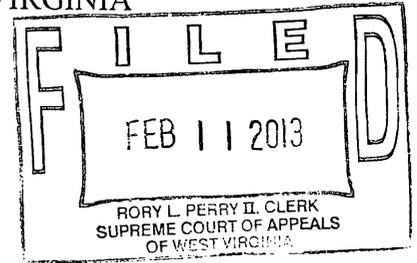


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0991



ROBERT L. BURNWORTH,  
Plaintiff below / Petitioner,

v.

Appeal from a final order of the  
Circuit Court of Kanawha County (11-C-1851)

KENT GEORGE,  
ROBINSON & MCELWEE, PLLC, and  
JOHN T. POFFENBARGER,  
Defendants below / Respondents.

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**BRIEF ON BEHALF OF THE RESPONDENTS,**  
**KENT GEORGE and ROBINSON & MCELWEE, PLLC**

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITY .....v

RESPONDENT’S STATEMENT OF THE CASE .....1

SUMMARY OF ARGUMENT.....10

STATEMENT REGARDING ORAL ARGUMENT .....14

STANDARD OF REVIEW .....15

ARGUMENT .....16

*Respondents Response to Petitioner’s First Assignment of Error:*

I. **THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENTS SUMMARY JUDGMENT WHEN IT RULED THAT THE ENTRY OF A CONSENT ORDER IN THE COLLECTION ACTION OPERATED TO EXTINGUISH ALL OBLIGATIONS UNDER THE NOTE AND DEED OF TRUST UNDERLYING PETITIONER’S CAUSE OF ACTION AGAINST RESPONDENTS SUCH THAT PETITIONER WAS UNABLE TO PROVE THE ESSENTIAL ELEMENT OF DAMAGES IN HIS MALPRACTICE ACTION**.....16

A. **Because Petitioner Voluntarily Entered into a Consent Order with the Collection Defendants Extinguishing the Note and the Colby Deed of Trust, Petitioner Cannot Prove His Damages, If Any, Were Directly and Proximately Caused by Any Act or Omission of RAM and George, and Summary Judgment Was Appropriate**.....16

1. **Petitioner cannot prevail in this legal malpractice action because he cannot prove that he suffered actual damages as a direct and proximate result of a breach of duty owed to him by the Respondents** .....16

2. **Petitioner cannot prove that he suffered actual damages as a direct and proximate result of a breach of duty owed to him by the Respondents because he voluntarily, through his own actions in entering into a Consent Order with the Collection Defendants, extinguished his right to damages related to the Colby Deed of Trust.** .....17

- a. Prior to the entry of the Consent Order, Petitioner failed to attempt to collect on the general warranty of title contained in the Colby Deed of Trust or in any other way obtain appropriate damages from Colby Corp.. .....18
- b. Petitioner voluntarily, through his own actions in entering into a Consent Order with the Collection Defendants, has now extinguished his right to damages related to the Colby Deed of Trust. ....20
  - i. The Note and Colby Deed of Trust are admissible as historical documents; however, the Note and Colby Deed of Trust are no longer negotiable, enforceable instruments.....21
  - ii. The Circuit Court correctly interpreted the clear, unambiguous express language of the Consent Order as extinguishing the Note and the instruments securing it, including the Colby Deed of Trust. ....22

*Respondents’ Response to Petitioner’s Second Assignment of Error:*

- II. **THE CIRCUIT COURT RULED CORRECTLY IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE THE PETITIONER HAS NOT PROVEN THAT THE CONSENT ORDER IN THE COLLECTION ACTION IS AMBIGUOUS.** .....23
  - A. **The Circuit Court’s Ruling Should Not Be Overturned on Petitioner’s Allegation That the Consent Order Is Ambiguous.** .....23
    - 1. **The Circuit Court’s ruling should not be overturned on the issue of the alleged ambiguity of the Consent Order, because the alleged ambiguity is not outcome-determinative.** .....23
    - 2. **The Consent Order is not ambiguous.** . ....26

*Respondents' Response to Petitioner's Third Assignment of Error:*

**III. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT, BECAUSE PETITIONER HAS NOT PROVEN THAT THE CONSENT ORDER WAS THE RESULT OF THE MUTUAL MISTAKE OF THE PARTIES......28**

**A. The Circuit Court's Ruling Should Not Be Overturned on Petitioner's Unsupported Claims That the Contested Language in the Consent Order Was the Result of the Mutual Mistake of the Parties.. .....28**

1. Because Petitioner never raised the issue of mutual mistake below, this Court should not entertain the issue on appeal.....29

2. Because Petitioner has not attempted to void the Consent Order, no reinterpretation of the Consent Order should be made based on the alleged mutual mistake.....29

*Respondents' Response to Petitioner's Fourth Assignment of Error:*

**IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 60(b) MOTION BECAUSE BOTH THE CONSENT ORDER AND THE CORRECTED ORDER EXTINGUISHED THE VIABILITY OF THE COLBY DEED OF TRUST, SUCH THAT UNDER EITHER VERSION OF THE CONSENT ORDER, PETITIONER REMAINED UNABLE TO PROVE THE ESSENTIAL ELEMENT OF DAMAGES IN HIS MALPRACTICE ACTION AGAINST RESPONDENTS......30**

**A. Petitioner's Corrected Order Was Ineffective as a Matter of Law to Restore the Note, the Colby Deed of Trust, or Petitioner's Action Against Respondents. ....30**

1. Because there is no evidence that the negotiated settlement agreement between Petitioner and the Collection Defendants is not binding and enforceable, the Note and the Colby Deed of Trust are extinguished by the express language therein.....31

2. Even if the underlying settlement agreement was modified or repudiated, the Note and the Colby Deed of Trust are extinguished by operation of law because Petitioner failed to include in the Corrected Order clear, unambiguous and unequivocal language providing that the Note survived the entry of judgment.....34

*Respondents' Response to Petitioner's Fifth Assignment of Error:*

V. **THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 60(b) MOTION ON THE GROUNDS OF JUDICIAL ESTOPPEL, BECAUSE THE PETITIONER PROFFERED THE ORDER TO THE COURT AND RELIED ON IT AT LEAST TWICE.** .....36

A. **The Circuit Court Did Not Abuse its Discretion in Denying Petitioner's Rule 60(b) Motion** .....36

1. **The Circuit Court's ruling should be affirmed on the issue of the judicial estoppel, because the judicial estoppel issue is not outcome-determinative** .....36

2. **Because the Petitioner proffered the Consent Order to the Circuit Court and relied upon it at least twice, judicial estoppel was appropriate.** . .....37

**CONCLUSION** .....39

**CERTIFICATE OF SERVICE** .....40

**TABLE OF AUTHORITY**

**West Virginia Decisions**

*Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737 (2000)..... 16

*Baker v. Gaskins*, 125 W. Va. 326, 24 S.E.2d 277 (1943).....33

*Barber v. Barber*, 195 W. Va. 38, 464 S.E.2d 358 (1995) .....32

*Barney v. Auvil*, 195 W. Va. 733, 466 S.E.2d 801 (1995)..... 28

*Bethlehem Mines Corporation v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969) .....27

*Cameron v. Cameron*, 105 W. Va. 621, 143 S.E.2d 349 (1928) .....32

*Calvert v. Scharf*, 217 W. Va. 684 619 S.E.2d. 197 (2005)..... 16, 17

*Frederick Management Co., L.L.C. v. City National Bank of West Virginia*,  
228 W. Va. 550, 723 S.E.2d 277 (2010) ..... 28

*Greenbrier Valley Bank v. Holt*, 114 W. Va. 363, 171 S.E. 906 (1933) .....23, 24

*Harrison v. Casto*, 165 W. Va. 787, 271 S.E.2d 774 (1980)..... 17

*Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990)..... 16, 17

*Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570,  
490 S.E.2d 657 (1997) ..... 28

*Larry V. Faircloth Realty, Inc. v. Pub. Serv. Comm’n of W. Va.*,  
2013 W.Va. LEXIS 37 (W. Va. Jan. 24, 2013) .....38

*McGuire v. Fitzsimmons*, 197 W. Va. 132, 475 S.E.2d 132 (1996) ..... 16

*McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d, 765 (1984)..... 30

*Meadows v. Employees’ Fire Ins. Co.*, 171 W.VA. 337, 298 S.E.2d 874 (1982) .....33

*Oakes v. Monongahela Power Company*, 158 W, Va. 18,  
207 S.E.2d (1974) ..... 17

*Orteza v. Monongalia County General Hospital*, 173 W. Va. 461,  
318 S.E.2d 40 (1984) ..... 26, 27

*Painter v. Peavey*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ..... 15

<i>Raleigh Co. Const. Co. v Amere Gas Utilities Co.</i> , 110 W.Va. 291, 158 S.E. 161 (1931) .....	33
<i>Sheetz, Inc., v. Bowles Rice McDavid Graff &amp; Love, PLLC</i> , 209 W. Va. 318, 547 S.E.2d 256 (2001).....	16
<i>State ex rel. Palumbo v. County Court of Kanwha County</i> , 151 W. Va. 61, 150 S.E.2d 887 (1996), <i>overruled in part</i> <i>on other grounds by Qualls v. Bailey</i> , 152 W. Va. 385, 164 S.E.2d 421 (1968), <i>and reinstated by State ex rel.</i> <i>Smoleski v. County Court</i> , 153 W. Va. 21, 166 S.E.2d 777 (1969).....	32
<i>State v. Mason</i> , 157 W.Va. 923, 205 S.E.2d 819 (1974) .....	32
<i>Toler v. Shelton</i> , 137 W. Va. 778, 204 S.E.2d 85 (1974) .....	15, 36
<i>Trent v. Cook</i> , 198 W. Va. 601, 482 S.E.2d 218 (1996) .....	28
<i>West Virginia Dept. of Health and Human Resources ex rel Wright</i> , 197 W. Va. 468, 475 S.E.2d 560 (1996).....	26, 37

**Federal Court Decisions**

<i>Andersen v. DHL Ret. Pension Plan</i> , 2013 U.S. Dist. LEXIS 157805 (W.D. Wash. Nov. 2, 2012) .....	34
<i>Brennan v. Midwestern United Life Ins. Co.</i> , 450 F.2d 999 (7th Cir. 1971), <i>cert. den.</i> 405 U.S. 921, 92 S. Ct. 957, 30 L. Ed. 2d 792 (1972).....	15
<i>Chesapeake Fifth Ave. Partners, LLC v. Summerset Walnut Hill, LLC</i> , 2009 U.S. Dist. LEXIS 39097 (D. Va. 2009) .....	35
<i>Drewitt v. Pratt</i> , 999 F.2d 774 (4th Cir. 1993) .....	15
<i>HICA Educ. Loan Corp. v. Perkins</i> , 2012 U.S. Dist. LEXIS 105622 (D. Colo. July 23, 2012).....	34
<i>Hines v. Seaboard Air Line Railroad Co.</i> , 341 F.2d 229 (2d Cir. 1965) .....	15
<i>In re Riebesell</i> , 586 F.3d 782 (10th Cir. 2009).....	34
<i>Richardson v. Econo-Travel Motor Hotel Corp.</i> , 553 F. Supp. 320 (E.D. Va. 1982) .....	26
<i>Saenz v. Kenedy</i> , 178 F.2d 417 (5th Cir. 1949) .....	15

