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Nos.: 050265 and 050266 (Consolidated)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

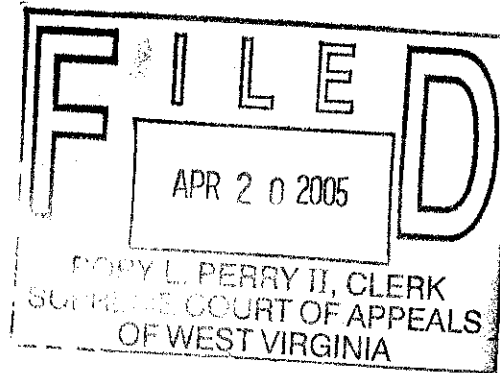
CAROLYN CLARK, M.D.,

Petitioner and Plaintiff Below,

v.

WILLIAM S. DRUCKMAN; SALSBERY  
& DRUCKMAN, a West Virginia partnership;  
RICHARD LINDSAY; TABOR, LINDSAY &  
ASSOCIATES, a West Virginia partnership;  
and FREDRICK L. DELP,

Petitioners and Defendants Below.



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**BRIEF OF AMICUS CURIAE DEBRA SAMS, D.O.  
ADDRESSING CERTIFIED QUESTION**

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ON CERTIFIED QUESTIONS FROM THE  
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA  
CIVIL ACTION NO.: 02-C-1002  
THE HONORABLE JOHN L. CUMMINGS, JUDGE

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## I. SUMMARY OF ARGUMENT.

All of the parties to the Clark v. Druckman, et al. action unanimously agree that the litigation privilege does not extend to a malicious prosecution cause of action against an adverse attorney for the wrongful filing or prosecution of a lawsuit.<sup>1</sup> In fact, malicious prosecution is not intended to be the subject of the certified questions *sub judice*.<sup>2</sup> However, the second certified question (addressing the litigation privilege) is so vague and overbroad, it may have the unintended effect of creating significant confusion over the law governing malicious prosecution and other intentional torts. In the event this Honorable Court answers the second certified question, Dr. Sams respectfully asks the Court to carefully consider the language utilized when formulating the response to the second certified question, and to include language that creates an exception to the litigation privilege for the tort of malicious prosecution.

The Defendants in the Clark case agree that attorneys do not enjoy immunity for the tort of malicious prosecution. In fact, they cite a litany of cases in support of the proposition that attorneys can be held liable for that tort. See “Response of William S. Druckman, Salsbery & Druckman, Richard Lindsay and Tabor, Lindsay & Associates to Petition to Certify Questions of Carolyn Clark, M.D.”, citing McKenna Long & Aldridge, LLP v. Keller, 598 S.E.2d 892, 894 (Ga.App. 2004); Bird v. Rothman, 627 P.2d 1097 (Ariz.Ct.App. 1981); Schunk v. Zeff & Zeff, 311 N.W.2d 322, 324 (Mich.Ct.App. 1981); Hill v. Willmott, 561 S.W.2d 331 (Ky.Ct.App. 1978); Drago v. Buonaguiro, 386 N.E.2d 821 (N.Y.Ct.App. 1978); Lyddon v. Shaw, 372 N.E.2d 685 (Ill. 1978); Spencer v. Burglass, 337 So.2d 596 (La.App. 1976); Norton v. Hines, 49

<sup>1</sup> See page 26 of “Response of William S. Druckman, Salsbery & Druckman, Richard Lindsay and Tabor, Lindsay & Associates to Petition to Certify Questions of Carolyn Clark, M.D.”

<sup>2</sup> Id.

Cal.App.3d 917 (Cal.Ct.App. 1975); Manita v. Hanson, 79 P.3d 404 (Ore.App. 2003); Brown v. Kennard, 113 CalRptr.2d 891 (Cal.Ct.App. 2001). **In addition to those ten jurisdictions, there are numerous other courts that recognize malicious prosecution and similar actions against attorneys and that hold the litigation privilege inapplicable to those actions.** See, e.g., *Restatement, Torts (Second) § 674, Comment (d)*, ("If... the attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, ... he is subject to the same liability as any other person."). Zamos v. Stroud, 32 Cal.4th 958, 87 P.3d 802, 12 Cal.Rptr.3d 54 (2004); Safeway Ins. Co. v. Guerrero, 207 Ariz. 82, 83 P.3d 560, 418 Ariz.Adv.Rep. 32 (Ariz.App. 2004); Durkin v. Davis, 814 So.2d 1246 (Fla.App. 2002) (indicating that malicious prosecution case against attorneys is appropriate when they unreasonably neglect to investigate the facts and law in making their determination to proceed with a lawsuit); Mazzio's Corp. v. Bright, 46 P.3d 201 (Okla.App. 2002); Nelson v. Miller, 227 Kan. 271, 282-283, 607 P.2d 438 (1980) (holding that premature filing and wrongful continuation of civil action constitute sufficient grounds to file malicious prosecution claim against attorney); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn.App. 1980); Mozzochi v. Beck, 529 A.2d 171, 204 Conn. 490 (1987); Hoppe v. Klapperich, 224 Minn. 224, 241-243, 28 N.W.2d 780, 791-792 (Minn. 1947); Adelman v. Rosenbaum, 133 Pa.Super. 386, 391, 3 A.2d 15, 18 (1938); Scholler v. Scholler, 10 Ohio St.3d 98, 102-103, 462 N.E.2d 158, 262-63 (1984) (no immunity for malicious acts); Fraidin v. Weitzman, 93 Md.App. 168, 235-36, 611 A.2d 1046, 1079-1080 (1992) (exception for malicious acts); Giles v. Hill Lewis Marce, 988 P.2d 143 (Ariz. 1999); Jacobson v. Garzo, 149 Vt. 205, 542 A.2d 265 (1988); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d

585 (1981); Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (abuse of process); BOE v. Farmingdale Classroom Teachers Ass'n, Inc., 38 N.Y.2d 397, 343 N.E.2d 278 (1975) (abuse of process); Ely v. Whitlock, 238 Va. 670, 385 S.E.2d 893 (1989) (abuse of process); Keen v. Ruddy, 784 P.2d 653 (Alaska 1989) (abuse of process); *R.E. Mallen & V.B. Levit, Legal Malpractice*, §49, at 101 (2d ed. 1981) (see also cases cited in *id.* §49, at 101-102 n. 87); and the list goes on.

This Court has never directly addressed the issue of the litigation privilege in the context of a malicious prosecution action. However, in her concurring opinion in Barefield v. DPIC Companies, Inc., Justice Davis cited the following language from a New Jersey case: “**The one tort excepted from the reach of the litigation privilege is malicious prosecution** or malicious use of process.” Barefield, 600 S.E.2d 256, 272 (W.Va. 2004), citing Baglini v. Lauletta, 338 N.J.Super 282, 768 A.2d 825, 833-34 (2001) (emphasis supplied). It appears that Justice Davis was aware that the vast majority of jurisdictions permit malicious prosecution actions against attorneys, and they except such actions from the litigation privilege. Should this Honorable Court answer the second certified question, it should follow the nationwide consensus and create a specific exception for malicious prosecution from the litigation privilege. In the alternative, if this Court does not wish to address the litigation privilege in the context of a malicious prosecution action, its opinion should specifically state that it is not addressing that cause of action by answering the certified question.

