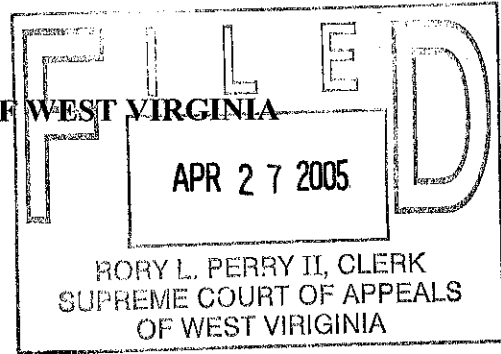


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



GEORGE BUTLER WILSON,

Plaintiff, Respondent

v.

**Civil Action No.: 99-C-1532
Honorable Paul Zakaib, Jr.**

**WILLIAM BERNET,
VANDERBILT UNIVERSITY,
and THOMAS J. GILLOOLY**

Defendants, Petitioners

**FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA**

THOMAS J. GILLOOLY'S BRIEF REGARDING CERTIFIED QUESTIONS

NO. 32579

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL	1
III. STATEMENT OF FACTS	5
IV. ASSIGNMENTS OF ERROR	13
V. ARGUMENT	15
A. A CLAIM FOR TORTIOUS INTERFERENCE WITH A PARENTAL RELATIONSHIP AS RECOGNIZED BY THIS COURT IN <i>KESSEL V. LEAVITT</i> DOES NOT APPLY TO ACTIONS TAKEN BY OPPOSING COUNSEL IN THE COURSE OF CHILD CUSTODY PROCEEDINGS	15
B. THE TORT OF INTERFERENCE WITH PARENTAL/CUSTODIAL RIGHTS HAS BEEN APPLIED ONLY TO THOSE WHO ABDUCT OR CONCEAL CHILDREN FROM A CUSTODIAL PARENT, AND TO THEIR ACCOMPLICES IN SUCH ABDUCTION OR CONCEALMENT	19
C. NO JURISDICTION HAS RECOGNIZED A CLAIM FOR TORTIOUS INTERFERENCE WITH PARENTAL/CUSTODIAL RELATIONS AGAINST AN OPPOSING ATTORNEY FOR ACTIONS TAKEN IN THE COURSE OF CHILD CUSTODY LITIGATION	22
D. THE LITIGATION PRIVILEGE SHOULD PROHIBIT ANY ACTIONS TAKEN IN CONNECTION WITH JUDICIAL PROCEEDINGS FROM BEING THE BASIS FOR A TORT ACTION, THUS AN ACTION FOR TORTIOUS INTERFERENCE WITH PARENTAL RELATIONSHIP CANNOT ARISE FROM ACTIONS TAKEN BY COUNSEL IN THE COURSE OF LITIGATION IN A CHILD CUSTODY DISPUTE.	24
E. A LAWYER TYPICALLY OWES NO DUTY TO ANY OPPOSING LITIGANT BEYOND THOSE IMPOSED BY RULE 11 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE AND THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT	25

F. IF THE COURT EXPANDS THE CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PARENTAL/CUSTODIAL RELATIONS, A PLAINTIFF SHOULD BE REQUIRED TO SEEK RELIEF FROM THE UNDERLYING JUDGMENT PRIOR TO FILING HIS INDEPENDENT ACTION

30

VI. CONCLUSION/PRAYER FOR RELIEF

34

TABLE OF AUTHORITIES

CASES

West Virginia

<u>Arnold v. United Companies Lending Corp.</u> , 511 S.E.2d 854 (W.Va. 1998).	15
<u>Barefield v. DPIC Companies, Inc.</u> , 600 S.E.2d 256 (W.Va. 2004).	25
<u>Bartles v. Hinkle</u> , 472 S.E.2d 827 (W.Va. 1996).	26
<u>Collins v. Red Roof Inns, Inc.</u> , 566 S.E.2d 595 (W.Va. 2002).	24
<u>Conley v. Spillers</u> , 301 S.E.2d 216, 220 (W.Va. 1983).	32,33
<u>Davis v. Wallace</u> , 565 S.E.2d 386 (W.Va. 2002).	28
<u>Hustead v. Ashland Oil, Inc.</u> , 475 S.E.2d 55, 60 (W.Va. 1996).	31,33
<u>In Re Estate of McIntosh</u> , 109 S.E.2d 153 (W.Va.1959).	31, 33
<u>Kessel v. Leavitt</u> , 511 S.E.2d 720 (W.Va. 1998).	passim
<u>Sharon B.W. v. George B.W.</u> , 507 S.E.2d 401 (W.Va. 1998).	9
<u>State ex. Rel. George B.W. v. Kaufman</u> , 483 S.E.2d 852 (W.Va. 1997).	5
<u>State of West Virginia ex rel. Kaufman v. Honorable Judge Zakaib, et al</u> , 535 S.E.2d 727 (W.Va. 2000).	11
<u>State of West Virginia v. Miller</u> , 459 S.E.2d 114 (W.Va. 1995).	31, 32

Other Jurisdictions

Federal

<u>Fenslage v. Dawkins</u> , 629 F.2d 1107 (5 th Cir.1980) .	21
<u>Kajtazi v. Kajtazi</u> , 488 F. Supp. 15 (E.D.N.Y. 1978).	21
<u>Llyod v. Loeffler</u> , 539 F. Supp. 998 (E.D. Wis.), aff'd, 694 F.2d 489 (7 th Cir. 1982).	21
<u>Tappen v. Ager</u> , 599 F.2d 376 (10 th Cir. 1979).	26

State

<u>D&D Fuller CATV Constr., Inc. v. Pace</u> , 780 P.2d 520 (Colo. 1989).	20
<u>Finn v. Lipman</u> , 526 A.2d 1380 (Me. 1987).	23
<u>Friedman v. Dozorc</u> , 312 N.W.2d 585 (Mich. 1981).	26, 27, 30
<u>Gibson v. Gibson</u> , 15 Cal. App. 3d 943 (Cal. App. 1971).	21
<u>Hoblyn v. Johnson</u> , 55 P.3d 1219 (Wyo. 2002).	20
<u>Kramer v. Leineweber</u> , 642 S.W.2d 364 (Mo. Ct. App. 1982).	21
<u>LaGrenade v. Gordon</u> , 264 S.E.2d 757 (N.C. App.1980).	21
<u>Larson v. Dunn</u> , 460 N.W.2d 39 (Minn. 1990).	20
<u>Marshak v. Marshak</u> , 628 A.2d 964 (Conn. 1993).	20
<u>McEvoy v. Helikson</u> , 562 P.2d 540 (Ore.1977).	22
<u>Norton v. Hines</u> , 49 Cal. App.3d 917 (Cal. App. 1975).	26
<u>Parnell v. Smart</u> , 66 Cal. App.3d 833 (Cal. App. 1977).	27
<u>Plante v. Engel</u> , 469 A.2d 1299 (N.H.1983).	21
<u>Rosefield v. Rosefield</u> , 221 Cal. App.2d 431 (Cal. Rpter 1963).	16, 17, 21
<u>Silcott v. Ogleby</u> , 721 S.W.2d 290 (Tex. 1986).	20, 21
<u>Simon v. Zipperstein</u> , 512 N.E.2d 636 (Ohio 1987).	26
<u>Stone v. Wall</u> , 734 So.2d. 1038 (Fla. 1999).	20
<u>Weirich v. Weirich</u> , 833 S.W.2d 942 (Tex.1992).	20
<u>Wood v. Wood</u> , 338 N.W.2d 123 (Iowa 1983).	20
<u>Zaharias v. Gammill</u> , 844 P.2d 137 (Okla. 1992).	20

STATUTES

West Virginia Code §61-2-14d (1997).	17
--------------------------------------	----

RULES

W.Va. R. Civ. 11 (2005)	28
W.Va. R. Civ. P. 60 (2005).	31, 34
W.Va. R. Prof. Con. 1.3 (2005).	28
W.Va. R. Prof. Con. 3.1 (2005).	29
Scope, W.Va. R. Prof. Con. (2005).	29

I. INTRODUCTION

Defendant/Petitioner Thomas J. Gillooly, by his counsel, J.H. Mahaney, Esquire and Wendy Glover Adkins of Huddleston Bolen, LLP, respectfully submits this Brief regarding the certified questions that this Court has accepted pursuant to the West Virginia Rules of Appellate Procedure. This proceeding represents the seventh occasion (three motions to recuse, three appeals, and this petition regarding certified questions) that this litigation, or the divorce/child custody case from which it arises, has been before this Court. As discussed below, this Court should clearly and emphatically hold that a litigant dissatisfied with the outcome of his divorce/child custody proceeding cannot sue the opposing attorney for damages for conducting that litigation against him, and bring this case (which has now spanned ten years) to a long-overdue conclusion.