<i>Smith v. Stone</i> , 308 F.2d 15 (9th Cir. 1962).....	15
<i>Society of Lloyd’s v. Reinhart</i> , 402 F.3d 982 (10th Cir. 2005).....	34
<i>Wagner v. United States</i> , 316 F.2d 871 (2d Cir. 1963) .....	15
<i>Westinghouse Credit Corp. v. D’Urso</i> , 371 F.3d 96 (2d Cir. 2004).....	34

**Non-West Virginia State Court Decisions**

<i>Banque Nationale de Paris v. 1567 Broadway Ownership Assoc.</i> , 248 A.D. 23 154, 669 N.Y.S. 2d 568 (N.Y. App. Div. 1 <sup>st</sup> Dept. 1998).....	35
<i>Beazley v. Sims</i> , 81 Va 644 (1886) .....	24
<i>Myer v. Myer</i> , 209 Kan. 31, 495 P.2d 942 (1972) .....	15
<i>Whitehurst v. Camp</i> , 899 So. 2d 679 (Fla. 1997).....	35

**West Virginia Rules**

Rule 10(d), W. Va. R. App P .....	1
Rule 18(a), W. Va. R. App P .....	14
Rule 19, W. Va. R. App P.....	14
Rule 12(b)(6), W. Va. R. Civ. P.....	4
Rule 42, W. Va. R. Civ. P.....	5
Rule 60(b), W. Va. R. Civ. P .....	32, 35, 36
Rule 79, W. Va. R. Civ. P.....	32
Rule 24, W. Va. T. C. R.....	9

**Secondary Sources**

34 Corpus Juris .....	24
2 Freeman on Judgments (5th Ed.) .....	24
15 Ruling Case Law .....	24

11 Wright & Miller, Federal Practice and Procedure, Civil § 2871 (1973)..... 15

COME NOW Respondents Kent George (“George) and Robinson & McElwee PLLC (“RAM”), by and through their counsel, and herein respond to the Brief filed by Petitioner Robert L. Burnworth (“Petitioner”) as follows:

**RESPONDENT’S STATEMENT OF THE CASE**

RAM and George respectfully disagree with Petitioner’s Statement of the Case, which contain inaccuracies, fails to address fully the proceedings before the Circuit Court, is replete with argument and contains scant citations to the record.<sup>1</sup> Accordingly, pursuant to Rule 10(d), W.Va.R.App.P., RAM and George submit the following as their Statement of the Case:

This appeal arises from the grant of summary judgment to Respondents by the Circuit Court of Kanawha County<sup>2</sup>, and the denial of Petitioner’s *Motion for Relief* under Rule 60(b), W.Va. R. Civ. P. The claims in the underlying action arose from the 2001 sale by Petitioner of his controlling interest in Access Documents Systems, Incorporated (“Access Documents”).

In October 2000, Petitioner sought legal representation from RAM and George for a proposed stock purchase/redemption transaction for Access Documents. (JA 5 at ¶ 5; 21 at ¶ 5) Petitioner, the President and sole shareholder of Access Documents, planned to transfer control of Access Documents to Robert Jones (“Jones”)<sup>3</sup>, who was both Petitioner’s friend and stockbroker. (JA 6 at ¶ 6; 354 at ¶3) George, an attorney and Member of RAM, agreed to

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<sup>1</sup> For example, Petitioner speculates regarding how simple a foreclosure would have been in 2006. (PB, p. 3) Petitioner never sought a foreclosure in 2006, nor is there anything in the record to suggest that Petitioner intended in 2006 to foreclose on the Deeds of Trust. Petitioner directed RAM and George to send a default letter to the debtors, which prompted continued payments on the Note up until 2009. (JA 8 at ¶22) Petitioner made no other efforts to collect against the Note until 2011 and never attempted to assert any of the remedies available to him under the transaction documents for default. *Id.*

<sup>2</sup> The Honorable Robert Chafin, Senior Status Judge, presided in the underlying action by special appointment. (JA 39)

<sup>3</sup> Petitioner chose not to reference Robert Jones or his wife, Jane Colby Jones by name in the underlying professional liability action, obliquely using the term “purchaser(s).”(JA 5-11) Petitioner did reference Colby Corporation, but then failed to take any action against Colby Corporation.

prepare documents for (1) the proposed sale of stock to Jones; (2) the redemption by the company, Access Documents, of the stock owned by Petitioner; and, (3) the implementation of the corporate strategy to effectuate the transfer of control of Access Documents to Jones. (JA 354 at ¶ 5) After months of negotiations and research, the transaction involved not a direct sale of assets to Jones, but a transfer of Petitioner’s interest in Access Documents to a corporation (created for the transaction), called ADSC Holding Company (hereinafter “ADSC Holding Co.”), with Jones’s wife, Jane Colby Jones, as the primary shareholder of ADSC Holding Co. (JA 259) In addition to a pledge against the ADSC Holding Co. stock<sup>4</sup>, the consideration to Petitioner for this transaction was (a) a sum certain at Closing (to be financed by the Joneses); (b) an employment contract with Access Documents; (c) shares in ADSC Holding Co.; and, (d) a promissory note from ADSC Holding Co. for the remaining balance owed (“the Note”). (JA 354-5 at ¶8; JA 205-266) With the exception of the Deeds of Trust, RAM drafted all of the transaction documents. Poffenbarger prepared the two (2) Deeds of Trust. (JA 6 at ¶10; 226-266) Poffenbarger presented the Deeds of Trust at Closing on August 1, 2001, disclosing for the first time the addresses of the property pledged and that one of the Deeds of Trust was from Colby Corporation (“Colby Corp.”), a company wholly owned by Jane Colby Jones. (JA 405 at ¶15) The introduction of Colby Corp., a stranger heretofore to the transaction, resulted in last minute edits to the transaction documents and a recommendation by RAM and George that the Closing be postponed—a recommendation ignored by Petitioner. (JA 406 at ¶¶ 17 and 18) The Deeds of Trust—one from the Joneses and one from Colby Corp.—contained general warranties of title and required that the Note continue to be negotiable in order for the Deeds of Trust to be enforceable. (JA 2 at ¶10; JA 205-266) Because Poffenbarger, on behalf of the Joneses and

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<sup>4</sup> The complete transaction documents, including the stock pledge (Stock Subscription Agreement), are not part of the record below, but referenced in the Guaranty Agreements. (JA 211, 219)

Colby Corp., presented the Deeds of Trust at Closing (hereinafter the “Jones Deed of Trust” and the “Colby Deed of Trust,” respectively), RAM did not have any opportunity prior to Closing to conduct a title search on any of the property pledged in the Jones and Colby Deeds of Trust—even if Petitioner asked Respondents to do so, which he did not. Both Deeds of Trust were to be second priority liens, subject to the priority given the banks that funded the cash portion of the transaction. (JA 405 at ¶ 9) On August 2, 2001, RAM delivered the two (2) Deeds of Trust to the Kanawha County Clerk’s Office for recordation. (JA 6 at ¶13)

On July 2, 2002, Petitioner released the Jones Deed of Trust, leaving the stock pledge, Joneses’ personal guaranties and the Colby Deed of Trust as security on the Note. (JA 442)

On or about August 22, 2006, Petitioner notified RAM that ADSC Holding Co. had defaulted under the Note. Petitioner asked RAM to send a default letter to ADSC Holding Co. and to the guarantors, the Joneses, which RAM did. (JA 406-7 at ¶23)<sup>5</sup> Presumptively, the default letter prompted ADSC Holding Co. and/or the Joneses to resume paying on the Note. (JA 8 at ¶22) Petitioner’s relationship with RAM ended in 2006 when he failed to pay RAM for the work conducted on his behalf in 2006. (JA 357 at ¶26)

In 2009, ADSC Holding Co. allegedly defaulted again under the Note. (JA 8 at ¶22) Petitioner retained new counsel who, in turn, retained another attorney to conduct title searches regarding the Deeds of Trust securing the Note. (JA 34-36) The title research disclosed the defects in the Colby Deed of Trust. *Id.*

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<sup>5</sup> RAM commenced preliminary title research to determine the status of the two (2) Deeds of Trust. (JA 3 at ¶ 21; ) Through this research, RAM discovered that Petitioner had released the Jones Deed of Trust and the Colby Deed of Trust was defective. In their *Motion for Summary Judgment* and *Memorandum in Support*, RAM and George contended that they notified Petitioner on September 5, 2006, that there was a problem with the Colby Deed of Trust. Petitioner did not timely challenge this contention in any *Response to the Motion for Summary Judgment* or in the Order granting summary judgment. (JA 353-368; 456)

On October 14, 2011, Petitioner filed the underlying legal malpractice action against Respondents, alleging that RAM, George and/or Poffenbarger are liable to him for damages arising from the defective Colby Deed of Trust that was secondary security to the Note. (JA 3-11) Petitioner alleged that RAM and George were negligent and breached their contract to him. *Id.* Petitioner alleged that Poffenbarger was liable for malpractice under a third-party beneficiary theory and also was liable for fraud. *Id.*

On November 14, 2011, Petitioner filed a collection action in the Circuit Court of Kanawha County, Civil Action No. 11-C-2026, against ADSC Holding Co. and the Joneses, for breach of contract, seeking the remaining balance under the Note (hereinafter the “Collection Action.”). (JA 108-131; 296)<sup>6</sup> Although Petitioner asserted claims of fraud against Poffenbarger in the legal malpractice action, Petitioner did not assert in the Collection Action fraud claims against Poffenbarger’s clients, the Joneses who presumably benefited from the alleged fraud. (JA 108-110) Petitioner also did not include Colby Corp. in the Collection Action, although the Colby Deed of Trust contained general warranties of title. *Id.*

On November 28, 2011, unaware of the Collection Action, RAM and George filed a *Motion to Dismiss*, pursuant to Rule 12(b)(6), W.Va.R.Civ., arguing that Petitioner had not sustained damages or, in the alternative, that Petitioner’s claims were barred under the applicable statute of limitations. (JA 31) RAM and George specifically argued that Petitioner had not suffered any damages as a direct and proximate result of any alleged act or omission by RAM and/or George, because Petitioner had not attempted to enforce his rights through any collection efforts against ADSC Holding Co. and/or the Joneses and had not sought to enforce his rights

