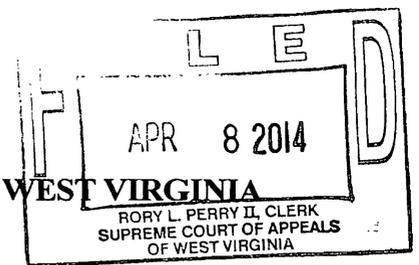


ARGUMENT DOCKET



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

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

Petitioners,

v.

Docket Number: 14-0280

**THE HONORABLE TOD KAUFMAN,
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
AND MARK A. MILLER,**

Respondents.

**NEW YORK LIFE'S SUPPLEMENTAL BRIEF IN SUPPORT OF JUSTIN S. GOLDEN
AND NEW YORK LIFE'S WRIT OF PROHIBITION**

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I. QUESTIONS PRESENTED

The subject lawsuit is, “in its essence,” a suit alleging alienation of affections. The West Virginia Legislature banned alienation of affections claims for important public policy reasons. *See* W. Va. Code § 56-3-2a. This ban applies even if the cause of action is not expressly referred to as an alienation of affections claim. *See Weaver v. Union Carbide*, 180 W.Va. 556, 378 S.E.2d 105 (1989). As in *Weaver*, the Respondent, Mark Miller (“Mr. Miller”), has not expressly plead alienation of affections, but has instead plead causes of action such as criminal conversation and breach of fiduciary duty to beneficiary.

Respondent’s primary argument is that, because this Court did not expressly prohibit criminal conversation in *Weaver*, and because criminal conversation has never been expressly repealed by the West Virginia Legislature, it is still a viable cause of action in West Virginia.

Thus, petitioners, New York Life Insurance and Annuity Corporation and NYLife Securities, LLC, (collectively “New York Life”), present the following questions: “are Respondent Mark Miller’s claims, including his claims for criminal conversation and civil adultery, ‘in their essence’ claims for alienation of affections, and therefore prohibited by W. Va. Code § 56-3-2a? Further, do claims based upon criminal conversation and civil adultery run afoul of this state’s public policy engrained in § 56-3-2a?”

II. STATEMENT OF THE CASE

Mr. Golden and Ms. Miller met in or around March 2009. [A 0160]. At the time, both Mr. Golden and Ms. Miller worked at the United Bank Building in Charleston, WV. [A 0005, 0029].

In January 2010, because her current retirement account was not making money, Ms. Miller decided to roll over her 401(k) account with United Health Care into an annuity

account with New York Life. [A 0029, 0201]. Before the purchase, New York Life first determined the annuity was suitable for Ms. Miller. Toward that end, Ms. Miller completed a detailed investor profile application and this information was forwarded to New York Life for approval. [A 0131-57]. After New York Life approved her application, Ms. Miller purchased the annuity from New York Life on or around January 26, 2010. [A 0005, 0147]. While Mr. Golden was the New York Life representative who assisted with the rollover, Mr. Golden is not a financial advisor; he was the sale person for which he received a one-time commission. [A 0182]. Ms. Miller used her own funds and was the sole owner of the annuity. [A 0185-186]. The annuity has performed extremely well. [A 0177]. Indeed, the Respondent, while having no legal standing whatsoever to the annuity, does not criticize or contest the financial performance of the annuity. Ms. Miller is satisfied with her New York Life annuity. [A 0201-202].

Several months after purchasing the annuity with New York Life, Ms. Miller began an extra-marital affair with Mr. Golden. [A 0054]. This affair took place outside the office and during their private and personal time. Because of irreconcilable marital problems, Respondent filed for divorce in May 2011. [A 0007]. Mr. and Mrs. Miller reached a settlement with their divorce and entered into a Final Agreed Order on November 22, 2011. [A 0007]. With this settlement, both parties waived their right to appeal the divorce and challenge the property settlement. Along with the division of other assets, Ms. Miller kept her New York Life annuity and Mr. Miller likewise kept his retirement accounts. [A 0086].

Respondent alleges that, as a result of the divorce, he has suffered financial damages. [A 0062-63]. These damages include legal and accounting bills Respondent incurred as a result of the divorce, as well as the value of the property that was awarded to Ms. Miller in the Property Settlement Agreement that he entered into as part of the Final Agreed Order of

Divorce. [A 0062-63, 0086]. Respondent further alleges he sustained emotional, medical and physical damages. [A 0193].

