

No. 14-0280

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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STATE OF WEST VIRGINIA *ex rel.*,  
JUSTIN S. GOLDEN, SR.,

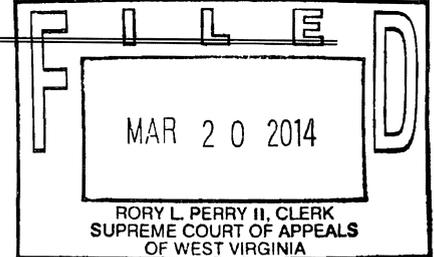
*Petitioner,*

v.

THE HONORABLE TOD KAUFMAN, Judge of the Circuit Court of  
Kanawha County, West Virginia; MARK A. MILLER,

*Respondents.*

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*From the Circuit Court of  
Kanawha County, West Virginia  
Civil Action No. 12-C-1038*



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SUMMARY RESPONSE OF RESPONDENT MARK A. MILLER  
TO PETITION FOR WRIT OF PROHIBITION

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P. Rodney Jackson (WV Bar No. 1861)  
Law Office of P. Rodney Jackson  
401 Fifth Third Center  
700 Virginia Street East  
Charleston, WV 25301  
(304) 720-6783

John C. Palmer IV (WV Bar No. 2801)  
Keith J. George (WV Bar No. 5102)  
Robinson & McElwee PLLC  
P.O. Box 1791  
Charleston, WV 25326  
(304)-344-5800  
*Counsel for Plaintiff Mark A. Miller*

Dated: March 20, 2014

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**MARK A. MILLER,**

**Plaintiff,**

**v.**

**From the Circuit Court of  
Kanawha County, West Virginia  
Civil Action No. 12-C-1038**

**JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION, (NYLIAC), and  
NYLIFE SECURITIES, LLC,**

**Defendants.**

**SUMMARY RESPONSE OF RESPONDENT MARK A. MILLER  
TO PETITION FOR WRIT OF PROHIBITION**

**I. ARGUMENT**

**A. The Question Presented**

Respondent Mark A. Miller submits this summary response pursuant to Rule 16(h) of the West Virginia Rules of Appellate Procedure, as directed by this Court's Scheduling Order. The Petition for Writ of Prohibition was filed in the late afternoon of Wednesday, March 19, 2014, seeking to block the trial of this matter which is set for Monday, March 24, 2014. Not only has the Prohibition Petition been interposed for the purpose of delay, it fails to meet the clearly defined requisites of the extraordinary remedy of prohibition. Rather, the Prohibition Petition is but a thinly disguised interlocutory appeal from the denial of the Petitioner's "renewed" motion for summary judgment occurring at the pre-trial conference on Tuesday, March 18, 2014.

The Petitioner states that the "question presented in his Petition is whether Mark Miller may maintain a civil action, based on claims of conversion, breach of fiduciary duty, intentional infliction of emotional distress, adultery, and criminal conversation, against an insurance

salesman who engaged in sexual relations with Maria Miller, allegedly to induce her into purchasing an annuity from him, that lead to the dissolution of the Miller's marriage?" The Petitioner's fundamental flaws in his argument addressing this question are (1) his failure to recognize the continued viability of the common law tort of criminal conversation, and (2) his over-expansive reading of this Court's opinion in *Weaver v. Union Carbide Corp*, 378 S.E.2d 105 (W.Va. 1989).

The tort of criminal conversation has long been recognized as a cause of action under West Virginia law. *Kuhn v. Cooper*, 141 W.Va. 33, 87 S.E.2d 531 (1955); *Harper v. Harper*, 252 F.39 (4<sup>th</sup> Cir. 1918) (applying West Virginia law).

"Criminal conversation" is a common law tort claim for adultery. *See* 41 Am.Jur.2d, Husband and Wife, § 242 (2005). Criminal conversation is the name for a tort which is based on sexual intercourse between the defendant and the plaintiff's spouse. Criminal conversation is akin to a "strict liability tort" because a plaintiff only needs to prove (1) the actual marriage between the spouses, and (2) sexual intercourse between the defendant and the plaintiff's spouse during the marriage. *Id.*

The tort of criminal conversation is recognized by the Restatement (Second) of Torts, § 685 (1977), which provides:

One who has sexual intercourse with one's spouse is subject to liability to the other spouse for the harm thus caused to any of the other spouse's legally protected marital interests.

The common law cause of action for alienation of affections consisted of three elements: (1) misconduct by the defendant; (2) a loss of spousal affection or consortium; and (3) a causal link between the misconduct and the loss. *See* 41 Am.Jur.2d, Husband and Wife, § 237 (2005).

The tort of alienation of affections is also recognized by the Restatement (Second) of Torts § 582 (2005), which provides:

One who purposely alienates one spouse's affections from the other spouse is subject to liability for the harm thus caused to the any of the other spouse's legally protected marital interests.

Unlike with the tort of criminal conversation, the tort of alienation of affections does not require proof of extramarital sex. Indeed, alienation of affections has been applied to the parents, brothers, or sisters of a spouse, and even strangers, who interfere with and destroy the marital relationship. *See e.g., Rush v. Buckles*, 93 W.Va. 493, 117 S.E. 130 (1923); *Gross v. Gross*, 70 W.Va. 317, 73 S.E. 961 (1912); *see also Ratcliffe v. Walker*, 117 Va. 569, 85 S.E. 575 (1915).

Because the torts of criminal conversation and alienation of affections involve different elements of proof, and may also involve different parties, the two causes of action are considered separate and apart, and clearly distinguishable. According to the Supreme Court of Appeals of West Virginia,

[a]lienation of affections is distinguished from an action for criminal conversation. In an alienation of affections action, if only enticement or artifice is shown, malice must be proved to warrant a recovery. But, if adultery is proved, such proof dispenses with the necessity for proving malice.

In an action for criminal conversation a physical debauchment of plaintiff's spouse is a necessary element, and the alienation of affections hereby resulting is merely a matter of aggravation.

*Kuhn v. Cooper*, 141 W.Va. 33, 87 S.E.2d 531, 536 (1955).

The entire thrust of Golden's argument is that the proposed amendment to add Counts IV and V for adultery and criminal conversation "is clearly prohibited by W.Va. Code § 56-3-2(a), which abolishes claims for alienation of affections." Response at p. 3. However, Golden's

argument fails to consider the distinction between alienation of affections on the one hand, and criminal conversation and adultery on the other.

As Golden notes, W.Va. Code § 56-3-2(a) abolishes all suits for alienation of affections.

The statute provides:

[n]otwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this State for breach of promise to marry or for alienation of affections, unless such civil action was instituted prior to the effective date of this section.

The effective date of this statute was March 6, 1969.

The Commonwealth of Virginia—whose common law prior to 1863 we inherited through our Constitution—passed Va. Code § 8.01-220, which abolished both alienation of affections and criminal conversation. (“Action for alienation of affection, breach of promise, criminal conversation and seduction abolished.”) Significantly, Virginia’s repealing statute was passed in 1968, the year before the passage of the West Virginia statute was passed which abolished only alienation of affections and breach of promise to marry. Thus, West Virginia, unlike Virginia, has not barred claims for criminal conversation or adultery.

Since this Court recognized that an action for alienation of affections must be distinguished from an action for criminal conversation in *Kuhn*; since Virginia enacted a statute which expressly abolished both alienation of affections and criminal conversation in 1968; and since the West Virginia Legislature enacted a statute abolishing only alienation of affections in 1969, Miller submits that it is abundantly clear that the cause of action for criminal conversation is a perfectly valid claim today in West Virginia.

Golden’s argument attempts to read new and additional words into W.Va. Code § 45-3-2(a). However, Golden cannot be permitted to do so. This Court has repeatedly held:

“[I]t is not for courts arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, courts are obligated *not to add to statutes something the Legislature purposely omitted*. A statute . . . may not under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.

*Longwell v. Bd. of Educ. of Marshall*, 213 W.Va. 486, 583 S.E.2d 109 (2003) (2003) (emphasis added); *Raleigh Gen. Hosp. v. Caudill*, 214 W.Va. 757, 591 S.E.2d 315 (2003); *Perito v. County of Brooke*, 215 W.Va. 178, 597 S.E.2d 311 (2004). Furthermore, “it has been repeatedly held in this state that under the provisions of Article VIII, Section 21, of the Constitution of the State of West Virginia, and Code 2-2-1, *the common law prevails unless changed by statute.*” *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605, 608 (1962) (emphasis added).

Golden attempts to rely on this Court’s opinion in *Weaver v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105 (1989). Indeed, Golden cites *Weaver* 40 times in his Petition. However, Golden’s reliance on *Weaver* is simply misplaced. In *Weaver*, the defendant, a marriage counselor, had a sexual relationship with the plaintiff’s former husband while she was providing marriage counseling to the former husband. The plaintiff’s claims against the defendant were for malpractice and intentional interference with the marital relationship. *Weaver*, 378 S.E.2d at 106. In Justice McHugh’s opinion, he noted that the wife’s claim “does not rest on any professional relationship that she had with the counselor and the malpractice theory is thus unavailable.” *Id.* at 107. Justice McHugh then noted that “[f]urthermore, as discussed below, her claim for intentional interference with the marital relationship becomes substantially similar to one for alienation of affections.” *Id.* at 107–08. Justice McHugh then discussed the cause of action for alienation of affections, citing *Kuhn v. Cooper, supra*, the Restatement (Second) of Torts § 683 (1977), *supra*, and 41 Am.Jur.2d Husband and Wife, §466 (1968).

Justice McHugh concluded that “[t]he claim for intentional interference with the marital relationship is, in its essence, one for alienation of affections and is barred by W.Va. Code § 56-3-2(a).” *Id.* at 109.

Significantly, although not mentioned by Golden in his Petition, Justice McHugh never mentioned the cause of action for criminal conversation (or the related cause of action for adultery) in the *Weaver* opinion. Accordingly, it can hardly be said that *Weaver* lends any support to Golden’s argument.

The mainstay of Golden’s argument is that the tort of criminal conversation “is clearly prohibited by W.Va. Code § 56-3-2(a), which abolishes claims for alienation of affections.”