II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

In this case, the Plaintiff, George Wilson ("Wilson"), seeks to recover damages for interference with his parental relationship with his minor son, under the authority of Kessel v. Leavitt, 511 S.E.2d 720 (W.Va. 1998), from the attorney who represented his former wife in a bitter and protracted divorce and child custody case, Defendant Thomas Gillooly, and from an expert retained by Mr. Gillooly on behalf of the wife in that litigation, Dr. William Bernet. Wilson also seeks to recover damages from Dr. Bernet's employer, Vanderbilt University, under the same claims. Unlike Kessel and all other cases in which the tort of interference with a parental relationship has been recognized and applied, Plaintiff seeks to hold Mr. Gillooly, Dr. Bernet and Vanderbilt liable not for abducting or fraudulently concealing a child, but for the manner in which the underlying divorce/child custody litigation was conducted. More egregiously, the Plaintiff's claims in this case, and the Circuit Court's answers to the three

certified questions which validate those claims, represent a dangerous, unwarranted and ill-founded extension of West Virginia law. If the Court affirms the Circuit Court's answers, lawyers will be held to a duty of care to opposing litigants, hindering the attorneys' ability to zealously pursue or defend his client's position in the context of civil litigation.

Of equal importance, Plaintiff's alleged damages in this case stem from his contention that "but for" alleged wrongdoing by Mr. Gillooly and Dr. Bernet, the child custody dispute would have been decided in his favor. He does so even though same claims of wrongdoing that are asserted as the basis for this tort action were asserted in, and rejected by, Judge Kaufman in adjudicating the divorce/child custody action and without seeking to set aside the underlying judgment against him. Judge Zakaib was in error when it answered Question No. 3 in the negative because permit the Plaintiff a "second bite at the apple" dangerously undermines the finality of child custody/divorce judgments and long standing principles of res judicata and collateral estoppel. If this Court answers Questions Nos. 1 and 2 in the affirmative, it must answer Question No. 3 in the affirmative as well to protect the integrity of child custody orders and judgments.

The present tort action arises out of more than five years of underlying litigation in a separate divorce and child custody action between the Plaintiff and his former wife, Sharon Bicks. On or about July 13, 1999, Wilson filed the present tort action against Dr. Bernet, Vanderbilt, and Mr. Gillooly (hereinafter "Petitioners"), asserting claims for: (1) fraud upon the court, (2) practicing medicine without a license, (3) tortious interference with parental relationship, and (4) intentional infliction of emotional distress.

After almost four years of litigation, and multiple dispositive motions, the Circuit Court granted the Petitioners' Renewed Motions for Summary Judgment on April 29, 2004 as to all

counts except the claim for tortious interference with a parental relationship. As a result of the Circuit Court's ruling, the Petitioners and the Respondent recognized the substantial need for guidance from this Court as to the availability of a cause of action for tortious interference with parental or custodial relationship against adverse experts and opposing counsel in divorce/child custody proceedings. Accordingly, in September of 2004, the Petitioners filed a motion with the Circuit Court, requesting certification of the following three questions pursuant West Virginia Code Section 58-5-2:

Certified Question 1: May the holding in Kessel v. Leavitt, 511 S.E.2d 720 (W.Va. 1998), which adopted a cause of action for tortious interference with a parental or custodial relationship, be applied to maintain a cause of action against an adverse child psychiatry expert witness who provides expert testimony in a hearing concerning visitation and custody and who participates in a reunification plan between mother and child pursuant to the orders of the court?

Certified Question 2: Does a cause of action for tortious interference with a parental or custodial relationship as recognized in Kessel v. Leavitt, 511 S.E.2d 720 (W.Va. 1998), exist in favor of a litigant involved in child custody/visitation proceedings against an attorney representing an opposing party in that litigation?

If the Court answers Question 1 and/or 2 in the affirmative, **Certified Question 3:** If the tortious interference with a parental/custodial relationship claim is based upon factual issues and/or allegations that were raised and resolved against the litigant in the child custody/visitation proceeding, must the litigant first seek and obtain relief from the judgment entered in the child custody/visitation proceeding with respect to such issue or allegations pursuant to Rule 60 of the West Virginia Rules of Civil Procedure or otherwise as a condition precedent to assert the tortious interference claim?

On October 4, 2004, by a agreement of all parties to this matter, the Circuit Court granted the Petitioner's Motion To Certify Questions of Law to the West Virginia Supreme Court of Appeals. Specifically, the Circuit Court certified the preceding three questions to this Court

pursuant to West Virginia Code Section 58-5-2, and erroneously answered Questions Nos. 1 and 2 in the affirmative and Question No. 3 in the negative. Ultimately, in March of 2004, based on the petitions filed by Mr. Gillooly, Dr. Bernet and Vanderbilt, this Court accepted all three questions certified by the Circuit Court.

The Circuit Court's answers to Questions No. 1 and No. 2, which validate the Plaintiff's only remaining claim in this matter, represent a dangerous, illogical and unwarranted extension of West Virginia law. To permit a losing party in litigation to assert an action for tortious interference with parental relationship against opposing counsel based solely on conduct taken in the course of that litigation will only serve to deter attorneys from representing clients in child custody and divorce matters. Moreover, extending Kessel to attorney's conduct in litigation will effectively create a new duty owed by an attorney to his client's adversary, hindering the lawyer's ability to zealously pursue or defend his client's position in the course of litigation, and providing a valuable tool for a losing litigant to use to deter representation, or avenge successful and effective representation. Moreover, if this Court affirms the Circuit Court's answer to Question No. 3, a losing party in litigation will be permitted to use a subsequent tort action to relitigate the underlying divorce or child custody proceedings despite any conflicting findings of fact or law made in the underlying action, and without disturbing such findings. To allow such tort actions without relief being sought and obtained from the initial judgment undermines Rule 60 of the West Virginia Rules of Civil Procedure and the inviolate sanctity of final judgments, and will potentially lead to an endless stream of retaliatory lawsuits and inconsistent judgments. Therefore, the Petitioners now request that the Court answer Questions Nos. 1 and 2 in the negative and Question No. 3 in the affirmative to continue to support an attorney's affirmative

duty to zealously represent his clients' interests within the bounds of the law and respect the finality of judgments.

III. STATEMENT OF FACTS

The divorce/child custody proceedings which give rise to this case began in August of 1995, and were handled by Judge Tod Kaufman in the Circuit Court of Kanawha County. See Sharon B.W. v. George B.W., Civil Action No. 95-D-1685. In December of 1995, the Circuit Court awarded temporary custody of the parents' minor son to Mr. Gillooly's client, Sharon Bicks. On August 16, 1996, the father and Plaintiff in this case, George Wilson ("Wilson") moved for an Emergency Temporary Order, alleging that his ex-wife and her boyfriend had sexually abused their minor child. The Circuit Court granted Wilson's application, and ordered that Dr. Wilson retain the child until further order from the Court.

On December 18, 1996, Ms. Bicks filed a motion to obtain visitation and moved the Circuit Court to compel Dr. Wilson to permit the child to be evaluated by a psychiatric/psychological expert with respect to the claim of alleged sexual abuse. The Circuit Court granted Ms. Bicks' motion, but Wilson filed a petition for Emergency Stay with this Court to prevent the evaluation from being conducted. Wilson's motion was granted on December 20, 1996. Ultimately, this Court remanded the case to Judge Kaufman for determination of "modification of custody; supervised visitation, if merited; and expert evaluation of the child." See State ex. Rel. George B.W. v. Kaufman, 483 S.E.2d 852 (W.Va. 1997)(hereinafter "Wilson P").

Beginning in March of 1997, Judge Kaufman conducted a bench trial on the issue of the alleged sexual abuse, during which both parties presented expert evidence as to whether the alleged sexual abuse had actually occurred. Dr. Timothy Freeman, a Ph.D. level psychologist,

retained by Wilson to interview the child, testified that in his opinion the alleged sexual abuse had in fact occurred. Ms. Bicks, through Mr. Gillooly, retained Dr. William Bernet, Medical Director of the Psychiatric Hospital at Vanderbilt University, as an expert witness in forensic child psychiatry. Dr. Bernet testified that in his opinion, the alleged sexual abuse had not occurred, and that Wilson and Dr. Freeman had "indoctrinated" the child with ideas of sexual abuse.

