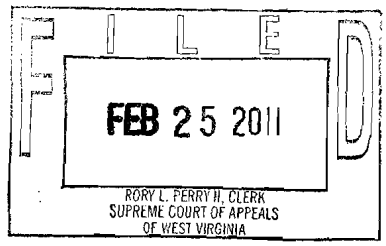
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 35759

CHRISTI MARIE BECK-SAMMS,

Appellant,

v.

GREGORY ALLEN SAMMS; and
CHADRICK R. PORTER,

Appellee.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL 1

II. STATEMENT OF FACTS 2

A. Background 2

B. Procedural History 8

III. ASSIGNMENTS OF ERROR 9

IV. POINTS AND AUTHORITIES RELIED UPON 10

V. DISCUSSION OF LAW. 11

A. The Circuit Court erred by failing to recognize that Plaintiff was asserting a cause of action for the tort of fraud 11

B. The Circuit Court erred by not applying the proper standard of review to Defendant's *Motion to Dismiss* 14

C. The Circuit Court erred in ruling that Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel. 17

1. *Res Judicata*. 17

2. Collateral Estoppel 19

VI. RELIEF PRAYED FOR 20

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

Appellant Christi Marie Beck-Samms sued her former husband, Appellee Gregory Allen Samms, and her former next door neighbor and attorney, Chadrick Porter, alleging that Mr. Samms and Mr. Porter fraudulently induced her to enter into a property settlement agreement in connection with her divorce from Mr. Samms. Ms. Beck-Samms also asserted claims against Mr. Samms and Mr. Porter for civil conspiracy, and asserted a cause of action against Mr. Porter for legal malpractice.

Mr. Samms filed a motion to dismiss alleging that Ms. Beck-Samms was trying to "re-litigate" the divorce, and that the time period to file a motion to set aside the divorce order and property settlement agreement had run. The Circuit Court of Kanawha County, West Virginia (Judge King presiding), agreed and dismissed the case as to Mr. Samms under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim. The Circuit Court dismissed Ms. Beck-Samms' tort claim for fraud on grounds not set forth in her *Amended Complaint*. Instead of analyzing Appellant's claim as a tort, it dismissed Appellant's *Amended Complaint* on the grounds that the time period to appeal a family court final order to the circuit court had passed, the one (1) year time limit to set aside a final order under Rule 60(b) for fraud had expired, and because Appellant's

claims were barred by the doctrines of *res judicata* and collateral estoppel.

This Appeal challenges the Circuit Court's ruling in that it failed to recognize that Appellant was asserting a cause of action for the independent tort of fraud and not an attempt to set aside an order under Rule 60(b) of the West Virginia Rules of Civil Procedure. Furthermore, this Appeal challenges the Circuit Court's ruling in that it applied the improper standard in reviewing a motion to dismiss, as well as its erroneous ruling that Appellant's claims are barred by the doctrines of *res judicata* and collateral estoppel.

II. STATEMENT OF FACTS[1]

A. Background

Appellant Christi Marie Beck-Samms and Appellee Gregory Allen Samms were formerly husband and wife. During the parties' marriage Ms. Beck-Samms bore four children, rarely worked outside the home, and for all intents and purposes, was a "stay-at-home" mother.

During the latter part of the Samms' marriage, they resided next door to Appellee Chadrick R. Porter, an attorney, and his wife, Jennifer Porter. In addition to being neighbors,

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[1]Appellant restates the facts found in her *Amended Complaint* which are to be accepted as true and construed most favorably in her behalf. *See Doe v. Wal-Mart Stores, Inc.*, 198 W. Va. 100, 105, 479 S.E.2d 610, 615 (1996).

the Samms and the Porters were friends and business partners. In August 2006, Mr. Porter's wife and Ms. Beck-Samms formed a limited liability company called Sweetpeas, LLC. The company was formed for the purpose of operating a retail children's clothing store.

