrine of judicial estoppel to support their argument that Capizzi cannot be an equity partner *in BCLLP* because he said he was not an equity partner *in the Frascogna firm*.

"The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party 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) (internal quotations and alterations omitted), *quoting Reynolds v. Krebs*, 143 A.D.3d 1256, 1256 (4th Dept. 2016).

Appellants' reliance on judicial estoppel is misplaced for a number of reasons. Foremost, 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. In other words, 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 Appellants 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)

> **THE COURT** [addressing Appellants' counsel]: See, you can make a statement – if I find they are indeed three separate firms, you can make a statement regarding your status in Firm 1 and Firm 2 that have nothing to do with Firm 3. It's not inconsistent.

(R.1621)

In addition, judicial estoppel does not apply because *Capizzi did not prevail in the Frascogna action*. Frascogna sued Capizzi claiming that Capizzi was his equity partner. Capizzi testified that he did not consider himself to be Frascogna's equity partner. Frascogna prevailed; Capizzi did not.

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).

C. Capizzi Is Not Attempting To Change His Prior Testimony

On pages 26-30, Appellants rely on a series of cases to support their claim that "an individual cannot change his prior sworn testimony." In each and every case, however, the "prior sworn testimony" concerned the *same* event or situation under consideration in the subsequent proceeding. For example, in *Stickney v. Alleca,* 52 A.D.3d 1214 (4th Dept. 2008), a plaintiff attempted to give two different versions of *the same accident*. In *Van Valkenburgh v. Lutz,* 304 N.Y. 95 (1952), a defendant gave conflicting statements about *the same parcel of property*. In *Betancourt v. City of New York,* 269 A.D.2d 177 (1st Dept. 2000), a plaintiff attempted to change his testimony about his observations in a slip and fall accident later on *in the same trial*. In *Karasik v. Bird,* 104 A.D.2d 758 (1st Dept. 1984), plaintiff denied his wife was an alcoholic in one trial to defeat a claim and then said she -- i.e., *the*

same wife -- was indeed an alcoholic in a subsequent retrial. In *Glatzer v. Webster,* 934 N.Y.S.2d 33 (Sup. Ct., Kings Cnty. 2011), a plaintiff testified that she did not own a nursing home and later said that she did own *the same nursing home*.

For obvious reasons, each of these cases is easily distinguished from the present case because the testimony relied upon by Appellants here did not involve the same limited liability partnership at issue on this appeal.

The final case relied upon by Appellants, *Matter of Gelman,* 23 A.D.2d 328 (4th Dept. 1965), is also easily distinguished. In that case, an attorney attempted to "disavow" his prior testimony about conduct leading to his suspension in an effort to obtain a different outcome. Here, Capizzi has *never* attempted to disavow the testimony he gave in the *Frascogna* case because he believed it to be true when he testified, because it involves a completely different law firm and because he is not attempting to change the outcome in that case.

D. Brown's And Chiari's Testimony In The *Frascogna* Litigation Was No Different Than Capizzi's Testimony

Appellants contend that Capizzi's testimony in the *Frascogna* lawsuit "represents the heart of defendants' appeal" (Page 6). Conspicuously missing from Appellants' 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. In fact, Brown and Chiari each testified in the *Frascogna* lawsuit and stated under oath that Chiari was not an owner of the Frascogna firm. This bears repeating. *During the Frascogna lawsuit, Brown and Chiari each claimed that Chiari did not have an ownership interest in the Frascogna firm.*

Chiari's testimony during the *Frascogna* lawsuit included the following:

- When asked when Brown made Chiari his "equal," and "gave up some of his interest in the [Frascogna] firm to [Chiari]," Chiari responded by saying "I don't think he give (sic) up an interest in the firm but he gave up some percentage points in terms of sharing of the income." (R.5504-05)

- When asked if Brown "*ever*" indicated Chiari would be "something other than a partner," Chiari responded [in 2006] "It was *always* our understanding that we were sharing net income based on a percentage…" (R.5513)
- When asked [in 2006] if he "*ever*" had an agreement for a continuing interest in the Frascogna firm's cases if he left, Chiari said "No." (R.5528)
- When asked if he would be responsible for "negative net income" (i.e., responsible for the Frascogna firm's debts), Chiari responded [in 2006] "I *never* had that understanding." (R.5530)
- In testimony on July 12, 2006, Chiari was asked to describe his "partner" relationship with Brown at the Frascogna firm, and he responded as follows: "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)
- On the very next page of the transcript, Chiari was asked if "Brown *ever* indicate[d]" that Chiari "would be something other than a partner when [he] joined the firm." Chiari responded to Frascogna's lawyer by stating: "Well, when you use the word

> partner, I guess – I guess the best way to answer it is, you – you've alleged partner to mean something in this case. And no, *I never expected, nor do I now* [in 2006]*, to have been a partner as defined by you in your complaint*. But we were partners in terms of sharing net income at the end of the year." (R.5514) [Chiari clearly understood that "as defined" in his complaint, Frascogna was claiming "that he was an equity partner." (R.3202)]

Brown's testimony in the *Frascogna* lawsuit was consistent with Chiari's. (*See* Capizzi's brief in response to Brown's appeal, at pages 16-17)

The trial court acknowledged the inconsistency in Chiari's positions during trial as follows:

> **THE COURT**: The [*Frascogna*] decision clearly -- whether you agree with it or not -- says, despite the fact Capizzi swearing up and down he's not a partner, and *I think even Chiari saying up and down he's not an owner, an equity partner*, whatever the words were, Fahey says they are.