Specifically accepting and crediting Dr. Bernet's testimony, Judge Kaufman issued a fifty-six-page Final Order on June 4, 1997, awarding permanent custody of the child to Ms. Bicks. See Final Order, Sharon B.W. v. George B.W., Case No. 950D-1685, June 4, 1997 attached as Exhibit A to Gillooly's Renewed Summary Judgment Motion. The Circuit Court rejected Dr. Freeman's testimony, reasoning that it intended "to follow the recommendation of [who] it believes to be the best and most capable and qualified psychiatrist in his case: Dr. Bernet. It matters little to the Court whose witness Dr. Bernet was." Following the entry of the Final Order, Judge Kaufman directed Dr. Bernet to submit a Reunification Plan to the Court, which would outline his recommendations for the process the parties should follow in reuniting the child with his mother, and for visitation, Wilson.¹ See Final Order, Sharon B.W. v. George B.W., Case No. 950D-1685, June 4, 1997 attached as Exhibit A to Gillooly's Renewed Summary Judgment Motion.

¹ After Judge Kaufman ordered Dr. Wilson to reimburse Sharon Bicks for all of her litigation-related expenses, Wilson (who had earned a six-figure income throughout the proceedings as a radiologist) filed a Chapter 13 bankruptcy petition. As a result of the filing, Ms. Bicks and Mr. Gillooly were prevented from collecting the costs incurred in the child custody dispute, and Sharon Bicks incurred even more costs in an effort to protest the bankruptcy. In November of 1999, United States Bankruptcy Judge Ronald G. Pearson dismissed Dr. Wilson's bankruptcy on the basis that Dr. Wilson was filing bankruptcy in bad faith in an effort to avoid the circuit court's order, requiring him to reimburse his ex-wife for the cost incurred as a result of the child custody proceedings. See November 30, 1999 Bankruptcy Court Order attached as Exhibit E to Bernet's Renewed Motion for Summary Judgment.

Following entry of the Final Order, Dr. Bernet worked as part of a committee with the guardian ad litem and other professionals to prepare a Reunification Plan. On or about June 16, 1997, Dr. Bernet submitted a Plan for Reunification to Judge Kaufman and all of the parties involved in the custody proceeding. See June 16, 1997 Plan for Reunification attached as Exhibit B to Gillooly's Renewed Summary Judgment Motion. On June 19, 1997, the Circuit Court entered a Reunification Order which adopted the recommendations of Dr. Bernet and ordered that the parties' son must be returned to Memphis, Tennessee to begin the reunification process with his mother no later than July 11, 1997.

Beginning in June of 1997 and continuing through May of 1999, Dr. Bernet also filed 12 additional reports with, and at the direction of, the Circuit Court providing recommendations on the level of visitation that Wilson should have with his son. See Dr. Bernet's Recommendations Regarding Visitation No. 1-12 collectively attached as Exhibit B to Gillooly's Renewed Summary Judgment Motion. Dr. Bernet's reports were advisory in nature, and Wilson was given the opportunity to object to any aspect of Dr. Bernet's reports, which he did on several occasions.

Within weeks of the entry of the Final Order, Dr. Wilson also began to file motions for disqualification asking to recuse Judge Kaufman and a petition for appeal of the Final Order, alleging in each pleading that fraud had been committed by Mr. Gillooly and Judge Kaufman, with the assistance of Dr. Bernet, with respect to the Final Order. Wilson requested numerous forms of relief including recusal and disqualification of Judge Kaufman, and reversal of the Final Order deciding the custody issue. Specifically, on June 29, 1997, Wilson filed a Petition for Appeal with this Court, alleging in part that Judge Kaufman was biased and prejudiced and that Dr. Bernet, in overseeing Wilson's visitation, had acted improperly as an advocate for Sharon Bicks. See June 29, 1997 Petition for Appeal in Sharon B.W. v. George B. W., Civil Action No.

95-D-1685. In addition to his allegations of impropriety, Wilson also appealed the substance of the Final Order entered by Judge Kaufmann, asserting that the trial court had applied the wrong standard of proof and failed to qualify Dr. Freeman as an expert. On January 15, 1998, Wilson filed his Brief, seeking reversal of the Final Order and alleging that Judge Kaufmann had somehow involved himself in the case sua sponte and had improperly communicated with the Bicks family about the case. On March 3, 1998, Wilson filed his Response to Brief of Appellee and further asserted that Dr. Bernet was a professional witness and actively assisted Mr. Gillooly in preparation of testimony for witnesses and had actively concealed evidence from the court.

On April 1, 1998, Wilson filed a Motion to Strike Submissions of Circuit Judge with this Court requesting that certain documents submitted by Judge Kaufman be stricken. In his motion, Wilson alerted the Court that he had filed an ethics complaint against Judge Kaufman asserting that all parties had been tainted by the Judge's conduct. On April 9, 1998, Wilson filed a Response to Ms. Bicks' Motion to Supplement Record With An Affidavit and Report from Dr. Bernet. In his motion, Wilson alleged specifically that "this is not the first time" Mr. Gillooly had sought to "contaminate the legal process," listing the following as examples of such past conduct by Mr. Gillooly: (a) sending his financial expert to a Justice of the Court, attempting to discuss the case with him; (b) having ex parte meetings with the Circuit Judge, including an "interesting, possibly 3 hour long meeting between the Judge and Mr. Gillooly's paralegal;" and (c) having his secretary approach a potential witness and advising her not to get involved in the case. Wilson also contended that Dr. Bernet had not acted as an unbiased "officer of the court" in supervising Wilson's visitation, and had submitted "slanted" reports to the Court. Despite Wilson's various allegations of fraud and impropriety, on July 14, 1998, this Court affirmed the

Circuit Court's Final Order in all material respects. See Sharon B.W. v. George B.W., 507 S.E.2d 401 (W.Va. 1998)(hereinafter "Wilson II").

On September 23, 1997, Wilson filed his first "Motion Of Defendant Requesting That The Honorable Judge Kaufman, Circuit Court Judge, Disqualify Himself and Recuse Himself From Participation In Further Proceedings In The Captioned Matter" with the trial court. In his motion, Wilson alleged again that Judge Kaufmann had improperly communicated with Mr. Gillooly, and asserted that Mr. Gillooly had in fact written the Final Order entered by the Court. See September 23, 1997 Motion of Defendant in Sharon B.W. v. George B. W., Civil Action No. 95-D-1685. In his motion, Wilson also alleged that the Judge had issued orders sua sponte and/or without hearings, giving the appearance of impropriety. On September 24, 1997, Judge Kaufman sent a letter to the Chief Justice of this Court, refusing to recuse himself and denying the wrongdoing alleged and stating that he himself had independently written the Final Order. See September 24, 1997 Letter to Chief Justice Margaret Workman from Tod Kaufman. On September 26, 1997, this Court (through its Chief Justice) entered an Administrative Order, finding that the evidence produced by Wilson in support of his Motion was insufficient to warrant disqualification. See September 26, 1997 Administrative Order. (hereinafter "Wilson III").

On October 20, 1997, Wilson filed a "Defendant's Second Motion for Recusal" with the Circuit Court, realleging that improper ex parte conversations had occurred between Mr. Gillooly and Judge Kaufman. Wilson also alleged that Judge Kaufman knew the Bicks family and had received improper communications about the case. See October 20, 1997 Defendant's Second Motion for Recusal. On December 1, 1997, Judge Kaufman submitted a second letter to the Chief Justice, again denying any unethical contacts and confirming that Wilson's motion was

again without merit. See December 1, 1997 Letter to Chief Justice Workman from Judge Kaufman. This Court subsequently denied Wilson's Second Motion for Recusal. (hereinafter "Wilson IV").

On August 17, 1998, Wilson filed a Third Motion for Disqualification, realleging that Mr. Gillooly had improperly communicated ex parte with the Judge. On August 27, 1998, Wilson filed his Reply to Plaintiff's Response to Defendant's Motion for Disqualification, again alleging that Mr. Gillooly had written the Court's Findings of Fact and Conclusions of Law, and alleging that Mr. Gillooly knew and participated in Judge Kaufman's alleged family connections with the Bicks family. On September 2, 1998, Judge Kaufman submitted a letter to Chief Justice Robin Davis, again refusing to recuse himself because he had no bias or prejudice for or against either side and had engaged in no impropriety with any paralegal or lawyer working on the case. This Court again denied Wilson's Third Motion for Recusal. (hereinafter "Wilson V").