In 2007, the Samms were suffering from marital difficulties and made the decision to divorce. Unlike most divorces, the Samms' divorce was amicable; or at least so Ms. Beck-Samms thought. On or about June 14, 2007, Mr. Samms and Mr. Porter met outside the presence of Ms. Beck-Samms to discuss the Samms' impending divorce. During this meeting, Mr. Porter personally prepared, or directed the preparation of the following documents which subsequently were filed as part of the Samms' divorce proceedings: A *Petition for Divorce;* an *Answer to Petition for Divorce;* a *Property Settlement Agreement;* and an *Agreed Final Order, Findings of Fact and Conclusions of Law.*

All of the aforementioned divorce documents prepared by Mr. Porter, or under his direction, listed Ms. Beck-Samms as the petitioner and Mr. Samms as the respondent in the divorce proceeding. Mr. Porter never indicated on any of the aforementioned divorce pleadings that he was the true draftsman of the documents. Instead, the documents were drafted in such a manner as to suggest that the parties themselves had authored the documents. After the aforementioned documents were drafted, Mr.

Samms and Mr. Porter jointly met with Ms. Beck-Samms to review and secure her signature on the documents. During that meeting, Mr. Porter represented to Ms. Beck-Samms, among other things, that the documents he had prepared, directly or indirectly, contained the following material terms of the settlement: That, until the former marital home was sold, Mr. Samms would pay all "ordinary" household expenses; that Ms. Beck-Samms would receive the 2006 Yukon Denali automobile and Mr. Samms was to make the payments thereon; that, after the home was sold, the parties would divide equally any profits or losses; that, after the home was sold, in lieu of and in consideration of Ms. Beck-Samms' waiver of her claim for alimony, Mr. Samms would pay to Ms. Beck-Samms child support in the amount of $4,000 a month, an amount which exceeded the amount that Ms. Beck-Samms would receive under the applicable child support guidelines; that Mr. Samms would retain all of his interest in his 401-K; and that Ms. Beck-Samms would receive her 50% interest in Sweetpeas, LLC, the company co-owned with Mr. Porter's wife, but only after a note upon which Mr. Samms was the obligor was paid or refinanced.

During the course of this conversation, Ms. Beck-Samms questioned Mr. Samms and Mr. Porter about the documents and some of the terms contained therein. In response to her various questions, Mr. Porter gave her legal advice and, among other things, specifically advised her that the proferred documents

constituted a "good deal" for her. Moreover, with respect to the waiver of alimony and the $4,000 a month child support payments, Mr. Porter advised Ms. Beck-Samms that receiving the payments as child support in lieu of alimony would inure to her benefit because, unlike alimony, her child support payments would not be taxed as income. Through his acts or omissions, Mr. Samms concurred with Mr. Porter's representations and advice, and urged Ms. Beck-Samms to accept the "good deal" that was being offered to her. Through his acts or omissions, Mr. Samms led Ms. Beck-Samms to believe that he intended to fully carry out the obligations assumed by him in the divorce documents prepared by Mr. Porter personally, or under his direction.

After receiving the assurances set forth above, and in reliance thereon, Ms. Beck-Samms signed the *Petition for Divorce* and *Property Settlement Agreement* on June 14, 2007. In the presence of Mr. and Ms. Samms, Mr. Porter forged his mother's name, Peggy Porter, as a notary public on the Verifications attached to the *Petition for Divorce* and *Answer to Petition for Divorce,* as well as the notarizations on the *Property Settlement Agreement*. At the time of the signing of the aforementioned documents, when Mr. Porter was advising Ms. Beck-Samms that she was getting a "good deal", no financial disclosure was made by Mr. Samms. After the aforementioned documents were signed, Mr. Porter personally accompanied Ms. Beck-Samms to the Kanawha

County circuit clerk's office to oversee the filing of the *Petition for Divorce* and *Answer to Petition for Divorce*.