(R.2031, emphasis added)

This testimony -- i.e., that Chiari "*never," "ever"* considered *himself* to be an equity partner in the Frascogna firm, even after Frascogna's departure -- is exactly the same thing Capizzi said about himself, testimony which Appellants describe as "playing fast and loose with the courts" (Page

23), and which they claim "represents the heart of defendants' appeal," because it "persisted even after Frascogna's departure." (Page 6)

In other words, on one hand Appellants contend that Capizzi *is not* an equity partner in BCLLP because he said he was not an equity partner in the Frascogna firm in 2006 prior to Justice Fahey's decision. On the other hand, Appellants claim that Chiari *is* an equity partner in BCLLP, even though Chiari said the exact same thing about his own status at the Frascogna firm at the exact same time.

There is one very significant distinction between what Capizzi said in the *Frascogna* trial and what Chiari said. Capizzi has *never* attempted to "recant" the testimony he gave in the *Frascogna* lawsuit *because he believed his testimony to be accurate when he gave it*. It was not until Capizzi received Justice Fahey's decision that Capizzi understood that he was an equity partner *in that firm*.

Unlike Capizzi, Chiari *has* "recanted" his testimony from the *Frascogna* lawsuit. Whereas he testified in the *Frascogna* case that he was *not* an owner of the Frascogna firm, Chiari testified in this case that he was an owner of the Frascogna firm all along. (R.2741, 3183-91) Remarkably, Chiari never provided an explanation for his "recanted" testimony, choosing instead to ignore it.

So why would Chiari testify that he was ***not*** an owner in the Frascogna firm if it were not true? The answer is obvious. Chiari believed his odds of defeating Frascogna's claims would be improved if Justice Fahey could be convinced that no one other than Brown – ***not even Chiari*** – was an equity partner in the Frascogna firm. Ultimately, however, the strategy backfired when Justice Fahey observed, if he accepted Chiari's testimony, the Frascogna firm would be left with only one "partner" (Brown), and "a partnership with one co-owner is not a partnership at all." (R.3435)

At the end of the day, the fact that Capizzi ***and Chiari*** testified they were not owners of the Frascogna firm, prior to Justice Fahey's decision concluding otherwise, is not relevant to Capizzi's status at BCLLP. What remains relevant, however, is Chiari's testimony, because, unlike Capizzi, Chiari *knew* his testimony in the *Frascogna* case was false, but he gave it anyway in an attempt to defeat Frascogna's claim. Under the principle of *falsus in uno, falsus in omnibus*, it should therefore come as no surprise that Chiari now claims that Capizzi is not an equity partner in BCLLP.

Point III. Capizzi Did Not "Change His Story At Trial"

On pages 31-40, Appellants selectively quote from and distort Capizzi's deposition and trial testimony in this case and then boldly assert that Capizzi's trial testimony was "diametrically opposed to his deposition testimony" and that, through "brazen chicanery," Capizzi is "manipulating the truth." The only "manipulation" here is Appellants' manipulation of Capizzi's testimony.

On page 37, Appellants represent that Capizzi admitted at his deposition that he "never" discussed his status as an owner/ equity partner *of BCLLP* with Brown and Chiari "following the *Frascogna* decision." Appellants' claim is premised upon *selective* quotes from Capizzi's deposition, most notably, at page 34, deposition testimony where Capizzi was asked: "Did you tell [Brown and Chiari] you thought, by virtue of Judge Fahey's decision, that you were an equity partner?" This question clearly asked if Capizzi *told* Brown and Chiari that he "thought" he was an equity partner *in the Frascogna firm* "by virtue of Judge Fahey's decision." 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. Parenthetically, this question did *not* ask Capizzi if he thought that Justice

Fahey had determined he was an equity partner at the Frascogna firm; rather, it asked if he *told* Appellants what he thought. At a different point in the deposition, when asked about Justice Fahey's decision, Capizzi testified that he first realized that his prior conclusion was incorrect when he read Justice Fahey's decision. (R.5942-43)

Appellants then attempt to contrast this deposition testimony *about the Frascogna firm* with a question at trial which asked if there were "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 Mr. Frascogna's departure.*" (Page 35) This question was clearly asking Capizzi about BCLLP -- i.e., the only firm "formed… following Frascogna's departure." To this question, asking *about BCLLP*, Capizzi testified that the parties *did* have discussions that occurred after Justice Fahey's decision.

Using these two different sets of questions and answers *about two different partnerships*, Appellants then assert that Capizzi changed his testimony between his deposition and trial. Clearly, he did not. At his deposition, when asked about discussions *regarding ownership of BCLLP*, Capizzi testified as follows:

> Q. Okay. Now, *did you ever, at any time before you departed Brown and Chiari tell Brown or Chiari that you thought you were an equity partner, member or owner of the firm*?
>
> A. *Yes*.
>
> Q. And when did you do that?
>
> A. *We had many discussions* especially in 2014 about ownership, about paying out, about what was going to happen when Jim retired. Before that we even had discussions about trying to put together a death agreement about what would happen when somebody died or retired. We had discussions about the life insurance that we had on each other's lives. There was several discussions about ownership interests in the firm and how to compensate either the retiring member or the deceased member's family, and *there was certainly many discussions along the way*.

(R.5969-70, emphasis added) This testimony is conspicuously missing from Appellants' brief.

Respectfully, it is beyond zealous advocacy to (a) conflate testimony about two different partnerships and then accuse Capizzi of "brazen chicanery" because the testimony is different; and (b) to assert that Capizzi denied having discussions about his "status" at BCLLP at his deposition when the transcript, which is contained in the record on appeal, clearly states that there were "many discussions" on this topic. Notably,

Appellants also made this same false claim to the trial court in post-trial submissions, causing Capizzi to address this issue in his Proposed Findings of Fact. (R.6016-6017)

Point IV. Appellants' Claim That "Nothing Fundamentally Changed" After Capizzi's Testimony In *Frascogna* Is Preposterous

In Point III of their brief, Appellants turn their attention to a discussion – albeit briefly – of the factors this Court and others have consistently relied upon to determine partnership claims where, as here, there is no written partnership agreement. Although they are missing from Appellants' brief, 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).