Less than a year later, on or about July 13, 1999, Wilson filed this action against Dr. Bernet and Mr. Gillooly. In his Complaint, Wilson continued to assert that Mr. Gillooly had acted improperly with respect to Judge Kaufman in the underlying case, alleging that Mr. Gillooly had interfered with his parental relationship by [effectively] obtaining a ruling in Ms. Bicks' favor in the divorce/custody proceedings. On November 30, 1999, Wilson noticed the deposition of Judge Kaufman in this action. In response, Judge Kaufman filed a Motion for a Protective Order Regarding the Deposition of Judge Kaufman, asserting judicial privilege. Ultimately the issue of whether Judge Kaufman could be ordered to appear for his deposition reached this Court, and in early 2000, the Court granted Judge Kaufman's writ of prohibition, concluding that he could not be compelled to testify concerning the mental processes he employed in formulating his official judgments or the reasons that motivated him in his official

acts in the prior divorce/custody proceedings. See State of West Virginia ex rel. Kaufman v. Honorable Judge Zakaib, et al, 535 S.E.2d 727 (W.Va. 2000). (hereinafter "Wilson VI").

Instead of filing an Answer in this action, on February 9, 2000, Mr. Gillooly filed his initial summary judgment motion with the Circuit Court. See Mr. Gillooly's Initial Summary Judgment Motion. On March 14, 2001, Dr. Wilson responded to Mr. Gillooly's Motion for Summary Judgment, arguing that the court should not rule on the motion at that time in the litigation given its early stage and the fact that he had not yet conducted any discovery. See Plaintiff's Initial Response to Gillooly's Motion for Summary Judgment. On July 10, 2001, the Circuit Court entered an Order instructing the parties to conduct further discovery on the issues raised by the motion for Summary Judgment and set an August 20, 2001 discovery deadline. See July 10, 2001 Court Order In Response to Motion for Summary Judgment. Allowing Wilson even more time to conduct discovery as to his claims, the Circuit Court subsequently granted two 90-day extensions of the discovery deadline at the request of the Plaintiff in August of 2001 and March of 2002. For various reasons, the Plaintiff failed to appear for his deposition until December of 2003.

At his deposition, Wilson testified that his claims against Mr. Gillooly are based on his allegations that Mr. Gillooly manipulated the litigation process in the divorce/child custody proceeding by colluding with Dr. Bernet to obtain a favorable outcome for Sharon Bicks. See Dr. Wilson's Deposition at 55-59 attached as Exhibit K to Gillooly's Renewed Motion for Summary Judgment. Wilson also testified that he believed that Mr. Gillooly asked Dr. Bernet to draft a report to the Court in the underlying domestic action recommending that Wilson have no contact with his son which was contrary to the Circuit Court's initial Order. See *Id.* at 59. Wilson further alleged that Mr. Gillooly reviewed and edited a majority of the reports that Dr. Bernet issued to

the Court and had telephone conferences with Dr. Bernet near the time that each report was submitted to the Court. See Id. However, Wilson relied solely on Mr. Gillooly and Dr. Bernet's billing records to substantiate this allegation. See Id. at 65. Wilson could not testify to any specific revisions or redactions which he believed Mr. Gillooly made to the reports and admitted that he did not know whether those revisions were limited to mere punctuation or involved the substance of the reports. See Id. at 61- 65. Further, Wilson conceded that he had objected to each report filed by Dr. Bernet. See Id.

Wilson insisted that his present claims against Mr. Gillooly were based on his prior claims of improper ex parte communications between Mr. Gillooly and Judge Kaufman, see Id. at 62, but conceded that he did not know the substance of those conversations or whether they involved procedural issues or substantive discussions about the case. See Id. at 63. Wilson further conceded that he had made several attempts to recuse Judge Kaufman and raised the issue of the alleged ex parte communications with Mr. Gillooly during the underlying domestic action. See Id. at 63. Wilson admitted that Judge Kaufman responded to his allegations and stated that he did not have any improper contact with Mr. Gillooly. See Id. Moreover, Wilson conceded that Judge Kaufman eventually refused to recuse himself, and the West Virginia Supreme Court of Appeals did not require him to step down. See Id.

After completing discovery, including the depositions of Dr. Wilson and Dr. Bernet, Mr. Gillooly and Dr. Bernet each filed Renewed Motions for Summary Judgment on all counts alleged in the Respondent's complaint. Specifically, Mr. Gillooly filed his Renewed Motion for Summary Judgment on April 15, 2004. See Gillooly's Renewed Motion for Summary Judgment. The Circuit Court heard the Petitioners' motions on April 29, 2004. On or about July 15, 2004, the Court entered an Order granting summary judgment on the claims of fraud upon the court

and the unlawful practice of medicine; however, the Petitioners' motions with respect to tortious interference with parental relationship were denied. See July 15, 2004 Order.

IV. ASSIGNMENTS OF ERROR

The Circuit Court in the underlying action erred in answering the certified Questions Nos. 1 and 2 in the affirmative and No. 3 in the negative. Under the facts of this case, the Circuit Court's answers to the certified questions regarding the substantive viability of the claim of tortious interference with a parental/custodial relationship improperly extends the holding of Kessel v. Leavitt to a fact pattern clearly not contemplated when the Court first recognizing this intentional tort. In Kessel, this Court recognized a cause of action for tortious interference with a parental/custodial relationship where the biological mother left the West Virginia to hide her pregnancy and to give her child up for adoption without the knowledge of the father. The Kessel Court created a civil tort remedy with available money damages, including punitive damages, for this type of conduct as a matter of public policy to reduce the increasing number of child abductions and concealment arising in child custody litigation. Moreover, the civil tort remedy was established to deter third parties from assisting parents with child abduction and concealment schemes which prevent the Court's neutral adjudication of these highly emotional matters.

The policy behind this tort is not served by allowing a losing custody litigant to bring the tort claim against the prevailing spouse's attorney or expert, based on allegations raised- and disposed of- in the underlying litigation. Furthermore, the unwarranted extension of the tort of intentional interference with parental/custodial relationship to actions taken by attorneys in the course of litigation in a child custody dispute would discourage legal counsel from representing clients in divorce and child custody matters and would hinder an attorney's ability to fully

represent his client's interests, within the bounds of the law, as required by the West Virginia Rules of Professional Conduct.

Moreover, the Circuit Court's answer to the third certified question violates the principle of finality of judgments embodied in the longstanding principles of res judicata and collateral estoppel. As recognized by the Circuit Court, a party could litigate specific contentions in a child custody/divorce action (i.e. the truthfulness or correctness of an expert's testing or an attorney's actions in representing an opposing party), lose on those contentions, and still be free to pursue the same contentions in a later tort action against the expert or attorney. Even if this Court chooses to extend the cause of action for tortious interference with parental relationship to actions taken in the litigation of a custody dispute by attorneys or experts, it must require that a plaintiff asserting such a claim first have the underlying judgment or finding set aside pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, so as not to offend the otherwise inviolate notion of finality of judgments.

If the Circuit Court's Answer to Question No. 3 is determined to be correct by this Court, the cause of action for tortious interference with a parental/custodial relationship could be used by disgruntled losing parties to seek retribution for an unfavorable judgment against not only their former spouse, but also their former spouse's counsel, regardless of the judgments and rulings made in the initial action. Moreover, a losing party could use the tort action as a mechanism to obtain the result he or she failed to obtain in the underlying divorce/child custody matter by virtue of a money judgment. Permitting this type of action would lead to endless litigation and numerous inconsistent judgments arising from the same set of facts and the same parties. In order to deter such misuse of the litigation process in the context of divorce and child

custody matters and to support the finality of judgments, the Court must answer Question No. 3 in the affirmative.

V. ARGUMENT

A. A CLAIM FOR TORTIOUS INTERFERENCE WITH A PARENTAL RELATIONSHIP AS RECOGNIZED BY THIS COURT IN *KESSEL V. LEAVITT* DOES NOT APPLY TO ACTIONS TAKEN BY OPPOSING COUNSEL IN THE COURSE OF CHILD CUSTODY PROCEEDINGS

Under very limited and specific factual circumstances, this Court first recognized a cause of action for tortious interference with a parental/ custodial relationship in *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998). In *Kessel*, the biological mother left West Virginia soon after learning of her pregnancy with Kessel's child, with the intent of hiding the pregnancy and placing the child for adoption without the consent of the father or an adjudication of his parental rights. To assist her in her concealment and the surreptitious adoption, the mother employed a California attorney. *See Id.* at 735. After discovering the pregnancy, the father filed an inverse paternity petition in the Circuit Court of Cabell County, West Virginia and requested an injunction to prohibit the mother from placing their unborn child for adoption until paternity had been established. *See Id.* The plaintiff attempted to serve the mother with a copy of the petition, but could not locate her. When the mother's family members and the California attorney were consulted, each either refused to disclose the mother's location or misrepresented her whereabouts. *See Id.* 735-736. Nonetheless, the West Virginia court entered an ex parte injunction order, prohibiting the mother from placing her unborn child up for adoption until paternity could be established. *See Id.*

Although the California attorney received a copy of the injunction order, he continued to seek placement for the mother's unborn child. *See Id.* at 736. The California attorney first located a couple in Oregon for possible placement. However, when they were informed of the

inverse paternity petition, the couple insisted that the biological father be informed of the adoption. When the California attorney refused, the Oregon couple declined to adopt the child. See Id. at 736-37. Ultimately, a Canadian couple adopted the child, and the father's rights were severed under Canadian law without notice to him or his consent. See Id. at 738.