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<sup>6</sup> In the underlying malpractice action, Petitioner was represented by James Lees and Kathy Brown. In the collection against ADSC Holding Company and the Joneses, Petitioner was represented by William Pepper, his counsel on this Appeal and the attorney who represented him on this matter as early as the Spring of 2009. (JA 34)

under the general warranty provisions of the Colby Deed of Trust. *Id.* Poffenbarger also filed a Motion to Dismiss, asserting that he did not owe Petitioner any duty. (JA 12-13)

On February 29, 2012, Petitioner filed a *Response in Opposition to Respondents' Motions to Dismiss*. (JA 40-48) Although RAM and George's *Motion to Dismiss* was predicated, in part, on Petitioner's failure to mitigate damages, Petitioner chose to remain silent regarding the Collection Action. *Id.*

On March 3, 2012, the Circuit Court convened a Hearing on RAM and George's *Motion to Dismiss*. During oral argument, Petitioner's counsel finally disclosed to the Court that Petitioner had filed a separate collection action. The Circuit Court denied RAM and George's *Motion to Dismiss* and announced an expedited discovery and trial schedule.<sup>7</sup> RAM and George filed their *Answer* to the Complaint on March 12, 2012, denying liability on all claims and asserting among their Affirmative Defenses that Petitioner had not sustained damages and had not enforced his rights against Colby Corp. (JA 69-89)

On April 16, 2011, RAM and George moved to consolidate the malpractice action with the Collection Action, pursuant to Rule 42, W.Va.R.Civ.P., asserting that both actions arose from the same transaction and that the parties would not be prejudiced in light of the absence of any activity in the Collection Action and limited discovery in the malpractice action. (JA 93-131) Poffenbarger, by letter from his counsel, joined in the *Motion to Consolidate*. Two (2) days later, on April 18, 2012, Petitioner filed a *Response in Opposition to the Motion to Consolidate*, asserting that the Collection Action had been (or was in the process of being) dismissed. (JA

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<sup>7</sup> During the Hearing, counsel for RAM and George orally moved to take discovery, including deposition testimony, from William Pepper and Glen Turley, who were identified as fact witnesses in the legal malpractice action. The Circuit Court granted this Motion, which was memorialized in an Order drafted and submitted to the Court by RAM and George's counsel per the directive of the Court. (JA132-137) When submitted to the Circuit Court, counsel for RAM and George requested that the Court not enter the submitted Order pending resolution of a concurrently filed *Motion to Consolidate*. *Id.*

138-140) Notwithstanding the pending *Motion to Consolidate*, the Honorable Carrie Webster, Judge of the Circuit Court of Kanawha County, entered a *Stipulation of Settlement and Order of Dismissal* (hereinafter “the Consent Order”) in the Collection Action, dated April 19, 2012 and entered by the Circuit Clerk on April 20, 2012. (JA 166-168) In the Consent Order, Petitioner obtained a judgment award against ADSC Holding Co. and the Joneses (hereinafter the “Collection Defendants”), individually and jointly, for the remaining balance owed under the Note, plus interest. *Id.* at ¶ 2.

At issue in this Appeal, the Consent Order included the following language:

[t]he entry of judgment in favor of the plaintiff [Petitioner] ... shall operate to extinguish all obligations of all the defendants under the [Promissory] Note, and any security instrument given to secure the same, and the subject Note is cancelled and merged into the judgment.

(*Id.* at ¶ 3.) [Emphasis added.]

On April 27, 2012, RAM and George filed their *Motion for Summary Judgment* and *Memorandum in Support*, predicated on the entry of the Consent Order. (JA 159-177) RAM and George argued that the intentional cancellation and extinguishment of the Note and pledged security, which included the Colby Deed of Trust, effectively rendered moot any claim asserted against RAM and/or George for any purported defect in the pledged security. RAM and George also filed a *Motion for Protective Order* for relief from pending discovery deadlines.

On May 21, 2012, Petitioner filed his *Response* to RAM and George’s *Motion for Summary Judgment*, arguing that his counsel in the Collection Action had opined that the judgment against the Collection Defendants was uncollectable. (JA 186-192) Petitioner submitted his own Affidavit regarding the collectability of the debt, rather than an Affidavit from his counsel. (JA191-192) The Affidavit failed to outline any efforts taken to collect on the judgment. *Id.* Petitioner’s *Response* did not challenge any of the factual averments in RAM and

George's Motion for *Summary Judgment*, nor did Petitioner claim that the Consent Order was ambiguous. To the contrary, Petitioner relied upon the Consent Order as the evidence of his losses. Petitioner merely contended that if his counsel was correct and the judgment uncollectable, then Respondents should be liable to him for the defects in any pledged security.

The Circuit Court convened a Hearing on May 23, 2012 on the pending motions. Immediately before the Hearing, RAM and George filed their *Reply* to Petitioner's *Response to the Motion for Summary Judgment*. (JA 196-268) In their *Reply*, RAM and George challenged the sufficiency of Petitioner's Affidavit and reasserted that Petitioner was unable to demonstrate that any alleged act or omission by RAM and/or George proximately caused his purported damages. *Id.*

Contrary to the assertions by Petitioner that the Circuit Court was confused and ignorant of the law of merger, the Circuit Court during the May 23<sup>rd</sup> Hearing took special care to elicit from Petitioner's counsel an explanation as to why Petitioner had entered into a settlement with the Collection Defendants that included the language found in Paragraph 3 of the Consent Order. (JA 439) Petitioner's counsel advised the Circuit Court that she was not part of the settlement negotiations, but understood that Petitioner, represented by other counsel (William Pepper), and the Collection Defendants, represented by their counsel (Nicholas Barth), had negotiated the terms of the Consent Order. (JA 439-440) Petitioner's counsel also was unable to respond to any of the Circuit Court's questions regarding the efforts to collect on the judgment. (JA 440-441)<sup>8</sup>

The Circuit Court expressed its opinion that the Consent Order was unique in the Court's experience. (JA 440) It appeared to the Circuit Court that, with the advice of counsel, Petitioner

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<sup>8</sup> The Circuit Court questioned whether the Collection Defendants had filed bankruptcy, what efforts were made toward wage garnishments, etc. (JA 440-41) Apparently, as of May 23<sup>rd</sup>, the only collection effort was the post-judgment deposition of Robert Jones, which was never admitted into evidence. (JA 296).

expressly gave up rights in Paragraph 3, rather than taking steps with the Consent Order to preserve his rights. *Id.* Having asked for and obtained confirmation from Petitioner’s counsel that Petitioner and the Collection Defendants were represented by competent counsel during the negotiated resolution of the Collection Action, the Circuit Court accepted the plain and unambiguous terms of the Consent Order. The Circuit Court then announced that it was granting RAM and George’s *Motion for Summary Judgment* and, upon oral motion from Poffenbarger, extended the grant of summary judgment to Poffenbarger, too. (JA 443-444)

One day after the Circuit Court granted summary judgment to Respondents, counsel for the Petitioner and the Collection Defendants in the Collection Action presented to the Honorable Carrie Webster a Corrected Stipulation of Settlement and Order of Dismissal (the “Corrected Order”), signed by the Collection Defendants, Petitioner and their respective counsel. (JA 3289-330)<sup>9</sup> The Corrected Order did not contain the language found in Paragraph 3 of the Consent Order. It also did not contain any language expressly repudiating the prior settlement agreement contained within the Consent Order and/or expressly repudiating the extinguishment of the Note and supporting security. In other words, nothing in the Corrected Order expressly preserved any rights Petitioner may have had before entry of judgment to claims arising from the Note and the Colby Deed of Trust. The Corrected Order was entered *nunc pro tunc*, effective as of April 19, 2012. *Id.*

On June 6, 2012, RAM and George tendered a proposed Judgment *Order Granting Summary Judgment to All Defendants*, reflecting the findings and conclusions from the May 23<sup>rd</sup>

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<sup>9</sup> When Petitioner presented the Corrected Order to Circuit Court, he claimed that “Judge Webster issued the original order. Now, however, whatever her belief as to the language, she has vacated that Order and put into its place a corrected order.” (JA 270) Subsequently, Petitioner admitted that Judge Webster did not enter the Corrected Order after some epiphany. Rather, counsel for Petitioner and the Collection Defendants presented the Corrected Order to Judge Webster only after and because Judge Chafin granted summary judgment to Respondents. (JA 348).

Hearing. The next day, Petitioner filed two (2) Motions: a) *Motion to Stay Consideration and Entry of Judgment Order Granting Summary Judgment to All Defendants Pending Ruling on Plaintiff's Motion for Relief*,<sup>10</sup> and, b) *Plaintiff's Motion for Relief*. (JA 269-278) Petitioner did not utilize the process afforded under Rule 24, W.Va. T.C.R., to object to the Order proffered by RAM and George. Instead, he presented to the Circuit Court the Corrected Order, noting that the Corrected Order did not contain the previously negotiated language (found at Paragraph 3 of the Consent Order) “extinguishing” and “cancelling” the Note and pledged security. Petitioner concluded that with the entry of the Corrected Order summary judgment was no longer appropriate. *Id.* Petitioner, through his counsel, apparently believed that removing the language in Paragraph 3 alone would be sufficient to persuade the Circuit Court that the Court had made an erroneous ruling during the May 23<sup>rd</sup> Hearing. RAM and George responded to the *Motion for Relief* by asserting that the request was neither proper nor warranted. RAM and George also argued that relief should be denied based on judicial estoppel and what appeared to be fraud on the Court. RAM and George asserted that Petitioner had engaged in a shell game. (JA 279-347)

During a Hearing on July 23, 2012, the Circuit Court reviewed the Corrected Order and the *Motion for Relief* and explained that Petitioner did not understand the Circuit Court’s prior ruling. (JA 446-458) The Circuit Court had been persuaded that Petitioner, who was represented in both actions by counsel, had knowingly and completely abandoned the Note and all pledged security (which included the Colby Deed of Trust) as part of a negotiated settlement with the Collection Defendants. Excluding the express extinguishment from the Corrected Order did not change the effect of the negotiated abandonment of the Note and claims arising from the Note through the judgment. Said differently, removing Paragraph 3 was not tantamount to expressly

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<sup>10</sup> The Circuit Court granted Plaintiff’s *Motion to Stay* as reflected by a separate Order. (JA374-376)

preserving the Note. The Circuit Court could not ignore the negotiated resolution, as embodied by the Consent Order, and the Court was not persuaded by the Corrected Order that Petitioner had preserved his claims. With the record before it, the Circuit Court could not re-craft either the Consent Order or the Corrected Order as Petitioner now argues should have occurred.