Instead of undertaking an analysis of the factors established by this Court, Appellants take a different approach. Appellants claim that Capizzi is not an equity partner in BCLLP because (1) Capizzi said that he was not an equity partner in the Frascogna firm, *and* (2) because they claim that "*all* of

the indicia factors relief (sic) on by Capizzi in this case *predated* his testimony in *Frascogna*." (Page 42) Appellants similarly claim that "*nothing fundamentally changed* in the 10 years after Capizzi gave his testimony in *Frascogna*." (Page 47) "Accordingly," they claim, "without proof that *anything* changed in the parties' relationship *after 2006*, this sworn testimony forecloses Capizzi from claiming to be an owner of [BCLLP]." (Page 21)

Brown also contends that "all" of the "factors – referred to as 'indicia' – [cited by Judge Walker] to determine if Capizzi was an equity partner in BCLLP" were "also present during *Frascogna*" (Brown's brief at page 14).

Defendants' claim that "nothing fundamentally changed" after Capizzi's testimony in *Frascogna* is preposterous. There were numerous "changes" that occurred "after 2006," and they provide compelling evidence of Capizzi's ownership interest.

First, the Frascogna firm ceased to exist "after 2006" because it was dissolved (R.3498) and terminated. (R.3674) BCLLP did not even exist until "after 2006." (R.3671) Thus, whereas Capizzi has readily acknowledged that he did not consider himself an equity partner in the Frascogna firm when he testified in that case, that obviously "changed" when Justice Fahey's decision was released and Justice Curran's order was signed. Simply, the

ownership "factors" that Capizzi *dismissed* in the *Frascogna* case were the same factors that Frascogna had relied upon to establish ownership -- factors that Justice Fahey accepted. As a result, after Justice Fahey's decision and Justice Curran's order, it was apparent *to everyone* that these "factors" could no longer be ignored.

In fact, Appellants were well aware that dramatic changes would be required "after 2006" if they wanted to avoid a similar situation in the future. *Chiari admitted this at trial* when he acknowledged, in light of Justice Fahey's decision and Justice Curran's order, moving forward he would "not make the same mistakes [he] made with Frank [Frascogna]," such that "…*when something would come up that somebody tried to use to show ownership in the past, I would try to correct it*." (R.176, emphasis added) The only person who had "tried to show ownership in the past" was Frascogna, and the things Frascogna "used to show ownership" are discussed below.

Second, Appellants' claim that "*all*" of the "factors" Capizzi relied upon as evidence of his ownership *in this case* were also present at the Frascogna firm, and that Capizzi did not submit "proof that anything changed in the parties' relationship after 2006" is silly. While it is certainly true that almost "*all*" of the factors that Justice Fahey relied upon as evidence of ownership in the *Frascogna* case *continued* when BCLLP was established on

May 24, 2007, there are numerous *additional* "factors" evidencing Capizzi's ownership of BCLLP that were not present at the Frascogna firm, or were not relied upon by Justice Fahey. In other words, whereas Appellants did *nothing* to "try to correct" the things that Justice Fahey relied upon in the *Frascogna* decision (as Chiari acknowledged would be required for a different result), *there were* numerous changes at BCLLP which *confirm* Capizzi's ownership.

A. The "Factors" That Remained The Same

In his decision in *Frascogna,* Justice Fahey identified several factors he considered compelling evidence of ownership – namely, (1) tax returns identifying the partners; (2) bank resolutions authorizing the partners to conduct transactions with the bank; (3) a line of credit personally guaranteed by the partners; and (4) a draft "death-agreement" whereby the partners' estates would continue to receive income from the Frascogna firm following their deaths.[4] (R.3429) Justice Fahey added that the "responsibility for obligations and liabilities" was a "particularly" significant fact supporting ownership. (R.3436)

[4] Justice Fahey listed one additional factor – namely, a d/b/a certificate listing all four men as partners in the Frascogna firm. No d/b/a certificate was ever filed for BCLLP and the Certificate of Registration for BCLLP did not list *any* of the firm's owners (R.3672)

Thus, if Appellants ***truly*** intended to exclude Capizzi from the ownership group at BCLLP, these would be the "factors" that would need to be "corrected," as Chiari admitted during trial. (R.176) Each "factor," as applied to BCLLP, is discussed below.

1. Tax Returns

Each year from 2007 through 2015, BCLLP filed partnership tax returns with NYS and with the IRS. (R.4510-4751) The returns were always signed by Brown or Chiari, or filed electronically pursuant to authorizations signed by Brown or Chiari. (R.5385) In each return, Capizzi, Brown and Chiari were the only three individuals identified as partners who received K-1s. (R.4184-4407)

2. Bank Resolutions

In 2012 and 2013, Brown and Chiari signed "Partners' Authority Resolutions" 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 ***alone*** to bind the partnership. (R.3715, 3725, 3750)

3. Line Of Credit

BCLLP maintained a line of credit with M&T Bank. Related documents were signed by Capizzi, Brown and Chiari on behalf of BCLLP. (R.3707, 3716, 3726, 3734) The line of credit fluctuated from time to time, but generally exceeded $1 million. (R.4128)

In addition to loan documents, M&T Bank required BCLLP's partners, including Capizzi, to *personally* guaranty BCLLP's obligations to the bank, including the line of credit. (R.3741, 3745)

4. The Death Agreement

One of the "factors" relied upon by Justice Fahey was a "draft death agreement" at the Frascogna firm. (R.3429) That agreement was marked as an exhibit and admitted into evidence in this case. (R.3755) The agreement referred to Capizzi as a "partner" and provided for payments to Capizzi's estate for eight years following his death.