#### B. Failings of the Petition

Prohibition is an extraordinary remedy, which lies only where the trial court has no jurisdiction, or having jurisdiction, exceeds its legitimate powers. *W.Va. Code* § 53-1-1. Here, there is no claim by Golden that the trial court has no jurisdiction, only that it has exceeded its legitimate powers. In such circumstances, this Court will examine five factors: (1) whether the parties seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifest persistent disregard for either procedural or a substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. *State ex rel. Verizon West Virginia, Inc. v. Matish*, 230 W.Va. 489, 740 S.E.2d 84, 90 (2013) (quoting *State ex rel. Hoover v. Berger*, 190 W.Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996)). These factors are general guidelines that serve as a

useful starting point for determining whether extraordinary writ of prohibition should issue. *State ex rel. Verizon West Virginia, Inc. v. Matish*, 230 W.Va. 489 (2013).

While all five factors need not be satisfied to issue the writ, the third factor, addressing the existence of clear error as a matter of law, should be given substantial weight. *Id.*

It is important to consider Golden's analysis of these five factors. First, Golden states that he has no other adequate means to obtain his desired relief; however, he simply states that "the trial of this case will commence on March 24, 2014, unless this Court intervenes." Petition at p. 10. However, it is patently obvious that Golden will have the opportunity to appeal any adverse judgment entered at trial. In addition, the order granting Miller leave to serve his Amended Complaint, about which Golden complains here, was entered on June 19, 2013. Since that time, Golden could have sought leave in the civil action below to certify his present questions of law to this Court, per W.Va. Code § 58-5-1.

Regarding the second factor, Golden claims he will be irreparably harmed if the trial goes forward, because his "private and personal life will be paraded in front of the jury . . . ." Petition, p. 10. Notwithstanding, Golden has admitted in his Answer to the Amended Complaint that he engaged in an affair with Maria Miller, Mark Miller's former wife. *See* Petitioner's Appendix at p. 94. Additionally, Golden has acknowledged the affair in discovery, which was attached to various briefs filed below. The Amended Answer and the other filings all appear in the public record in the Kanawha County Circuit's office. Thus, it is difficult to sympathize with Golden because his affair will be the subject of an approximate four (4) day long trial in the Circuit Court of Kanawha County.

Curiously, with respect to the second factor, Golden also includes Maria Miller, saying that she "will also suffer irreparable harm." He claims that she will have to testify about certain

intimate details of her private life. This rings hollow, since Golden has issued a subpoena commanding her appearance as a witness at trial. Copies of the subpoena and return of service have been provided herewith. In addition, Golden obtained her affidavit, which appears in his Appendix, at p. 269, in which she admitted a “romantic relationship” with Golden. He further suggests that “she has to worry about formally being made a party to this lawsuit and, possibly, having to repay some (or all) of what she was given in the form of marital assets during the divorce.” Petition at p. 10. Golden does not suggest how Maria Miller could be made a party to this case before the commencement of trial on March 24, 2014, nor does he provide any support whatsoever for the preposterous notion that she may have to repay anything from the Property Settlement Agreement which was reached in the divorce.

As to the third factor, Golden argues that the Circuit Court’s order in denying his renewed motion for summary judgment on March 18 is clearly erroneous as a matter of law. Here, Miller persists in his efforts to conflate the common law tort of criminal conversation with the common law tort of alienation of affections. As noted above, the latter was unquestionably abolished by our Legislature in 1969, per W.Va. Code § 56-3-2(a), but the former was not, and absolutely remains viable to this very day. Miller has fully discussed the distinctions between these two separate torts above, and will not repeat his argument here. As authorized by this Court’s Scheduling Order, Miller refers to the two Provisional Responses which he filed in opposition to the Motion for Summary Judgment of the Defendants below on November 27, 2013. These Provisional Responses are provided herewith. *See* Plaintiff Mark A. Miller’s Provisional Response in Opposition to Defendant Justin S. Golden, Sr.’s Motion for Summary Judgment; Plaintiff Mark A. Miller’s Provisional Response in Opposition to Motion for

Summary Judgment on Behalf of Defendants New York Life Insurance and Annuity Corporation and NYLife Securities, LLC.

Golden also addresses the claim alleged in Miller's Amended Complaint for adultery. Again, Golden fails to understand the claim. The adultery claimed alleged in Count IV of Miller's Amended Complaint is based upon *W.Va. Code* § 61-803, which provided that "[i]f any person commit adultery or fornication, he shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than \$20." Unquestionably, this criminal statute was repealed by the Legislature, effective June 1, 2010. However, Golden's assertion that somehow the misdemeanor crime of adultery, repealed in 2010, was somehow affected by the abolishment of the cause of action failing alienation of affections in 1969, is utterly fallacious. Without question, "[a] statute is assumed to be prospective in its operation unless expressly made retroactive," per *W.Va. Code* § 2-2-10(bb). Furthermore, the repeal of the law does not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, under *W.Va. Code* § 2-2-8. Miller has alleged in his Amended Complaint that the affair between Golden and Maria Miller began prior to June 11, 2010, and Miller has also alleged that the violation of the adultery statute, *W.Va. Code* § 68-8-3, has resulting in injuries to him, as provided by *W.Va. Code* § 55-7-9. Accordingly, the repeal of *W.Va. Code* § 61-8-3 has no effect on a cause of action set forth in Count IV of the Amended Complaint for adultery occurring before its repeal. The Affidavit of Maria Miller, dated March 14, 2014, was filed by Golden on March 14, 2014, indicated that "on or around April or May, 2010, she and Justin Golden began to have a romantic relationship." Accordingly, she squarely puts the beginning of the affair prior to the effective date of the repeal of the adultery criminal statute.

Neither the fourth nor the fifth factors for determining whether entertain an issue or writ of prohibition have been addressed by Golden. These are (4) whether the lower tribunal's order is an oft-repeated error or manifests persistent disregard for either procedural or substantive law, and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

This Court has clearly stated that whenever the Court believes that a petition for writ of prohibition is interposed for the purpose of delay or to confuse and confound legitimate workings of criminal or civil process in the lower court's, a rule will be denied. *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). This is precisely the situation here, as Golden's Petition was filed essentially two business days before his trial was to commence. That the Petition is really an attempted interlocutory appeal of the denial of his Renewed Motion for Summary Judgment is patently obvious from his Conclusion. Therein, he "respectfully requests the Court issue a Writ of Prohibition barring enforcement of the Circuit Court's Order denying Mr. Golden's Motion for Summary Judgment . . . and requests that this Court apply *W.Va. Code* § 56-3-2(a) and its holdings in *Weaver v. Union Carbide Corp.*, 378 S.E.2d 105 (W.Va. 1989) to the facts presented in this case and grant Summary Judgment in favor of Mr. Golden." Petition at p. 16.

### **CONCLUSION**

For the reasons set forth above, Respondent Mark A. Miller respectfully requests that this Court deny the Petition for Writ of Prohibition and refuse to issue its rule.

Dated: March 20, 2014

Respectfully submitted,

MARK A. MILLER

By Counsel



John C. Palmer IV (WV Bar No. 2801)

Keith J. George (WV Bar No. 5102)

Robinson & McElwee PLLC

P.O. Box 1791

Charleston, WV 25326

(304)-344-5800

*Counsel for Plaintiff Mark A. Miller*

P. Rodney Jackson (WV Bar No. 1861)

Law Office of P. Rodney Jackson

401 Fifth Third Center

700 Virginia Street East

Charleston, WV 25301

(304)-720-6783

*Counsel for Plaintiff Mark A. Miller*

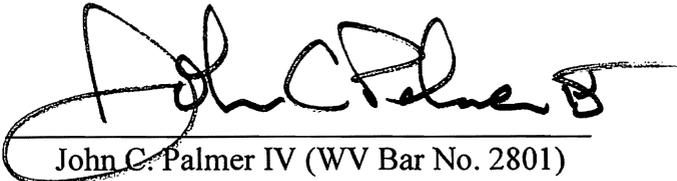
**CERTIFICATE OF SERVICE**

I, John C. Palmer IV, counsel for Respondent Mark A. Miller, hereby certify that I served true copies of the attached **SUMMARY RESPONSE OF RESPONDENT MARK A. MILLER TO PETITION FOR WRIT OF PROHIBITION** upon counsel of record on March 20, 2014:

Arie M. Spitz, Esq.  
Mychal Sommer Schulz, Esq.  
Dinsmore & Shohl LLP  
900 Lee Street, Suite 600  
Charleston, West Virginia 25301  
*Counsel for Justin S. Golden, Sr.*

Stuart A. McMillan, Esq.  
Thomas M. Hancock, Esq.  
600 Quarrier Street  
P.O. Box 1386  
Charleston, West Virginia 25325  
*Counsel for Defendants New York Life Insurance and Annuity Corporation (NYLIAC) and NYLIFE Securities, LLC*

Honorable Tod J. Kaufman, Judge  
Thirteenth Judicial Circuit  
Kanawha County Judicial Building  
111 Court Street  
Charleston, West Virginia 25301

  
John C. Palmer IV (WV Bar No. 2801)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MARK A MILLER,

Plaintiff,

v.

Civil Action No. 12-C-1038  
Judge Kaufman

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION (NYLIAC), and  
NYLIFE SECURITIES, LLC,

Defendants.

TO: MARIA MILLER  
United Center  
Charleston, WV 25301

X YOU ARE HEREBY COMMANDED pursuant to Rule 45, W.Va. R.Civ.P., to appear at the place, date and time specified below to:

- testify in the taking of a deposition in the above-styled case  
 testify in a hearing in the above-styled case  
 testify in the trial of the above-styled case

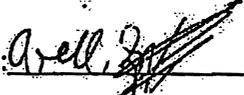
   YOU ARE HEREBY COMMANDED: to produce and permit inspection of and copying of designated records, books, documents or tangible things in your possession, custody or control, as follows:

Place: Courtroom of Honorable Tod Kaufman  
Kanawha County Circuit Court  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, WV 25301

Date: March 25, 2014

Time: 9:00 a.m.

Issued by: Arie M. Spitz (WVSB# 10867)  
Dinsmore & Shohl LLP  
900 Lee Street, Suite 600  
Charleston, WV 26501  
*Counsel for Defendant  
Justin S. Golden, Sr.*

Signature: 

Date of Issuance: March 11, 2014

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MARK A MILLER,

Plaintiff,

v.