On July 30, 2012, RAM and George tendered to the Circuit Court a proposed Order memorializing the July 23<sup>rd</sup> Hearing. On August 3, 2012, Petitioner submitted his *Objections to the Proposed Order* (pertaining to the July 23<sup>rd</sup> Hearing) and asserted for the first time his cart-before-the-horse argument that the Consent Order was “ambiguous,” because—although Petitioner repeatedly relied upon the Consent Order before the Circuit Court—the Consent Order (negotiated and ratified by Petitioner and the Collection Defendants), purportedly did not reflect their intent. (JA 370-373) <sup>11</sup> On August 10, 2012, the Circuit Court entered the Order tendered by RAM and George and made a handwritten note on the Order that it rejected Petitioner’s written objections to the same.(JA 420-430) It is from the Order granting summary judgment to Respondents and the Order denying Petitioner relief from summary judgment that Petitioner now appeals.

### **SUMMARY OF ARGUMENT**

Under West Virginia law, summary judgment is appropriate where the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Respondents RAM and George submit that the Circuit Court’s award of summary judgment in their favor should be affirmed, because Petitioner, with the assistance of counsel, devised the Consent Order in the Collection Action, extinguishing by

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<sup>11</sup> Although Petitioner asserted that the Circuit Court misunderstood the Collection Defendants’ intent, there was no evidence presented to the Circuit Court regarding the Collection Defendants’ intent. It is equally plausible that the Collection Defendants did not care what impact the Consent Order or the Corrected Order had on Petitioner’s malpractice claims, because, as more fully argued, *infra*, both Orders ultimately protected the Colby Corp.—the company wholly owned by Jane Colby Jones.

operation of law the Note and the Colby Deed of Trust. Moreover, the Corrected Order that Petitioner submitted in the Collection Action did not “undo” the extinguishment. There are no genuine issues of material fact surrounding that extinguishment.

In order to prove his legal malpractice claim against Respondents RAM and George, Petitioner must prove three elements by a preponderance of the evidence. First, Petitioner must prove that he retained the services of RAM and George; second, he must prove that in representing him, RAM and George neglected a reasonable duty due to him; and third, he must prove that he suffered damages as a direct and proximate result of Respondents’ breach of that duty.

It is only the third of these elements that is at issue in this Appeal.<sup>12</sup> Respondents RAM and George submit, and the Circuit Court ruled, that Petitioner cannot prove, as a matter of law, that he suffered any damages whatsoever as a direct and proximate result of any breach of duty by RAM and George. Instead, all of Petitioner’s damages were directly and proximately caused by Petitioner’s own, voluntary actions in negotiating a settlement and taking a judgment (the Consent Order) in the Collection Action against the Collection Defendants,<sup>13</sup> based on the Note, without preserving claims against Colby Corp. or the Respondents.

Under clear West Virginia law, once a creditor obtains a judgment on a promissory note, the promissory note is merged into the judgment and is extinguished as an independent entity. Once the judgment is entered, the creditor’s recovery is based solely upon the judgment, not

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<sup>12</sup> In the Circuit Court, RAM and George stated that it was undisputed that there was an attorney-client relationship between Petitioner and RAM and George. Respondents reserved for future argument all issues related to any alleged breach of duty, as these allegations were not argued below. The Circuit Court ruled, and this Appeal was brought, solely on the third element, the issue of damages.

<sup>13</sup> Petitioner did not include the Colby Corp. as a defendant in the Collection Action, and did not sue the corporation separately prior to obtaining the judgment in the Collection Action. Petitioner did not include any language in the Consent Order excepting the Colby Deed of Trust from extinguishment.

upon the promissory note. The Circuit Court understood this, and was not, as Petitioner asserts, ignorant of the law. Thus, when Petitioner filed suit on the Note and obtained a consent judgment against the Collection Defendants, the Note sued upon, under the general rule of merger, was cancelled, extinguished and merged into the judgment both by operation of law and by the express language of the Consent Order. The Consent Order went further than this general rule, however, and expressly extinguished the security instruments supporting the Note.

Central to this Appeal is the effect of the Consent Order on the Colby Deed of Trust, which is at the foundation of this malpractice action and Appeal. Petitioner's legal malpractice claim against Respondents RAM and George is based on Petitioner's allegations that Respondents breached duties to Petitioner which were related to the Colby Deed of Trust. However, the extinguishment of the Note by the judgment operated to extinguish the Colby Deed of Trust prior to Petitioner's having made any attempt whatsoever to mitigate damages by collecting from Colby Corp. under the general warranty provisions of the Deed of Trust, which extinguished Petitioner's claim for damages against Respondents. This occurred in two ways.

First, as noted, the Colby Deed of Trust was extinguished by the express language of the Consent Order. Petitioner and the Collection Defendants negotiated to include specific, express language in the Consent Order extinguishing all the instruments securing the Note:

3. The entry of judgment in favor of the plaintiff pursuant to this Stipulation of Settlement and Order of Dismissal shall operate to extinguish all obligations of all the defendants under the Note, and any security instrument given to secure the same, and the subject Note is cancelled and merged into the judgment.

(JA 309,310 ¶ 3) (Emphasis added).

This language in the Consent Order, which did not expressly exempt the Colby Deed of Trust from its purview, operated as an express extinguishment of the Colby Deed of Trust.

Petitioner never challenged that the Colby Deed of Trust fell within the language “the Note, and any security instrument given to secure the same.”

Second, the Consent Order, as a judgment on the Note, triggered extinguishment under the terms of the Colby Deed of Trust. Unlike the usual deed of trust which secures the debt evidenced by a promissory note, the Colby Deed of Trust explicitly specified that it acted only as security on the negotiable Note:

THIS CONVEYANCE IS IN TRUST NEVERTHELESS TO SECURE the prompt and full payment of that certain negotiable Promissory Note executed by ADSC Holding Company, a West Virginia Corporation, to Robert Burnworth . . .

(JA 243,244) (Emphasis added).

Pursuant to this language, the Colby Deed of Trust became unenforceable under its own terms when the Note was no longer negotiable. As a result, the warranty language in the Colby Deed of Trust was enforceable by Petitioner prior to the extinguishment of the Note, but unenforceable after the Note was cancelled and extinguished through the judgment. By entering into the judgment with the Collection Defendants, Petitioner voluntarily extinguished any cause of action based on the Colby Deed of Trust. Any loss of damages was therefore caused, not by any actions of RAM and George, but by Petitioner’s own actions in extinguishing the Note and the Colby Deed of Trust.<sup>14</sup>

As the Circuit Court properly ruled, because Petitioner never attempted to obtain damages from the Colby Corp. prior to the time the Note was extinguished by the judgment in the Collection Action, Petitioner voluntarily extinguished and abandoned his claim against Colby

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<sup>14</sup> Contrary to Petitioner’s First Assignment of Error, the Circuit Court never ruled as to the evidentiary value of the Note or the security instruments. Instead, the Circuit Court ruled that Petitioner, as a matter of law, could not prove that any defect in the Colby Deed of Trust itself proximately caused Petitioner’s damages, because Petitioner never pursued any remedies available under the Colby Deed of Trust before voluntarily extinguishing it.

Corp., which in turn constituted the extinguishment and abandonment of his claim for damages against RAM and George.

This language in the Consent Order extinguishing the Note and all instruments securing it was meaningful to the Circuit Court. As reflected in the Hearing transcripts, the Consent Order demonstrated to the Circuit Court that Petitioner, with the help of his counsel, had negotiated this resolution with the Collection Defendants. Petitioner's counsel in the malpractice action confirmed this during the May 23<sup>rd</sup> Hearing.

Because Petitioner's damages, if any, were caused by Petitioner's voluntary actions in extinguishing the Note and the Colby Deed of Trust through entry of the judgment in the Collection Action, rather than by any acts or omissions by RAM or George, Respondents are entitled to summary judgment as a matter of law. The Circuit Court's ruling should be affirmed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to the criteria set forth in Rule 18(a), W.Va. R.App. P., oral argument is necessary to aid the Court in understanding and analyzing the factual and legal context of the numerous issues presented by the Petitioner's Appeal. The ten (10) minute limit provided by Rule 19, W.Va. R. App. P., provides sufficient time for argument because the assignments of error involve the application of settled law. Additionally, this case is appropriate for a *Memorandum Decision* affirming the Circuit Court's award of summary judgment in favor of these Respondents and denial of Petitioner's Motion for Relief on the grounds that there are no issues of material fact and these Respondents are entitled to judgment as a matter of settled law.

## STANDARD OF REVIEW

Under West Virginia law, this Court must use two different standards in its review of this matter. The first standard of review, the *de novo* standard, should be applied to Petitioner's first three assignments of error relating to the Circuit Court's award of summary judgment in favor of Respondents. *Painter v. Peavey*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994), *citing* *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993)

The second standard of review, the abuse of discretion standard, should be applied to Petitioner's last two assignments of error relating to the Circuit Court's denial of Petitioner's Rule 60(b) motion. Under the narrower abuse of discretion standard, this Court is limited to a review of the Order of denial itself, and not of the substance supporting the underlying judgment nor of the final judgment order. *Toler v. Shelton*, 137 W. Va. 778, 784, 204 S.E.2d 85, 89 (1974), *citing* *Hines v. Seaboard Air Line Railroad Co.*, 341 F. 2d 229, 231 (2d Cir. 1965); *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1963); *Smith v. Stone*, 308 F. 2d 15 (9th Cir. 1962); *Saenz v. Kenedy*, 178 F.2d 417 (5th Cir. 1949); *Myer v. Myer*, 209 Kan. 31, 495 P.2d 942 (1972). The *Toler* Court explained:

Accordingly, the function of the appellate court is limited to deciding whether the judge abused his discretion in ruling that sufficient grounds for disturbing the *finality* of the judgment were not shown in a timely manner.

*Id.* (emphasis by the Court), *citing* *Brennan v. Midwestern United Life Ins. Co.*, 450 F. 2d 999 (7th Cir. 1971), *cert. den.* 405 U.S. 921, 92 S. Ct. 957, 30 L. Ed. 2d 792 (1972). *See generally*, 11 Wright & Miller, Federal Practice and Procedure: Civil § 2871 (1973).