At BCLLP, in 2011, Brown drafted and proposed a *new* "death agreement" to Capizzi. (R.520-26, 3756-61) This agreement was similar to the agreement relied upon by Justice Fahey, but with some significant changes. Whereas the Frascogna firm agreement referred to the four individuals as "partners," the new agreement referred to Brown, Chiari and Capizzi as "members" of BCLLP, and whereas the *Frascogna* agreement called for *eight*

years of payments to a deceased "partner's" estate, the BCLLP agreement called for *13 years* of payments to each "member's" estate, including Capizzi's estate, following death.

The BCLLP agreement, which Capizzi characterized as "the beginning of a partnership agreement," was never signed because Capizzi expected his interest in BCLLP to grow, and he did not want to be limited to 20% of BCLLP's profits. (R.730-35)

B. The "Changes" That Confirm Capizzi's Ownership Of BCLLP

The following "factors" *did not* "*predate* Capizzi's testimony in Frascogna." Rather, all of the following events – relied upon by Capizzi at trial – occurred *after* the *Frascogna* decision, confirming Capizzi's ownership status in BCLLP.

1. Capizzi's Statements Of Intent At BCLLP

According to Appellants, statements of "intent" are crucially important factors, or indicia. In fact, Appellants state, at page 17, "it is the intent of the partner (sic) that determines the nature of their relationship." Given this categorical claim, Appellants must surely concede that Capizzi's statements of intent *while at BCLLP* are highly significant. Yet Appellants brief completely ignores the numerous *documented* statements by Capizzi evidencing his "intent" to be an equity partner of BCLLP (these documented

statements are in addition to the "many discussions" referenced at page 37 - 39 of this brief).

During trial, Capizzi identified and "relied" on at least three different written statements evidencing his "intent" to be an owner of BCLLP. These include (1) an email to his accountant seeking advice for completing financial aid applications, where he said: "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" (R.5422); (2) a federal financial aid application to Wake Forest University which asked Capizzi to identify any businesses he owned and to state the ownership percentage, to which Capizzi responded "BCLLP" and "20%" (R.5847-48); and (3) an email from Capizzi to BCLLP's accountant asking the accountant to verify his 20% ownership interest in BCLLP. (R.4174)

Tellingly, all three of these documented statements by Capizzi were made long before he decided to leave BCLLP or, using Appellants' words, they were "written at the time when his financial interests were not at issue." (Page 46)

By contrast, Appellants can point to no statements by Capizzi -- oral or written -- *denying* his ownership status in BCLLP, because none exist.

2. The Parties' Deal To Share Profits

Capizzi does not dispute that Brown and Chiari decided how profits would be divided at the Frascogna firm. (R.2793, 2797) Thus, the percentages varied from year to year at the Frascogna firm. As Chiari explained at trial:

> Q. You testified that at the previous firm -- so before Judge Fahey's decision, that the percentages of income between you and [Capizzi] and [Frascogna] and [Brown] were changed from time to time.
>
> * * *
>
> A. They were.
>
> Q. So in those years, '98, up until at least '04, when [Frascogna] left, those numbers changed a fair amount, right?
>
> A. They did.

(R.3201)

This variability continued after Frascogna departed. In 2006, for example, the year before BCLLP was established, Chiari received almost $200,000 (21%) more of the profits than Brown. (R.5729, 5733, 5736)

Starting in 2007, when BCLLP was established, things changed. In 2007, Capizzi, Chiari and Brown made a "deal" to share profits on a fixed percentage basis, with Capizzi receiving 20% and Chiari and Brown each receiving 40%.

In their effort to convince this Court that Capizzi is "without proof that *anything* changed in the parties' relationship *after 2006*," at page 38, Appellants falsely claims that the profits at BCLLP were divided "in those same percentages (20/40/40) for two full years before this purported conversion" in 2007. This is clearly not correct as shown above. When asked about this at trial *both* Chiari and Brown testified that the income was *not* split 40/40/20 in 2006. Brown testified "of course it's not" (R.2347-48), and Chiari testified "there was a change between '06 and '07 based on the numbers." (R.3197) The "numbers" are the numbers contained on the Frascogna firm's 2006 tax return (R.5710) and summary (R.5736), showing that the profits were divided 43/36/21 – not 40/40/20 -- in 2006.

At page 39, Appellants reiterate this false claim by alleging "the insinuation that the three men reached a new agreement to split profits 20/40/40… is pure fantasy." Yet here is Chiari's testimony concerning this new "deal," acknowledged by Chiari during his deposition and confirmed at trial:

> Q. Is there a reason why from '07 to '13 that the ordinary business income of the firm was distributed 40/40/20 in each of those years?
>
> A. Other than the obvious? That we --
>
> Q. What is the obvious?

A. That's what we -- that's what we designated it to be.

Q. That's what you agreed to?

A. Yeah, we agreed to it.

(R.3086)

Brown also confirmed that, once BCLLP was established in 2007, there was a new "deal" involving Capizzi, whereby they agreed to share profits 40/40/20. Brown's deposition testimony was as follows:

Q. Was that your deal with Sam [Capizzi], 40/40/20?

A. That had been up until we changed the arrangement in '14, I think it was.

* * *

Q. So was that true, that was your deal that you -- I'm sorry, that he would get 20 percent up until, as you say …you changed the deal? …Is that what you're saying?

A. Yes. We changed it in 2014.

(R.2331)

Given this testimony, it cannot be disputed that (a) there was ***no deal*** to split profits 40/40/20 at the Frascogna firm at any time, including 2006, and (b) there ***was*** such a deal at BCLLP in 2007. Because there was no deal in 2006, and there was a deal in 2007, the "deal" in 2007 was obviously a "new deal."