Civil Action No. 12-C-1038  
Judge Kaufman

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION (NYLIAC), and  
NYLIFE SECURITIES, LLC,

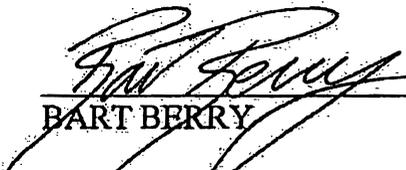
Defendants.

RETURN OF SERVICE

STATE OF WEST VIRGINIA

COUNTY OF Kanawha:

I, Bart Berry, a credible person over the age of twenty-one, being first duly sworn, on his oath says that he executed the within Trial Subpoena on Maria Miller at the United Bank Center, 500 Virginia Street, East, Charleston, West Virginia, by hand delivering to Maria Miller an exact and true copy the 11<sup>th</sup> day of March, 2014.

  
BART BERRY

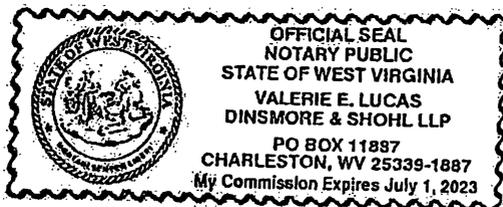
Taken, subscribed and sworn to before me this 12<sup>th</sup> day of March, 2014.

Given under my hand and Seal.

My commission expires:

July 1, 2023

  
NOTARY PUBLIC



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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MARK A. MILLER,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-1038

Judge Kaufman

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATOIN (NYLIAC), and  
NYLIFE SECURITIES, LLC,

Defendants.

**PLAINTIFF MARK A. MILLER'S PROVISIONAL RESPONSE IN OPPOSITION TO  
DEFENDANT JUSTIN S. GOLDEN, SR.'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff Mark A. Miller ("Mr. Miller"), by counsel, and for his Provisional<sup>1</sup> Response in Opposition to Defendant Justin S. Golden, Sr.'s Motion for Summary Judgment, states as follows:

**I. INTRODUCTION**

In support of his Motion for Summary Judgment, Mr. Golden argues that "Mr. Miller has plead [sic] various torts in order to disguise the fact that his claim is really one for alienation of affections," which he correctly asserts is no longer a viable cause of action pursuant to W. Va. Code § 56-3-2a. Justin S. Golden's Memorandum in Support of His Motion for Summary Judgment ("Memorandum") at 3. This is a stale argument—one that has already been presented to and rejected by this Honorable Court. See Justin S. Golden, Sr.'s Response to Mr. Miller's Motion to Amend His Complaint; Order Granting Motion to Amend Complaint. Furthermore,

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<sup>1</sup> Mr. Miller is providing this Provisional Response in Opposition to Defendant Justin S. Golden, Sr.'s Motion for Summary Judgment, although Mr. Miller has also asked leave to complete the discovery which he has undertaken. See Plaintiff Mark A. Miller's Rule 45(f) Motion to Permit Discovery. In his Motion, Mr. Miller has requested that this honorable Court order a continuance of Mr. Golden's Motion for Summary Judgment and Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC's Motion for Summary Judgment until after Mr. Miller's discovery has been completed.

Mr. Golden's Motion is extremely premature, as the Discovery deadline has not yet passed and the parties have not even conducted depositions. See Agreed Order to Change the Discovery Deadline (Sept. 9, 2013). Most importantly, however, there remain genuine issues as to several facts—for example, when Mr. Golden's affair with Maria Miller began—that are absolutely material to the outcome of the case. As such, Mr. Miller respectfully requests that this Honorable Court deny Mr. Golden's Motion for Summary Judgment and permit the case to proceed to trial.

## II. FACTS

In his Memorandum in Support of his Motion for Summary Judgment, Mr. Golden sets forth a seemingly definitive factual and procedural background for this case. However, this is disingenuous, as his portrayal of the facts is anything but definitive. For example, Mr. Golden presents the "fact" that the affair between himself and Maria Miller ("Ms. Miller") began in August 2010. Mr. Golden's Response at 2. In doing so, however, Mr. Golden cites to his own Answer to the Amended Complaint, in which he alleged—not under oath—that the affair began on or around August 2010, as well as to Mr. Miller's Response to Mr. Golden's written discovery requests, in which Mr. Miller admitted that he does not know the exact date that the affair began.

When the affair began is a key fact in this case, yet it is hardly undisputed. While Mr. Miller has provided responses to Mr. Golden's written discovery requests, Mr. Golden has not yet paid him the same courtesy. Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC (collectively, "New York Life") have not responded to Mr. Miller's requests for admission, interrogatories, and requests for production of documents either. Although the depositions of Mr. Golden and Ms. Miller as well as the Rule 30(b)(7) deposition

of New York Life have been noticed by Mr. Miller within the time allotted before the discovery deadline of December 6, 2013, they have not yet taken place. Instead, after such remarkably limited discovery, both Defendants have moved for summary judgment and Mr. Golden has moved to stay discovery. The date that the affair began is but one example of many crucial facts that have yet to be determined in this case. Further discovery is needed to determine such facts, to respond to the Defendants' Motions for Summary Judgment, and to prepare for trial. At the very least, however, it is apparent that genuine issues of material fact exist and that, therefore, summary judgment is inappropriate at this stage.

### III. ARGUMENT

#### A. Standard of review for a Motion for Summary Judgment.

To obtain summary judgment, the moving party must first be able to "show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c). In other words, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Painter v. Peavy, 451 S.E.2d 755, 758 (W. Va. 1994) (emphasis added). The Court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." Painter v. Peavy, 451 S.E.2d 755, 758 (W. Va. 1994). Moreover, "[i]n cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial." Williams v. Precision Coil, Inc., 459 S.E.2d 329, 336 (W. Va. 1995).

As a final and particularly relevant consideration, "[a] decision for summary judgment before discovery has been completed must be viewed as precipitous." Board of Ed. Ohio County v. Van Buren and Firestone, Architects, Inc., 267 S.E.2d 440 (W. Va. 1980); see also

Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 474 S.E.2d 872, 881 (W. Va. 1996) (“As a general rule, summary judgment is appropriate only after adequate time for discovery. A party opposing a motion for summary judgment must have reasonable opportunity to discover information that is essential to its opposition of the motion.” (citing Celotex Corp. v. Catrett, 477 U.S. 317 at 322 (1986) and quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 at 250 (1986)) (internal citations and quotation marks omitted)).

**B. Mr. Miller’s claims for criminal conversation and adultery cannot be transmuted into a claim for alienation of affections.**

Mr. Golden’s argument that Mr. Miller’s claims amount to nothing more than an action for alienation of affections and therefore should be dismissed under W. Va. Code § 56-3-2a, is clearly mistaken. The problem with this argument is that, contrary to Mr. Golden’s thinking, the tort of criminal conversation is completely separate and distinct from the tort of alienation of affections. Mr. Golden’s argument fails upon examination of the plain language of W. Va. Code § 56-3-2a, the historical context for the passage of that statute, comparison to other state statutes explicitly abolishing criminal conversation, and the distinctive elements of the causes of action which Mr. Golden seeks to merge.

First, the provision of the West Virginia Code to which Mr. Golden refers abolishes only two causes of action: breach of promise to marry and alienation of affections. See W. Va. Code § 56-3-2a (“Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this state for breach of promise to marry or for alienation of affections, unless such civil action was instituted prior to the effective date of this section.”). This provisions simply does not mention adultery or criminal conversation. The statutory language is hardly ambiguous; therefore, “its plain meaning is to be accepted and applied without resort to

interpretation.” Crockett v. Andrews, 172 S.E.2d 384, Syl. Pt. 2 (W. Va. 1970). As the Supreme Court of Appeals of West Virginia has made abundantly clear:

It is not for courts arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*. Moreover, a statute, or an administrative rule, may not, under the guise of interpretation, be modified, revised, amended, or rewritten.

Subcarrier Communications, Inc. v. Nield, 624 S.E.2d 729, 736 (W. Va. 2005) (emphasis in original) (quoting Longwell v. Board of Educ. of County of Marshall, 583 S.E.2d 109, 114 (2003)) (internal citations and quotation marks omitted).

However, Mr. Golden is encouraging this honorable Court to engage in judicial activism and defy the State Constitution, which mandates that the common law “shall be and continue the law of this statute *until altered or repealed by the Legislature*.” W. Va. Const. Art. VIII, § 13 (emphasis added). While “the legislature has the power to change the common law, and inasmuch as it has not done so in connection with the question involved in this case, the common law relating thereto remains the law of this State.” Seagraves v. Legg, 127 S.E.2d 605, 608–09 (W. Va. 1962) (citing, *inter alia*, Shifflette v. Lilly, 43 S.E.2d 289, 293 (W. Va. 1947 (“The common law is not to be construed as altered or changed by statute, unless the legislative intent to do so be plainly manifested.”)). In arguing that W. Va. Code § 56-3-2a has abolished criminal conversation, Mr. Golden is encouraging this honorable Court to ignore that Constitutional mandate as well as the precedent of this State’s highest court.

This mandate is especially significant in light of the historical context of this statute. In 1968, Virginia’s General Assembly enacted legislation which explicitly prohibited actions for alienation of affection, breach of promise to marry, seduction, and criminal conversation. See Va. Code § 8.01-220. Importantly, West Virginia’s statute passed the following year does not

include criminal conversation. This is no mere coincidence; it is a purposeful omission on the part of the Legislature. If the Legislature had wished to abolish criminal conversation, it would have explicitly done so as other states have.<sup>2</sup> It has not done so here.