## ARGUMENTS

**I. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENTS SUMMARY JUDGMENT WHEN IT RULED THAT THE ENTRY OF A CONSENT ORDER IN THE COLLECTION ACTION OPERATED TO EXTINGUISH ALL OBLIGATIONS UNDER THE NOTE AND DEED OF TRUST UNDERLYING PETITIONER'S CAUSE OF ACTION AGAINST RESPONDENTS SUCH THAT PETITIONER WAS UNABLE TO PROVE THE ESSENTIAL ELEMENT OF DAMAGES IN HIS MALPRACTICE ACTION.**

**A. Because Petitioner Voluntarily Entered into a Consent Order with the Collection Defendants Extinguishing the Note and the Colby Deed of Trust, Petitioner Cannot Prove His Damages, If Any, Were Directly and Proximately Caused by Any Act or Omission of RAM and George, and Summary Judgment Was Appropriate.**

**1. Petitioner cannot prevail in this legal malpractice action because he cannot prove that he suffered actual damages as a direct and proximate result of a breach of duty owed to him by the Respondents.**

As this Court explained in *Calvert v. Scharf*, a legal malpractice claim such as Petitioner asserted against RAM and George requires proof by a preponderance of the evidence on three essential elements—duty, breach of duty and damages:

We have repeatedly recognized, and now expressly hold, that, generally, "in a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) the attorney's employment; (2) his[/ her] neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the [plaintiff]."

*Calvert v. Scharf*, 217 W. Va. 684, 690, 619 S.E.2d 197, 203 (2005), quoting *Keister v. Talbott*, 182 W. Va. 745, 748-49, 391 S.E.2d 895, 898-99 (1990) (citations omitted by the Court), and citing, *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 333 n.13, 547 S.E.2d 256, 271 n.13 (2001); *Armor v. Lantz*, 207 W. Va. 672, 681, 535 S.E.2d 737, 746 (2000); *McGuire v. Fitzsimmons*, 197 W. Va. 132, 136-37, 475 S.E.2d 132, 136-37 (1996).

In the Circuit Court, RAM and George never disputed the attorney-client relationship they had with Petitioner. RAM and George reserved for future argument all issues related to any alleged breach of duty. Their *Motion for Summary Judgment* concerned only the element of

damages, specifically, whether Petitioner had suffered damages and whether those damages were directly and proximately caused by any act or omission by RAM and/or George.

Under West Virginia law, damages are never presumed in a legal malpractice action. Instead, the burden is on the plaintiff to present both evidence of an actual loss sustained, and evidence that such loss was the direct and proximate result of the attorney's negligence. *Id.* at 695, 619 S.E.2d 197, 208 (2005), citing *Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990); *Harrison v. Casto*, 165 W. Va. 787, 271 S.E.2d 774 (1980). Respondents submit here, as they argued below, that Petitioner cannot prove that he has suffered an actual loss<sup>15</sup> or, if he has, that such loss was directly and proximately caused by any act or omission on the part of RAM and/or George. The Circuit Court agreed by ruling that any damages suffered by Petitioner were caused by Petitioner's own voluntary actions, and not those of these Respondents.

**2. Petitioner cannot prove that he suffered actual damages as a direct and proximate result of a breach of duty owed to him by the Respondents because he voluntarily, through his own actions in entering into a Consent Order with the Collection Defendants, extinguished his right to damages related to the Colby Deed of Trust.**

Petitioner filed this legal malpractice action against RAM and George, alleging that they (along with Poffenbarger) had been negligent and had breached their contract with him in connection with the Colby Deed of Trust used to secure the Note. It is critical to understanding the legal arguments in this Appeal that there are no allegations against the Respondents other than those arising from the Colby Deed of Trust. Colby Corp. was notably absent from both the Collection Action and the malpractice action.

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<sup>15</sup> Petitioner concedes in his brief that “[Petitioner’s] agreement with the collection action defendants, as reduced to judgment, may or may not lead to full payment . . . .” (PB 6).

- a. **Prior to the entry of the Consent Order, Petitioner failed to attempt to collect on the general warranty of title contained in the Colby Deed of Trust or in any other way obtain appropriate damages from Colby Corp.**

Petitioner claims to have suffered damages in 2006 when he was unable to foreclose upon certain pledged property using the Colby Deed of Trust.

Plaintiff alleges that he has sustained substantial damages proximately caused by these defendants. The promissory note was supposed to be a secured note, at least to the extent of the considerable value of the Kanawha City commercial building.<sup>16</sup> Collecting on a secured note should have been simple and effective in 2006 upon the initial default. A foreclosure would have taken place, the property would have been sold, and the net proceeds would have been paid to Burnworth to apply to the note. But none of this occurred because, unbeknownst to Burnworth at the time, the deed of trust was invalid and did not secure the repayment of the note because it was not a conveyance by the owners of the property.

(PB 3)(Footnote added)

However, Petitioner has stated unequivocally that the Collection Defendants resumed payment on the Note in 2006 after receiving a default notice and he did not learn of the defect in the Deed of Trust until October of 2009. (JA 9 ¶22) Petitioner’s decision not to foreclose in 2006, therefore, was unrelated to any “unknown” defects in the Colby Deed of Trust.

In his Brief, Petitioner set forth his other “attempts” at collecting damages from the Collection Defendants, stating that he, at all times, “has proceeded properly under the circumstances.” (PB 6) Petitioner describes his actions as follows:

When the buyer of [Petitioner’s] business [ADSC Holding Co.] defaulted on the note, [Petitioner] first sought to foreclose under a deed of trust tendered by [ADSC Holding Co.] to secure payment of the purchase price. When Burnworth realized that he in fact had no such security – [Colby Corp.] the grantor of the deed of trust, did not own the property – and that the lack of security was caused by the lawyers who had worked on the 2001 sale of the business [Respondents], he sued the [Respondents] in October 2011.

*Id.*

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<sup>16</sup> Petitioner’s *Complaint* in the malpractice action estimates the value of the building to be at least \$640,000.00. (JA 5-11, 9 at ¶33)

Petitioner initiated his malpractice action prior to filing the Collection Action and in both actions completely ignored Colby Corp. and the language of the Colby Deed of Trust.<sup>17</sup> Missing from the foregoing paragraph from Petitioner's brief are Petitioner's other possible actions. The Colby Deed of Trust was a general warranty deed; title to the property was warranted by not just one, but two parties, as follows:

5. Warranty of Title: Grantor [Colby Corp.] represents, warrants and covenants to the Trustees and Lender that Borrower [ADSC Holding Co.] has: . . . (iii) will warrant generally the title to the Property; . . . . .

(JA 243,248 ¶ 5).

Despite this provision, Petitioner made no attempt to sue either the Grantor (the Colby Corp.), or the Borrower (ADSC Holding Co.), to enforce the general warranty of title under the Colby Deed of Trust.

Petitioner's recitation of how he "proceed[ed] properly under the circumstances" continues:

[A] month later with a different lawyer [Petitioner] attempted to mitigate his damages by suing the corporate buyer [ADSC Holding Co.] and individual guarantors [Robert Jones and Jane Jones] on the note. . . . Burnworth quickly came to an agreement with the defendants in the collection action [ADSC Holding Co., Robert Jones and Jane Colby Jones] and reduced the contract dispute to a consent order . . . .

(PB 6). [Emphasis added.]

Petitioner's efforts were half-hearted and poorly considered. First, although Petitioner sued on the Note, he made no attempt to mitigate any of the damages related to the Colby Deed of Trust by joining Colby Corp. in the Collection Action or by bringing a separate lawsuit against Colby Corp. Second, Petitioner made no attempt to mitigate any of his alleged damages

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<sup>17</sup> Repeatedly below, RAM and George pointed out that Petitioner had not taken any action against Colby Corp. under the general warranty provisions.(JA 22; 32; 81-2; and 174). Petitioner never addressed the possibility of this avenue of recovery.

for fraud<sup>18</sup> by including a cause of action for fraud in the Collection Action, or by bringing a separate action for fraud against Colby Corp.

In sum, as of the time the Consent Order was entered into, Petitioner had made no attempt whatsoever to collect upon the debt owed let alone identify, quantify, or provide any evidence to the Circuit Court of actual damages arising from the Colby Deed of Trust.

- b. Petitioner voluntarily, through his own actions in entering into a Consent Order with the Collection Defendants, has now extinguished his right to damages related to the Colby Deed of Trust.**

Because Petitioner had made no attempt whatsoever to identify, quantify, or provide any evidence to the Circuit Court of actual damages arising from the Colby Deed of Trust prior to the date of entry of the Consent Order, the deciding issue in this case is whether the entry of the Consent Order operated to cut off, cancel or extinguish the Colby Deed of Trust and any damages that could arise therefrom.

Respondents submit that the Colby Deed of Trust has been extinguished by the judgment in the Collection Action for two reasons: First, the clear and unambiguous language of the Consent Order states that it is extinguished. Second, even without the Consent Order's extinguishing language, the clear language of the Colby Deed of Trust<sup>19</sup> states that it no longer has any effect.

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<sup>18</sup> Petitioner only alleged fraud against Poffenbarger. Inexplicably, Petitioner made no effort to allege fraud against the Joneses who were the only parties who could have derived any benefit from a fraud against the Petitioner, or against Colby Corp., whose President, Jane Colby Jones, tendered the fraudulent Deed of Trust at Closing.

<sup>19</sup> The Notes and the Deeds of Trust were part of the record before the Circuit Court. (JA205-266)

- i. **The Note and Colby Deed of Trust are admissible as historical documents; however, the Note and Colby Deed of Trust are no longer negotiable, enforceable instruments.**

Petitioner misconstrues the Circuit Court’s ruling when Petitioner writes in his First Assignment of Error that the Circuit Court ruled “that the note and deed of trust were no longer available as evidence in this malpractice action and that Burnworth was, therefore, unable to prove the essential element of damages in his malpractice action.”( PB 1) (Emphasis added.)<sup>20</sup> In his Summary of Argument, Petitioner argues that the Consent Order could not “eradicate such documents as historical facts.” (PB 5). Later, Petitioner argues again that “the evidence . . . did not somehow vanish.” *Id.*

RAM and George agree with Petitioner that the historical documents referred to— namely, the Note and the Colby Deed of Trust-- have not mysteriously vanished and certainly are admissible as evidence as to what agreements were entered into on August 1, 2001. Nor, indeed, is there any statement by the Circuit Court to suggest that the Court ruled as Petitioner contends. Although historical documents, the Note and the Colby Deed of Trust have no effective existence as fully functioning, enforceable, negotiable instruments, and are not admissible to such effect. It is this second meaning to which the Circuit Court referred in the Order entered July 23, 2012, when it used the phrase “non-existent Promissory Note.” (JA 336, ¶ 13). It is also this second meaning to which the Circuit Court referred in the Order entered August 15, 2012, when it used the phrase “the evidentiary predicate to [Petitioner’s] damages claims.” (JA 385, ¶ 7).