In evaluating whether a cause of action for interference with parental relationship should be adopted, this Court looked first to Section 700 of the Restatement (Second) of Torts which provides for a cause of action by a parent who is entitled to custody of a minor child against one who by force abducts the child from his/her home against one who induces the child to leave its home with knowledge that the parent has not consented, or against one who imprisons or induces the child not to return home with the knowledge that the child is away from home against the will of his/her parent. This Court also looked to other jurisdictions that had previously adopted the tort of tortious interference with parental/custodial relationship. See Id. Specifically, the Kessel Court relied on Rosefield v. Rosefield, 221 Cal. App.2d 431 (Cal. Rptr. 1963), in which the mother's claim for tortious interference with a parental relationship arose from a divorce proceeding where the father with the help of the grandfather took the child from the mother and concealed the child's whereabouts from the mother just before the court was to award custody to her. See Id. at 762. The Rosefield Court declined to definitively rule as to the propriety of the mother's claim for tortious interference with custodial relationship because custody had not yet been awarded to her, but the court did find that the father had impermissibly infringed upon the mother's parental and custodial rights. See Id. In response to the Rosefield holding, this Court stated:

We believe that it was a legal wrong for the husband and father to abscond with the child, and that respondent [grandfather] would be liable in damages even for the father's actions, if conspiracy were shown. Of course, not every transportation of a child by one parent

causing the other parent loss of custody and association with the child would be wrongful. If, however, one parent makes away with the offspring, removes it effectually from judicial control, conceals it, and leaves the other parent utterly bereft of the means of enjoying any of the privileges of parenthood, it is folly to say that the decamping parent is merely exercising his 'equal right' to the custody of the child. There is no equality about it.

See Id.

Finally, this Court reasoned that a claim for tortious interference with parental rights could be properly rooted in criminal statutes which forbid the abduction of children from their custodial parent or guardian. See Id. at 765. Specifically, this Court stated that "West Virginia Code Section 61-2-14d (1997) recognizes as a crime the concealment or removal of a minor child *in violation of a court order* and with intent to deprive another person of lawful custody or visitation rights and provides criminal penalties for such actions." (emphasis added). See Id. at 765. Because it is a criminal act to fraudulently conceal or abduct a child, this court reasoned that the existence of a civil remedy for such conduct was consistent with West Virginia public policy.

Based on these principles, the Court held in Kessel that a parent may maintain a cause of action against one who tortiously interferes with the parent's parental or custodial relationship, see Id. at 765-66, if the following factors are proven:

(1) the complaining party has a right to establish or maintain a parental or custodial relationship with a parental or custodial relationship with his or her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused him harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

Syl. Pt. 7, Kessel v. Leavitt, 511 S.E.2d 720. Importantly, however, the Kessel Court limited its holding by distinguishing it from interference with a parent's visitation rights or interference which results in a parent's loss of a child's society or companionship. See Id. at 761 n. 43. Specifically, tortious interference with parental/custodial relationship involves the removal of parental or custodial authority from a parent, whereas tortious interference with a parent's visitation rights or alienation of affections connotes only that a parent is not able to enjoy the company of his/her child. See Id. at 761 n. 44.

As a result, this Court found in Kessel that the biological father alleged a sufficient claim for tortious interference with a parental relationship against the biological mother's parents and brother. See Id. 765-769.² However, the Court found that the father could not maintain his tortious interference claim against the mother because "the prosecution of such a claim between parents with co-equal rights effectively permits one parent to elevate his/her parental or custodial rights above those of the other parent rather than leaving such a determination to the judiciary equipped to resolve such custodial disputes." See Id. at 767.

As this Court's analysis in Kessel makes absolutely clear, the tort of interference with a parental relationship was recognized to provide a civil remedy for, and deterrent against, abductions and/or concealment of a child's whereabouts from a custodial parent or guardian by a noncustodial parent or third parties. As this Court also made clear in Kessel, the tort was not intended to apply to every conceivable type of interference with a parental/custodial relationship (i.e. loss of society or companionship), but only to those instances where a non-custodial parent or third party has taken action outside of the legal system to fraudulently or surreptitiously hide a child from lawful proceedings or has violated a custody order by such actions. The tort of

interference with a parental relationship was never intended to serve as a mechanism to police the actual conduct of attorneys or experts in child custody litigation by the reasoning employed by this Court in recognizing the tort in Kessel clearly does not support such an extension.

Because mechanisms are already in place for Court supervision of the lawyers and experts who appear before them with respect to the conduct of litigation, extension of the tort as a vehicle to police litigation conduct is unnecessary and would encroach on the function already performed by capable judges. Moreover, making a cause of action for interference with parental relations available to a losing litigant in child custody litigation (an area of the law noteworthy for emotional litigants and protracted disputes) would dangerously expand the scope of such litigation, promote multiple and frivolous filings, and deter capable practitioners from representing clients in child custody disputes for the fear of being sued by a vindictive, non-prevailing party. In short, none of the policy considerations present in Kessel are implicated when dealing with conduct of an attorney in child custody litigation. Because Kessel v. Leavitt simply does not support a cause of action in this instance, Questions Nos. 1 and 2 should be answered in the negative.

B. THE TORT OF INTERFERENCE WITH PARENTAL/CUSTODIAL RIGHTS HAS BEEN APPLIED ONLY TO THOSE WHO ABDUCT OR CONCEAL CHILDREN FROM A CUSTODIAL PARENT, AND TO THEIR ACCOMPLICES IN SUCH ABDUCTION OR CONCEALMENT

This Court's decision in Kessel v. Leavitt was the first and only time this Court has recognized, applied or interpreted the tort of tortious interference with a parental/custodial relationship. Although this Court has not had the opportunity to consider whether the tort would apply to situations beyond child abduction, concealment or violation of child custody orders,

² The Kessel Court did not determine whether the father had a sufficient claim against the California attorney because the attorney was not a party to the appeal as a result of his failure to satisfy the bond requirement set forth in Rule 6(d) of the West Virginia Rules of Appellate Procedure. See Id. at 742.

Courts from across the country have done so and have limited application of the tort to those situations. Consequently, the Circuit Court's answer to Question No. 1 represents a substantial and dramatic expansion of current law well beyond what has been recognized in any other jurisdiction.

A claim for intentional interference with parental rights is commonly established in divorce situations where the noncustodial parent, with or without collusion with relatives, absconds with a child and/or hides the child from the custodial parent. See Marshak v. Marshak, 628 A.2d 964 (Conn. 1993). A majority of jurisdictions, including sixteen state supreme courts, have recognized the tort of intentional interference with the custodial relationship. See Hoblyn v. Johnson, 55 P.3d 1219 (Wyo. 2002) (citing Kessel v. Leavitt, 511 S.E.2d 720 (W.Va. 1998)). However, three state supreme courts have declined to recognize a claim for tortious interference with the custodial parent-child relationship based upon the concern that tort recovery and its accompanying litigation would be detrimental to the best interests of the child. See Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990); Zaharias v. Gammill, 844 P.2d 137 (Okla. 1992); Hoblyn v. Johnson, 55 P.3d 1219 (Wyo. 2002). In Larson v. Dunn, the Minnesota Supreme Court focused on the possibility of increased litigation in child custody matters and the danger that the tort might escalate intra-family disputes as a basis for declining to recognize the tort in that state.

Of the majority of the states that recognize the tort, most allow the action to be asserted not only against the abductor or concealer, but also against third parties who actually aid or assist in the abduction or concealment. See Stone v. Wall, 734 So.2d. 1038 (Fla. 1999); Wood v. Wood, 338 N.W.2d 338 N.W.2d 123 (Iowa 1983); Weirich v. Weirich, 833 S.W.2d 942 (Tex. 1992); see also D&D Fuller CATV Constr., Inc. v. Pace, 780 P.2d 520 (Colo. 1989)(mother suing grandparents for conspiring with father to conceal child whereabouts); Silcott v. Ogleby,

721 S.W.2d 290 (Tex. 1986)(father suing son's maternal grandfather); Kramer v. Leineweber, 642 S.W.2d 364 (Mo. Ct. App. 1982)(mother suing father and grandmother); Plante v. Engel, 469 A.2d 1299 (N.H.1983)(father suing grandparents for aiding and abetting mother in interfering with custodial relationship); Gibson v. Gibson, 15 Cal. App. 3d 943 (Cal. 1971)(holding mother of abducting parent liable); Rosefield v. Rosefield, 221 Cal. App. 2d 431 (Cal. 1963)(holding father of abducting parent liable); LaGrenade v. Gordon, 264 S.E.2d 757 (N.C. 1980)(holding parents of abducting parents liable).