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<sup>2</sup> In footnote 2 of their Response to Plaintiff's Motion for Judgment on the Pleadings ("Response of New York Life"), New York Life cites to statutes of other states in which criminal conversation has been explicitly abolished. See Ala. Code § 6-5-331 ("There shall be no civil claims for alienation of affections, *criminal conversation*, or seduction of any female person of the age of 19 years or over."); Cal. Civ. Code § 43.5 ("No cause of action arises for: (a) Alienation of affection. (b) *Criminal conversation*. (c) Seduction of a person over the age of legal consent. (d) Breach of promise of marriage."); Colo. Rev. Stat. § 13-20-202 ("All civil causes of action for breach of promise to marry, alienation of affections, *criminal conversation*, and seduction are hereby abolished.") Conn. Gen. Stat. Ann. § 52-572(f) ("No action may be brought upon any cause of action arising from *criminal conversation*"); Del. Code. § 10-39-3924, ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, enticement, or breach of contract to marry are abolished. No act done in this State shall operate to give rise, either within or without this State, to any such right of action. No contract to marry made or entered into in this State shall operate to give rise, either within or without this State, to any cause or right of action for its breach."); D.C. Code § 16-923 ("Cause of action for breach of promise, alienation of affections, and *criminal conversation* are hereby abolished."); Fla. State. § 771.01 ("The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are hereby abolished."); Ga. Code § 51-1-17 ("Adultery, alienation of affections, or *criminal conversation* with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or *criminal conversation* are abolished."); Ind. Code § 34-12-2-1(a) ("The following civil causes of action are abolished: (1) Breach of promise to marry. (2) Alienation of affections. (3) *Criminal conversation*. (4) Seduction of any female person of at least eighteen (18) years of age."); Mich. Comp. L. § 600.2901 ("The following causes of action are abolished: (1) alienation of affections of any person, animal, or thing capable of feeling affection, whatsoever; (2) *criminal conversation*); (3) seduction of any person of the age of 18 years or more; (4) breach of contract to marry."); Minn. Stat. § 553.02 ("All civil causes of action for breach of promise to marry, alienation of affections, *criminal conversation*, and seduction are abolished."); Nev. Rev. Stat. § 41.380 ("All civil causes of action for breach of promise to marry, alienation of affections, and *criminal conversation*, are hereby abolished; but this section does not abolish any cause of action for criminal conversation which accrued before July 1, 1979."); N.J. Stat. § 2A:23-1 ("The rights of action formerly existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are abolished from and after June 27, 1935."); N.Y. Civ. Rights Law § 80-a ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction and breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."); Ohio Rev. Code § 2305.29 ("No person shall be liable in civil damages for any breach of a promise to marry, alienation of affections, or *criminal conversation*, and no person shall be liable in civil damages for seduction of any person eighteen years of age or older who is not incompetent . . ."); Or. Rev. Stat. § 31.982 (formerly § 30.850) ("There shall be no civil cause of action for *criminal conversation*"); Vt. Stat. § 15-1001 ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, or breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."); Va. Code § 8.01-220(A) ("Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or *criminal conversation* upon which a cause of action arose or occurred on or after June 28, 1968."). New York Life also cites to cases from other states' courts that have judicially abolished the cause of action for criminal conversation. See Response of New York Life at 4, fn. 2. However, as set forth herein, West Virginia does not permit its courts to independently abrogate the common law.

Moreover, a claim for alienation of affections, though certainly related to a claim for criminal conversation, is nonetheless a distinct cause of action. Criminal conversation necessitates a showing of the following two elements of proof: (1) an actual marriage between the spouses; and (2) sexual intercourse between the defendant and the plaintiff's spouse. 41 Am.Jur.2d, Husband and Wife, § 242 (2005); see also Restatement 2d of Torts § 685 (2005). Alienation of affections, on the other hand, requires three completely different elements: (1) misconduct by the defendant; (2) loss of spousal affection or consortium; and (3) a causal link between the misconduct and the loss. 41 Am.Jur.2d, Husband and Wife, § 237; see also Restatement 2d of Torts § 683 (2005). Thus, the only common ground between these two otherwise entirely distinct causes of action is the prerequisite of a valid marriage.

In further demonstration of the differences between these two causes of action, criminal conversation requires that the disruption to the marriage be "sexual intercourse" between the defendant and the plaintiffs' spouse, whereas alienation of affections merely requires "misconduct" by the defendant which causes loss of spousal affection or consortium. Misconduct is certainly not limited to sexual intercourse, and has been applied to meddling parents or in-laws, siblings, and even strangers. See, e.g., Rush v. Buckles, 117 S.E. 130 (W. Va. 1923); Gross v. Gross, 73 S.E. 961 (W. Va. 1912); see also Ratliffe v. Walker, 85 S.E. 575 (Va. 1915). Disparities such as these make clear that these causes of action cannot and should not be conflated.

Because the torts of criminal conversation and alienation of affections involve different elements of proof, and may also involve different parties, the two causes of action are considered separate and apart, and clearly distinguishable. According to the Supreme Court of Appeals of West Virginia,

[a]lienation of affections is distinguished from an action for criminal conversation. In an alienation of affections action, if only enticement or artifice is shown, malice must be proved to warrant a recovery. But, if adultery is proved, such proof dispenses with the necessity for proving malice.

In an action for criminal conversation a physical debauchment of plaintiff's spouse is a necessary element, and the alienation of affections thereby resulting is merely a matter of aggravation.

Kuhn v. Cooper, 87 S.E.2d 531, 536 (W. Va. 1955).

To paraphrase the words of Mark Twain, the reports of the death of the tort of criminal conversation in West Virginia have been greatly exaggerated. Criminal conversation is indeed alive, and to state otherwise is to defy our Constitution and the precedent of our Supreme Court of Appeals. Furthermore, as Mr. Golden has admitted, "The Motion accurately states that the pleadings in this case establish the elements of criminal conversation: Mr. Golden admitted to having sex with Ms. Miller while she was married to Mr. Miller. See Justin S. Golden's Response to Plaintiff's Motion for Judgment on the Pleadings at 1. Therefore, Mr. Miller's claim for criminal conversation should not be dismissed.

**C. Genuine issues of material fact remain with respect to Mr. Miller's claim for conversion.**

Mr. Golden argues that Mr. Miller's claim for conversion fails as a matter of law because two of the elements—namely, the property of another and wrongful exertion—have not been met, according to certain allegedly "uncontroverted" facts. This conclusion, however, is premature, as the discovery process is still pending, and there remain genuine issues of material facts underlying the existence of these elements which have yet to be clarified.

First, Mr. Golden claims that "[t]he uncontroverted facts . . . show that Mr. Miller had no ownership interest in the 401(k) account," either directly or as a beneficiary. Memorandum at 7. Thus, Mr. Miller "cannot prove the fourth element of conversion: that Mr. Golden acted in denial

of Mr. Miller's rights or inconsistent therewith." Id. The "uncontroverted facts" that Mr. Golden uses to reach this conclusion are two of Mr. Miller's responses to requests for admission, which Mr. Golden recounts as the following: "Mr. Miller admits that he was not the owner of the 401(k) account and that Ms. Miller did not need his approval to rollover the account into an annuity with NYLife." Id. As to the former admission, the relevant request asked Mr. Miller to "[a]dmit that at the time Ms. Miller rolled over the IRA into an Annuity, . . . *Ms. Miller was the owner of the IRA.*" Plaintiff's Answers to Justin S. Golden, Sr.'s First Set of Discovery Requests at 3 (emphasis added). Mr. Miller's affirmative response cannot be transformed into an admission that he was not the owner of the 401(k) account. Furthermore, the fact that Mr. Miller's permission was not required for the rollover does not mean that Mr. Miller had no legally cognizable stake in the account. To the contrary, Mr. Miller may well have had a property interest. For example, in the context of life insurance policies, West Virginia adheres to the following rule:

It is well established that if the insured retains no rights to change the beneficiary of a life insurance policy or, as here, gives up that right, the beneficiary stands in the position of a third party beneficiary to the insurance contract with indefeasibly vested rights in the proceeds. This is the law in West Virginia.

Perkins v. Prudential Ins. Co. of America, 455 F.Supp. 499, 501 (S.D.W.Va. 1978) (quoting Morton v. United States, 457 F.2d 750, 753 (4th Cir. 1972)) (internal citations omitted). It is not known at this point whether or not Ms. Miller retained such a right. This is a genuine issue of material fact that must be answered in discovery, and it presents an inescapable obstacle to Mr. Golden obtaining summary judgment.

Next, Mr. Golden asserts that "the uncontroverted facts show that the affair began seven (7) months after Ms. Miller rolled over her 401(k)." Memorandum at 7. Therefore, Mr. Miller "cannot prove the second element of conversion," that of wrongful exertion. Memorandum at 8.

However, to prove this point, Mr. Golden cites to (1) his own Answer to the Amended Complaint, in which he “[a]vers . . . that he and Maria Miller began an affair on or about the month of August, 2010,” Justin S. Golden, Sr.’s Answer to Plaintiff’s Amended Complaint at ¶ 12, and (2) Mr. Miller’s affirmative response to Mr. Golden’s request that he “[a]dmit that you do not know the date when Ms. Miller and Mr. Golden began having an affair,” Plaintiff’s Answers to Justin S. Golden, Sr.’s First Set of Discovery Requests at 2. Mr. Golden’s Answer was not made under oath, and moreover, these references indicate that the exact or approximate date that the affair began is anything but “uncontroverted.” This is another question of material fact that has yet to be resolved in discovery, and another reason why summary judgment is inappropriate at this stage.

**D. Whether Mr. Golden’s adulterous affair with Ms. Miller while serving as her fiduciary is a jury question.**

In arguing that Mr. Miller’s claim for intentional infliction of emotional distress (“IIED”) “flies in the face of the intent and purpose of W. Va. Code § 56-3-2a,” Mr. Golden again ignores the intent and purpose of that very provision to eliminate only breach of promise to marry and alienation of affections. See supra at Part III.B. It is overly simplistic to assume that because Mr. Miller’s claims stem, in part, from the affair between Ms. Miller and Mr. Golden, they are all claims for alienation of affections. The law is more discerning and will not permit such a metamorphosis.