On July 30, 2007, Mr. Porter then prepared, from a fill-in form available on the Supreme Court of West Virginia's website, a *Financial Statement* for Plaintiff, but still did not prepare one for Mr. Samms. The *Financial Statement* prepared by Mr. Porter contains several abject errors that make it appear that there are less marital assets than in fact was the case. For example, the *Financial Statement* lists Mr. Samms' "stock/mutual funds" and tools as separate assets, when those assets were in fact marital, and also lists Ms. Beck-Samms' automobile (and the substantial debt associated with it) as a "separate" asset of Ms. Beck-Samms rather than a "marital" one.

In addition to the foregoing misrepresentations, the *Financial Statement* prepared by Mr. Porter failed to include the information regarding the alimony claim that Ms. Beck-Samms should have been making, yet only stated "Mutually agreed" where the form requests the reasons that alimony should be awarded or denied.

As with the prior pleadings, after Mr. Porter prepared the *Financial Statement* for Ms. Beck-Samms, he advised her to sign it, and then Mr. Porter forged his mother's name, Peggy Porter, as the notary on the Verification page. The *Financial Statement* was marked "hand delivery" by Mr. Porter, and upon

information and belief, a copy was provided to Mr. Samms. However, at no time did Mr. Samms ever prepare (or cause to be prepared) and file a financial statement of his own as is required by West Virginia law.

A final hearing was held in the Samms divorce on August 1, 2007. The Court, however, did not enter the *Agreed Final Order, Findings of Fact and Conclusions of Law* until August 16, 2007 because the Order prepared by Mr. Porter did not contain some required notice of appeal rights language. Upon information and belief, such language was added by the Court after the August 1, 2007 hearing.

Subsequent to the entry of the *Final Order*, Mr. Samms began defaulting on his financial obligations to Ms. Beck-Samms. In April 2008, Ms. Beck-Samms was forced to file a contempt motion against Mr. Samms. In response, Mr. Samms filed a motion to modify his child support obligation. At a hearing held on May 8, 2008, the Family Court of Kanawha County, West Virginia agreed to modify downward Mr. Samms' child support obligation. Thereafter, Mr. Samms filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of West Virginia.

Within a month of the entry of the *Final Order*, Ms. Beck-Samms and Mr. Porter's wife began having difficulties working together in the Sweetpeas, LLC business. These

difficulties "came to a head" in November of 2007, when Ms. Beck-Samms was threatened with legal action from Mr. Porter and/or his wife, Jennifer Porter, if Ms. Beck-Samms did not surrender her interest in the business over to Jennifer Porter. Ms. Beck-Samms did not have the financial resources to defend herself against the Porters' threats, so in December of 2007, four (4) months after the entry of the *Final Order*, Ms. Beck-Samms ceded her interest in Sweetpeas, LLC to Jennifer Porter. Upon information and belief Mr. Porter prepared the documents conveying Ms. Beck-Samms' interest in the company to his wife.

As a consequence of the aforementioned fraudulent actions of Mr. Samms and Mr. Porter, subsequent to the entry of the *Final Order*, Ms. Beck-Samms has lost her home, which succumbed to foreclosure; lost her vehicle after Mr. Samms stopped making the payments thereon; lost her business; lost any interest in Mr. Samms' 401-K; lost a significant portion of her child support award; and has not received a penny of alimony, which could have and would have been awarded but for the actions of Mr. Samms and Mr. Porter.

B. Procedural History

On June 11, 2009, Appellant filed a three count *Complaint* against Appellee Gregory Allen Samms, Appellant's former husband, and Appellee Chadrick R. Porter, an attorney. An *Amended Complaint* was filed on June 17, 2009. Count I of the

Amended Complaint is a claim for the tort of fraud and asserts that Mr. Samms and Mr. Porter fraudulently induced Ms. Beck-Samms to enter into a property settlement agreement, and other agreements, regarding the Samms' divorce proceeding. Count II asserts civil conspiracy against both Mr. Samms and Mr. Porter. Count III, which is not at issue in this Appeal, asserts that Mr. Porter committed legal malpractice.