And because they had this new "deal" to share profits on a fixed percentage basis from 2007 through 2013, there was no reason for the three men to get together and discuss this division of profits during these years. Brown confirmed his deposition testimony at trial:

> **SZANYI**: I'll reread it again. I don't think [Capizzi] ever participated in any meetings up until two thousand -- and I don't want to get my years wrong, but it would have been -- let's see. It would have been '14. Question, okay. And in the prior years, it was a forgone conclusion he would get 20 percent, right? Answer, he would, yeah. There was nothing to meet about. He would get 20 percent. Did I read that correctly?
>
> **[BROWN]:** Yes, you did.

(R.2350-51)

As evidence by Exhibit 154 (R.5425), the parties' lived up to their "deal" from 2007 through 2013, and the three men divided profits 40/40/20, plus or minus 1%, during these years.

The significance of this change – i.e., this new deal -- to Capizzi's claim is obvious. *Prior to* the establishment of BCLLP, Chiari and Brown decided how much to pay Capizzi. After BCLLP was established, however, the parties negotiated and agreed on how the profits would be divided, *because that's what owners do*.

3. The Parties Changed Their "Deal" In 2014

As discussed in the Statement of Facts, *supra*, in June 2014, Chiari, Capizzi and Brown agreed to modify their 40/40/20 agreement. (R.4150-51) The new agreement was reduced to writing on June 30, 2014 by Chiari:

> **MR. SZANYI:** And Don [Chiari], the reason that you were memorializing this new method of compensation is because it was a change to the agreement that you had with Sam that we just went through, where it was previously 40/40/20; that's why you were memorializing it, correct?
>
> **[CHIARI]:** Yes.

(R.3097-98)

The new agreement ***required*** each of the three men to "***evaluate each contribution***" by the others. Chiari testified:

> 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)

4. BCLLP's Tax Returns Confirm Capizzi's Ownership

Justice Fahey relied on the Frascogna firm's partnership tax returns identification of "partners" as evidence of ownership. In the present case, BCLLP's tax returns contained significant additional information confirming Capizzi's ownership interest.

In 2008, partnership tax returns contained a question that did not exist previously (R.1273) – namely, "did any individual or estate own, 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*.). Thereafter, *every* BCLLP partnership return submitted to the IRS, all of which were signed by Brown or Chiari (*see* R.5385 for e-filing authorizations) states "under penalties of perjury" that *no one* owned "50% or more." The 2008 return lists Capizzi's ownership interest at 20.19%. (R.4533) BCLLP's office manager testified at trial that she witnessed Brown or Chiari reviewing the tax returns every year "with [her] own eyes." (R.557-58) As recognized by Judge Walker (R.18), if no partner owns "50% or more," by definition, the partnership must have *at least three* owners.

BCLLP's tax returns also confirm that Capizzi was allocated a share of BCLLP's "recourse" liabilities each year. (Capizzi's K-1s are found at R.4217-94; *see* "line K"). For example, Capizzi's allocated share of the firm's

recourse liabilities in 2008 was $336,337. (R.4226) BCLLP's accountant, David Barrett ("Barrett"), a CPA with Freed Maxick, relying on IRS guidelines, confirmed that a "recourse" obligation is an obligation for which the partner is *personally* responsible. (R.1262) In response to questioning by Judge Walker, Barrett also confirmed that a recourse obligation is *not* consistent with Appellants' claim in this lawsuit that Capizzi is merely a non-equity partner:

> 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)

At trial and in their appellate briefs, Appellants have offered no response to Barrett's testimony that BCLLP's tax returns are "inconsistent" with Appellants' claims in this litigation.

For a discussion of the doctrine of tax estoppel as it relates to BCLLP's tax returns, the Court is respectfully referred to Capizzi's brief in response to Brown's appeal. (*See* pages 53-58)

5. BCLLP's Accountants' Records Confirm Capizzi's Ownership

BCLLP's accountant, Barrett, was ***never*** told by Brown or Chiari that Capizzi was merely a "profits interest partner" prior to this litigation (R.1362-63), and his firm's "work papers" refer to Capizzi as an owner. (R.1281-83, 3816)

Although Barrett was the accountant primarily responsible for the BCLLP account (R.1222), a different CPA, Sandra York ("York"), was responsible for day-to-day activities. (R.1228-29, 1290) When Capizzi was refinancing a mortgage in 2014 and his lender, M&T Bank, requested verification from BCLLP's accountants of his representation that he was an owner of BCLLP (R.864), Capizzi was referred to York by BCLLP's office manager and York verified Capizzi's ownership interest. (R.1065) York sent a letter to M&T Bank on Freed Maxick letterhead which states: "We are the accountants for [BCLLP]. This is to advise that Samuel J. Capizzi is the owner

of 20% of the law firm partnership of [BCLLP]." The letter is dated November 6, 2014 and signed "Sandra P. York, CPA, Senior Manager." (R.4175)

6. Changes To BCLLP's Pension Plans Confirm Capizzi's Ownership

On pages 41-42, Appellants allege that "the court cited defendants' law firm's benefit plans wherein Capizzi is listed as a trustee. (R.10)." In other words, Appellants represent to this Court that Judge Walker relied upon the fact that Capizzi's is listed as a *trustee* of the BCLLP pension plans as evidence of his ownership of BCLLP.

This is nothing but a straw man argument.

Judge Walker *did not* "cite" Capizzi's status as a trustee. Judge Walker did not mention or rely on Capizzi's position as a trustee from 2007 to 2010 *at all*. Appellants refer this Court to page 10 of the record as support for their claim, but the word "trustee" does not appear on this or any other page of Judge Walker's decision.

Capizzi has *never* claimed that his position as a trustee from 2007 to 2010 is evidence of ownership. In fact, at trial and in his post-trial submissions, Capizzi advised Judge Walker and Appellants *on multiple occasions* that he was *not* relying on this as evidence of ownership. Capizzi's July 25, 2019 Proposed Findings of Fact confirm this. (R.6001)

What ***is*** "noted" in Judge Walker's decision, starting on page 10 of the record, is a discussion of evidence presented at the trial which established that BCLLP's pension plan was amended, starting in 2012, to distinguish "owners" from "employees," so that the owners of BCLLP could be treated more favorably, and Capizzi was specifically identified as one of the firm's three owners.