Mr. Golden real argument is that engaging in an adulterous affair with Ms. Miller while serving in a fiduciary capacity as her broker-dealer, life insurance agent, and/or investment advisor is somehow not extreme or outrageous. But see Dzinglski v. Wierton Steel Corp., 445 S.E.2d 219, 225 (W. Va. 1994) (quoting Restatement 2d of Torts § 46, cmt. e) (“The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a

relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.”). As the critical question is whether the conduct “go[es] beyond all possible bounds of decency,” Mr. Golden appears to place his own conduct squarely within those bounds. Harless v. First Nat. Bank in Fairmont, 289 S.E.2d 692, n. 9 (W. Va. 1982). He further justifies his conduct by stating that “extra-marital affairs occur on such a regular basis that in 1969 West Virginia passed a law that prohibits cuckolded spouses from bringing claims based on the extra-marital affairs of their spouses.” Memorandum at 10. Mr. Golden does not support this assertion with legislative history, statistical data, or otherwise. As discussed previously, however, W. Va. Code § 56-3-2a does not have this purported effect because it eliminated only suits for breach of promise to marry and alienation of affections. Moreover, as Mr. Golden correctly notes, “whether conduct is in fact outrageous is a question for jury determination.” Hatfield v. Health Mgmt. Assocs. of W. Va., 672 S.E.2d 395, 404 (W. Va. 2008). Therefore, this question is rightfully left in the jury’s capable hands.

Finally, Mr. Golden argues that even if his conduct was outrageous, Mr. Miller’s IIED claim fails because he “has based all of his legal theories on the same factual allegations.” Memorandum at 10. In support of this argument, Mr. Golden points to this Court’s holding in Dzingski v. Weirton Steel Corp.:

[T]he prevailing rule in distinguishing a wrongful discharge claim from an outrage claim is this: when the employee’s distress results from the fact of his discharge—e.g., the embarrassment and financial loss stemming from the plaintiff’s firing—rather than from any improper conduct on the part of the employer in effecting the discharge, then no claim for intentional infliction of emotional distress can attach.

445 S.E.2d at 226. This distinction is relevant in the context of employment discrimination claims, which can produce duplicative wrongful discharge and IIED claims. Id. at 225 (citing Farmer v. Carpenters, 430 U.S. 290 (1977)). It is not relevant, however, in the context of the

instant case. Although Mr. Golden is correct in stating that “Mr. Miller has based all of his legal theories on the same factual allegations: that Mr. Golden used his sexual relationship with Ms. Miller to persuade her [to] rollover her 401(k) account to an annuity account with NYLife,” each theory is a separate cause of action with unique elements of proof. This is not only allowed—it is encouraged. See W. Va. R. Civ. P. 18(a) (“A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternative claims, as many claims, legal or equitable, as the party has against an opposing party.”); Slider v. State Farm Mut. Auto. Ins. Co., 557 S.E.2d 883, 887–88 (W. Va. 2001) (“The threat of claim preclusion requires that litigants present in a single action all claims or defenses that may appropriately be resolved within the confines of such proceeding.”). As such, Mr. Golden’s claim for IIED is valid and should be left to the jury.

**E. Mr. Golden owed fiduciary duties to Mr. Miller as beneficiary of Ms. Miller’s retirement account.**

Mr. Golden is incorrect in stating that he owed no fiduciary duty to Mr. Miller. As a broker-dealer, life insurance agent, and/or investment advisor to Ms. Miller, Mr. Golden without question owed her fiduciary duties because he was advising her about how to invest her money. By inappropriately convincing Ms. Miller to rollover her 401(k), of which Mr. Miller was a beneficiary, by making an investment with New York Life, Mr. Golden breached his fiduciary duties to Ms. Miller as well as Mr. Miller, who would have otherwise stood to benefit from the 401(k).

Furthermore, Mr. Golden has provided an overly simplistic and incorrect interpretation of the opinion of Mr. Miller’s expert witness in stating that “[t]his point of law is so clear that even . . . Professor Gerald Bradley . . . admits that Mr. Golden did not owe fiduciary duties to Mr. Miller.” Expert Report of Professor Bradley at 1. Professor Bradley came to a much more

nuanced conclusion: “I should like to add my judgment that the Plaintiff (Mr. Miller) was not *clearly* as party to any fiduciary relationship with NY Life or its registered representatives. *He was nonetheless a beneficiary of the duties implicated by his wife’s fiduciary relationship with . . . Mr. Golden and the company, and a readily foreseeable victim to the breaches thereof.*” Id. (emphasis added). This is not a legal opinion, as Mr. Golden suggests, but rather, as Professor Bradley plainly states in his letter, an opinion as to the ethical duties owed by Mr. Golden. Therefore, Professor Bradley’s opinion does not run afoul of the proscription that an expert witness cannot render an opinion on a question of law. See Jackson v. State Farm Mut. Auto. Ins. Co., 600 S.E.2d 346, 355 (W. Va. 2004).

Mr. Golden also incorrectly relies upon Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989) to conclude that Mr. Miller cannot assert a claim of breach of fiduciary duty based on Mr. Golden’s breach of his fiduciary duty to Ms. Miller. Again, this is an argument that Mr. Golden has previously made and that this Honorable Court has previously rejected. See Justin S. Golden, Sr.’s Response to Mr. Miller’s Motion to Amend His Complaint; Order Granting Motion to Amend Complaint. The holding in Weaver was limited to the following: “[A] suit by a nonpatient spouse against a marriage counselor is substantially the same as one for alienation of affections and is, therefore, barred. This is because the nonpatient plaintiff lacks any professional relationship with the counselor and essentially sues for the alienation of his spouse’s affections.” 370 S.E.2d at 559. Weaver is distinguishable from Mr. Miller’s case in several respects. First, the plaintiff’s claims in Weaver were for malpractice and intentional interference with the marital relationship—not for criminal conversation. Additionally, the defendant was a marriage counselor with no professional relationship to the nonpatient spouse—not a broker-

dealer, life insurance agent, and/or investment advisor with fiduciary duties to the beneficiary of the account with which he was dealing. Thus, the holding in Weaver is irrelevant to this case.

**F. Genuine issues of fact remain as to Mr. Golden's claim for adultery.**

Mr. Golden asserts, and Mr. Miller does not contest, that West Virginia's adultery statute was taken off of the books effective June 11, 2010. See 2010 W.V. ALS 34; 2010 W. Va. Acts 34; 2010 W.V. Ch. 34.1 2010 W.V. SB 457. This means that if the affair between Mr. Golden and Ms. Miller began after that date, it would not be actionable; however, if the affair began prior to that date, former W. Va. Code § 61-8-3 would remain applicable to it. See W. Va. Code § 2-2-8 ("The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired . . . ."); State v. Easton, 510 S.E.2d 465, 481 (W. Va. 1998) ("[I]f a criminal statute 'has been repealed, an offense committed under it, before repeal thereof, would not be condoned nor forgiven.' " (quoting State v. Tippens, 113 S.E. 751, 751 (W. Va. 1922))). Mr. Golden claims that the affair began in August 2010. Justin S. Golden, Sr.'s Answer to Plaintiff's Amended Complaint at ¶ 12. At this point, Mr. Miller does not know exactly when the affair began. Plaintiff's Answers to Justin S. Golden, Sr.'s First Set of Discovery Requests at 2. Beyond being a factual issue that has yet to be resolved in discovery, this is a genuine issue of material fact that precludes summary judgment.

Mr. Golden again contends that the Mr. Miller's claim for adultery is not actionable because it is a claim for alienation of affections and is prohibited by W. Va. Code § 56-3-2a. As stated above, the statute cited does not abolish any causes of action beyond the two causes of action specifically set forth therein—namely, breach of promise to marry and alienation of affections—and the West Virginia Legislature intended it to go no further. See supra Part III.B.

**G. Criminal conversation remains a viable cause of action and is not prohibited by W. Va. Code § 56-3-2a.**

Lastly, Mr. Golden once again argues that Mr. Miller's claim for criminal conversation is actually a claim for alienation of affections and is prohibited by W. Va. Code § 56-3-2a. As stated previously, the statute cited does not abolish any causes of action beyond the two causes of action specifically set forth therein—namely, breach of promise to marry and alienation of affections—and the West Virginia Legislature intended it to go no further. See supra Part III.B.

**IV. CONCLUSION**

THEREFORE, for the reasons set forth above, Mr. Miller respectfully requests that this honorable Court deny Mr. Golden's Motion for Summary Judgment and permit the case to proceed to trial.

Respectfully Submitted,

**MARK A. MILLER**

By Counsel,



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P. Rodney Jackson (WV Bar # 1861)  
Law Office of P. Rodney Jackson  
401 Fifth Third Center  
700 Virginia Street East  
Charleston, WV 25301  
Telephone: (304)-720-6783  
*Counsel for Plaintiff Mark A. Miller*

John C. Palmer IV (WV Bar # 2801)  
Keith J. George (WV Bar # 5102)  
Robinson & McElwee PLLC  
P.O. Box 1791  
Charleston, WV 25326  
Telephone: (304)-344-5800  
Fax: (304)-344-9566  
*Counsel for Plaintiff Mark A. Miller*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

MARK A. MILLER,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-1038

Judge Kaufman

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION (NYLIAC), and  
NYLIFE SECURITIES, LLC,

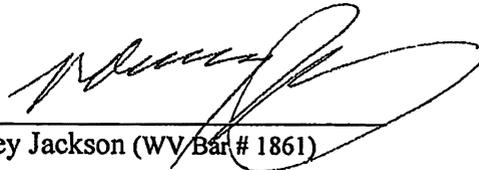
Defendants.

CERTIFICATE OF SERVICE

I, P. Rodney Jackson, counsel for the Plaintiff, hereby certify that on this 27<sup>th</sup> day of November, 2013, I served true copies of **PLAINTIFF MARK A. MILLER'S PROVISIONAL RESPONSE IN OPPOSITION TO DEFENDANT JUSTIN S. GOLDEN, SR.'S MOTION FOR SUMMARY JUDGMENT** upon counsel for the Defendants by U.S. Mail, postage prepaid, in an envelope addressed to:

Arie M. Spitz, Esq.  
Mychal Sommer Schulz, Esq.  
Dinsmore & Shohl LLP  
900 Lee Street, Suite 600  
Charleston, West Virginia 25301  
*Counsel for Justin S. Golden, Sr.*

Stuart A. McMillan, Esq.  
Thomas M. Hancock, Esq.  
600 Quarrier Street  
P.O. Box 1386  
Charleston, West Virginia 25325  
*Counsel for Defendants New York Life  
Insurance and Annuity Corporation  
(NYLIAC) and NYLIFE Securities, LLC*



P. Rodney Jackson (WV Bar # 1861)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MARK A. MILLER,

Plaintiff,

v.