In lieu of filing an answer to the *Amended Complaint*, Appellee Samms filed a *Motion to Dismiss* under W. Va. R. Civ. P. 12(b)(6), (dismissal for failure to state a claim upon which relief can be granted). Mr. Samms argued that the matters and claims set forth in Appellant's *Amended Complaint* have already been litigated in the Family Court of Kanawha County, West Virginia, and as such, are barred by the doctrines of *res judicata* and collateral estoppel. Further, Mr. Samms argued that Appellant cannot bring this action now since the time for Ms. Beck-Samms to seek relief by appeal or under W. Va. R. Civ. P. 60(b) had passed. By *Order* entered on March 9, 2010, the Circuit Court ruled in favor of Mr. Samms.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court erred by failing to recognize that Appellant was asserting a cause of action for the independent tort of fraud.

B. The Circuit Court erred by not applying the proper standard of review to Appellee's *Motion to Dismiss*.

C. The Circuit Court erred in ruling that Appellant's claims are barred by the doctrines of *res judicata* and collateral estoppel.

IV. POINTS AND AUTHORITIES RELIED UPON

W. Va. R. Civ. P. 60(b) 11

W. Va. Code § 51-2A-10 11

W. Va. R. Civ. P. 60(b)(3) 12

Deitz v. Deitz, 222 W. Va. 46, 659 S.E.2d 331 (2008) 13

Savas v. Savas, 181 W. Va. 316, 382 S.E.2d 510 (1989). 13

7 J. Moore, Moore's Federal Practice, ¶ 60.33 at 360 (2d ed. 1987). 13

Doe v. Wal-Mart Stores, Inc., 198 W. Va. 100, 105, 479 S.E.2d 610, 615 (1996) 15

Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) 15

Pocahontas Mining Co. Limited Partnership v. OXY USA, Inc., 202 W.Va. 169, 174, 503 S.E.2d 258, 263 (1998) 15,16

Syl. pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981). 16

Sinkewitz v. City of Huntington, 217 W. Va. 265, 268, 617 S.E.2d 812, 815 (2005). 18

Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997) 18

Syl. Pt. 3, *Slider v. State Farm Mut. Auto Ins. Co.*, 210 W. Va. 476, 557 S.E.2d 883 (2001). 19

Lane v. Williams, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965) 19,20

V. DISCUSSION OF LAW

A. The Circuit Court erred by failing to recognize that Appellant was asserting a cause of action for the independent tort of fraud.

The Circuit Court's *Order* of March 9, 2010 dismissed Ms. Beck-Samms' claim for the tort of fraud since the one year time limit to seek relief from judgment, due to fraud, under Rule 60(b) had passed. *Q.v.*, at pp. 2-4, ¶ 5-8. Further, the Court found that Ms. Beck-Samms' time limit to appeal the family court's final order had, likewise, expired. *Q.v.*, at p. 2, ¶ 1-4. What the Court failed to recognize, however, is that Ms. Beck-Samms is <u>not</u> appealing the family court's final order and her cause of action for fraud was <u>not</u> brought under Rule 60(b). Nowhere in Ms. Beck-Samms' *Amended Complaint* does she assert a count or cause of action for fraud under Rule 60(b). Rather, Ms. Beck-Samms asserted a cause of action for the independent tort of fraud and the Circuit Court misinterpreted her claim since the Court's *Order* is completely devoid of any mention of a cause of action for the tort of fraud.

Appellee Samms' *Motion to Dismiss* argued, and the Circuit Court agreed, that the *Amended Complaint* must be dismissed because Appellant did not seek relief under Rule 60(b) of the Rules of Civil Procedure.[2] That Rule permits a party to

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[2]Since 2001, motions for relief from family court judgments have been governed by W. Va. Code § 51-2A-10. Nonetheless, this

seek relief from a judgment order when certain enumerated circumstances exist, one of which is for fraud under Rule 60(b)(3). In finding such, the Court's *Order* implies that since Ms. Beck-Samms did not seek relief from the final divorce order under Rule 60(b), she cannot now sue Mr. Samms for fraud in Circuit Court. This assertion is incorrect as a matter of law.