Section 700 of the Restatement (Second) of Torts (upon which this Court relied in Kessel) does not expressly apply to third parties acting at the direction of, or in complicity with, a parent who improperly abducts or conceals a child. Nevertheless, courts have reasoned that because an abducting party can be held liable for taking a child from a custodial parent, any third person who conspires with an abductor, or aids or abets in the abduction of a child, can also be held liable. See Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980)(interpreting Texas law and holding parents, brother, sister and nephew of abducting parent liable); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978)(interpreting New York law and holding father and brother of abducting parent liable); Llyod v. Loeffler, 539 F. Supp. 998 (E.D. Wis.), aff'd, 694 F.2d 489 (7th Cir. 1982)(interpreting Wisconsin law and holding parents of abducting parent liable). In such a claim against a third party, the custodial parent may recover if the third party financially supported the abducting parent, allowed that parent and the child to stay at the third party's home, or otherwise aided the parent in taking the child and concealing him from the custodial parent. See generally Id.

Although the tort of interference with parental/custodial rights has logically and appropriately been extended to apply to persons who act in concert with those who abduct or

conceal children from a custodial parent, the tort has not been extended any further, by any jurisdiction. As those jurisdictions that have recognized the tort have reasoned, the purpose of the tort is to deter abductions and similar conduct and is to provide a remedy when such conduct occurs. That reasoning has no application, however, to non-abduction or concealment situations, and no application whatsoever to those whose role is to conduct the litigation (or give testimony in litigation) which to determines who the custodial parent will be. The Circuit Court's Answer to Question No. 2 represents a significant and unprecedented expansion of the tort of interference with parental relationship which will only lead to the retaliatory use of such litigation in the highly emotional setting of divorce/child custody litigation. Therefore, the Circuit Court was in error, and this Court should answer Question No. 2 in the negative.

C. NO JURISDICTION HAS RECOGNIZED A CLAIM FOR TORTIOUS INTERFERENCE WITH PARENTAL/CUSTODIAL RELATIONS AGAINST AN OPPOSING ATTORNEY FOR ACTIONS TAKEN IN THE COURSE OF CHILD CUSTODY LITIGATION

Although the tort of interference with parental relations has been applied to attorneys who assist their client in wrongfully concealing a child, it has never been applied against an opposing lawyer for conduct taken in the course of child custody litigation. For example, McEvoy v. Helikson, 562 P.2d 540 (Ore. 1977), the plaintiff and his former wife were divorced by decree, and the court awarded the plaintiff custody subject to visitation rights of the mother. See Id. at 541. Subsequently, the court entered an order granting the mother temporary custody of the child until a specific date when the mother would be required to deliver the child to the plaintiff. See Id. The temporary custody order also mandated that the mother's attorney would retain his clients' passports (the mother was a citizen of Switzerland) until the child had been returned to her father. See Id. The attorney defied the order; however, and returned his client's passports, allowing the mother to leave the country with her child. See Id. at 542. Because the

attorney violated a court order, and assisted this client in doing so, by delivering the passports to the mother, the court held that the attorney had interfered with the father's parental/custody rights even though there was no direct contact between the attorney and the child. See Id. at 544.

In stark contrast, the Maine Supreme Judicial Court has held that a cause of action for intentional interference with parental relations cannot be maintained against an opposing lawyer. See Finn v. Lipman, 526 A.2d 1380 (Me. 1987). In Finn, the plaintiff alleged tortious interference with parental/custodial relationship and intentional infliction of emotional distress based on actions taken by opposing counsel in a divorce proceeding. See Id. at 1380. Because there was no evidence that the attorney counseled the child or his client to violate the custody order put in place by the Court, the Maine Supreme Court reasoned that the tort of interference with parental/custodial relations was inapplicable to the opposing lawyer. See Id. at 1383. The Finn Court stated, "There is nothing inconsistent in the facts as alleged in Finn's complaint and counteraffidavits with an attorney's duty to advocate the interests of his client as required by the Maine Bar Rules." See Id. at 1383.

In this case, the stipulated and undisputed facts make clear that the allegations made against Mr. Gillooly in this case in no way involve abduction or concealment of a child, but only the manner in which the litigation was conducted (i.e. unnecessary proceedings, ex parte communications with the court, improper editing of an expert's report). No court has ever recognized a claim in this context, and to do so now would not only be inconsistent with the cases throughout the country that have recognized and applied the tort, but would deter lawyers from actively representing their clients in divorce proceedings and create further grounds for endless litigation. Therefore, the Court should answer Question No. 2 in the negative to prohibit an unwarranted extension and misapplication of the tort of interference with parental relationship

to actions taken by an attorney in litigation as an advocate for his client's interests as supported by the Rules of Professional Conduct.

D. THE LITIGATION PRIVILEGE SHOULD PROHIBIT ANY ACTIONS TAKEN IN CONNECTION WITH JUDICIAL PROCEEDINGS FROM BEING THE BASIS FOR A TORT ACTION, THUS AN ACTION FOR TORTIOUS INTERFERENCE WITH PARENTAL RELATIONSHIP CANNOT ARISE FROM ACTIONS TAKEN BY COUNSEL IN THE COURSE OF LITIGATION IN A CHILD CUSTODY DISPUTE.

Should this Court recognize a claim of tortious interference with a parental/custodial relationship based solely on actions taken by legal counsel in the course of litigation, such a cause of action would be directly contrary to the concept of the litigation privilege. The litigation privilege affords protection to all parties involved in judicial proceedings and allows an attorney to zealously advocate arguments and positions on behalf of his client without fear of subsequent defamation claims by an adversary party arising from any oral and/or written communication made in connection with the judicial proceeding. See Collins v. Red Roof Inns, Inc., 566 S.E.2d 595, 598 (W.Va. 2002). The litigation privilege provides an absolute bar to civil actions against attorneys for defamatory communications made in connection with a judicial proceeding as long as the communications are related to the judicial action. See Id. at 599. The Court has previously recognized that the litigation privilege is necessary for the administration of justice because those who participate in judicial proceedings must be able to do so without being impeded by the fear of subsequent defamations actions. See Id. at 604. Specifically, the public policies associated with the litigation privilege include:

- (1) promoting the candid, objective and undistorted disclosure of evidence;
- (2) placing the burden of testing the evidence upon the litigants at trial;
- (3) avoiding chilling effect resulting from the threat of subsequent litigation;
- (4) reinforcing the finality of judgments;
- (5) limiting collateral attacks upon judgments;
- (6) promoting zealous advocacy;
- (7) discouraging abusive litigation practices; and
- (8) encouraging settlement.

See Barefield v. DPIC Companies, Inc., 600 S.E.2d 256, 272 (W.Va. 2004)(citing James v. Brown, 637 S.W.2d 914, 917-18 (Tex. 1982)).

In Barefield, Justice Davis underscored the importance of the litigation privilege and its broad application in her concurring opinion. Looking to case law from other jurisdictions, Justice Davis reasoned that “[t]he litigation privilege extends beyond claims of defamation to claims of abuse of process, intentional infliction of emotional distress, negligent misrepresentation, invasion of privacy, . . . interference with contract and prospective economic advantage.” See Id. (quoting Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1132 (Cal. 1990)).

Although this Court has not directly addressed the issue of whether the litigation privilege under West Virginia law applies to conduct as well as communications, Justice Davis’s concurrence in Barefield provides strong and pervasive support for such application. Applying such logic to the case at bar, the actions taken by Mr. Gillooly in the course of underlying child custody dispute clearly would be protected by the litigation privilege and therefore not subject to attack in tort. Extending the cause of action for tortious interference with parental relationship would obviously diminish the privilege, or destroy it altogether in the context of child custody disputes. The rationale behind the litigation privilege provides additional reason for this Court to answer Question No. 2 in the negative.