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATOIN (NYLIAC), and  
NYLIFE SECURITIES, LLC,

Defendants.

CIVIL ACTION NO. 12-C-1038  
Judge Kaufman

**PLAINTIFF MARK A. MILLER'S PROVISIONAL RESPONSE IN OPPOSITON  
TO MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS  
NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION  
AND NYLIFE SECURITIES, LLC**

COMES NOW Plaintiff Mark A. Miller ("Mr. Miller"), by counsel, and for his Provisional<sup>1</sup> Response in Opposition to the Motion for Summary Judgment on Behalf of Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC (collectively, "New York Life"), states as follows:

**I. INTRODUCTION**

In support of its Motion for Summary Judgment, New York Life argues that Mr. Miller's lawsuit is nothing more than a claim for alienation of affections, "which the West Virginia Legislature unequivocally banned over forty years ago" in W. Va. Code § 56-3-2a. Memorandum of Law in Support of Motion for Summary Judgment on Behalf of Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC ("New York

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<sup>1</sup> Mr. Miller is providing this Provisional Response in Opposition to the Motion for Summary Judgment on Behalf of Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC, although Mr. Miller has also asked leave to complete the discovery which he has undertaken. See Plaintiff Mark A. Miller's Rule 45(f) Motion to Permit Discovery. In his Motion, Mr. Miller has requested that this honorable Court order a continuance of Mr. Golden's Motion for Summary Judgment and Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC's Motion for Summary Judgment until after Mr. Miller's discovery has been completed.

Life's Memorandum") at 2. However, this is a stale argument—one that has already been presented to and rejected by this Honorable Court. See Justin S. Golden, Sr.'s Response to Mr. Miller's Motion to Amend His Complaint; Order Granting Motion to Amend Complaint. Furthermore, New York Life's Motion is extremely premature, as the Discovery deadline has not yet passed and the parties have not even conducted depositions. See Agreed Order to Change the Discovery Deadline (Sept. 9, 2013). Most importantly, however, there remain genuine issues as to several facts—for example, when Mr. Golden's affair with Maria Miller began—that are absolutely material to the outcome of the case. As such, Mr. Miller respectfully requests that this honorable Court deny New York Life's Motion for Summary Judgment and permit the case to proceed to trial.

## II. FACTS

In the Memorandum in Support of its Motion for Summary Judgment, New York Life sets forth a seemingly definitive "statement of undisputed facts" for this case. However, the title of this section is disingenuous, as the facts portrayed therein is anything but undisputed. For example, New York Life presents the "fact" that the affair between Mr. Golden and Maria Miller ("Ms. Miller") began in August 2010. New York Life's Memorandum at 4. In doing so, however, New York Life cites to Mr. Golden's own Answer to the Amended Complaint, in which he alleged—not under oath—that the affair began on or around August 2010, as well as to Mr. Miller's Response to Mr. Golden's written discovery requests, in which Mr. Miller admitted that he does not know the exact date that the affair began.

When the affair began is a key fact in this case, yet it is hardly undisputed. While Mr. Miller has provided responses to Mr. Golden's written discovery requests, Mr. Golden has not yet paid him the same courtesy. New York Life has not responded to Mr. Miller's requests for

admission, interrogatories, and requests for production of documents either. Although the depositions of Mr. Golden and Ms. Miller as well as the Rule 30(b)(7) deposition of New York Life have been noticed by Mr. Miller within the time allotted before the discovery deadline of December 6, 2013, they have not yet taken place. Instead, after such remarkably limited discovery, both Defendants have moved for summary judgment and Mr. Golden has moved to stay discovery. The date that the affair began is but one example of many crucial facts that have yet to be determined in this case. Further discovery is needed to determine such facts, to respond to the Defendants' Motions for Summary Judgment, and to prepare for trial. At the very least, however, it is apparent that genuine issues of material fact exist and that, therefore, summary judgment is inappropriate at this stage.

### III. ARGUMENT

#### A. Standard of review for a Motion for Summary Judgment.

To obtain summary judgment, the moving party must first be able to “show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56(c). In other words, “[a] motion for summary judgment should be granted only when it is *clear* that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Painter v. Peavy, 451 S.E.2d 755, 758 (W. Va. 1994) (emphasis added). The Court “must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” Painter v. Peavy, 451 S.E.2d 755, 758 (W. Va. 1994). Moreover, “[i]n cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial.” Williams v. Precision Coil, Inc., 459 S.E.2d 329, 336 (W. Va. 1995).

As a final and particularly relevant consideration, “[a] decision for summary judgment before discovery has been completed must be viewed as precipitous.” Board of Ed. Ohio County v. Van Buren and Firestone, Architects, Inc., 267 S.E.2d 440 (W. Va. 1980); see also Powderidge Unit Owners Ass’n v. Highland Properties, Ltd., 474 S.E.2d 872, 881 (W. Va. 1996) (“As a general rule, summary judgment is appropriate only after adequate time for discovery. A party opposing a motion for summary judgment must have reasonable opportunity to discover information that is essential to its opposition of the motion.” (citing Celotex Corp. v. Catrett, 477 U.S. 317 at 322 (1986) and quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 at 250 (1986)) (internal citations and quotation marks omitted)).

**B. Mr. Miller’s claims for criminal conversation and adultery cannot be transmuted into a claim for alienation of affections.**

New York Life’s argument that Mr. Miller’s claims amount to nothing more than an action for alienation of affections and therefore should be dismissed under W. Va. Code § 56-3-2a is erroneous. The problem with this argument is that the tort of criminal conversation is completely separate and distinct from the tort of alienation of affections. New York Life’s argument fails upon examination of the plain language of W. Va. Code § 56-3-2a, the historical context for the passage of that statute, comparison to other state statutes explicitly abolishing criminal conversation, and the distinctive elements of the causes of action which New York Life seeks to combine

First, the provision of the West Virginia Code to which New York Life refers abolishes only two causes of action: breach of promise to marry and alienation of affections. See W. Va. Code § 56-3-2a (“Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this state for breach of promise to marry or for alienation of affections, unless such civil action was instituted prior to the effective date of this section.”).

This provisions simply does not mention adultery or criminal conversation. The statutory language is hardly ambiguous; therefore, “its plain meaning is to be accepted and applied without resort to interpretation.” Crockett v. Andrews, 172 S.E.2d 384, Syl. Pt. 2 (W. Va. 1970).

As the Supreme Court of Appeals of West Virginia has made abundantly clear:

It is not for courts arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*. Moreover, a statute, or an administrative rule, may not, under the guise of interpretation, be modified, revised, amended, or rewritten.

Subcarrier Communications, Inc. v. Nield, 624 S.E.2d 729, 736 (W. Va. 2005) (emphasis in original) (quoting Longwell v. Board of Educ. of County of Marshall, 583 S.E.2d 109, 114 (2003)) (internal citations and quotation marks omitted).

However, New York Life is encouraging this honorable Court to engage in judicial activism and defy the State Constitution, which mandates that the common law “shall be and continue the law of this statute *until altered or repealed by the Legislature*.” W. Va. Const. Art. VIII, § 13 (emphasis added). While “the legislature has the power to change the common law, and inasmuch as it has not done so in connection with the question involved in this case, the common law relating thereto remains the law of this State.” Seagraves v. Legg, 127 S.E.2d 605, 608–09 (W. Va. 1962) (citing, *inter alia*, Shifflette v. Lilly, 43 S.E.2d 289, 293 (W. Va. 1947 (“The common law is not to be construed as altered or changed by statute, unless the legislative intent to do so be plainly manifested.”)). In arguing that W. Va. Code § 56-3-2a has abolished criminal conversation, New York Life is encouraging this honorable Court to ignore that Constitutional mandate as well as the precedent of this State’s highest court.

This mandate is especially significant in light of the historical context of this statute. In 1968, Virginia’s General Assembly enacted legislation which explicitly prohibited actions for

alienation of affection, breach of promise to marry, seduction, and criminal conversation. See Va. Code § 8.01-220. Importantly, West Virginia's statute passed the following year does not include criminal conversation. This is no mere coincidence; it is a purposeful omission on the part of the Legislature. If the Legislature had wished to abolish criminal conversation, it would have explicitly done so as other states have.<sup>2</sup> It has not done so here.

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<sup>2</sup> In footnote 2 of their Response to Plaintiff's Motion for Judgment on the Pleadings ("Response of New York Life"), New York Life cites to statutes of other states in which criminal conversation has been explicitly abolished. See Ala. Code § 6-5-331 ("There shall be no civil claims for alienation of affections, *criminal conversation*, or seduction of any female person of the age of 19 years or over."); Cal. Civ. Code § 43.5 ("No cause of action arises for: (a) Alienation of affection. (b) *Criminal conversation*. (c) Seduction of a person over the age of legal consent. (d) Breach of promise of marriage."); Colo. Rev. Stat. § 13-20-202 ("All civil causes of action for breach of promise to marry, alienation of affections, *criminal conversation*, and seduction are hereby abolished.") Conn. Gen. Stat. Ann. § 52-572(f) ("No action may be brought upon any cause of action arising from *criminal conversation*"); Del. Code. § 10-39-3924, ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, enticement, or breach of contract to marry are abolished. No act done in this State shall operate to give rise, either within or without this State, to any such right of action. No contract to marry made or entered into in this State shall operate to give rise, either within or without this State, to any cause or right of action for its breach."); D.C. Code § 16-923 ("Cause of action for breach of promise, alienation of affections, and *criminal conversation* are hereby abolished."); Fla. State. § 771.01 ("The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are hereby abolished."); Ga. Code § 51-1-17 ("Adultery, alienation of affections, or *criminal conversation* with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or *criminal conversation* are abolished."); Ind. Code § 34-12-2-1(a) ("The following civil causes of action are abolished: (1) Breach of promise to marry. (2) Alienation of affections. (3) *Criminal conversation*. (4) Seduction of any female person of at least eighteen (18) years of age."); Mich. Comp. L. § 600.2901 ("The following causes of action are abolished: (1) alienation of affections of any person, animal, or thing capable of feeling affection, whatsoever; (2) *criminal conversation*); (3) seduction of any person of the age of 18 years or more; (4) breach of contract to marry."); Minn. Stat. § 553.02 ("All civil causes of action for breach of promise to marry, alienation of affections, *criminal conversation*, and seduction are abolished."); Nev. Rev. Stat. § 41.380 ("All civil causes of action for breach of promise to marry, alienation of affections, and *criminal conversation*, are hereby abolished; but this section does not abolish any cause of action for criminal conversation which accrued before July 1, 1979."); N.J. Stat. § 2A:23-1 ("The rights of action formerly existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are abolished from and after June 27, 1935."); N.Y. Civ. Rights Law § 80-a ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction and breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."); Ohio Rev. Code § 2305.29 ("No person shall be liable in civil damages for any breach of a promise to marry, alienation of affections, or *criminal conversation*, and no person shall be liable in civil damages for seduction of any person eighteen years of age or older who is not incompetent . . ."); Or. Rev. Stat. § 31.982 (formerly § 30.850) ("There shall be no civil cause of action for *criminal conversation*."); Vt. Stat. § 15-1001 ("The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, or breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."); Va. Code § 8.01-220(A) ("Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or *criminal conversation* upon which a cause of action arose or occurred on or after June 28,