Ms. Beck-Samms is not seeking "relief" from, or "reconsideration" of, the final divorce order. Rather, she is seeking damages which resulted from the Appellees' fraudulent conduct that induced her to enter into a contract and related agreements regarding her divorce settlement. The crux of the *Amended Complaint* is that Ms. Beck-Samms was promised certain terms, the documents omitted language that would have guaranteed that she receive the relief she was promised, and that thereafter, Mr. Samms was able to alter the agreed-upon terms because the documents were not prepared in such a manner as to guarantee her the relief she was promised.[3] She was fraudulently lulled into signing documents under the false belief that she was

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section is virtually identical to Rule 60(b).

[3]For example, as the *Amended Complaint* alleges, Ms. Beck-Samms was promised $4,000 a month ($1,000.00 a month, each month, for each child) for a certain period of time. She was told the payment should be called "child support" instead of alimony so it would not be taxed. Thus, she signed a waiver of alimony and the family court ratified a child support amount that exceeded the child support guidelines. Then, just months after the agreement was ratified, Mr. Samms successfully moved to have his "child support" reduced. *See Amended Complaint*, at ¶¶ 32-3.

guaranteed to receive certain benefits that were a "good deal". Thus, Ms. Beck-Samms is not seeking to "re-litigate" the divorce, nor is she seeking "relief" from the settlement agreement. Rather, Ms. Beck-Samms is seeking damages occasioned by Appellees' fraudulent conduct.[4]

"A final order of a family court may be challenged in the circuit court either by a direct appeal to the circuit court or *through resort to the circuit court's original jurisdiction.*" *Deitz v. Deitz*, 222 W. Va. 46, 55, 659 S.E.2d 331, 340 (2008)(Emphasis added). In a factually similar case, *Savas v. Savas*, 181 W. Va. 316, 382 S.E.2d 510 (1989), the West Virginia Supreme Court ruled that a Rule 60(b) motion is not the exclusive remedy for seeking relief from a final judgment in family court (if indeed that was Ms. Beck-Samms' goal). The court in *Savas*, in analyzing the timeliness of a former wife's Rule 60(b) motion to determine if the claim of fraud constituted fraud upon the court or fraud between the parties, stated that "[f]raud inter partes, without more, should not be fraud upon the court, but **redress should be left to** a motion under 60(b)(3) <u>or</u> to **the independent action.**" *Id.* at 319 (*quoting* 7 J. Moore, <u>Moore's Federal Practice</u>, ¶ 60.33 at 360 (2d ed. 1987))(Emphasis added).

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[4]Again, by way of example, Ms. Beck-Samms does not want to "re-open" the divorce to seek alimony. She wants to obtain a money judgment against Mr. Samms and Mr. Porter for the monies she was promised.

"independent action" for fraud is what Ms. Beck-Samms is pursuing and she is doing so through the circuit court's original jurisdiction. Such an action is permitted under West Virginia law; if it were not, individuals who have suffered harm, in cases similar to the one at bar, would be left without a forum within which to seek redress.

Indeed, an independent and factually separate action for fraud must be brought in the circuit court since a family court does not have jurisdiction to hear Ms. Beck-Samms' claims against a third party, Mr. Porter, and it does not have jurisdiction to hear a common law tort action for fraud.

Accordingly, Ms. Beck-Samms' claim for fraud in the Circuit Court was proper and the Circuit Court erred in dismissing her *Amended Complaint*.