Finally, the vast majority of jurisdictions do not recognize absolute immunity for an attorney’s litigation conduct, and there are other well-recognized exceptions to the litigation privilege such as fraud. Barefield, 600 S.E.2d 256, 273 (W.Va. 2004), Justice

Davis concurring and citing Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 107 Cal.App.4<sup>th</sup> 54, 78, 131 Cal.Rptr.2d 777 (2003) and Matsura v. E.I. Du Pont Nemours and Co., 102 Hawai'i 149, 73 P.3d 687, 694 (2003). Therefore, this Court should be mindful of the other exceptions to the litigation privilege when formulating its response to the second certified question.

One of the purposes of this *amicus* brief is to bring to light the numerous exceptions to the litigation privilege so this Court may consider them when answering the second certified question. Further, *amicus curiae* Debra Sams, D.O. wishes to ensure that the Court's response to the second certified question does not unintentionally create confusion over the well-established malicious prosecution exception to the litigation privilege, in as much as all parties to the Clark case agree that the litigation privilege does not apply to malicious prosecution actions, the consensus among jurisdictions adheres to that principle, and that issue is not intended to be covered by the certified questions.

The undisputed facts of Sams v. Hunt, et al. demonstrate that meritorious malicious prosecution actions against attorneys exist, and that conduct giving rise to the same ought not be immunized. In *Sams*, the testimony of the Defendant lawyers and their expert witness establish a prima facie case of malicious prosecution. It is the intent of this brief to discuss the consensus among jurisdictions that malicious prosecution is excepted from the litigation privilege, and to review the other exceptions to the said privilege. After considering the arguments of the parties in the Clark case as well as this *amicus* brief, *amicus curiae* Debra Sams, D.O. respectfully requests that this Court recognize the well-established exceptions to the litigation privilege, including malicious prosecution and fraud.

## II. FACTS PERTAINING TO THE SAMS V. HUNT, ET AL. CASE.

### A. Facts Underlying The Medical Malpractice Lawsuit Against Debra Sams, D.O.

Brian W. Allen and his wife, Rebecca Ann Allen<sup>3</sup>, began illegally abusing narcotics and other medications together after their marriage on September 26, 1997. In fact, Mr. Allen stated the following of his wife's illegal drug habit in a sworn statement prepared by the Defendant lawyers:

After the marriage of September 26, 1997, to the best of [Mr. Allen's] recollection, the decedent **smoked marijuana as often as she had it; used cocaine intravenously as often as it was available; and used morphine, dulodids, and crack cocaine.** Decedent was a drug addict and any attempt to elaborate on each drug transaction would be futile, suffice to say that decedent used drugs, bought drugs, and sold drugs.

(Appendix Exhibit 1, page 4, emphasis supplied). Unfortunately for Mrs. Allen, her addiction to and frequent illegal abuse of narcotics led to her ultimate demise when, on October 1, 1999, **Brian W. Allen illegally crushed Oxycontin, liquefied it, and injected it into her thereby causing her to die of a narcotic overdose.**<sup>4</sup> (App.Ex. 2 pages 1, 5, and 9; App.Ex. 3; and App.Ex. 4, page 10).

Thereafter, attorneys Mark Hunt, Anthony Serreno, and the law firm of Hunt and Serreno ("Defendant Lawyers") undertook Mr. Allen's representation in an effort to profit from his wife's death by instituting a wrongful death and medical malpractice lawsuit, notwithstanding the well-known legal principle that a "person cannot maintain an action, if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." Gray v. Farley, 1992 WL

<sup>3</sup> Rebecca Allen was the niece of *Amicus Curiae* Debra Sams, D.O.

<sup>4</sup> She was pronounced dead the following day on October 2, 1999. It should be noted that Mrs. Allen obtained her Oxycontin prescriptions from physicians other than Dr. Sams in the months leading up to her death.

564130 (S.D. W.Va., Oct. 26, 1992), citing 1 CJS, Actions, §29; see also Appendix Exhibit 5, pages 11-12. To accomplish his objective, Mr. Allen sought the aid of the Defendant Lawyers on **July 2, 2001**, three months prior to the expiration of the statute of limitations. (App.Ex. 6).

At the request of the Defendant lawyers, Mr. Allen completed three written questionnaires on July 2, 2001, July 17, 2001 and on September 11, 2001, respectively. (App.Ex. 6, 7, and 8). From those documents, the Defendant lawyers learned that the decedent was first prescribed Oxycontin in 1998 or 1999 for severe orthopaedic pain, that **she altered the medication before using it (i.e. she crushed it)**, that she obtained the medication from four (4) different pharmacies, that Dr. Sams **and another physician in Rupert, West Virginia** prescribed Oxycontin for her, and that **she obtained Oxycontin without a prescription by buying it on the street**. Id. Mr. Allen also freely informed the Defendant lawyers that Dr. Sams was not the only physician who prescribed Oxycontin, and that he and Mrs. Allen were illegally “shooting up” the medication on the night she died. (App.Ex. 9)<sup>5</sup>.

It is undisputed that prior to filing a lawsuit against Dr. Sams, the Defendant lawyers took no actions to verify the information provided to them by Mr. Allen, they did not attempt to obtain any medical records, they did not attempt to discover the identity of the other physician in Rupert who prescribed Oxycontin to Mrs. Allen, they did not attempt to discover the details missing from Mr. Allen’s recitation of the facts, and they entered into a 40% contingency fee with him. Rather, despite knowing that Mrs. Allen was an illegal drug addict since 1997, that she bought Oxcontin on the street, that she

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<sup>5</sup> It should be noted that the Defendant Lawyers’ file contains very few actual attorney notes from conversations with Mr. Allen. This Appendix Exhibit is one of the few contained in the file.

crushed Oxycontin before using it, that Mrs. Allen “shot up” Oxycontin on the night of her death, and that other physicians prescribed Oxycontin to Mrs. Allen, the Defendant lawyers filed suit against Dr. Sams on October 2, 2001. (App. Exhibit 10). Further, rather than withhold service of the Complaint to conduct a meaningful investigation, they elected to serve Dr. Sams with the lawsuit and conduct no formal or informal discovery for almost six (6) months.

**B. The Frivolous Medical Malpractice Lawsuit.**

The Defendant lawyers’ expert witness, Arden John Curry, II, testified that they had an attorney-client relationship with Mr. Allen in July 2001; they had three months to obtain the medical records; there was sufficient time for them to obtain the medical records and conduct a meaningful investigation into the alleged malpractice; and that they should have collected the pertinent records. (App. Ex. 11, pages 34-35, 37-38, 63-66, 72, 109-110). Mr. Curry also testified that the Defendant lawyers should have attempted to collect the records after they filed the lawsuit rather than wait six months to do so. (App. Ex. 11, pages 153-154). Rather than conduct any investigation and without ever meeting Mr. Allen in person, the Defendant lawyers filed a medical malpractice and wrongful death Complaint against Dr. Sams containing numerous false allegations for which the Defendant lawyers had absolutely no support. (App. Ex. 6, 7, 8, and 10). **Mr. Curry further testified that based upon all of the available information, including the Defendants’ entire file and their depositions, the Defendant Lawyers had no good faith basis, justification or reasonable basis for filing the medical malpractice lawsuit against Dr. Sams:**

Q: ... Would it be fair to say -- back to my earlier question -- that the only information that Hunt & Serreno had available to them before suit was filed was information they obtained directly from Mr. Allen?

A. As it relates to?

Q. This case.

A. Yes, sir.

Q. And so when we talk about whether it was reasonable for them to file suit, what we're talking about is whether based upon the information they obtained from Mr. Allen, they had sufficient basis, sufficient reason or justification for suing Dr. Sams, correct?

A. Yeah. Whether there was enough information they could file a suit, believing that there was a reasonable basis to do so, naming Dr. Sams, yes.

(App.Ex. 11, page 80).