To the extent Petitioner’s First Assignment of Error is based on his belief that the Circuit Court’s ruling referred to the admissibility of the Note and Colby Deed of Trust as historical

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<sup>20</sup> Petitioner repeats this concept in his Second and Third Assignments of Error, in which he refers to the “eliminat[ion] of the documents as necessary ‘evidentiary predicates.’ ” *Id.* [Emphasis added.]

documents, Petitioner's Assignment of Error has no merit and the Circuit Court's award of summary judgment in favor of these Respondents should be affirmed.

- ii. **The Circuit Court correctly interpreted the clear, unambiguous express language of the Consent Order as extinguishing the Note and the instruments securing it, including the Colby Deed of Trust.**

The Consent Order in the Collection Action contains language that specifically extinguishes the security instruments, to-wit:

The entry of judgment in favor of the plaintiff [Petitioner] pursuant to this Stipulation of Settlement and Order of Dismissal shall operate to extinguish all obligations of the defendants under the Note, and any security instrument given to secure the same, and the subject Note is cancelled and merged into the judgment.

(JA 183,184 at ¶3) (Emphasis added)

There is no question that the Colby Deed of Trust is a "security instrument given to secure the Note," and it is therefore extinguished by the above quoted language. Because the recovery of damages under the Colby Deed of Trust was voluntarily abandoned by Petitioner when he extinguished the Deed of Trust, Petitioner cannot now seek damages from RAM and George in connection with this same Deed of Trust.

Additionally, the clear, unambiguous language of the Colby Deed of Trust provides that the Colby Deed of Trust can only be enforced while the Note is negotiable:

THIS CONVEYANCE IS IN TRUST NEVERTHELESS to secure the prompt and full payment of that certain negotiable Promissory Note executed by ASDC Holding Company. . . . A true and exact copy of the Note is attached hereto as Exhibit "B", is made a part hereof and incorporated hereby reference for all pertinent purposes.

(JA 244) (Emphasis added).

The Colby Deed of Trust clearly states that it has been given to secure a "negotiable" promissory note. After the Consent Order was entered the Note was no longer negotiable. The Note had "lost its vitality; it ha[d] expended its force and effect. All its power to sustain rights

and enforce liabilities ha[d] terminated in the judgment.” *Greenbrier Valley Bank v. Holt*, 114 W. Va. 363, 364-65, 171 S.E. 906, 907 (1933).

Because Petitioner voluntarily abandoned all rights to recover damages under the Colby Deed of Trust when he agreed to resolve the Collection Action via the Consent Order and extinguished both the Note and the Colby Deed of Trust, Petitioner cannot now seek damages from RAM and George in connection with this same Deed of Trust. RAM and George respectfully submit that the Circuit court ruled correctly when it held that Petitioner extinguished his own legal malpractice cause of action. The Circuit Court’s ruling and grant of summary judgment to Respondents should be affirmed.

**II. THE CIRCUIT COURT RULED CORRECTLY IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, BECAUSE THE PETITIONER HAS NOT PROVEN THAT THE CONSENT ORDER IN THE COLLECTION ACTION IS AMBIGUOUS.**

**A. The Circuit Court’s Ruling Should Not Be Overturned on Petitioner’s Allegation That the Consent Order Is Ambiguous.**

The Circuit Court ruled correctly when it granted Respondents summary judgment after holding that Petitioner extinguished his own cause of action. The Circuit Court’s ruling should be affirmed, first, because the issue of ambiguity is not outcome-determinative; and second, because the Consent Order is not ambiguous.

**1. The Circuit Court’s ruling should not be overturned on the issue of the alleged ambiguity of the Consent Order, because the alleged ambiguity is not outcome-determinative.**

It is not necessary to reach the issue of the alleged ambiguity of the Consent Order because this alleged ambiguity is not outcome-determinative. The same result would be reached whether the questioned language is interpreted to operate as it expressly states (to extinguish “the

Note and any security instrument given to secure” the Note), or whether it is interpreted under Petitioner’s stated intent to restate the West Virginia law of merger.

Petitioner’s *Notice of Appeal* (JA 389-431, 398) contains a clear and simple statement of what he alleges the parties intended by the contested language:

The parties to the promissory note case [Collection Action] had every right to include in their agreed order a simple statement of the law of merger, i.e. that the judgment and note were merged into a judgment order and that there is now an enforceable judgment which supercedes the note

(JA 398) Petitioner’s interpretation, then, turns on the application of long-settled West Virginia law regarding judgments taken on promissory notes to damages in a legal malpractice action.

Under clear West Virginia law, once a creditor obtains a judgment on a promissory note, the promissory note is merged into the judgment and is extinguished as an independent entity. As early as 1933, the West Virginia Supreme Court of Appeals wrote:

[W]e are not here dealing with the note; it is the judgment alone which must be considered. The note became merged in the judgment. "The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It 'is drowned in the judgment', and must henceforth be regarded as *functus officio*." 2 Freeman on Judgments (5th Ed.), p. 1166. In agreement: 15 Ruling Case Law, p. 792; 34 Corpus Juris, p. 752; *Beazley v. Sims*, 81 Va. 644.

*Greenbrier Valley Bank, Supra*, 114 W. Va. at 364-65.

Clearly, then, in West Virginia, from the time a judgment is entered in a lawsuit seeking to collect upon a promissory note, the creditor’s recovery must be based on the judgment, not on the promissory note and its security instruments. Thus, when Petitioner filed suit on the Note in the Collection Action and obtained a judgment against ADSC Holding Co. and its guarantors, Robert Jones and Jane Colby Jones, the Note was extinguished and merged into the judgment. Petitioner’s remedies were no longer on the Note, but solely on the judgment.

Petitioner's claims against RAM and George, however, are not founded on damages caused by the Collection Defendants. Petitioner's claims against RAM and George are founded on damages allegedly related to the Colby Deed of Trust. However, Petitioner cannot prove what amount, if any, of his alleged damages are related to the Colby Deed of Trust if he voluntarily rendered impossible for the damages to be recouped from Colby Corp., as would be the case if the merger of the Note into the judgment extinguished the Colby Deed of Trust. Petitioner can no longer be heard to complain that any alleged legal malpractice on the part of RAM or George caused his damages; Petitioner caused his own damages by his failure to collect from Colby Corp. prior to the extinguishment of the Note.

The issue, therefore, is whether the Colby Deed of Trust has been extinguished by the judgment in the Collection Action. RAM and George submit that because of the unique nature of the Colby Deed of Trust, it did not survive the merger, and Petitioner no longer has any cause of action against these Respondents.

Clearly, the Note merged into the judgment in the Collection Action and was extinguished by operation of law, not merely by operation of certain language contained in the Consent Order. Thus, whether the Circuit Court's interpretation or Petitioner's interpretation controls, the result is the same. For this reason, Petitioner's lengthy arguments on whether the language extinguishing the Note and the security instruments truly manifested the intent of the parties are immaterial. One way or the other, the enforceability of the Note was extinguished by the judgment, which in turn, based on language in the Colby Deed of Trust, caused the extinguishment of said Deed of Trust. The extinguishment of the Colby Deed of Trust prior to Petitioner's making any attempt to collect under the Deed of Trust's warranty provisions

rendered Petitioner's inability to collect damages entirely his own fault and not the fault of RAM and George.

Because the issue of ambiguity of the Consent Order makes no difference to the final determination of the Respondents' motion for summary judgment, this Court need not consider it on appeal. Where this Court disposes of an issue on certain grounds it need not consider other contentions. *See W.Va.Dept.of Health and Human Resources, ex rel. Wright*, 197 W. Va. 468, 471, 475 S.E.2d 560, 563 (1996) ("Because we dispose of this case on other grounds, we do not address these contentions"). RAM and George respectfully submit that the Circuit Court ruled correctly when it held that Petitioner extinguished his own cause of action by entering into the Consent Order. The Circuit Court's grant of summary judgment to Respondents should be affirmed.

## **2. The Consent Order is not ambiguous.**

Although Petitioner oft repeats in his Brief that the Consent Order is ambiguous, saying so does not make it so. Petitioner provides no reasoned argument specifying precisely what language, what phraseology, or what punctuation creates an ambiguity that could be misinterpreted in the Consent Order. Instead, Petitioner's argument appears to be that, because the clear language of the Consent Order does not give him the result he wanted, that language must be ambiguous.

West Virginia law, however, does not agree. This Court has held that "Agreements are not necessarily ambiguous because the parties disagree as to the meaning of the language of the agreement." *Orteza v. Monongalia County General Hospital*, 173 W. Va. 461, 464, 318 S.E.2d 40, 43 (1984), *quoting Richardson v. Econo-Travel Motor Hotel Corp.*, 553 F. Supp. 320 (E.D. Va. 1982). This Court also has ruled that, "Where the terms of a contract are clear and

unambiguous, they must be applied and not construed." *Orteza*, at 464, 318 S.E.2d at 43, *citing Bethlehem Mines Corporation v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

Here, the clear language of the Consent Order states:

The entry of judgment in favor of the plaintiff [Petitioner] pursuant to this Stipulation of Settlement and Order of Dismissal shall operate to extinguish all obligations of the defendants under the Note, and any security instrument given to secure the same, and the subject Note is cancelled and merged into the judgment.

(JA 183,184 ¶3) [Emphasis added.]

There can truly be no argument as to the meaning of the clear language of the Consent Order. It should not be overlooked that both Petitioner and the Collection Defendants were represented by counsel in the crafting of the Consent Order and the presentation of the same for entry in the Collection Action. The same language this is now alleged to be ambiguous was created or ratified by Petitioner's counsel in the Collection Action.

There are two clauses in the Note, the clear language of either of which is alone sufficient to uphold the Circuit Court's award of summary judgment. The clear language of the first clause in the Consent Order states "[t]he entry of judgment in favor of the plaintiff . . . shall operate to extinguish . . . any security instrument given to secure the [Note]." The clear language of this statement provides that the Consent Order operates to extinguish the Colby Deed of Trust. Petitioner argues that this was not the intent of the parties, but no contrary intent is indicated anywhere in the document. Petitioner's argument for the ambiguity of this clause cannot prevail.

The clear language of the second clause of the Consent Order states "the subject Note is cancelled and merged into the judgment." Petitioner argues that this language correctly states the law of West Virginia that upon entry of a judgment a promissory note is merged into the judgment and loses its vitality. (PB 10) Respondents agree. Based on this language alone,

without resort to any other language in the Consent Order, the Colby Deed of Trust ceases to be enforceable, as there is no longer a “negotiable” Note to secure.

Because there is clearly no ambiguity on the face of the Consent Order, Petitioner cannot now create ambiguity by referring to the unexpressed intent of the parties. RAM and George respectfully submit that the Circuit Court ruled correctly when it held that Petitioner extinguished his own cause of action in the clear language of the Consent Order. The Circuit Court’s grant of summary judgment in favor of the Respondents should be affirmed.