The history of the BCLLP pension plan, and the changes that were made to the plan starting in 2012 – all of which *post-date* Capizzi's testimony in *Frascogna* – were summarized and relied upon by Judge Walker in his decision (R.10-13), but the details are as follows:

- From May 24, 2007 through October 30, 2012, the BCLLP pension plan consisted of a "Profit-Sharing Plan" that treated owners and employees the same; this was called a "*pro rata* plan." (R.1414-15)
- On October 30, 2012, a pension consultant, Vincent Spina ("Spina"), made a sales pitch to Brown, Chiari and Capizzi utilizing a PowerPoint presentation which identified Brown, Chiari and Capizzi as the firm's "partners," and referred to them as collectively as "the employer." (R.3848, 3851)

- At the October meeting, Spina asked who owned the firm (R.743-44), because this information would be relevant depending on the type of plan selected. (R.1842, 1853-54) Capizzi testified that *Brown responded to Spina's question and identified Brown, Chiari and Capizzi as owners*. (R.743-44) Brown thereafter testified over *four days*, but *never denied telling Spina that Capizzi was one of the owners*.
- At the October meeting, Spina advised Brown, Chiari and Capizzi that the firm's existing Profit-Sharing Plan was "a poor plan design because the pool for owners is the same pool [as for employees]." (R.1834-36) Spina proposed modifying the plan to "benefit the owners." (R.1829)
- Following the October meeting, Spina exchanged emails with BCLLP's investment manager, referring to Capizzi as "Attorney-owner" and a "Principal" (with a capital "P" which, from Spina's prior employment, indicated ownership). (R.1820-26, 3956)

- Spina ultimately transitioned BCLLP to his assistant Jill Casey ("Casey"). (R.1808) In her deposition, which was admitted into evidence, Casey confirmed that Spina told her that Capizzi was an owner following the October meeting with Brown. (R.4924)
- Numerous emails were exchanged between Casey and BCLLP's Office Manager Kimille Kasperek ("Kasperek"). In these emails, Casey referred to Capizzi as an owner (R.3961, 3975, 3977, 4013) and, although Kasperek spoke with Brown or Chiari about these emails, and "more likely than not" printed copies for them (R.570), she was never told to tell Casey that Capizzi was not an owner, and she never did. (R.571-72)
- Spina's advice was ultimately accepted and BCLLP added a Cash Balance Plan to its Profit Sharing Plan after the meeting. A plan document was created (R.3868), along with two different "Summary Plan Descriptions" – one "for Owners" (R.3922) and one "for Employees." (R.3939)
- Only Capizzi, Brown and Chiari were identified as "owners" in the Summary Plan Description for Owners. (R.3922)

- Kasperek testified that she gave the Summary Plan Description for Owners to Brown and Chiari. (R.577-78)
- On December 12, 2013, Kasperek "uploaded" and emailed an "information request" identifying Brown, Chiari and Capizzi as the three owners of BCLLP. (R.564-67, 3968-72) Kasperek did not include the ownership percentages on the form because she did "not know the ownership percentage at that time." (R.631)
- Spina did not learn that Brown and Chiari were disputing Capizzi's ownership until *after* Capizzi left the firm. (R.1839-40)

As this Court has no doubt noticed, Appellants' brief does not mention ***anything*** about the BCLLP pension plan, beyond their ***false*** claim that Capizzi was relying on his status as a trustee.

7. 20% Of Frascogna's Settlement Was Paid By Capizzi

The ***Frascogna*** lawsuit was settled for $400,000 in 2007. Appellants claim that Capizzi was not an equity partner in the Frascogna firm which, if true, would mean that Chiari and Brown alone would have been required to pay the entire $400,000 settlement to Frascogna. But this is not what happened. As acknowledged by Chiari at trial, the $400,000 paid to Frascogna was paid ***by BCLLP*** in 2007, thereby reducing BCLLP's profits (net income) by $400,000 in 2007. (R.220) This resulted in Capizzi's agreed upon

20% share of BCLLP's profits (*see* the discussion above) being reduced by $80,000. (R.683-84) In other words, *Capizzi paid $80,000 of the $400,000 settlement to Frascogna*, even though Appellants claim that Capizzi was not an equity partner in *either* the Frascogna firm *or* BCLLP.

8. Capital Contribution

As recognized by the trial court (R.8), if the *Frascogna* case had not settled, the matter would have proceeded to the accounting ordered by Justice Curran, and Capizzi -- a defendant in the *Frascogna* lawsuit who was determined by Justice Fahey to be one of the four equity partners -- would have been responsible for a share of the liabilities on dissolution or, alternatively, entitled to a share of the assets. Given Frascogna's $400,000 settlement, which all of the parties to this lawsuit agreed was a "great deal" (R.683), and the fact that Capizzi stayed at the Frascogna firm for two years after Frascogna left, Capizzi estimated that the value of his interest in the Frascogna firm was significantly greater than $400,000. But Capizzi neither demanded nor received a distribution as a result of the court ordered dissolution of the Frascogna firm; instead Capizzi "rolled" his interest in the Frascogna firm into BCLLP, thus making a capital contribution to the new entity, BCLLP, along with Brown and Chiari. (R.687-89)

9. Real Estate

During the entire time that BCLLP existed, from May 24, 2007 to January 8, 2016, the firm's principal office was located at 5775 Broadway in Lancaster. The real estate and building at that location were owned by an entity known as 5775 Broadway, Lancaster, LLC, which in turn was owned by Capizzi, Brown and Chiari in equal shares. (R.709-10, 725, 3677-79)

10. Life Insurance

Another example of ownership "indicia" that did not "*predate*" Capizzi's testimony in *Frascogna* is life insurance. Life insurance was not provided for the partners in the Frascogna firm because, according to Brown, it was "too expensive." (R.517) At BCLLP, however, life insurance policies were purchased, insuring ***only*** the lives of Brown, Capizzi and Chiari. (R.555) The policies were paid by BCLLP and were "not considered draws," according to BCLLP's bookkeeper and office manager (R.555).