Q. ... [I]f the only information that Hunt & Serreno had available to them prior to filing suit is that which is contained in the **intake questionnaire and the two subsequent questionnaires, there simply wasn't enough for anybody to go forward and sue Dr. Sams, correct?**

**A. I don't think that you would have had a reasonable basis to do that.**

(App.Ex. 11, page 101)

Q. So let's look at what he told them. What we know he told them. And what we know he told them is what's contained in these three questionnaires, correct?

A. Correct.

**Q. And that information, you have told us before, would not justify anybody, including Hunt & Serreno, in suing Dr. Sams, that information alone?**

A. No.

**Q. It wouldn't?**

**A. It would not.**

(App.Ex. 11, pages 106-107)

**Q. Based on what you know for sure, they were not justified in suing Dr. Sams, were they?**

**A. I think you needed additional information that you could not take those three documents and sit in a room and give it to an attorney and say, "Does this give you a good faith basis to file a lawsuit." It just doesn't do it.**

(App.Ex. 11, page 120)

**Q. When this case goes to trial, would it be fair to say that you are going to tell the ladies and gentlemen of the jury based on the information that we know Hunt & Serreno had -- that we know they had -- this lawsuit against Dr. Sams should not have been filed?**

**A. Right.**

(App.Ex. 11, pages 238-239).

The testimony of the Defendant lawyers' expert witness establishes that they filed the medical malpractice lawsuit against Dr. Sams without probable cause and with complete disregard for her rights. Dr. Sams first learned of the meritless, damaging lawsuit when one of her peers at work showed her an article in The Register Herald, a newspaper serving Greenbrier County where she practices medicine, which reprinted some of the false allegations. (App.Ex. 12). Thereafter, she was served with the Complaint, filed an Answer thereto, and initiated her own discovery while the Defendant lawyers conducted no formal or informal discovery.

On February 22, 2002, counsel for Dr. Sams sent a letter to the Defendant lawyers providing them with her office chart and the details surrounding the death of Mrs. Allen. (App.Ex. 13). In that correspondence and in the attached medical records, the following was made known:

- Dr. Sams treated Mrs. Allen from 1989 through 1995 (two years before Mrs. Allen began abusing numerous illegal drugs in 1997 – see App.Ex. 1). Mrs. Allen did not treat with Dr. Sams from March 1995 through December 1998.
- Dr. Sams began treating Mrs. Allen again in January 1999 for back pain, and Lortab, rather than Oxycontin, was prescribed for the condition. Again, this period of treatment came two years after Mrs. Allen became an illegal drug addict. (App.Ex. 1).
- In May 1999, Dr. Sams diagnosed Mrs. Allen with hepatitis C. Lortab, and other medications containing Acetaminophen, are contraindicated in patients with that liver condition. Therefore, Dr. Sams prescribed a thirty (30) day supply of Oxycontin as an appropriate alternative pain medication and in accordance with the manufacturer's recommended dose.
- Dr. Sams prescribed Oxycontin to Mrs. Allen on only four occasions from May through August 1999, and each was in accordance with the manufacturer's recommendations. At the beginning of September 1999, she appropriately terminated the physician-patient relationship via certified letter when she suspected Mrs. Allen was seeking medications.
- **Mrs. Allen received another prescription for Oxycontin from Rodolfo Stock, M.D. on September 23, 1999, and yet another prescription from another physician on October 1, 1999, the day before her death.**

(App.Ex. 13). The correspondence requested the voluntary dismissal of Dr. Sams from the lawsuit given the above information – information that, according to the Defendant lawyers' expert witness, could and should have been discovered prior to filing the lawsuit. If the Defendant lawyers' theory against Dr. Sams was that she started Mrs. Allen on a course of addiction, it was clear *ab initio* that such a theory was without merit, inasmuch as Mr. Allen reported to the Relators that Mrs. Allen became an addict of illegal drugs in 1997 – two years before Dr. Sams began prescribing Lortab and Oxycontin. (App.Ex. 1).

In a continued display of audacity, defiance and utter disregard for Dr. Sams, the Defendant lawyers responded by letter dated March 15, 2002, refusing to dismiss Dr. Sams and suggesting that her counsel file a Motion for Summary Judgment. (App.Ex.

14). Having no other options, Dr. Sams was forced to file a Motion for Summary Judgment and accompanying affidavit on July 19, 2002. (App.Ex. 5). Dr. Sams' Motion merely reiterated the contents of her counsel's February 22, 2002 letter described above, and it sought the same relief, namely dismissal with prejudice. (App.Ex. 13 and 5). The Defendant lawyers filed no responsive pleading, and a hearing was held on August 5, 2002, to address the Motion. (App.Ex. 15). Although the Defendant lawyers refused to voluntarily dismiss Dr. Sams six (6) months earlier, at this hearing and without any new information, they stated the following:

I'll simply say, Judge, the lead Plaintiff – the lead Plaintiff counsel in this case and our firm has determined based upon the affidavit filed by Dr. Sams, that **we have no way of overcoming that affidavit and that we do not object to the motion for summary judgment.**

(App.Ex. 15, page 4, emphasis supplied). According to the Defendant lawyers, if they had obtained Dr. Sams' office chart and other easily obtainable medical records prior to filing suit, they would have realized that there was no way to oppose or overcome a Motion for Summary Judgment. On August 28, 2002, the Court entered an Order, signed by the Defendant lawyers without objection, dismissing the medical malpractice case against Dr. Sams. (App.Ex. 16).

### **C. The Malicious Prosecution Lawsuit, And Testimony Establishing A Prima Facie Case.**

On March 25, 2003, Debra Sams, D.O. instituted a lawsuit against the Defendant lawyers, alleging multiple causes of action, including malicious prosecution. (App.Ex. 17). After filing an Amended Complaint, Dr. Sams entered into a Stipulation with the Defendant lawyers to dismiss all of her causes of action with the exception of malicious prosecution. (App.Ex. 18). **Therefore, the sole cause of action in the Sams v. Hunt, et**

**al. matter is malicious prosecution.** McCammon v. Oldaker, 205 W. Va. 24, 516 S.E.2d 38 (1999). The elements of that cause of action are as follows:

To maintain an action for malicious prosecution it is essential to prove: (1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff. Syllabus Point 1, Lyons v. Davy-Pocahontas Coal Co., 75 W. Va. 739, 84 S.E. 744 (1915).

Id., Syl. Pt. 3.

As demonstrated above, the Defendant lawyers' expert witness testified that they did not have a good faith basis or justification upon which to file the medical malpractice lawsuit against Dr. Sams. Accordingly, Dr. Sams can unequivocally establish the second malicious prosecution element. Further, she can satisfy the third element because the medical malpractice lawsuit was dismissed, with prejudice, upon an uncontested motion for summary judgment. Finally, she can establish the first element, maliciousness, through the testimony of the Defendants and their expert witness.

For instance, the Defendant lawyers testified that they knew in October 2001 that the law of this State would not allow a recovery if a lawsuit was based upon an illegal or immoral act (App.Ex. 19, pages 49-50, Mark Hunt's deposition transcript), and they also testified that they knew it was illegal and immoral for Mr. Allen to cause his wife's death and for his wife to use drugs without a prescription:

Q. You have already agreed with the principle that a person cannot profit from an immoral or illegal act; correct?

A. Yes, sir.

Q. You do know that's the law?

A. Yes, sir.

Q. So assuming what Mr. Rebrook<sup>6</sup> told Judge Rowe is true, that your client Mr. Allen crushed Oxycontin, liquefied it, injected it into his wife and killed her, it is your testimony to this jury that you simply don't know whether that would be an immoral act; is that right?