B. The Circuit Court erred by not applying the proper standard of review to Appellee's *Motion to Dismiss*.

As discussed *supra*, Ms. Beck-Samms' *Amended Complaint* sets forth a count for the independent tort of fraud and, had the Circuit Court recognized such and applied the proper standard of review, Appellee's *Motion to Dismiss* would have been denied.

"In a number of cases this Court has consistently held that a trial court should not grant a Rule 12(b)(6) motion to dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief." *Doe v. Wal-Mart Stores, Inc.*, 198 W. Va. 100, 105, 479 S.E.2d 610, 615 (1996). "Additionally, the Court has held that, in assessing a plaintiff's appeal from an order of a lower court granting a motion to dismiss under Rule 12(b)(6), the allegations contained in the plaintiff's complaint must be accepted as true and construed most favorably in his behalf." *Id.* "[A] circuit court should not dismiss a claim 'merely because it doubts that the plaintiff will prevail in the action.'" *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007).

> A pleading which includes a claim of fraud requires more than the short, plain statement of the claim contemplated under Rule 8(a)(1). As Rule 9(b) of the West Virginia Rules of Civil Procedure provides, in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Id., 221 W. Va. at 493, 655 S.E.2d at 515. However, "pleading a fraud claim is distinguishable from proving a fraud claim: 'the pleading must not be expected to include every element of the proof.'" *Id.*, 221 W. Va. at 494, 655 S.E.2d at 516 *quoting Pocahontas Mining Co. Limited Partnership v. OXY USA, Inc.*, 202 W. Va. 169, 174, 503 S.E.2d 258, 263 (1998).

Ms. Beck-Samms' claim of fraud in her *Amended Complaint* was pled with sufficient particularity to set forth a claim upon which relief could be granted, especially when viewed in a light most favorable to Ms. Beck-Samms.

> The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it."

Highmark, 221 W. Va. at 493, 655 S.E.2d at 515 *citing* Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

Ms. Beck-Samms' *Amended Complaint* contains a lengthy recitation of allegations common to all counts which set forth the acts of the Appellees which she believes to be fraudulent and how she was induced by those acts to enter into the property settlement agreement and other contracts during her divorce.

Additionally, Count I of her *Amended Complaint* sets forth what of those acts she believes amounted to fraud. Ms. Beck-Samms asserts in Count I that: (1) "Plaintiff was induced by the fraudulent acts of Defendants, individually and separately, to enter into an agreement with Defendant Samms in connection with the Samms' divorce action" and sets forth exactly what she was induced to do, *q.v.*, at p. 10, ¶ 40; that (2) "Defendants committed fraud against Plaintiff by inducing her to enter into a divorce settlement which they characterized as a 'good deal', when it [*sic*] fact such representations or omissions were material and false", *q.v.*, at p. 11, ¶ 41; that (3) "Plaintiff relied to her detriment on the material false representations of Defendants", *q.v.*, at p. 11, ¶ 42; and that (4) "As a consequence

of Defendants' actions, Plaintiff has been damaged." *Q.v.*, at p. 11, ¶ 43.

Count I of the *Amended Complaint* adequately notifies Appellees that their representations or omissions were fraudulent, material and false, and that there was detrimental reliance that led to Ms. Beck-Samms' damages. Thus, from the above cited authorities, Count I of Ms. Beck-Samms' *Amended Complaint* satisfies the requirements for alleging fraud and the Circuit Court should not have granted Appellee's *Motion to Dismiss* for failure to state a claim.

C. The Circuit Court erred in ruling that Appellant's claims are barred by the doctrines of *res judicata* and collateral estoppel.

The Circuit Court's *Order* found that Appellant's claim for fraud is barred by the doctrines of *res judicata* and collateral estoppel. *Q.v.*, at pp. 5-6, ¶ 10-15. The Circuit Court erred in its finding, however, because all the elements for either doctrine were not satisfied.

1. *Res Judicata*

> Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must

> be such that it could have been resolved, had it been presented, in the prior action.