**III. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT, BECAUSE PETITIONER HAS NOT PROVEN THAT THE CONSENT ORDER WAS THE RESULT OF THE MUTUAL MISTAKE OF THE PARTIES.**

**A. The Circuit Court’s Ruling Should Not Be Overturned on Petitioner’s Unsupported Claims That the Contested Language in the Consent Order Was the Result of the Mutual Mistake of the Parties.**

**1. Because Petitioner never raised the issue of mutual mistake below, this Court should not entertain the issue on appeal.**

Petitioner raises for the first time on appeal the issue of mutual mistake. It is well-settled that this Honorable Court will not entertain on appeal a non-jurisdictional argument which was not raised below in the trial court. *Frederick Mgmt. Co., L.L.C. v. City Na’l. Bank of W.Va.*, 228 W. Va. 550, 723 S.E.2d 277 (2010), *citing, inter alia, Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997) (“We frequently have held that issues which do not relate to jurisdictional matters and ... not ...raised before the circuit court will not be considered for the first time on appeal....”) *See also, Trent v. Cook*, 198 W.Va. 601, 602, 482 S.E.2d 218, 219 (1996) (“The Supreme Court of Appeals is limited in its authority to resolve assignments of non-jurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review”) and *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) (“Our general rule is that

non-jurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered").

It is clear from a review of the record that Petitioner never argued the issue of mutual mistake in the Circuit Court. When the Consent Order was being discussed at the Hearing on May 23, 2012, Petitioner did not claim that a mutual mistake had been made by the parties to the agreement. In fact, the only mention of the concept of "mutual mistake" was made by Respondent's counsel, when he reminded the Circuit Court that Petitioner had not raised the argument in the Corrected Order:

Mr. Farrell: There is nothing in the new Paragraph 3 that says we repudiate and we were under duress, we had a mutual mistake of fact, we had a disability, or anything else that induced us to say to each other that we are extinguishing these underlying documents that form the basis of this legal malpractice order.

(JA 452-53)

Because the issue of mutual mistake as to the Consent Order was never raised in the Circuit Court, Petitioner cannot now seek to raise the issue on appeal. RAM and George respectfully submit that the Circuit Court ruled correctly when it held that Petitioner extinguished his own cause of action in the clear language of the Consent Order. The Circuit Court's award of summary judgment in favor of Respondents should be affirmed.

**2. Because Petitioner Has Not Attempted to Void the Consent Order, No Reinterpretation of the Consent Order Should Be Made Based on the Alleged Mutual Mistake.**

Petitioner also argues that because the language in the Note was so obviously a "mistake," the Circuit Court should have reformed the agreement and "interpreted [it] to reflect the obvious intent of the parties." (PB 15) However, had there been a mutual mistake of fact, Petitioner could have and should have brought such mistake to the attention of the Circuit Court rather than passively expecting the Circuit Court to infer the mistake. Instead, Petitioner merely

provides authority to this Court for the proposition that where there has been a mutual mistake, the contract is voidable or reformable. *See McGinnis v. Cayton*, 173 W.Va. 102, 105, 312 S.E.2d 765, 769 (1984).

Petitioner's solution, however, is to reform the Consent Order so that it is consistent with the parties interpretation of West Virginia's law relating to the doctrine of merger. Yet, as discussed *supra*, even this interpretation leads to the same result with regard to the extinguishment of the Note and the Colby Deed of Trust.

Because there is no clearly articulated mutual mistake of fact on the face of the Consent Order and because even the judicial reformation of the agreement Petitioner now seeks will not change the outcome of this matter, RAM and George respectfully submit that the Circuit Court ruled correctly when it held that Petitioner extinguished his own cause of action in the clear language of the Consent Order. The Circuit Court's ruling should be affirmed.

**IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 60(b) MOTION BECAUSE BOTH THE CONSENT ORDER AND THE CORRECTED ORDER EXTINGUISHED THE VIABILITY OF THE COLBY DEED OF TRUST, SUCH THAT UNDER EITHER VERSION OF THE CONSENT ORDER, PETITIONER REMAINED UNABLE TO PROVE THE ESSENTIAL ELEMENT OF DAMAGES IN HIS MALPRACTICE ACTION AGAINST RESPONDENTS.**

**A. Petitioner's Corrected Order Was Ineffective as a Matter of Law to Restore the Note, the Colby Deed of Trust, or Petitioner's Action Against Respondents.**

In an attempt to avoid the consequences of the Consent Order, Petitioner and the Collection Defendants reformulated the Consent Order and submitted another Order (the Corrected Order), for entry *nunc pro tunc* in the Collection Action. The Corrected Order omitted the extinguishment language contained at Paragraph 3 of the Consent Order.

However, mere removal of the extinguishment language in the Consent Order was not sufficient to revive the Note and the Colby Deed of Trust or otherwise permit them to survive entry of the Corrected Order for two reasons. First, Petitioner made no representation to the Circuit Court and presented no evidence that the voluntary and negotiated settlement agreement contained within the Consent Order was not binding and enforceable. Second, the Corrected Order did not state in clear, unambiguous and unequivocal terms that the Note (and, by extension, the Colby Deed of Trust) would survive the merger of the entry of judgment.

- 1. Because there is no evidence that the negotiated settlement agreement between Petitioner and the Collection Defendants is not binding and enforceable, the Note and the Colby Deed of Trust are extinguished by the express language therein.**

At the July 23<sup>rd</sup> Hearing, the Circuit Court focused on the fact that although the Corrected Order omitted the extinguishment language previously contained in Paragraph 3 of the Consent Order, there was no language specifically repudiating that paragraph in the Corrected Order:

THE COURT:           It's taken out of the Order. It's not taken out of what these people agreed to at one time....

I have reconsidered and upon reconsideration, I am still of the opinion that there's nothing that has occurred since the time of this Court's prior ruling which changes the facts of this case, and I will enter the Order that was submitted.

(JA 446-58, 455-56)

The Circuit Court's *Order Denying Plaintiff's Motion for Relief from Summary Judgment Previously Granted to All Defendants* (JA 420-31) stated the Court's position as follows:

4. Burnworth has not presented any evidence that the voluntary and negotiated settlement he entered into with ADSC Holding Company and the Joneses contained within the [Consent Order] was not a binding agreement. The [Corrected Order] contains no findings to suggest that the substantive agreement reached by Burnworth, ADSC Holding Company and the Joneses reflected in the [Consent Order] is not binding. Moreover, Burnworth's request that this Court interpret the [Corrected Order] as changing the substantive rights of the parties,

rather than merely correcting a clerical error, is inconsistent with West Virginia law. *See Barber v. Barber*, 195 W.Va. 38, 464 S.E.2d 358 (1995).

(JA 426-27)

As the Circuit Court noted, Petitioner's interpretation of the *nunc pro tunc* Corrected Order as revitalizing the Note and the instruments securing it is clearly inappropriate under West Virginia law. In fact, it is highly likely that, under Petitioner's interpretation, the Corrected Order is invalid. The *Barber* Court cited by the Circuit Court quoted Syllabus Point 3 of *State ex rel. Palumbo v. County Court of Kanawha County* as holding:

A *nunc pro tunc* order must be based on some memorandum on the records relating back to the time it is to be effective and such order cannot be entered if the rights of the parties may be adversely affected thereby.

*Barber v. Barber*, 195 W.Va. 38, 42, 464 S.E.2d 358, 362 (1995), quoting *State ex rel. Palumbo v. County Court of Kanawha County*, 151 W.Va. 61, 68, 150 S.E.2d 887, 892 (1966), overruled in part on other grounds by *Qualls v. Bailey*, 152 W.Va. 385, 164 S.E.2d 421 (1968), and reinstated by *State ex rel. Smoleski v. County Court*, 153 W.Va. 21, 166 S.E.2d 777 (1969).

Petitioner's Rule 60(b) Motion was submitted with only one exhibit: the Corrected Order. (JA 269-75) Petitioner provided no documentation specifically repudiating the extinguishment provision in the Consent Order, and certainly no documentation showing that the purported repudiation took place on April 19, 2012, the day after the Consent Order was entered.<sup>21</sup> Yet, such evidence of a memorandum on the record relating back to April 19, 2012, the effective date of the Corrected Order, is required. *See, generally, Cameron v. Cameron*, 105 W.Va. 621, 625, 143 S.E.2d 349, 351 (1928). Without this documentation, it was fully within the sound discretion of the Circuit Court to interpret the Corrected Order as the correction of a clerical error.

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<sup>21</sup> Although the Consent Order bears the date of April 19, 2012, it was not entered until April 20, 2012. (JA 296, 302-04). *See* Rule 79, W.Va. R. Civ. P., and *Syl. Pt. 5, State v. Mason*, 157 W.Va. 923, 205 S.E.2d 819 (1974).

Additionally, as previously stated, under West Virginia law, the *nunc pro tunc* Corrected Order could not validly provide for adverse consequences to the Collection Defendants. *See generally, Baker v. Gaskins*, 125 W.Va. 326, 328, 24 S.E.2d 277, 278 (1943). Petitioner did not dispute in the record before the Circuit Court that the grantor of the Deed of Trust at issue, the Colby Corp., was a wholly owned corporation of Collection Defendant Jane Colby Jones. (JA 355 at ¶ 15) Petitioner concedes in his Brief that the language removed from the Corrected Order was language requested by the Collection Defendants' counsel. (PB 4) Revitalizing the Colby Deed of Trust as Petitioner now argues the Circuit Court should have done, without any support on the record, would have been inconsistent with the law and facts.

Under West Virginia law it is clear that the same principles of law apply to the interpretation and construction of contracts as apply to the interpretation of statutes. *Meadows v. Employers' Fire Ins. Co.*, 171 W. Va. 337, 339, 298 S.E.2d 874, 876 (1982) ("the general principles of construction apply alike to statutes and contracts"). It is well-settled that, in this state, "courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided. . . ." *Raleigh County Construction Co. v. Amere Gas Utilities Co.*, 110 W. Va. 291, 295-96, 158 S.E. 161, 163 (1931). Similarly, where an interpretation of a *nunc pro tunc* Order would render it void, it is within the Circuit Court's sound discretion to interpret it in such a way that the Order remains valid on its face.

It was fully within the sound discretion of the Circuit Court to interpret the change incorporated into the Corrected Order as simply the correction of a clerical error in order to protect the validity of the Corrected Order. Because the Circuit Court's interpretation results in the original negotiated settlement agreement between Petitioner and the Collection Defendants

remaining undisturbed and fully enforceable, the Note and the Colby Deed of Trust are extinguished. Petitioner is left with no cause of action against these Respondents. Summary Judgment in favor of these Respondents is therefore appropriate and the Circuit Court's Order should be affirmed.