A. It probably – if I had to make a decision, it probably is, sir.

Q. How about using drugs without a prescription; is that illegal?

A. Yes.

(App.Ex. 19, pages 131-132). Thus, the Defendant lawyers knew a lawsuit would be barred because Mr. Allen had crushed, liquefied and injected his wife with Oxycontin, thereby causing her death. The Defendant lawyers also concede that Kimberly Williams, their former employee, had this information before the medical malpractice lawsuit was filed:

Q. But if you had to guess it is your testimony that if Mr. Allen took Oxycontin tablets, crushed them up into powder, liquefied them, drew it up into a syringe, injected it into his wife causing an overdose and her death, if you had to guess, you think that would be immoral?

A. Yes. If any of that happened, yes.

Q. Now wait a minute. I thought you just told this jury a few minutes ago that Mr. ReBrook's representations in open court regarding the conduct of your client were based on information he obtained from Ms. Williams. Is that right?

A. Yes.

Q. And I thought you also told the jury you don't have any reason at all to dispute or disagree with what Ms. Williams told Mr. ReBrook.

A. Never.

(App.Ex. 19, pages 132-133). Defendant Hunt's own testimony establishes that he knew a lawsuit would be barred, and thus would be frivolous, based upon these facts, and his

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<sup>6</sup> Mr. ReBrook is an employee of Hunt & Serreno, and he represented to the Judge that Mr. Allen killed his wife. (App. Exhibit 4).

employee, Kimberly Williams, knew these facts prior to filing the lawsuit. Yet, the Defendant lawyers elected to file the lawsuit on a 40% contingent fee agreement in an attempt to make a handsome profit from Mr. Allen's illegal and immoral conduct, as well as that of his wife.

The evidence of malicious prosecution does not stop there. Kimberly Williams testified that filing the medical malpractice action against Dr. Sams would have been "frivolous" if they knew that Mr. Allen had crushed, liquefied, and injected Oxycontin into his wife, resulting in her death:

Q. Let me ask it again. I want you to assume hypothetically that you knew before the suit was filed that Mr. Allen injected his wife with Oxycontin the night she died and nevertheless suit was filed. Despite that knowledge, would you agree with me that lawsuit would have been frivolous?

A. I don't know that I would use the word "frivolous" but probably barred by law, if I knew. I certainly want to qualify.

Q. I understand that. But to say that a suit would be barred by law certainly suggests that if you knew the suit was barred and filed anyway, it would be frivolous. Wouldn't it?

A. Right.

(App.Ex. 20, pages 95-96, Kimberly Williams' deposition transcript). We already know from Mark Hunt's testimony above that Kimberly Williams did, in fact, know Mr. Allen killed his wife in this fashion. (App.Ex. 19, pages 132-133). However, we do not need to take his word for it because Kimberly Williams also testified that before the lawsuit was filed, she had in her possession documents that clearly established that fact:

Q. Do you know what efforts, if any, were made before suit was filed to determine the cause of Ms. Allen's death?

A. I'm sure that we had the death certificate.

...

Q. Did you see the autopsy before the suit was filed?

A. I did. I believe I did.

...

Q. So you knew before suit was filed that the autopsy stated that Ms. Allen was found unresponsive shortly after another person had injected some crushed tablets intravenously. Is that correct?

A. Yes.

**Q. You also knew that Bates No. 1517 that we just read into the record states that Mr. Allen injected crushed Oxycontin into his wife's body on 10/1/99. You knew that before suit was filed?**

**A. I knew that it was written in the report. Yes.**

(App.Ex. 20, pages 99-103, emphasis supplied). Ms. Williams testified that she knew a lawsuit would be frivolous if she was aware that Mr. Allen caused his wife's death in this fashion, and she subsequently testified that she knew Mr. Allen had done so before suit was filed. She also testified that she had documentary evidence, namely the documents from the Office of Chief Medical Examiner, which clearly identify Mr. Allen as the person who injected his wife and killed her. (App.Ex. 2, pages 5 and 9, Bates stamped 001513 and 001517).

In a shocking display of audacity, Defendant Hunt testified that even if he had known that Mr. Allen had illegally killed his wife, he still would have filed the frivolous lawsuit:

**Q. If you had known before suit was filed against Dr. Sams that Mr. Allen, according to Mr. ReBrook, took Oxycontin tablets, crushed them, liquefied them, and injected that into his wife thereby killing her, would you have sued Dr. Sams, if you knew that?**

**A. Yes.**

**Q. Despite the fact that you believe that if you have to guess that conduct would be an immoral act, you still would have sued Dr. Sams?**

**A. The bigger – Yes.**

(App.Ex. 19, pages 134-135, emphasis supplied; see also pages 141-142, 143, 172). **Mr. Hunt recognizes that Mrs. Allen's death was the result of an illegal act which bars a civil lawsuit, Ms. Williams testified that a lawsuit would be frivolous if it were filed under such circumstance, and, yet, Mr. Hunt would still have filed the frivolous lawsuit.** Defendant Hunt went so far as to testify that even though he had no idea how many times Dr. Sams prescribed Oxycontin to Mrs. Allen (even at the time of his deposition), he, nevertheless, would have sued Dr. Sams. (App.Ex. 19, page 143). Even Mr. Hunt's expert witness, Mr. Curry, could not believe that testimony:

Q. And you're also aware that despite the fact that to this very day, he hasn't taken the time to look at her chart, he tells us that given everything he now knows, he would still sue her. Now, help me put those two statements together. Can you make sense of that for us? We've got a guy that admits to this day having been sued for malicious prosecution for suing Dr. Sams -- to this very day, he hasn't taken the time to look at her chart. But he turns around and says, "But by god, if I had the chance, I would do it again." Does that make sense to you?

A. No, sir.

Q. Does that sound a little reckless to you for a lawyer to say, knowing everything I now know, I would still sue that doctor, even though I haven't bothered to look at her records? **That's reckless, isn't it?**

**A. I would have thought that he would have looked at the records if he was going to answer your question and make that statement.**

(App.Ex. 11, page 157).

The testimony from the Defendant Lawyers and their expert witness is sufficient to establish the element of maliciousness, which has been defined as follows:

"[W]here there is a want of probable cause resulting from wanton and reckless disregard of the rights of the party sued, evincing utter absence of that caution and inquiry a man should employ before filing suit on any account against his customer, malice will be inferred." Robinson v. Goudchaux's, 309 So.2d 287, 290 (La. 1975).

"[M]alice may be inferred from gross and culpable negligence in omitting to make suitable inquiries before instituting the suit." Nyer v. Carter, 367 A.2d 1375, 1378 (Me. 1977).

Malice "may consist of defendant's reckless and oppressive disregard of plaintiff's rights." Hugee v. Pennsylvania Ry. Co., 376 Pa. 286, 291, 101 A.2d 740, 743 (1954).

"In the law of malicious prosecution, [malice] means that the prosecution was instituted primarily because of a purpose other than that of bringing an offender to justice. It is the intentional doing of a wrongful act without legal justification, and may be inferred from the absence of probable cause; it does not necessarily involve hatred or ill will." *Black's Law Dictionary*, Abridged 6<sup>th</sup> ed. (1991), page 660

Applying these definitions to the above-enumerated testimony, Dr. Sams is also able to establish the first element of her malicious prosecution cause of action. Interestingly, the Defendant Lawyers' expert witness recently testified that they acted maliciously when they knowingly and falsely accused Dr. Sams of committing a felony in this case:

Q Okay. Can you and I agree that when Hunt & Serreno filed the pleading with the court that we have marked as Exhibit 14-B, which was their reply to our supplemental memorandum regarding the motion to dismiss, that is the document in which they allege that Dr. Sams does not have clean hands in this matter. That she was a family member who apparently gave samples of OxyContin to Ms. Allen. On its face, given what you know at a minimum that statement was reckless, wasn't it, because they knew it was a lie?