Sinkewitz v. City of Huntington, 217 W. Va. 265, 268, 617 S.E.2d 812, 815 (2005), *citing* Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

The Circuit Court found that (1) there was a final adjudication on the merits in the family court regarding the parties' divorce, (2) the parties were the same, and (3) since Ms. Beck-Samms is partially basing her damages upon the support and assets she was supposed to receive in the divorce case, all the elements for *res judicata* are satisfied. To the contrary, none of the elements of *res judicata* are satisfied.

First, there was not a final adjudication on the merits set forth in the case at bar. As discussed, *supra*, this is an independent action for fraud and conspiracy to commit fraud, and not an action to re-litigate the terms of the property settlement agreement or any other terms of the divorce proceeding that were "litigated" in the family court. Second, there are additional parties to this action who are not in privity. Mr. Porter was not and could not have been a party to the divorce proceedings in family court. Finally, the cause of action is not identical to the family court proceeding and could not have been resolved in the family court proceeding since it does not have jurisdiction to hear a tort action, and further, involves the circumstances

and events of entering into the agreement and not the terms of the agreement itself or the divorce.

> An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties *might have litigated* as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits.

Syl. Pt. 3, *Slider v. State Farm Mut. Auto Ins. Co.*, 210 W. Va. 476, 557 S.E.2d 883 (2001)(Emphasis added).

The circumstances and events involved in this action did not become apparent to Ms. Beck-Samms until sometime <u>after</u> the divorce proceeding and, thus, could not have been resolved at that time. Therefore, the Circuit Court erred in finding that Ms. Beck-Samms claim for fraud is barred by the doctrine of *res judicata* since all the elements necessary to establish the doctrine have not been satisfied.

2. Collateral Estoppel

The doctrine of collateral estoppel bars "only those matters which were actually litigated in the former proceeding[.]" *Lane v. Williams*, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965). Accordingly,

> Plaintiffs in a civil action are not precluded, on the basis of *res judicata* or estoppel, from maintaining a second action against persons who were defendants in a former action, or who are in

> privity with parties defendant in the former action, where the causes of action alleged in the two actions are different and where none of the matters in issue in the second action were adjudicated in the former action.

Id. at Syl. Pt. 1. As previously set forth, the cause of action for fraud in the case at bar is separate and distinct from the former family court proceeding and, as such, was not actually litigated in that proceeding. Therefore, Ms. Beck-Samms' claim of fraud is not barred by the doctrine of collateral estoppel.

VI. RELIEF PRAYED FOR

For the foregoing reasons, Appellant Christi Marie Beck-Samms prays that this Court enter an order that:

1. Vacates the Kanawha County Circuit Court's grant of the Appellee's *Motion to Dismiss*;

2. Vacates the Kanawha County Circuit Court's ruling that Appellant's claim for the tort of fraud is barred due to the passage of the time period to appeal a family court final order;

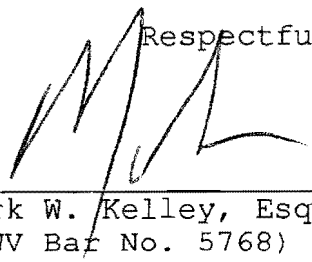
3. Vacates the Kanawha County Circuit Court's ruling that Appellant's claim for the tort of fraud is barred due to the passage of the one (1) years time limit to file a motion for relief for fraud under Rule 60(b);

4. Vacates the Kanawha County Circuit Court's ruling that Appellant's claims are barred by the doctrines of *res judicata* and collateral estoppel; and

5. Remands this case to the trial court for further proceedings.

Appellant further requests all other such relief as this Court deems just and proper.

Respectfully submitted this 25th day of February, 2011.



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CERTIFICATE OF SERVICE

I, Mark W. Kelley, an attorney for Appellant Christi Marie Beck-Samms, hereby certify that on February 25, 2011, I served a true and correct copy of the foregoing **"BRIEF OF APPELLANT"** on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

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