Moreover, a claim for alienation of affections, though certainly related to a claim for criminal conversation, is nonetheless a distinct cause of action. Criminal conversation necessitates a showing of the following two elements of proof: (1) an actual marriage between the spouses; and (2) sexual intercourse between the defendant and the plaintiff's spouse. 41 Am.Jur.2d, Husband and Wife, § 242 (2005); see also Restatement 2d of Torts § 685 (2005). Alienation of affections, on the other hand, requires three completely different elements: (1) misconduct by the defendant; (2) loss of spousal affection or consortium; and (3) a causal link between the misconduct and the loss. 41 Am.Jur.2d, Husband and Wife, § 237; see also Restatement 2d of Torts § 683 (2005). Thus, the only common ground between these two otherwise entirely distinct causes of action is the prerequisite of a valid marriage.

In further demonstration of the differences between these two causes of action, criminal conversation requires that the disruption to the marriage be "sexual intercourse" between the defendant and the plaintiffs' spouse, whereas alienation of affections merely requires "misconduct" by the defendant which causes loss of spousal affection or consortium. Misconduct is certainly not limited to sexual intercourse, and has been applied to meddling parents or in-laws, siblings, and even strangers. See, e.g., Rush v. Buckles, 117 S.E. 130 (W. Va. 1923); Gross v. Gross, 73 S.E. 961 (W. Va. 1912); see also Ratliffe v. Walker, 85 S.E. 575 (Va. 1915). Disparities such as these make clear that these causes of action cannot and should not be conflated.

Because the torts of criminal conversation and alienation of affections involve different elements of proof, and may also involve different parties, the two causes of action are considered

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1968."). New York Life also cites to cases from other states' courts that have judicially abolished the cause of action for criminal conversation. See Response of New York Life at 4, fn. 2. However, as set forth herein, West Virginia does not permit its courts to independently abrogate the common law.

separate and apart, and clearly distinguishable. According to the Supreme Court of Appeals of West Virginia,

[a]lienation of affections is distinguished from an action for criminal conversation. In an alienation of affections action, if only enticement or artifice is shown, malice must be proved to warrant a recovery. But, if adultery is proved, such proof dispenses with the necessity for proving malice.

In an action for criminal conversation a physical debauchment of plaintiff's spouse is a necessary element, and the alienation of affections thereby resulting is merely a matter of aggravation.

Kuhn v. Cooper, 87 S.E.2d 531, 536 (W. Va. 1955).

To paraphrase the words of Mark Twain, the reports of the death of the tort of criminal conversation in West Virginia have been greatly exaggerated. Criminal conversation is indeed alive, and to state otherwise is to defy our Constitution and the precedent of our Supreme Court of Appeals. Furthermore, as Mr. Golden has admitted, "The Motion accurately states that the pleadings in this case establish the elements of criminal conversation: Mr. Golden admitted to having sex with Ms. Miller while she was married to Mr. Miller. See Justin S. Golden, Sr.'s Response to Plaintiff's Motion for Judgment on the Pleadings at 1. Therefore, Mr. Miller's claim for criminal conversation should not be dismissed.

**C. Genuine issues of material fact remain with respect to Mr. Miller's claim for conversion.**

New York Life next argues that Mr. Miller's claim for conversion fails as a matter of law because two of the elements—namely, the property of another and wrongful exertion—have not been met. This conclusion, however, is premature, as the discovery process is still pending, and there remain genuine issues of material facts underlying the existence of these elements which have yet to be clarified.

Moreover, New York Life bases its conclusion largely on pleadings, including Mr. Golden's Answer to the Amended Complaint, which he cites for the "undisputed fact[ ] . . . that Mr. Golden and Ms. Miller did not begin their affair until August 2010 . . . ." New York Life's Memorandum at 9. As stated above, Mr. Golden's Answer was not made under oath and therefore is hardly a definitive source. This is another question of material fact that has yet to be resolved in discovery, and another reason why summary judgment is inappropriate at this stage.

**D. Genuine issues of material fact remain with respect to Mr. Miller's claim for intentional infliction of emotional distress.**

New York Life also argues that Mr. Miller has failed to meet two of the elements for a claim of intentional infliction of emotional distress—namely, that Mr. Golden acted with intent and that Mr. Miller's emotional distress was so severe that no reasonable person could be expected to endure it. With regards to the latter element, New York Life notes that "[f]or better or for worse, affairs are not uncommon in today's society." New York Life's Memorandum at 11. While perhaps true—though New York Life has not cited to any authority for purported fact—New York Life is making the remarkable argument that the policy of West Virginia should be against the sanctity of marriage. New York Life otherwise cites to the pleadings to establish the factual basis for its conclusions. However, the pleadings cannot establish the definitive facts of this case. These elements therefore represent more material facts that have yet to be resolved in discovery, and another reason why summary judgment is inappropriate at this stage.

**E. Genuine issues of material fact remain with respect to Mr. Miller's claim for breach of fiduciary duty.**

New York Life is incorrect in stating that Mr. Golden owed no fiduciary duty to Mr. Miller. As a broker-dealer, life insurance agent, and/or investment advisor to Ms. Miller, Mr. Golden without question owed her fiduciary duties because he was advising her about how to

invest her money. Professor Gerald Bradley, the expert witness for Mr. Miller, explained this succinctly: “[Mr. Miller] was nonetheless a beneficiary of the duties implicated by his wife’s fiduciary relationship with . . . Mr. Golden and the company, and a readily foreseeable victim to the breaches thereof.” Expert Report of Professor Bradley at 1. (emphasis added). By inappropriately convincing Ms. Miller to rollover her 401(k), of which Mr. Miller was a beneficiary, by making an investment with New York Life, Mr. Golden breached his fiduciary duties to Ms. Miller and therefore to Mr. Miller, who would have otherwise stood to benefit from the 401(k). However, as with the claims for conversion and intentional infliction of emotional distress, additional discovery is needed to establish the factual basis for these claims and show that genuine issues of material fact exist. Thus, summary judgment is inappropriate at this stage.

**F. Genuine issues of material fact remain with respect to Mr. Golden’s claim for adultery.**

New York Life asserts, and Mr. Miller does not contest, that West Virginia’s adultery statute was taken off of the books effective June 11, 2010. See 2010 W.V. ALS 34; 2010 W. Va. Acts 34; 2010 W.V. Ch. 34.1 2010 W.V. SB 457. This means that if the affair between Mr. Golden and Ms. Miller began after that date, it would not be actionable; however, if the affair began prior to that date, former W. Va. Code § 61-8-3 would remain applicable to it. See W. Va. Code § 2-2-8 (“The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired . . . .”); State v. Easton, 510 S.E.2d 465, 481 (W. Va. 1998) (“[I]f a criminal statute ‘has been repealed, an offense committed under it, before repeal thereof, would not be condoned nor forgiven.’ ” (quoting State v. Tippens, 113 S.E. 751, 751 (W. Va. 1922))). Mr. Golden claims—not under oath—that the affair began in August 2010. Justin S. Golden, Sr.’s Answer to Plaintiff’s Amended Complaint at ¶ 12. At this point, Mr. Miller does not know

exactly when the affair began. Plaintiff's Answers to Justin S. Golden, Sr.'s First Set of Discovery Requests at 2. Beyond being a factual issue that has yet to be resolved in discovery, this is a genuine issue of material fact that precludes summary judgment.

**G. Criminal conversation remains a viable cause of action and was not abolished with the repeal of the crime of adultery.**

Like New York Life's argument that the tort of criminal conversation was abolished with the passage of W. Va. § 56-3-2a, its argument that the tort was abolished with the repeal of the crime of adultery also fails. Although criminal conversation is indeed the common law tort claim of adultery, the West Virginia Legislature explicitly repealed only the crime of adultery, and until it explicitly repeals the common law tort claim of criminal conversation, it remains the law in West Virginia.

**H. Genuine issues of material fact exist with respect to Mr. Miller's claim for negligent training and supervision.**

New York Life additionally argues that Mr. Miller's claim for negligent training and supervision fails because the facts do not indicate "any negligence on the part of Mr. Golden" during his employment with New York Life or the existence of duties owed by Mr. Golden to Mr. Miller. However, as with the other claims discussed herein, additional discovery is needed to establish the factual basis for Mr. Miller's claim for negligent training and supervision and to show that genuine issues of material fact exist. Thus, summary judgment is inappropriate at this stage.