MR. FOWLER: Objection to the form.

MR. STUHR: They knew it was a lie.

MR. FOWLER: Also as to relevance.

MR. STUHR: True?

THE WITNESS: If you were asking me, taking what you did out of the deposition, where Hunt said that he knew that there was no such -- if he knew that there was no such thing as samples, which he said in his deposition, and he put that allegation in there merely because the doctor had sued him, **I agree that is reckless.**

BY MR. STUHR: **Q And it's malicious, isn't it?**

**A Yes. I mean, you ought not to do it.**

(App.Ex. 11, pages 121-122). To this day, the Defendant lawyers' malice toward Dr. Sams continues unabated.

In short, discovery in the Sams v. Hunt, et al. matter has yielded more than enough evidence to establish a *prima facie* case of malicious prosecution. In fact, Mr. Curry testified that he could not think of a single medical malpractice attorney who would behave like the Defendant lawyers. (App.Ex. 11, pages 42-43). As such, the Sams v. Hunt, et al. matter is a prime example of a legitimate malicious prosecution case against lawyers for which there is and should be no protection under the litigation privilege.

### **III. ARGUMENT.**

#### **A. Malicious Prosecution Actions Are Uniformly Excepted From The Litigation Privilege.**

All of the parties to the Clark case agree that malicious prosecution is excepted from the litigation privilege and they cite to numerous cases to support that proposition. In fact, jurisdictions across this country and other authorities uniformly agree that the litigation privilege does not shield lawyers from malicious prosecution and similar lawsuits. Barefield, 600 S.E.2d 256 (W.Va. 2004, J. Davis concurring), citing Baglini v. Lauletta, 338 N.J.Super 282, 768 A.2d 825, 833-34 (2001); McKenna Long & Aldridge, LLP v. Keller, 598 S.E.2d 892, 894 (Ga.App. 2004); Bird v. Rothman, 627 P.2d 1097

(Ariz.Ct.App. 1981); Schunk v. Zeff & Zeff, 311 N.W.2d 322, 324 (Mich.Ct.App. 1981); Hill v. Willmott, 561 S.W.2d 331 (Ky.Ct.App. 1978); Drago v. Buonaguiro, 386 N.E.2d 821 (N.Y.Ct.App. 1978); Lyddon v. Shaw, 372 N.E.2d 685 (Ill. 1978); Spencer v. Burglass, 337 So.2d 596 (La.App. 1976); Norton v. Hines, 49 Cal.App.3d 917 (Cal.Ct.App. 1975); Manita v. Hanson, 79 P.3d 404 (Ore.App. 2003); Brown v. Kennard, 113 CalRptr.2d 891 (Cal.Ct.App. 2001); Zamos v. Stroud, 32 Cal.4th 958, 87 P.3d 802, 12 Cal.Rptr.3d 54 (2004); Safeway Ins. Co. v. Guerrero, 207 Ariz. 82, 83 P.3d 560, 418 Ariz.Adv.Rep. 32 (Ariz.App. 2004); Durkin v. Davis, 814 So.2d 1246 (Fla.App. 2002); Mazzio's Corp. v. Bright, 46 P.3d 201 (Okla.App. 2002); Nelson v. Miller, 227 Kan. 271, 282-283, 607 P.2d 438 (1980); Peerman v. Sidicane, 605 S.W.2d 242 (Tenn.App. 1980); Mozzochi v. Beck, 529 A.2d 171, 204 Conn. 490 (1987); Hoppe v. Klapperich, 224 Minn. 224, 241-243, 28 N.W.2d 780, 791-792 (Minn. 1947); Adelman v. Rosenbaum, 133 Pa.Super. 386, 391, 3 A.2d 15, 18 (1938); Fraidin v. Weitzman, 93 Md.App. 168, 235-36, 611 A.2d 1046, 1079-1080 (1992) (malicious acts excepted from privilege); Giles v. Hill Lewis Marce, 988 P.2d 143 (Ariz. 1999); Jacobson v. Garzo, 149 Vt. 205, 542 A.2d 265 (1988); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (abuse of process); BOE v. Farmingdale Classroom Teachers Ass'n, Inc., 38 N.Y.2d 397, 343 N.E.2d 278 (1975) (abuse of process); Ely v. Whitlock, 238 Va. 670, 385 S.E.2d 893 (1989) (abuse of process); Keen v. Ruddy, 784 P.2d 653 (Alaska 1989) (abuse of process); *R.E. Mallen & V.B. Levit, Legal Malpractice*, §49, at 101 (2d ed. 1981) (see also cases cited in *id.* §49, at 101-102 n. 87); *Restatement, Torts (Second) § 674, Comment (d)*; and the list goes on.

This Court should adopt the well-recognized and uniform rule that malicious prosecution lawsuits are excepted from the litigation privilege. In fact, recognizing this exception to the litigation privilege is consistent with the West Virginia Constitution, which provides:

**“The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay”.**

W. Va. Constitution, Article III, §17. Further, this Court has expanded on this concept as follows:

[W]e are mindful that “for every wrong there is supposed to be a remedy somewhere.” Sanders v. Meredith, 78 W.Va. 564, 572, 89 S.E. 733, 736 (1916). **This Court has opined that “the concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy.”** O’Neil v. City of Parkersburg, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) (citation omitted). *See also* Gardner v. Buckeye Sav. & Loan Co., 108 W.Va. 673, 152 S.E. 530, 533 (1930) (“**It is the proud boast of all lovers of justice that for every wrong there is a remedy.**”)...

**We are also mindful that recognizing tortious conduct as actionable serves additional purposes beyond providing a remedy to the person injured by the tortious conduct.** While it is true that “the object of tort law is to provide reasonable compensation for losses,” Roberts v. Stevens Clinic Hosp., Inc. 176 W.Va. 492, 504, 345 S.E.2d 791, 803 (1986), **additional foundations of tort law are morality and deterrence.** *See* Bart S. Wilhoit, *Spoilation Of Evidence: The Viability Of Four Emerging Torts*, 46 UCLA L.Rev. 631, 662 (1998) (“**It is generally accepted that the three fundamentals of tort law are morality, compensation, and deterrence**”). **Therefore, in answering the questions before us, we will also consider the level of condemnation and deterrence that may be required as a sufficient response to the conduct at issue.**

Hannah v. Heeter, 213 W.Va. 704, 710, 584 S.E.2d 560, 566 (2003) (emphasis supplied).

In other words, when lawyers maliciously harm a party-adversary during the course of litigation, there should be a remedy available to the injured party in accordance with the Constitutional foundation of our law and this Court's interpretation thereof. Malicious prosecution is that remedy, as recognized by the overwhelming majority of jurisdictions and other authorities. Further, as argued below, an attorney should not be immune from liability for his intentional torts. If a lawyer maliciously prosecutes a lawsuit, there must be a sufficient remedy to promote morality and deterrence of such conduct. Id.

Therefore, this Court should explicitly recognize an exception to the litigation privilege in malicious prosecution actions because there exists wide-spread general acceptance of this proposition among all authorities, West Virginia recognizes the fundamental concept that for every wrong there is to be a remedy, and it is consistent with this Court's stated principle that tort law is founded upon morality and deterrence. In the alternative, if this Court does not wish to consider this exception when answering the second certified question, it should announce that it is specifically withholding judgment on whether malicious prosecution falls within the litigation privilege to prevent any unintended effects of its written decision.