E. A LAWYER TYPICALLY OWES NO DUTY TO ANY OPPOSING LITIGANT BEYOND THOSE IMPOSED BY RULE 11 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE AND THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT

As recognized by the Circuit Court, the tort of interference with parental relations would expand a lawyer’s duty to an opposing litigant, making it enforceable in tort, to do nothing improper or untoward in the context of divorce/child custody litigation. Because a lawyer

typically owes no duty to an opposing litigant, and because an attorney's conduct is adequately and properly policed by Rule 11 and the West Virginia Rules of Professional Conduct, application of the tort of interference with a parental relationship to litigation conduct is unnecessary.

Although this Court has not addressed whether a lawyer owes a duty of care enforceable in tort to an opposing litigant, other jurisdictions have addressed this issue and have held that an attorney owes no duty of care to his client's adversary. See e.g. Norton v. Hines, 49 Cal. App.3d 917, 918 (Cal. App. Ct. 1975). Generally, an attorney has an exclusive and paramount duty to his client alone, and has no duty to protect the interests of an adverse party because the adverse party is not an intended beneficiary of the attorney's services. Therefore, the adversary's interests would not only interfere with the attorney's ability to fully represent the client's interests but also the attorney's ongoing concern of being sued for his advocacy on behalf of his client would detrimentally interfere with attorney-client relationship. See Friedman v. Dozore, 312 N.W.2d 585, 592-93 (Mich. 1981); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987).

The Tenth Circuit Court of Appeals has held that an attorney's duty of care is owed only to a client and to the Court. See Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979). The Tappen Court found that it would be unreasonable for an adverse party to rely upon opposing counsel to protect him from harm. See Id. at 379. Specifically, the Tappen Court stated:

[a]n attorney engaged in discharging his professional duties to his client is not held liable for negligence toward a third person, for the reason that his paramount and exclusive duty is to his client. Concededly, there has been some relaxation of this doctrine in some states, but this arises in cases where the attorney's acts benefits a third party. No such relaxation is found where, as here, the relationship is an adversary alone. In this type of case, the lawyer must be loyal to his client, and there is no room for existence of a duty running to the adversary.

Id. at 378. Clearly, the adversarial nature of the judicial system does not support a duty of care owed by an attorney to his client's adversary because such a duty would create an unacceptable conflict of interest which would compromise an attorney's effectiveness as the advocate for his client's interests. See Friedman v. Dozorc, 312 N.W.2d 585, 592 (Mich. 1981). As the Friedman Court specifically reasoned:

The duties, professional and actionable, owed to the client by the attorney acting as advocate and adviser are broader than the obligation of reasonable investigation. Those duties concern decisions which the attorney makes on behalf of, and often in consultation with, the client, regarding the manner of proceeding with the client's cause. A decision to proceed with a future course of action that involves litigation will necessarily adversely affect a legal opponent. If an attorney were held to owe a duty of care to both the client and the client's adversary, the obligation owing to the adversary would extend beyond undertaking an investigation and would permeate all facets of the litigation. The attorney's decision-making and future conduct on behalf of both parties would be shaped by the attorney's obligation to exercise due care as to both parties. Under such a rule an attorney is likely to be faced with a situation in which it would be in the client's best interest to proceed in one fashion and in the adversary's best interest to proceed contrariwise. However he chooses to proceed, the attorney could be accused of failing to exercise due care for the benefit of one of the parties.

Friedman v. Dozorc, 268 N.W.2d at 591. The Friedman Court also directly quoted Parnell v. Smart, 66 Cal. App. 3d 833, 837-838 (Cal. App. 1977) cautioning:

The distinguishing feature of this case is that the defendants occupy the position of counselor to the adverse party (Farmer) in an adverse proceeding instituted by the plaintiff. Defendants were directly responsible to their client, Farmers, and were under a duty to represent and protect their client's interest against the claim being made by the Plaintiff. In this role, they were duty bound to challenge, minimize, or, if possible, to defeat the claim being made. Under these circumstances, it is unreasonable to conceive that defendants owed some sort of legal duty to plaintiff.

See Friedman v. Dozorc, 268 N.W.2d at 591 (quoting Parnell v. Smart, 66 Cal. App.3d 833, 837-838 (Cal. App. 1977)). The Friedman Court held that the public policy of maintaining a vigorous adversary system outweighs the alleged advantage of finding a duty of care owed by an attorney to the opposing party. See Id. at 592.

With respect to attorneys, tort liability is unnecessary for policing litigation conduct because Rule 11 of the West Virginia Rules of Civil Procedure and the Rules of Professional Conduct exclusively govern the conduct of attorneys and provide adequate remedies for violations of ethical principles. Rule 11 of the West Virginia Rules of Civil Procedure provides a mechanism through which parties can prevent frivolous lawsuits or lawsuits being filed for an improper purpose. See Bartles v. Hinkle, 472 S.E.2d 827 (W.Va. 1996). Rule 11, with its possible sanctions, deters frivolous litigation, compensates the victims of vexatious litigation, and educates the Bar about appropriate standards of conduct. See Davis v. Wallace, 565 S.E.2d 386 (W.Va. 2002). Under Rule 11, West Virginia trial courts have the authority to order payment of reasonable attorney's fees and costs incurred as a result of vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by good faith argument for application, extension, modification, or reversal of existing law. Therefore, Rule 11 provides litigants with a mechanism through which to sanction parties and require them to pay attorneys fees and costs incurred as a result of a vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported in good faith.

Furthermore, Rule 1.3 of the West Virginia Rules of Professional Conduct states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." See W.Va. R. Prof. Con. 1.3 (2004). As the Comment to Rule 1.3 further provides, "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in the advocacy upon

the client's behalf." See *Id.* Rule 3.1 of the West Virginia Rules of Professional Conduct also counsels that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." W.Va. R. Prof. Con. 3.1 (2005). The Comment to Rule 3.1 states that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." See *Id.* Clearly, the Rules of Professional Conduct establish duties owed by an attorney to his client, to the Court, and to others involved in litigation, and may be construed to create implied duties to his client's adversary. However, the Rules of Professional Conduct make it clear that an attorney owes a paramount duty to his client and must zealously advocate the client's position within the bounds of the law. Nonetheless, it has been firmly established by the express terms of the Rules of Professional Conduct that an attorney's violation of the Rules cannot support a private cause of action for such violation. The "Scope" of the Rules of Professional Conduct expressly states:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide the structure regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self assessment, or for sanctioning a lawyer under the administration of the disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

W.Va. R. Prof. Con. Scope (2005). Similarly, this Court has specifically recognized that an attorney's violation of the Rules of Professional Conduct cannot support a private cause of action for such a violation. See *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998)(citing *First National Bank in Marlinton v. Blackhurst*, 345 S.E.2d 57, 574 (W.Va. 1986)). Therefore, no duties

arising from in the West Virginia Rules of Professional Conduct may be utilized by the Plaintiff as a duty which gives rise to liability under a tort theory.

A majority of jurisdictions have also found a lack of any duty on the part of an attorney to an adverse party based on a strong public policy favoring free access to the courts. “[Our] adversary system ‘intends, and expects, lawyers to probe the outer limits of the bounds of the law, ever searching for a more efficacious remedy, or a more successful defense.’” See Friedman v. Dozorc, 312 N.W.2d 585, 592-93 (quoting State Bar Grievance Administrator v. Corace, 213 N.W.2d 124 (Mich. 1973)). An attorney faced with the risk of being held liable under a tort theory to the adverse party will have a greater initiative to decline cases and will also be hindered in the free use of the courts on behalf of his client. See Friedman v. Dozorc, 312 N.W.2d at 593 (Mich. 1981).

The Circuit Court’s answer to Question No. 2 breaks new ground in creating a previously unrecognized duty sounding in tort owed by an attorney to his client’s adversary in child custody litigation. Such a duty will only impede an attorney’s ability to fully represent his client’s interests as a result of the fear of tort litigation from the opposing party, and violate the public policy of free access to the courts. Given the provisions of Rule 11 of the West Virginia Rules of Civil Procedure, recognition of such a tort is unnecessary. Consistent with existing law, the Court should answer Question No. 2 in the negative.

F. IF THE COURT EXPANDS THE CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PARENTAL/CUSTODIAL RELATIONS, A PLAINTIFF SHOULD BE REQUIRED TO SEEK RELIEF FROM THE UNDERLYING JUDGMENT PRIOR TO FILING HIS INDEPENDENT ACTION

Assuming, *arguendo*, that a cause of action of tortious interference with parental/custodial relations does in fact exist, it is clear that relief under Rule 60 of the West Virginia Rules of Civil Procedure is a necessary condition precedent to asserting a claim of this

type. In essence, Wilson claims that because of Mr. Gillooly's actions in the underlying divorce action, Judge Kaufman made the wrong decision in granting custody of his child to Ms. Bicks and in limiting his visitation. Although those decisions were affirmed by this Court, Wilson asserts in this case that those judgments were obtained by fraudulent or wrongful conduct on the part of Mr. Gillooly, and seeks to recover money damages on the theory that the outcome of the underlying case should have been different. Under well-settled principles of res judicata and collateral estoppel, to assert these claims Wilson must first be required to obtain relief from the underlying judgment pursuant to Rule 60(b).