**I. Genuine issues of material fact exist with respect to Mr. Miller's claim for *respondeat superior*.**

New York life argues that, based on Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989), Mr. Miller cannot impute liability to New York Life under a theory of *respondeat superior*. Again, this is an argument that Mr. Golden has previously made and that this

Honorable Court has previously rejected. See Justin S. Golden, Sr.’s Response to Mr. Miller’s Motion to Amend His Complaint; Order Granting Motion to Amend Complaint. The holding in Weaver was limited to the following: “[A] suit by a nonpatient spouse against a marriage counselor is substantially the same as one for alienation of affections and is, therefore, barred. This is because the nonpatient plaintiff lacks any professional relationship with the counselor and essentially sues for the alienation of his spouse’s affections.” 370 S.E.2d at 559. Weaver is distinguishable from Mr. Miller’s case in several respects. First, the plaintiff’s claims in Weaver were for malpractice and intentional interference with the marital relationship—not for criminal conversation. Additionally, the defendant was a marriage counselor with no professional relationship to the nonpatient spouse—not a broker-dealer, life insurance agent, and/or investment advisor with fiduciary duties to the beneficiary of the account with which he was dealing. Thus, the holding in Weaver is irrelevant to this case.

Additionally, as stated above, only limited discovery has taken place. Further discovery is needed to establish the factual basis for Mr. Miller’s claims and to show that genuine issues of material fact exist. Therefore, summary judgment is inappropriate at this stage.

**J. Mr. Miller’s claims are not barred by res judicata.**

New York Life makes the unique argument that Mr. Miller is seeking the same relief as he did in his divorce action against Ms. Miller—specifically, New York Life alleges that Mr. Miller is seeking an interest in his wife’s 401(k). This is not the case. Mr. Miller is not pursuing a ruling that he is currently has an ownership interest in his ex-wife’s 401(k); rather, insofar as Mr. Golden improperly and through a breach of his fiduciary duties convinced Ms. Miller to rollover her 401(k), of which Mr. Miller was at that time a beneficiary, to an annuity with New York Life, conversion occurred. However, as stated above, the discovery process is still

pending, and there remain genuine issues of material facts underlying the existence of these elements which have yet to be clarified.

**K. Mr. Miller's claims are not barred by the statute of limitations.**

New York Life correctly states that a two-year statute of limitations applies Mr. Miller's claims for breach of fiduciary duty, intentional infliction of emotional distress, and respondeat superior pursuant to W. Va. Code § 55-2-12(c). However, such claims are not barred by the statute of limitations unless the jury so determines.

In Harper v. Harper, the U.S. Court of Appeals for the Fourth Circuit held that "the statute of limitations runs from the date of the injury, and mere lack of knowledge of the actionable wrong does not suspend it, nor does silence of the wrongdoer, *unless he has done something to prevent discovery of the wrong.*" Harper v. Harper, 252 F. 39, 43-44 (4th Cir. 1918).

In Jones v. Aburahma, the West Virginia Supreme Court of Appeals further explained this so-called "discovery rule":

Ordinarily, the applicable statute of limitations begins to run when the actionable conduct first occurs, or when an injury is discovered, or with reasonable diligence, should have been discovered. W. Va. Code 55-7B-4 [1986]. The discovery rule recognizes "the inherent unfairness of barring a claim when a party's cause of action could not have been recognized until after the ordinarily applicable period of limitation." Harris v. Jones, 209 W. Va. 557, 562, 550 S.E.2d 93, 98 (2001). "[U]nder the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." Syllabus Point 2, in part, Gaither v. City Hospital, Inc., 199 W. Va. 706, 711, 487 S.E.2d 901, 906 (1997).

There are two common situations when the discovery rule may apply. The first occurs when "the plaintiff knows of the existence of an injury, but does not know the injury is the result of any party's conduct other than his own." Gaither, 199 W. Va. 706, 713, 487 S.E.2d 901, 908 (1997) (modifying Hickman v. Grover, 178 W. Va. 249, 358 S.E.2d 810 (1987)). In Gaither, this Court held that a question of fact exists as to when Mr. Gaither first "became aware" that the hospital's negligence, as opposed to his own negligence, may have resulted in the

amputation of his leg. “[W]e find nothing in the record to indicate that the appellant had any reason to know before January 1993 that City Hospital may have breached its duty and failed to exercise proper care, or that City Hospital’s conduct may have contributed to the loss of his leg.” 199 W. Va. 706, 715, 487 S.E.2d 901, 910.

The second situation may occur when an individual “does or should reasonably know of the existence of an injury *and* its cause.” Gaither, 199 W. Va. at 713, 487 S.E.2d at 908 (emphasis added). In footnote 6 of Gaither, this Court lists instances where “causal relationships are so well-established [between the injury *and* its cause] that we cannot excuse a plaintiff who pleads ignorance.” These instances include a patient who, after having a sinus operation, lost sight in his left eye, and a patient who, after undergoing a simple surgery for the removal of a cyst, was paralyzed in both legs. Gaither, 199 W. Va. at 712, 487 S.E.2d at 907 (internal citations omitted).

In such instances, when an individual knows or should reasonably know of the injury *and* its cause, the injured party must “make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship” for the discovery rule to apply. 199 W. Va. at 713, 487 S.E.2d at 908 (quoting Cart v. Marcum, 188 W. Va. 241, 423 S.E.2d 644).

600 S.E.2d 233, 236 (W. Va. 2004) (emphasis in original).

The most recent decision as to the discovery rule in West Virginia is Dunn v. Rockwell.

In that case, the Supreme Court of Appeals set forth a five-step analysis, incorporating the discovery rule, for determining whether a statute of limitations barred a given claim:

First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action . . . . Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitations is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through

five will generally involve questions of material fact that will need to be resolved by the trier of fact.

689 S.E.2d 255, Syl. Pt. 5. (W. Va. 2009).

New York Life states that Mr. Golden sold the annuity to Ms. Miller on January 26, 2010, and that Mr. Miller's claims are therefore time-barred because he filed his initial Complaint on June 5, 2012, more than a year after August 2010. However, it is not clear that the sale of the annuity was the pivotal event that set off the clock. With respect to Mr. Miller's claim of intentional infliction of emotional distress, it may be more appropriate to look to the "last act" of the affair, as with criminal conversation. See Harper at ¶ 43–44. Mr. Golden has alleged in his Answer to the Amended Complaint that his affair with Ms. Miller began on or around August 2010. See Justin S. Golden, Sr.'s Answer to Plaintiff's Amended Complaint at ¶ 12. However, Mr. Golden's statement in his Answer was not made under oath and therefore is not definitive; furthermore, we do not know when the affair ended. As to Mr. Miller's claim of breach of fiduciary duty, it may be that Mr. Golden's fiduciary duties were ongoing, depending on the type of the annuity that he sold to Ms. Miller. Whether the two-year statute of limitations bars Mr. Miller's claims is therefore a very fact-dependent question—underscoring the need for further discovery—and one that ultimately should be decided by the jury. Mr. Golden is liable for criminal conversation unless the jury determines that the statute of limitations bars the claim.

#### **L. Asdf**

New York Life's final argument is an undisguised invitation to engage in judicial activism. As stated above, doing so would defy the West Virginia Constitution and the precedent of the Supreme Court of Appeals. Mr. Miller's claims cannot be transformed into a claim for alienation of affections, and wishful thinking will not make it so. Abolishing the common law tort claim of criminal conversation is the province of the Legislature, not the courts.

New York Life’s claim that many states have eliminated alienation of affections by statute does not help its case. The statutes cited explicitly abolish criminal conversation, unlike W. Va. Code § 56-3-2a. The case law cited also has no bearing, as West Virginia courts may not independently abrogate the common law.

As the Legislature has never abolished Mr. Miller’s claims—or in the case of Mr. Miller’s claim for adultery, has not taken away the right to pursue a cause of action for adultery that accrued prior to its repeal—allowing Mr. Miller’s claims to go forward will not cause the law of West Virginia to go backward, as New York Life claims. See New York Life’s Response at 19. The claim for criminal conversation is very much alive in West Virginia. Furthermore, although the tort of alienation of affections may have been rooted in different times in which “wives were the chattel of their husbands,” that is clearly not the case today. See New York Life’s Response at 18. The modern application of criminal conversation appears to promote rather than take away women’s rights, as wives may bring a claim of criminal conversation against their husbands. In urging this honorable Court to take away the tort of criminal conversation, New York Life appears to be making the perverse argument that the policy of West Virginia should be to oppose the sanctity of marriage.

#### IV. CONCLUSION

THEREFORE, for the reasons set forth above, Mr. Miller respectfully requests that this honorable Court deny the Motion for Summary Judgment on Behalf of Defendants New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC, and permit the case to proceed to trial.

Respectfully Submitted,

**MARK A. MILLER**

By Counsel



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P. Rodney Jackson (WV Bar # 1861)  
Law Office of P. Rodney Jackson  
401 Fifth Third Center  
700 Virginia Street East  
Charleston, WV 25301  
Telephone: (304)-720-6783  
*Counsel for Plaintiff Mark A. Miller*

John C. Palmer IV (WV Bar # 2801)  
Keith J. George (WV Bar # 5102)  
Robinson & McElwee PLLC  
P.O. Box 1791  
Charleston, WV 25326  
Telephone: (304)-344-5800  
Fax: (304)-344-9566  
*Counsel for Plaintiff Mark A. Miller*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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MARK A. MILLER,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-1038

Judge Kaufman

JUSTIN S. GOLDEN, SR.,  
NEW YORK LIFE INSURANCE AND  
ANNUITY CORPORATION (NYLIAC), and  
NYLIFE SECURITIES, LLC,

Defendants.

CERTIFICATE OF SERVICE

I, P. Rodney Jackson, counsel for the Plaintiff, hereby certify that on this 27<sup>th</sup> day of November, 2013, I served true copies of PLAINTIFF MARK A. MILLER'S PROVISIONAL RESPONSE IN OPPOSITON TO MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION AND NYLIFE SECURITIES, LLC upon counsel for the Defendants by U.S. Mail, postage prepaid, in an envelope addressed to:

Arie M. Spitz, Esq.  
Mychal Sommer Schulz, Esq.  
Dinsmore & Shohl LLP  
900 Lee Street, Suite 600  
Charleston, West Virginia 25301  
*Counsel for Justin S. Golden, Sr.*

Stuart A. McMillan, Esq.  
Thomas M. Hancock, Esq.  
600 Quarrier Street  
P.O. Box 1386  
Charleston, West Virginia 25325  
*Counsel for Defendants New York Life  
Insurance and Annuity Corporation  
(NYLIAC) and NYLIFE Securities, LLC*

  
P. Rodney Jackson (WV Bar # 1861)