**B. The Overwhelming Majority Of Jurisdictions Do Not Recognize An Absolute Immunity And Hold That Attorneys Can Be Found Responsible In Tort For Their Litigation Conduct. This Court Should Consider Those Exceptions When Issuing Its Decision.**

Recognizing that malicious prosecution is a firmly established exception to the litigation privilege, it is clear that the privilege does not confer absolute immunity upon attorneys for their litigation conduct. In other words, lawyers do not have free reign to intentionally harm a party-adversary without consequence. Brooks v. Zebre, 792 P.2d

196 (Wyo. 1990) citing Havens v. Hardesty, 43 Colo.App. 162, 600 P.2d 116 (1979) (“There is no automatic immunity for attorneys from their tortious conduct”). In fact, another well-recognized exception to the privilege is fraud. Barefield, 600 S.E.2d 256, 273 (W.Va. 2004), Justice Davis concurring and citing Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 107 Cal.App.4<sup>th</sup> 54, 78, 131 Cal.Rptr.2d 777 (2003) and Matsura v. E.I. Du Pont Nemours and Co., 102 Hawai’i 149, 73 P.3d 687, 694 (2003). The complete citation from the Matsura case Justice Davis cited is as follows:

Generally speaking, policy considerations favor limiting liability for litigation misconduct because the threat of liability might reduce the quantity and quality of evidence available to the finder of fact. However, in the present case, the defendants are alleged to have fraudulently distorted the evidence presented in a prior proceeding. **Clearly, such misconduct is directly contrary to the policy of promoting the candid, objective, and undistorted disclosure of evidence. Accordingly, this policy does not favor limiting liability in a subsequent proceeding where there is an allegation of fraud committed in the prior proceeding.**

Matsura, 102 Hawai’i at 156, 73 P.3d at 694 (emphasis supplied).

Fraud, like many other intentional torts, is based upon the course of conduct of an individual rather than a communication, and, thus, the litigation privilege does not apply. Pacific Gas and Electric Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1133, 791 P.2d 587, 595, 270 Cal.Rptr. 1, 9, FN12 (1990) (cited by Justice Davis in her Barefield concurring opinion). In most of the cases to which the litigation privilege applies to bar a cause of action, the tort alleged is based upon a communication rather than a course of conduct. Therefore, many, if not most, intentional torts brought against a lawyer for his litigation conduct, as opposed to a communication he made in a pleading, are permitted to proceed in other jurisdictions.<sup>7</sup>

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<sup>7</sup> See the cases cited in section III., A. above as well as the ones cited in the following pages.

For instance, in Texas the litigation privilege does not apply to attorney liability for conspiracy, fraudulent conduct, negligent misrepresentation, aiding and abetting a breach of fiduciary duty, and malicious conduct during the course of litigation. See Querner v. Rindfuss, 966 S.W.2d 661 (Tex.App. – San Antonio 1998); Lackshin v. Spofford, 2004 WL 1965636 (Tex.App.-Houston (14 Dist.)); Poole v. Houston & T.C. Ry., 58 Tex. 134, 137 (Tex. 1882) (holding that attorneys acting on behalf of their clients are not shielded from liability for their fraudulent conduct because fraudulent acts are “entirely foreign to the duties of an attorney”).

In California, attorneys can be liable to an opposing party for fraud and malicious prosecution. See Vega v. Jones, Day, Reavis & Pogue, 121 Cal.App.4<sup>th</sup> 282, 288, 17 Cal.Rptr.3d 26, 31-32 (2004) (“If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability”); Goodman v. Kennedy, 18 Cal.3d 335, 556 P.2d 737, 745, 134 Cal.Rptr. 375, 383 (1976); Norton, *supra*.

In Oklahoma, an attorney is liable to third persons for malicious prosecution and any other intentional torts when he shares the illegal motives of his client. See Robinson v. Volkswagen AG, 940 F.2d 1369, 1371-74 (10<sup>th</sup> Cir. 1991) (Arising from the Northern District of Oklahoma), citing 7 Am.Jur.2d Attorneys at Law §235 at 275 (1980 & 1991 Supp.) (“[i]f an attorney is actuated by malicious motives or shares the illegal motives of his client, he may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions”); Anderson v. Canaday, 37 Okl. 171, 131 P. 697, 699-700 (1913); Mazzio's Corp., *Supra*.

In New York, an attorney can be held liable to third parties when there is evidence of fraud, collusion, malicious acts, tortious acts, or other special circumstances in addition to the tort of malicious prosecution. See Conti v. Polizzotto, 243 A.D.2d 672, 663 N.Y.S.2d 293 (N.Y.App. 1997); Singer v. Whitman & Ransom, 83 A.D.2d 862, 863, 442 N.Y.S.2d 26 (N.Y.App. 1981) (“An attorney may be held liable for injuries sustained by a third party as a consequence of the attorney's wrongful or improper exercise of authority, or where the attorney has committed fraud or collusion or a malicious or tortious act”); Drago, *supra*.

In Minnesota, lawyers are subject to liability when there is fraud, malice, improper motives to their actions, an allegation of malicious prosecution, or when the lawyer has otherwise committed an intentional tort. See Marker v. Greenberg, 313 N.W.2d 4, 5 (Minn. 1981); Eustis v. David Agency, Inc., 417 N.W.2d 295, 298 (Minn.Ct.App. 1987) (“Liability arises only if that attorney acted with fraud, malice, or has otherwise committed an intentional tort”); Farmer v. Crosby, 43 Minn. 459, 461, 45 N.W. 866 (1890); Hoppe, *supra*.

In Wisconsin, attorneys can be held liable when they act with fraud, collusion, malice, or otherwise acted tortiously. See Auric v. Continental Casualty Co., 111 Wis.2d 507, 512, 331 N.W.2d 325, 328; Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); Goerke v. Vojvodich, 67 Wis.2d 102, 108, 226 N.W.2d 211 (1975), *citing* 7 C.J.S. Attorney and Client s 52b, page 834 (“an attorney is personally liable to a third party who sustained an injury in consequence of his wrongful act or improper exercise of authority where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act”).

In Pennsylvania, lawyers are liable to third parties when they are guilty of fraud, collusion, or a malicious or tortious act, including when they have committed malicious prosecution. See Adelman, op cit, 133 Pa.Super. 386, 391, 3 A.2d 15, 18 (“malicious action is not sheltered by any privilege. An attorney is personally liable to a third party when he is guilty of fraud, collusion, or a malicious or tortious act, and he is liable, as anyone else, when he encourages and induces another to commit a trespass”).

In Illinois, lawyers are subject to liability when there is fraud or collusion as well as in malicious prosecution actions. See Bloomer Amusement Co. v. Eskenazi, 75 Ill.App.3d 117, 394 N.E.2d 16, 31 Ill.Dec. 100 (1979); Lyddon, supra.

In Florida, an attorney can be liable to a third party where there is evidence of a non-negligent tort such as fraud, theft and the like, and this includes malicious prosecution claims. See Adams v. Chenowith, 349 So.2d 230, 231 (Fla.App.4<sup>th</sup> 1977); Durkin, supra.