11. Management Responsibilities

Another "factor" that flies in the face of Appellants' statement that "***all*** of the indicia factors relief [sic] on by Capizzi in this case *predated* his testimony in *Frascogna*" (page 42, emphasis added) is management responsibility. "Management of the business" is one of the four primary

factors this Court relies upon to determine partnership. *Hammond,* 151 A.D.3d at 1897.

In the *Frascogna* case, responding directly to Justice Fahey, Capizzi testified "Judge, we never sat down as a joint group of four, never." (R.5481) A few pages later in the same transcript, Capizzi confirmed this by adding "We never had discussions amongst the four of us." (R.5483) And when asked about his management responsibilities at the Frascogna firm, Capizzi testified as follows:

> Q. Did you participate, sir, in the management of the [Frascogna] firm?"
>
> A. No.

(R.5484)

As Capizzi readily acknowledges in his complaint <u>in this case</u>, Chiari was BCLLP's "*de facto* managing partner" and Capizzi relied on Chiari to fulfill this role at BCLLP. (R.3477) Chiari confirmed that he was, "in effect," the managing partner at BCLLP. (R.234) Nevertheless, Capizzi was heavily involved in management at BCLLP. (R.749, *et seq.*)

In pretrial discovery, Capizzi served a discovery demand requesting all "internal memoranda concerning [BCLLP's] management." In response, Appellants produced more than 100 pages of documents for the relevant time period, May 24, 2007 to January 8, 2015 (R.265-67), and the

documents were collectively marked and received as Exhibit 82. (R.4065-4170)

The documents marked as Exhibit 82 conclusively establish, often in Defendants' own words, Capizzi's significant role in the management of BCLLP. For example, the memoranda at R.4128, 4131, 4132, 4134, 4137, 4139, 4142, 4143, 4147, 4150, 4152, 4155, 4156 and 4160 memorialize partner meetings involving *only* Capizzi, Brown and Chiari.[5] Equally significant, Exhibit 82 *does not* include any memoranda documenting partner meetings of Chiari and Brown *that did not include Capizzi*. In other words, for each and every partner meeting at BCLLP, Capizzi was always included, and "no one else was in the room where it happened."[6] The "Re" lines on these memoranda vary; some specifically reference "Office Administration" and others simply reference "Office," "Meeting," "Office Meeting" or "Office Issues." Without question, however, all of the memoranda document high level discussions relating to the management of BCLLP and all involve Capizzi. The following are some examples of the issues documented in these memoranda:

- The line of credit that was personally guaranteed by Capizzi (R.4128, 4160)

[5] Some of the referenced memoranda from Brown are addressed to the "File," but they were sent to Capizzi and Chiari. (R.466)

[6] "The Room Where It Happens," lyrics by Lin-Manuel Miranda, from the Broadway musical *Hamilton.* © Warner Chappell Music, Inc.

- Insurance coverage on "our" buildings (R.4129)
- Criteria for compensating associate attorneys (R.4129)
- Brown's "status" at BCLLP, including Brown's interest in "other opportunities" outside of BCLLP (R.4130)
- The assignment of cases (R.4131, 4143, 4147)
- Chiari's concern about Brown's interest in doing legal work outside of BCLLP because "we have invested in the name of the firm" (R.4131)
- Ways to cut expenses (R.4132)
- Renovations at a new office for BCLLP and concerns about the progress (R.4132, 4147)
- Managing associate attorneys (R.4137)
- Hiring new attorneys (R.4137, 4142, 4147, 4155)
- Oversight of cases ("[Capizzi] indicated that he has been monitoring major auto cases and premises cases…") (R.4138)

- Organizing files for an attorney leaving BCLLP ("Sam [Capizzi] is going to put together John's files so that they can be transferred to John…") (R.4138)
- The quality of new attorneys (Capizzi expresses concerns and adds "I think we all need to weigh in on the hiring decisions") (R.4142)
- Issues with the quality of work by associate attorneys (R.4143)
- Brown's "intentions" with regard to the amount of time he will be spending in Buffalo and his "retirement or otherwise" (R.4148)
- Associate compensation (R.4155)
- The status of cases going to trial and possible settlement (R.4155)
- A new retainer agreement for the office (R.4156)
- The "tracking of aging of files and tracking the amount of cases opened and closed by attorneys" (R.4157)
- The fact that "intakes" at the office seemed to be "way down" (R.4160)

- Confirmation that Capizzi will "deal with" a "situation" involving a former BCLLP attorney (John Elmore) (R.4161)
- Discussions about the status of cases within the office (R.4161)
- Brown's plans to be in Arizona and South Carolina from November [2014] through March [2015] (R.4161)

It bears repeating that the issues documented in these memoranda were discussed at partner meetings involving only Capizzi, Chiari and Brown. There are ***no*** memoranda documenting partner meetings that did not include Capizzi.

In addition to memoranda documenting partner meetings involving only Brown, Capizzi and Chiari, Exhibit 82 contains numerous additional memoranda and emails documenting Capizzi's significant role in the management of BCLLP's affairs. For example, the memoranda at R.4066, 4086, 4088, 4090, 4093, 4095, 4096, 4097, 4102, 4105, 4106, 4112, 4118, 4126 and 4153 confirm that Capizzi was ***independently*** instructing associate attorneys, and R.4094 and 4103 confirm that Brown, Chiari and Capizzi were ***equally*** responsible for supervising associate attorneys.