On June 5, 2012, Respondent filed his Complaint against Petitioners. [A 0001]. The original Complaint alleged conversion, breach of fiduciary duty, intentional infliction of emotional distress, negligent training and supervision and respondeat superior. [A 0001-09]. New York Life filed a Motion to Dismiss on July 16, 2012. [A 0105]. That Motion to Dismiss was denied. On June 19, 2013, Respondent was granted leave to amend his Complaint. His Amended Complaint added counts for adultery and criminal conversation. [A 0033-34].

New York Life filed a Motion for Summary Judgment on November 1, 2013. [See A 0124]. Around the same time, Mr. Golden filed his own Motion for Summary Judgment, and Respondent filed a Motion for Judgment on the Pleadings. On January 16, 2014, the Kanawha County Circuit Court held a hearing on these motions. While no final order was entered, all of these motions were effectively denied during that hearing so that discovery could continue.

On March 14, 2014, New York Life renewed its Motion for Summary Judgment. [A 0124]. During the pre-trial hearing for this matter held on March 18, 2014, the Kanawha County Circuit Court denied New York Life's Motion in its entirety.

On the morning of March 24, 2014, immediately prior to this Court issuing its Rule to Show Cause in this case, Mr. Miller voluntarily dismissed his claims for conversion and intentional infliction of emotional distress. As such, the only claims now pending against Mr. Golden are adultery, criminal conversation and breach of fiduciary duty to beneficiary. The only causes of action alleged against New York Life have always been, and still are, negligent training/supervision and respondeat superior.

III. SUMMARY OF ARGUMENT

This case is based on the extra-marital affair Mr. Golden had with Ms. Miller. This type of lawsuit is readily known as an “alienation of affections” claim, which the West Virginia legislature unequivocally banned over forty years ago. That ban is further reflected in West Virginia’s Supreme Court jurisprudence, and has been adopted by nearly every state in the union, and nearly every modern democracy around the world.

As with almost all “alienation of affections” cases, Respondent did not couch his case as an alienation of affections claim. Instead, Respondent alleges the extra-marital relationship, including the embarrassing and humiliating acts of that relationship, and then asserts various theories for recovery arising out of that relationship. Often, these cases assert professional negligence or breach of fiduciary duty against the third party to the affair and his or her putative employer.

In addition, Respondent alleges a fiduciary duty extended from Mr. Golden to him, and that Mr. Golden violated that duty. However, the undisputed evidence shows no fiduciary relationship existed whatsoever – indeed, the evidence shows the two never had any substantive communications at all. The annuity was purchased by Ms. Miller, using her funds. The annuity is, and always has been, her property. As such, there is no foundation for Respondent’s breach of fiduciary duty claim.

Faced with decisional and statutory law on point, the Kanawha County Circuit Court ruled that questions of fact existed and a jury should determine the outcome of this case. Pressing forward with a trial will undoubtedly result in a public spectacle, embarrassing and humiliating to the parties, witnesses and prospective jurors. The granting of a writ is the only true remedy available to the Petitioners at this point.

IV. ARGUMENT

A. Standard for Writ of Prohibition

Under West Virginia Code § 53-1-1, a right to a writ of prohibition shall lie, in part, where a Circuit Court exceeds its legitimate powers. W. Va. Code § 53-1-1, *James M.B. v. Carolyn M.*, 456 S.E. 2d 16, 20 (W.Va. 1995). In determining whether a writ is a proper remedy, this Court has established five (5) factors that must be assessed:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

State ex rel. Johnson Controls, Inc. v. Tucker, 229 W. Va. 486, 493, 729 S.E.2d 808, 815 (2012).

In evaluating the above factors to determine whether a writ is proper, the Court need not find that all factors are applicable. Rather, it may use a combination of factors to grant the writ. This Court has noted that “it is clear the third factor, the existence of a clear error as a matter of law, should be given substantial weight.” *In re W. Virginia Rezulin Litig.*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). In this case, the first, second, third, and fifth factors all suggest Petitioners’ Writ of Prohibition should be granted.¹

B. The Circuit Court’s Decision to Try This Matter Was An Error As a Matter of Law Because Mark Miller’s Entire Claim is Actually One for Alienation of Affections, a Cause of Action That is Prohibited in West Virginia.