When a court of competent jurisdiction fairly renders a judgment on the merits, such judgment is conclusive on the parties and their privies until reversed or set aside in a direct proceeding. See Hustead v. Ashland Oil, Inc., 475 S.E.2d 55, 60 (W.Va. 1996)(citing Storm v. Nationwide Mutual Insurance Co., 97 S.E.2d 759 (Va. 1957)). Any view to the contrary would result in uncertainty and confusion, and would undermine the conclusive character of judgments which the doctrines of res judicata and collateral estoppel were developed to prevent. See Id.

The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are closely related. See State of West Virginia v. Miller, 459 S.E.2d 114 (W.Va. 1995). Res Judicata generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action. See State of West Virginia v. Miller, 459 S.E.2d at 120. A claim is barred by res judicata when the prior action involves identical claims and the same parties or their privies. See In Re Estate of McIntosh, 109 S.E.2d 153 (W.Va. 1959). The West Virginia Supreme Court of Appeals on prior occasions has stated that the principles of res judicata function " to advance several related policy goals -- (1) to promote fairness by

preventing vexatious litigation; (2) conserve judicial resources; (3) to prevent inconsistent judgments; and (4) to promote finality of judgments by bringing litigation to an end.” See State of West Virginia v. Miller, 459 S.E.2d at 122 n.8 (quoting Mellon-Stuart Co. v. Hall, 359 S.E.2d 124 (W.Va. 1987)).

Collateral estoppel is designed to foreclose relitigation, in a second suit, of issues which have previously been litigated in an earlier suit, even though there may be differences in the causes of action between the parties of the first and second suit. See Conley v. Spillers, 301 S.E.2d 216, 220 (W.Va. 1983). Collateral Estoppel is broader than the doctrine of res judicata because it applies to a cause of action different from that litigated in the original controversy. See Id. The primary focus of collateral estoppel is whether the issue, which is being sought to be relitigated, was actually litigated in the first action. See Id. at 220. Similar to res judicata, collateral estoppel stands for an extremely important principle in our adversary system because the doctrine “serves to estop the relitigation by parties and their privies of any right, fact or legal matter which is put in issue and has been once determined by a valid and final judgment of a court of competent jurisdiction.” See State of West Virginia v. Miller, 459 S.E.2d at 121(citing State v. Wilson, 429 A.2d 931 (Conn. 1980) and Ashe v. Swenson, 397 U.S. 436, 443 (1970)).

The doctrine of collateral estoppel requires that the first judgment be rendered on the merits and be a final judgment by a court having competent jurisdiction over the subject matter and the parties. See Conley v. Spillers, 301 S.E.2d at 220. However, an additional requirement of mutuality must always be met for application of res judicata, but is not always required for collateral estoppel. See Id. The underlying premise for requiring mutuality of parties is that it would be unfair for the party seeking the advantage of the judgment not to be bound by it. See Id. at 221. A majority of the jurisdictions, including West Virginia, recognize however that

parties are not foreclosed from asserting collateral estoppel if they cannot meet the requirement of mutuality. See Conley v. Spillers, 301 S.E.2d 216 (W.Va. 1983).

Rule 60 of the West Virginia Rules of Civil Procedure provides the means to attack a final judgment in a civil action. See Id. at 60. Subparagraph (b) of Rule 60 sets forth specific circumstances under which a final judgment may be set aside, including inadvertence, surprise, excusable neglect, unavoidable cause, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. See W.Va. R. Civ. P. 60 (2004). The purpose of Rule 60(b) is to provide a mechanism for attacking a final judgment, but only when the circumstances set forth in Rule 60 are present. See Husted v. Ashland Oil, 475 S.E.2d at 61.³ When such extraordinary circumstances do not exist, the judgment may not be set aside and its findings may be not disturbed in a later lawsuit.

If the Court chooses to extend the cause of action for tortious interference with parental relationship to actions taken in child custody litigation by an opposing lawyer, the Court must also address whether the plaintiff should be required to have the findings of fact and the judgment in the custody proceeding set aside as a condition precedent to such a claim. By necessity, such a claim will only be asserted in situations like the present case where a litigant has litigated, and lost, on his custody claim, and seeks to hold the lawyer responsible for not being awarded custody. In other words, if recognized, the claim that Wilson asserts in this case will always involve a relitigation of the underlying dispute (i.e. the outcome would have been different had the lawyer not acted improperly).

To allow a party to a divorce/child custody proceeding to bring an independent tort action without first setting aside an initial judgment through the appeals process or Rule 60 of the West

³ An independent action to set aside a judgment may also be brought, but proof of grounds such as those contained in Rule 60 are required to prevail in such an action.

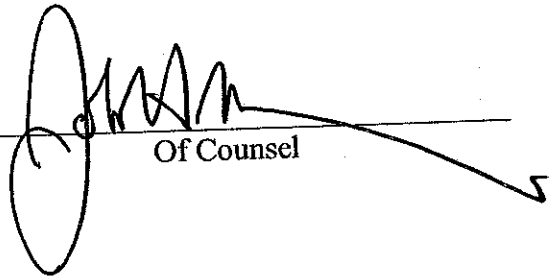
Virginia Rules of Civil Procedure would ignore, and destroy, res judicata and collateral estoppel, as it relates to that judgment. A party such as Dr. Wilson would be free to ignore the outcome in the first case and relitigate the correctness of that decision in the same form without proof of the Rule 60(b) factors and without setting aside the first judgment. Such a rule would not only lead to inconsistent judgments, but would allow a disgruntled child custody litigant to pursue multiple lawsuits with no regard for the outcome of the earlier suits. In the highly emotional environment of child custody disputes, there is a significant risk for such misuse of litigation. Specifically, if the Court were to allow parties to bring subsequent tort actions without first obtaining relief from the original judgment, litigants may trek into an endless stream of litigation in an attempt to obtain a result in their favor. Moreover, litigants may use lawsuits as a retaliatory tool to harass their former spouse and to disrupt and hinder the process of establishing custody of a child with that parent. Therefore, if the Court recognizes a cause of action for the tortious interference with parental/custodial relationships against opposing counsel, the Court should require the plaintiff to initially set aside the first judgment prior to bring the second lawsuit. Accordingly, the Court should answer Question No. 3 in the affirmative.

VI. CONCLUSION/PRAYER FOR RELIEF

The Circuit Court erred by answering Certified Question Nos. 1 and 2 in the affirmative because actions taken in the course of litigation should not be the basis for a cause of action for tortious interference with parental/custodial relationship. Furthermore, to recognize such a tort action based on such actions by an attorney creates an unprecedented duty owed by an attorney to the his client's adversary and violates the public policy. Therefore, the Court should answer Questions 1 and 2 in the negative. Moreover, the Circuit Court erred by answering Certified Question No. 3 in the affirmative because to allow a losing party to bring a subsequent tort action

based on based on allegations raised- and disposed of- in the underlying litigation would be inconsistent with the principles of res judicata and collateral estoppel. Therefore, the Court should answer Question No. 3 in the affirmative and require the plaintiff to obtain relief from the underlying judgment through the appeals process or Rule 60 before pursuing a subsequent tort action.

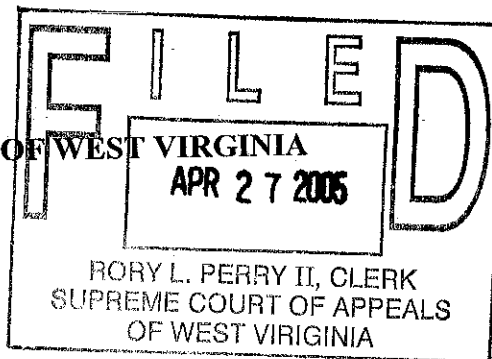
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



GEORGE BUTLER WILSON,

Plaintiff, Respondent

v.

**Civil Action No.: 99-C-1532
Honorable Paul Zakaib, Jr.**

**WILLIAM BERNET,
VANDERBILT UNIVERSITY,
and THOMAS J. GILLOOLY**

Defendants, Petitioners

**FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
NO. 32579**

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing "*Thomas J. Gillooly's Brief Regarding Certified Questions*" on the following by U.S. Mail on the 27th day of April, 2005, to:

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A handwritten signature in black ink, appearing to be "M. Fisher", written over a horizontal line.