Exhibit 83 (R.4171) is a copy of a memorandum contained within Exhibit 82 (R.4131), with the addition of Capizzi's notes from a subsequent partner meeting. Capizzi's notes reflect discussions and ideas for cost cutting measures, including a six month and two year plan. As Capizzi explained at trial, "things to help save money" at the firm was "one of the things [he, Brown and Chiari] were talking about constantly." (R.806-07)

Of course, management related activities are not always documented in memoranda. For example, in 2014, Capizzi, Brown and Chiari confidentially met with attorney Kathleen Sweet to discuss the possibility of Ms. Sweet joining BCLLP, but no memoranda was generated. Only Capizzi, Brown and Chiari participated in the interview process. (R.350, 749-50)

In an effort to minimize Capizzi's role in management, at pages 42-43, Appellants reference the *five* findings on pages 10-11 of Judge Walker's decision (R.13-14), which Judge Walker found to be inconsistent with Capizzi's claims in this case (in contrast to the 24 findings that Judge Walker found supportive of Capizzi's claims). As discussed in Capizzi's brief in response to Brown's appeal, at pages 48 - 53, the five "findings" cited by Judge Walker are not supported by the record, or are irrelevant to Capizzi's ownership status.

12. Defendants Sued Capizzi For A BCLLP Debt

As mentioned in the Statement of Facts, *supra*, another "change" that occurred after 2006 is Defendants' counterclaim against Capizzi, whereby Defendants have *sued him personally for BCLLP's line of credit/ indebtedness to M&T Bank.* The claim is contained in Appellants' fourth counterclaim (R.3470-71), and was acknowledged by the trial court. (R.9-10, 462)

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

At pages 11 and 59, Appellants quote *one sentence* from a January 30, 2015 email sent by Capizzi to his personal accountant requesting assistance with financial aid applications for his sons' colleges (R.5422), and allege that this one sentence is an admission by Capizzi that he is not an owner of BCLLP. As explained in detail in Capizzi's brief in response to Brown's appeal (*see* pages 64 - 67), however, by taking this one sentence out of context, Appellants have attempted to mislead the Court. Conspicuously omitted from Appellants' brief is Capizzi's statement in this same email to his accountant which 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*."

Point VI. Appellants' Reliance On Material *Excluded* From Evidence

Like Brown, Appellants also quote from and rely upon documents that Judge Walker *excluded* from evidence in this case. The documents in question are post-trial submissions from the Frascogna case, not signed by Capizzi. The documents are referenced on pages 7, 23, 32 and 33 of Appellants' brief, and the documents were ruled inadmissible by Judge Walker at R.2614-65 and 2843-44.

As discussed in Capizzi's brief in response to Brown's appeal, at pages 58 - 64, these documents were included in the record on appeal for only one reason, so Defendants could challenge Judge Walker's evidentiary rulings if they elected to do so. But Defendants have *not* challenged Judge Walker's rulings. Instead, Appellants have simply ignored his rulings and relied upon the excluded documents as if they were in evidence. For the reasons stated in Capizzi's brief in response to Brown's appeal, this conduct on the part of Appellants should not be countenanced by this Court. Those portions of Appellants' brief which rely on the excluded documents should be disregarded, and it would not be unreasonable for the Court to reject Appellants' entire briefs and dismiss their appeals, as a sanction for this improper conduct.

Conclusion

Appellants claim that Capizzi was not an owner of BCLLP on January 8, 2016 because he said he was not an owner of another partnership ten years earlier, and because they claim "nothing changed" between 2006 and January 8, 2016. Appellants are wrong on both counts.

Capizzi's testimony about the Frascogna firm and/or his relationship with Brown and Chiari *prior to BCLLP* is simply irrelevant to his status on January 8, 2016. BCLLP is a separate and distinct legal entity from the Frascogna firm, both before and after Frascogna's departure. And although Capizzi was an owner of BCLLP from the beginning, it does not matter. What matters is whether he was an equity partner on the day he withdrew from the firm on January 8, 2016. Clearly he was, as evidenced by the overwhelming evidence of the parties' relationship from May 24, 2007 through January 8, 2016, and even after January 8, 2016 when Brown and Chiari sued Capizzi to recover a debt owed by BCLLP.

And there were dramatic "changes" that took place after Capizzi testified in the *Frascogna* case. The "changes" started in 2007 with the parties' new agreement to share profits on fixed percentages; when Capizzi became actively involved in management at BCLLP; and when BCLLP started allocating "recourse" liabilities to Capizzi, which BCLLP's own accountant

testified was inconsistent with non-equity partnership. The "changes" accelerated, especially from 2011 through 2015, when Brown proposed the 2011 "death agreement" offering to pay Capizzi's estate a share of BCLLP's profits for 13 years after his death; when the BCLLP pension plan was changed in 2012 to "favor" the owners, including Capizzi; and when Chiari documented the parties' 2014 agreement to have Brown's and Chiari's compensation determined by Capizzi's evaluations of them.

Yet even if these dramatic changes had not occurred, the evidence would still be overwhelmingly in Capizzi's favor based solely on the "factors" set forth in Justice Fahey's decision from December 22, 2006 – namely, the sharing of profits; Capizzi's identification as a partner on tax returns; Capizzi's personal guarantee of BCLLP's line of credit; and the bank resolutions signed by Brown and Chiari confirming Capizzi's authority to bind BCLLP.

Simply, the evidence supporting Capizzi's ownership is staggering, and Judge Walker's decision concluding that Capizzi was an equity partner on January 8, 2016 is amply supported by admissible evidence. The order of September 13, 2019 should be affirmed, with costs, and the appeal from the order of October 15, 2019 should be deemed abandoned or, alternatively, the order should be affirmed, with costs.

Dated: August 25, 2020

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