**2. Even if the underlying settlement agreement was modified or repudiated, the Note and the Colby Deed of Trust are extinguished by operation of law because Petitioner failed to include in the Corrected Order clear, unambiguous and unequivocal language providing that the Note survived the entry of judgment.**

Even if this Court should find, notwithstanding Respondents' argument *supra*, that the Corrected Order is evidence that Petitioner and the Collection Defendants modified the underlying settlement agreement to eliminate the express extinguishment provisions, RAM and George submit that the result is not as simplistic as Petitioner's argument suggests. Because Petitioner and the Collection Defendants did not state in clear, unambiguous and unequivocal language that they intended the viability of the Note to survive the entry of judgment upon it, the Note merged with the judgment by operation of law.

Where a cause of action is to survive a judgment, in whole or in part, that survival must be expressly stated in the contract. For example, the United States District Court for the District of Colorado held that when parties contract in contradiction to the general rule of merger, they must use "clear, unambiguous and unequivocal language" to do so. *HICA Educ. Loan Corp. v. Perkins*, 2012 U.S. Dist. LEXIS 105622 1, 5 (D. Colo. July 25, 2012). In *HICA*, because the parties' agreement lacked such clear and unambiguous language, the District Court enforced the general rule of merger. *Id.*, citing, *In re Riebesell*, 586 F.3d 782, 794 (10<sup>th</sup> Cir. 2009); *Society of Lloyd's v. Reinhart*, 402 F.3d 982, 1004 (10<sup>th</sup> Cir. 2005). *Accord*, *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96 (2d Cir. 2004); *Andersen v. DHL Ret. Pension Plan*, 2012 U.S. Dist.

LEXIS 157805 (W.D. Wash Nov. 2, 2012); *Chesapeake Fifth Ave. Partners, LLC v. Sommerset Walnut Hill, LLC*, 2009 U.S. Dist.LEXIS 39097 (D.Va. 2009); *Banque Nationale de Paris v. 1567 Broadway Ownership Assoc.*, 248 A.D.2d 154, 669 N.Y.S.2d 568 (N.Y. App. Div. 1<sup>st</sup> Dept. 1998); *Whitehurst v. Camp*, 899 So. 2d 679 (Fla. 1997).

As discussed *supra*, at the July 23<sup>rd</sup> Hearing, the Circuit Court focused on the fact that while the Corrected Order did not contain the extinguishment language contained in the Consent Order, there also was no clear, unambiguous and unequivocal language concerning the survival and continued enforceability of the Note. Because Petitioner did not satisfy the requirement that any interest in a cause of action intended to survive the merger into the judgment must be expressly contained in the contract in clear, unambiguous and unequivocal language, the Corrected Order operated as a matter of law to extinguish the Note and merged it into the judgment, rendering the Note itself non-negotiable. As discussed *supra*, because the language in the Colby Deed of Trust provides that it secures only “a negotiable” Note, the Colby Deed of Trust is also extinguished.

The result reached under the Corrected Order, therefore, is no different from the result under the Consent Order. Even if Petitioner’s Rule 60(b) Motion were granted, the result [the extinguishment of the Note and, by extension, the extinguishment of a) the Colby Deed of Trust and b) Petitioner’s cause of action against these Respondents] would be the same. West Virginia law provides that it is not necessary for this Court to reverse the Circuit Court’s denial of Petitioner’s Rule 60(b) Motion just to have Petitioner fail on the merits:

[W]here a claim is absolutely without merit, neither a reviewing court nor a trial court should engage in a fruitless venture to vacate a judgment by reason of procedural defects merely to confront a substantive rule which mandates a denial of movant’s underlying action.

*Toler v. Shelton* at 786, 304 S.E.2d at 90. Because Petitioner cannot prevail under either the Consent Order or the Corrected Order, the Circuit Court's denial of Petitioner's Rule 60(b) Motion was correctly within its sound discretion.

RAM and George respectfully submit that the Circuit Court exercised its sound discretion when it held that Petitioner extinguished his own cause of action under (1) the clear language of the Consent Order and underlying settlement agreement, and (2) as a matter of law, under the Corrected Order. The Circuit Court's ruling denying relief to Petitioner under Rule 60(b), W.Va. R. Civ. P., should be affirmed.

V. **THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 60(b) MOTION ON THE GROUNDS OF JUDICIAL ESTOPPEL, BECAUSE PETITIONER PROFFERED THE ORDER TO THE COURT, AND HAD RELIED ON IT AT LEAST TWICE.**

A. **The Circuit Court Did Not Abuse its Discretion in Denying Petitioner's Rule 60(b) Motion.**

As has been set forth clearly in this Response, there is no difference in the result of the issues in this Appeal, whether they are analyzed under the Consent Order or the Corrected Order. Under either analysis – under the express extinguishment language found in the Consent Order or under the operation of law as appropriate under the Corrected Order – RAM and George are entitled to summary judgment in their favor. There is therefore no reason to disturb the Circuit Court's sound exercise of discretion in this matter. The Circuit Court's Order denying Petitioner Relief under Rule 60(b) should be affirmed.

1. **The Circuit Court's ruling should be affirmed on the issue of the judicial estoppel, because the judicial estoppel issue is not outcome-determinative.**

As previously argued *supra*, there is no difference in the result of this matter under the Consent Order or the Corrected Order. For this reason, Petitioner's lengthy arguments on

whether or not the Circuit Court inappropriately used judicial estoppel as a mechanism to enforce the “wrong” judgment are immaterial. Either the Colby Deed of Trust was extinguished by the express language in Paragraph 3 of the Consent Order, or it was extinguished as a matter of law by merger of the Note into the judgment. The extinguishment of the Colby Deed of Trust prior to Petitioner’s making any attempt to collect under the Deed of Trust’s warranty provisions, rendered Petitioner’s inability to collect damages entirely his own fault, and not the fault of RAM and George.

Because the issue of ambiguity of the Consent Order makes no difference to the final determination of the Respondents’ *Motion for Summary Judgment*, this Court need not consider it on appeal. Where the Court disposes of an issue on certain grounds it need not consider other contentions. *See W.Va. Dept.of Health and Human Res., ex rel. Brenda Wright, supra.* RAM and George respectfully submit that the Circuit Court ruled correctly when it held that Petitioner extinguished his own cause of action when he voluntarily and with assistance of counsel entered into the Consent Order with the Collection Defendants. The Circuit Court’s denial of relief to Petitioner was appropriate and within the Court’s sound discretion, and, therefore, should be affirmed.

**2. Because the Petitioner proffered the Consent Order to the Circuit Court and relied upon it at least twice, judicial estoppel was appropriate.**

Petitioner is judicially estopped from taking inconsistent positions with regard to the Consent Order. As this Court recently stated in a case involving a Public Service Commission Order:

[Plaintiff] has asserted inconsistent positions regarding the PSC's May final order — first requesting that the PSC deny the petitions for reconsideration and enforce that order, then appealing the order to this Court asking that it be reversed. Our law is clear that [plaintiff] is judicially estopped from challenging the May final order.

*Larry V. Faircloth Realty, Inc. v. Pub. Serv. Comm'n of W. Va.*, 2013 W.Va. LEXIS 37 at 1, 15 (W. Va. Jan. 24, 2013).

Here, Petitioner has taken equally inconsistent positions with regards to the Consent Order. First, Petitioner bargained and negotiated, with the assistance of counsel, for specific, unique, clear, and unambiguous language extinguishing the Note and the security instruments, including the Colby Deed of Trust, supporting it. Later, when that effort did not yield the result he had hoped for, Petitioner attempted to delete the same provision. The Circuit Court correctly held that Petitioner was judicially estopped from changing his position at this point in the litigation.

Petitioner's argument as to judicial estoppel is completely disingenuous. In the *Order Denying Plaintiff's Motion for Relief*, the Circuit Court sets out its findings regarding judicial estoppel. (JA 428 at ¶ 8) The Circuit Court explicitly lists three (3) acts taken by Petitioner with regard to the Consent Order: first, Petitioner tendered the Consent Order to the Circuit Court; second, he successfully relied upon the Consent Order to oppose the Respondents' *Motion to Consolidate*; and, third, Petitioner implicitly relied on the Consent Order as a basis for Petitioner's argument that he could not execute the Consent Order against the Collection Defendants because they were purportedly judgment-proof.

After successfully defeating Respondents' *Motion to Consolidate*, Petitioner wants to repudiate the Consent Order on which his defense was based. The Circuit Court, in its sound exercise of discretion, ruled that Petitioner cannot disavow the Consent Order after having relied upon it repeatedly before the Court in opposition to Respondents.

For all of the above reasons, including that the end result is the same under both the Consent Order and the Corrected Order and that Petitioner is judicially stopped from changing

his position, Respondents RAM and George respectfully submit that the Circuit Court ruled correctly when it denied Petitioner's Motion for Relief from summary judgment.

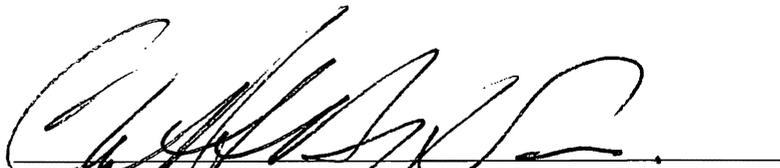
**CONCLUSION**

RAM and George have argued consistently that the underlying action and the Collection Action are part of a shell game. Petitioner has come to the Court with unclean hands. The Collection Action was a token gesture for claiming damages without Petitioner making any real effort to collect against the Collection Defendants or Jane Colby Jones's company, Colby Corp. That scheme backfired when Petitioner rushed to obtain a consent judgment without carefully considering the implications on the transaction documents. Contrary to Petitioner's unsupported arguments, the Circuit Court was careful and deliberate in its rulings. The clear principles of law and equity support affirming the Circuit Court and denying Petitioner's appeal.

**Kent George and Robinson & McElwee PLLC,**

**Respondents,**

**By Counsel,**



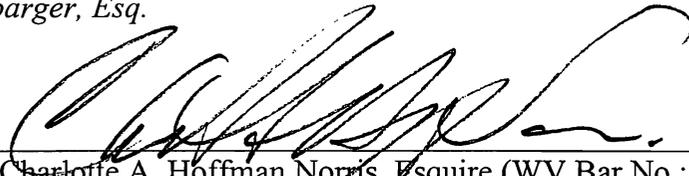
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**CERTIFICATE OF SERVICE**

I, Charlotte A. Hoffman Norris, counsel for Respondents Kent J. George and Robinson & McElwee PLLC, hereby certify that I served a true copy of *Brief on Behalf of the Respondents Kent George and Robinson & McElwee PLLC* on this the 11<sup>th</sup> day of February, 2013 by United States Mail, First Class, postage prepaid, upon the following counsel of record:

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