In Louisiana, an attorney may be answerable to a non-client for malpractice where the offended party is able to establish fraud or collusion, and there is a cognizable claim for fraud and malicious prosecution as well. See St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co., 937 F.2d 274 (5<sup>th</sup> Cir. 1991) (Arising from the Eastern District of Louisiana) (“An attorney may be answerable to a non-client for malpractice where the offended party is able to establish fraud or collusion”); Bergman v. New England Insur. Co., 872 F.2d 672, 675-76 (5<sup>th</sup> Cir. 1989) (applying Louisiana law) (citing Olympia Roofing Co. v. City of New Orleans, 288 So.2d 670 (La.App.), cert denied, 292 So.2d 244 (La. 1974)); Broussard v. F.A. Richard & Assoc., Inc., 732 So.2d 578, 1998-1167 (La.App. 3 Cir. 3/17/99); Spencer, supra.

In Missouri, lawyers can be held liable to third parties for intentional torts such as fraud, conspiracy, interference with a business relationship, slander of title, duress, conspiracy, collusion, or malicious acts. See Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc., 931 S.W.2d 166, 176-178 (Mo.App.West.Dist. 1996) (analyzing Missouri law) (“This rule provides that an attorney may be liable to a third person for acts arising out of the attorney's representation of a client, if the attorney is guilty of fraud, collusion, or a malicious or tortious act” and “The basis for the exceptional circumstances rule is that ‘fraud, collusion, or a malicious or tortious act’ is conduct which is beyond the conditional or qualified privilege of an attorney”); Donahue v. Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 627 (Mo. banc 1995); White v. McCoy Land Co., 101 S.W.2d 763, 766 (Mo.App. 1936), aff'd White v. Scarritt, 341 Mo. 1004, 111 S.W.2d 18 (1937); Rose v. Summers, Compton, Wells & Hamburg, 887 S.W.2d 683, 686 (Mo.App. 1994); Kennedy v. Kennedy, 819 S.W.2d 406, 410 (Mo.App. 1991) (“Thus, in this state an attorney may be liable for intentional torts committed in furtherance of his representation of a client”); Mark Twain Kansas City v. Jackson, 912 S.W.2d 536, 538 (Mo.App. 1995); Lackey v. Vickery, 57 F.Supp. 791 (W.D.Mo. 1944).

In Indiana, attorneys can be sued by third parties when there is evidence of fraud, collusion, malicious or tortious conduct. See Meier v. Pearlman, 401 N.E.2d 31 (Ind.App.1<sup>st</sup>Dist. 1980).

In New Jersey, an attorney is liable to third-party non-client for fraud, conspiracy, aiding and abetting, and malicious prosecution. See Morganroth & Morganrith v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 416 (3<sup>rd</sup> Cir. 2003) (arising from the District of New Jersey) (“Licensed lawyers are not shielded from liability if their conduct extends

beyond the legitimate bounds of lawful representation”); Banco Popular, 2003 WL 1961025 at 5, 6, 2003 N.J.Super. LEXIS 151, at 15-16; Baglini, *supra*.

In Maryland, an attorney is liable to non-client third party for fraud, collusion, malicious actions, and tortious actions because such actions go beyond the intent of the litigation privilege. See Fraidin, *op cit*, 93 Md.App. 168, 235-36, 611 A.2d 1046, 1079-1080 (“The law does require that while an attorney is acting within the scope of his employment, he may not commit fraud or collusion, or a malicious or tortious act, even if doing so is for the benefit of the client. Such actions are beyond the qualified privilege and an attorney is personally liable for them”); Layman v. Layman, 84 Md.App. 183, 187, 578 A.2d 314, 316 (1990).

In Iowa, attorneys can be held liable to an opposing party for fraudulent misrepresentations. See American Family Service Corp. v. Michelfelder, 968 F.2d 667 (8<sup>th</sup> Cir. 1992) (originating in the Southern District of Iowa).

In Colorado, when an attorney acts fraudulently or maliciously, he is subject to liability to a non-client; an attorney can be liable to non-client for negligent misrepresentation; and an attorney owes a duty to his adversary not to commit intentional torts. See Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 235-236 (Colo. 1995); Schmidt v. Frankewich, 819 P.2d 1074, 1079 (Colo.App. 1991); McGee v. Hyatt Legal Services, Inc., 813 P.2d 754, 757 (Colo.App. 1990); Allied Financial Services, Inc. v. Easley, 676 F.2d 422, 423 (10<sup>th</sup> Cir. 1982) (arising from the District of Colorado) (“Under Colorado law, an attorney owes a duty to his adversary not to engage in fraudulent or malicious conduct or to commit intentional torts”); Weigel v.

Hardesty, 37 Colo.App. 541, 549 P.2d 1335 (1976); In re Estate of Brooks, 42 Colo.App. 333, 596 P.2d 1220 (1979); Havens v. Hardesty, 43 Colo.App. 162, 600 P.2d 116 (1979).

In Georgia, the general rule is that an attorney owes no duty to the adversarial party except to refrain from tortious conduct, such as fraud and malicious use of process. See Arthur Pew Construction Co., Inc. v. First National Bank of Atlanta, 827 F.2d 1488, 1493 (11<sup>th</sup> Cir. 1987) (arising from the Northern District of Georgia) (“Generally, an attorney owes no duty to the adversary of a client except to refrain from tortious conduct”); Guillebeau v. Jenkins, 182 Ga.App. 225, 355 S.E.2d 453, 458 (1987); Tarver v. Wills, 174 Ga.App. 550, 551, 330 S.E.2d 896 (1985); McKenna, Supra.

In Ohio, an attorney can be held liable to a third party when he acts maliciously. See Scholler, Supra.

In Arkansas, an attorney’s immunity from lawsuits does not extend to conduct constituting fraud, intentional misrepresentations, or intentional torts. See Almand v. Benton County, Arkansas, 145 B.R. 608, 617 (W.D.Arkansas 1992) (“the attorney is held liable only for conduct constituting fraud, intentional misrepresentations, or intentional torts”); Robertson v. White, 633 F.Supp. 954, 970 (W.D.Ark. 1986); Norwood v. Heaslett, 218 Ark. 286, 289, 235 S.W.2d 955 (1951); Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 (1989).

In Kansas, a lawyer can be held liable for committing fraud, racketeering, and malicious prosecution against opposing party. See Raymark Industries, Inc. v. Stemple, 714 F.Supp. 460 (D.Kan. 1988); Nelson, supra.

In Rhode Island, an attorney has a duty to refrain from actively participating in fraudulent conduct, and he is liable to a third-party if he, in fact, engages in such conduct.

See Nisenzon v. Sadowski, 689 A.2d 1037 (R.I. 1997) (“An attorney owes a duty to an adverse party not to participate actively in fraudulent conduct” and “Thus an attorney has no general duty to the opposing party, but he is liable for injuries to third parties when his conduct is fraudulent or malicious”).

In Oregon, a lawyer can be held liable for misrepresentations to an opposing party as well as for the “wrongful initiation” of a lawsuit which is similar to malicious prosecution. See Jeska v. Mulhall, 71 Or.App. 819, 693 P.2d 1335 (1985); Manita, *supra*.

In Arizona, the litigation privilege does not extend to intentional torts such as a fraudulent conveyance, malicious prosecution, or abuse of process. See McElhanon v. Hing, 151 Ariz. 386, 728 P.2d 256 (1985); Bird, *Supra*; Safeway, *supra*; Giles, *supra*.

In Kentucky, an attorney is liable to third parties when his actions are fraudulent or tortious, such as where he has committed malicious prosecution. See Rose v. Davis, 157 S.W.2d 284, 284-85, 288 Ky. 674 (1941); Hill, *supra*.

In Alabama, a non-client can sue attorney for fraud and negligent misrepresentation. See Kinney v. Williams, 2003 WL 23025596 (Alabama 2003).

In Michigan, a lawyer can be held liable to an opposing party for malicious prosecution and abuse of process. See Schunk, *supra*; Friedman, *supra*.

In Tennessee, an action for malicious prosecution and abuse of process is cognizable against an attorney by an opposing party. See Peerman, *supra*.

In Connecticut, an opposing party can bring an action for abuse of process against a lawyer. See Mozzochi, *supra*.

In Vermont, an attorney can be sued for abuse of process. See Jacobson, *supra*.

In Nevada, lawyers can be held liable for abuse of process. See Bull, *supra*.

In Virginia, lawyers can be sued for malicious prosecution and abuse of process.

See Ely, supra.

In Alaska, an attorney can be sued for abuse of process. See Keen, supra.

In New Hampshire, attorneys can be held liable for malicious defense as a logical outgrowth from malicious prosecution and abuse of process actions. See Aranson v. Schroeder, 140 N.H. 359, 671 A.2d 1023 (1995). The Aranson Court noted that other jurisdictions have touched upon the tort of malicious defense as well: “The Supreme Court of South Carolina impliedly recognized the tort in Cisson v. Pickens, 258 S.C. 37, 186 S.E.2d 822, 825 (1972). And relief has been granted where the tortious conduct took root in a cross complaint. Bertero v. National General Corp., 13 Cal.3d 43, 118 Cal.Rptr. 184, 192, 529 P.2d 608, 616 (1975).” Aranson, 140 N.H. at 365, 671 A.2d at 1027.

In summary, lawyers may be held liable to third-parties and/or opposing parties for the following conduct in other jurisdictions: malicious prosecution, abuse of process, malicious defense, conspiracy, fraud and fraudulent conduct, negligent misrepresentation, aiding and abetting a breach of fiduciary duty, malicious conduct during the course of litigation, collusion, intentional torts, theft, interference with a business relationship, slander of title, duress, fraudulent conveyance, aiding and abetting, racketeering, intentional misrepresentations, wrongful initiation of a lawsuit, and other tortious acts. The reasoning utilized by the numerous jurisdictions holding lawyers accountable for their litigation conduct is sound, and *amicus curiae* Debra Sams, D.O. requests that the Court take into consideration these multiple exceptions to the litigation privilege. At a minimum, this Court should follow the consensus among jurisdictions and hold that the

litigation privilege does not apply in the presence of malicious prosecution and fraudulent conduct.

**C. Neither Lawyer Nor Layman Should Be Immune From Liability When They Commit An Intentional Tort.**

When a person commits an intentional tort, regardless of whether the person is a lawyer, school teacher, brick layer, secretary, doctor or vagabond, he should be held accountable for his actions. What legitimate public policy is served by immunizing any class of persons from liability for *intentional torts*? Certainly, every lawyer should be free to zealously represent his client's interests through vigorous advocacy. However, a lawyer can advocate his position thoroughly, effectively and legitimately without intentionally causing injury to another.

Some argue that lawyers are a privileged class of persons not subject to the constraints of civilized society. According to proponents of absolute immunity, lawyers should be permitted to knowingly, maliciously, fraudulently, deceitfully and intentionally violate the rights of law-abiding citizens for no legitimate purpose and escape liability merely by uttering the words, "I am a lawyer." That brazen position is founded upon a weak argument that intentional tort lawsuits against attorneys would have a chilling effect on their willingness and ability to zealously represent their clients. The corollary of such an argument is that the laws of this State are intended to encourage attorneys to violate the rights of innocent persons with impunity. Proponents of absolute immunity appear to argue that clients have an expectation that their attorney's zealous representation of them includes the commission of intentional torts against the opposing party. Is it the public policy of this State to permit attorneys to intentionally cause injury to the opposing party without fear of accountability? If so, unscrupulous lawyers and their ilk would be free to

practice their brand of lawyering at will, and they would be permitted to commit fraud, malicious prosecution, sexual harassment, invasion of privacy, spoliation of evidence, assault, battery, and extortion, among others. Does zealous representation contemplate trampling the rights of the adversary? Sadly for our beleaguered profession, proponents of absolute immunity would have this Court believe the answer to that query is yes.

*Amicus curiae* Debra Sams, D.O. respectfully suggests that permitting intentional torts against lawyers would carefully balance the interests of all persons involved in litigation and provide safeguards to the innocent. Would it be a bad thing if attorneys were discouraged from committing *intentional* torts against a party opponent in litigation? Lawyers should be encouraged to engage in legitimate and lawful representation of their clients and discouraged from crossing the line into the world of intentional torts. As this Court has stated:

This Court holds each and every attorney to the **inflexible requirement** that he 'diligently, faithfully and **legitimately** perform every act necessary to protect, conserve and advance the interests of his client.'

Deleware CWC Liquidation Corp. v. Martin, 213 W.Va. 617, 623, 584 S.E.2d 473, 479 (2003) (emphasis supplied). Permitting lawyers to be held accountable for their intentional torts not only encourages legitimacy and discourages wrongful conduct, but it also aids in monitoring the legal profession and provides an innocent injured party redress. Fear of being sued will not intimidate a lawyer whose conduct is legitimate, and, therefore, there will be no chilling effect that hinders lawful advocacy. Rather, lawyers will be mindful that the bounds of human decency and morality, as enforced through the law, do not permit them to intentionally cause harm to others.

To be admitted to a bar, lawyers take an oath to uphold the integrity of the adversarial legal system. We put our trust and faith in the jury system to address the wrongs of civil society. It is curious that lawyers will so freely and stridently hold out the legal system as the panacea for legal wrongs, while they are even quicker to distrust it when it comes to judging their own intentional, wrongful conduct. A jury is entirely capable of determining whether a lawyer's conduct constitutes an intentional tort or permissible advocacy. After all, juries determine complex cases of medical malpractice, product liability, contract cases, criminal liability, criminal penalties such as whether to impose the death sentence upon a person, and other difficult matters. Why should lawyers trust a jury to determine whether a person lives or dies in a sentencing phase of a criminal case, but then distrust the same jury to determine whether a lawyer committed an intentional tort? The built in safeguards of the legal system which lawyers serve should eliminate any concern that permitting intentional tort claims against them will have a "chilling effect" on the practice of law.

In short, only a handful of lawyers will actually cross the line from advocacy to intentional tortfeasor. Those who *intentionally* do so should be subject to the same liability as any other person in society. The lawyer who strenuously and legitimately advocates his client's position should rest assured that the legal system he serves will also serve him.

#### **IV. CONCLUSION.**

The parties to the Clark lawsuit agree that the litigation privilege does not extend to malicious prosecution actions, and they did not intend to put that issue before this Court. However, the second certified question could create confusion over the law

governing malicious prosecution, and *amicus curiae* Debra Sams, D.O. requests that this Court address that potential confusion. Specifically, she requests that this Court follow the consensus among virtually all other jurisdictions and authorities and explicitly recognize the firmly established rule that malicious prosecution causes of action are excepted from the litigation privilege. In the alternative, if the Court does not wish to address this narrow issue in the Clark case, she requests that this Court announce that it is passing on this issue in its written decision.

Finally, creating an exception to the litigation privilege for malicious prosecution actions is consistent with the sound rationale of the West Virginia Constitution, the law of this State, and the statements in other jurisdictions that an attorney should not be immune from intentional, tortious conduct.

Respectfully submitted this 20<sup>th</sup> day of April 2005.

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CERTIFICATE OF SERVICE

I, Timothy R. Linkous, counsel for Debra Sams, D.O., do hereby certify that service of the forgoing "Brief of *Amicus Curiae* Debra Sams, D.O. Addressing Certified Question" has been made upon the following counsel of record via U.S. Mail, postage prepaid, on the 20<sup>th</sup> day of April 2005:

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