Prior to 1969, West Virginia allowed a husband to sue his wife’s extra-marital partner in civil court for money damages. The cause of action was known as “alienation of

¹ New York Life does not believe the fourth factor is probative in this case. The error that was made by the Kanawha County Circuit Court is not one that is made regularly.

affections” and was common throughout the United States until the 1930s, when some states began abolishing the cause of action. *See, e.g.*, Proof of Alienation of Affections, 54 AMJUR POF 3d 135 § 5. The cause of action for alienation of affections provided a remedy when a third person was at fault for destruction of the marital relationship. *Id.* at § 1. It provided civil recourse for the humiliation, emotional damage, and pain inherent to an extra-marital affair. *Id.* Just as a man had a right to sue someone who stole his horse, he had a right to sue someone who had an affair with his wife.

West Virginia abolished the alienation of affections cause of action in 1969. The legislature passed a bill stating that:

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

W. Va. Code § 56-3-2a (1969). West Virginia thereby adopted the modern view, eliminating the role of the legal system in resolving disputes regarding extra-marital affairs and the ancillary legal theories that arise out of such affairs.

Accordingly, where an alienation of affections claim is brought using otherwise legitimate claims in an attempt to circumvent West Virginia Code § 56-3-2a, the entire case must be dismissed. *See Weaver v. Union Carbide*, 180 W.Va. 556, 378 S.E.2d 105 (1989). In *Weaver*, a wife sued her husband’s marriage counselor and the company which employed the marriage counselor for professional malpractice.² *Id.* The marriage counselor carried on an extra-marital affair with the husband which the wife alleged led to their divorce and to extensive

² The counselor, Suzanne Hallenberg, was employed by the husband’s employer, Union Carbide, as a company counselor.

humiliation and suffering on her part. *Id.* The Fourth Circuit Court of Appeals presented a certified question to the West Virginia Supreme Court:

May a wife maintain a suit, based on a claim of malpractice or intentional interference with the marital relationship, against a marriage counselor who in the treatment of her husband engages in sexual relations that lead to the dissolution of the marriage?

Id. The West Virginia Supreme Court, despite the otherwise cognizable claim for professional malpractice, answered by holding that:

We conclude that such a suit is, *in its essence*, one for alienation of affections and is barred by W. Va. Code 56-3-2a.

Id. (emphasis added). Despite the otherwise legally recognizable claim of professional malpractice, the West Virginia Supreme Court directed dismissal of the entire case because, “in its essence,” the claim was one for alienation of affections. *Id.* The undisputed facts show this case is substantially similar; Respondent and Mr. Golden never had any professional relationship, nor did they ever enter into any contract together. Respondent has brought a claim based on the professional relationship of his wife and her extra-marital partner, just as in *Weaver*. In *Weaver*, the West Virginia Supreme Court held that

[w]e must look to the substance of the plaintiff’s complaint and not merely to its form. It is clear that the plaintiff seeks only damages that relate to the impairment of her marriage and to her eventual divorce. ... To allow her suit would also run counter to the policies underlying the legislative abolition of suits for alienation of affections.

Weaver, at 560, 109.

This suit, like *Weaver*, is an alienation of affections suit where a professional relationship between the participants in the extra-marital affair has given the Respondent some additional legal theories. As in *Weaver*, this case must be dismissed despite those additional legal theories because of the prohibition on alienation of affections claims. Respondent’s

Complaint is “in its essence” an alienation of affections suit. Accordingly, this Court should follow the will of the legislature and dismiss his claim in its entirety.

1. *A claim for criminal conversation is not exempt from the Weaver analysis.*

The United States Supreme Court has explained the origin of the claim of criminal conversation:

‘Injuries that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. . .’

Tinker v. Colwell, 193 U.S. 473, 481, 24 S. Ct. 505, 48 L. Ed. 754 (1904) citing 3 Bl. Com. edited by Wendell, page 139. Ultimately, Respondent’s claim for criminal conversation is rooted in the idea that a husband owns his wife. Respondent essentially asks this Court to grant him damages because Mr. Golden has done damage to his property.

Criminal conversation is a common law tort claim for adultery. *See Kuhn v. Cooper*, 87 S.E.2d 531, 536 (W. Va. 1955). In *Kuhn*, a case that was decided when both criminal conversation and alienation of affections were still viable causes of action, this Court explained that those two causes of action were different. The *Kuhn* Court said:

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

Id. However, *Kuhn* also explains that the damage suffered as the result of criminal conversation is the alienation of a spouse’s affection. *See Id.*, 87 S.E.2d at 531. As such, when a plaintiff alleges criminal conversation in a situation like the subject civil action, he has made an allegation that is “in its essence” one for alienation of affections.

To be sure, in *Weaver*, the wife alleged torts like malpractice and interference with the marital relationship. *Weaver*, 378 S.E.2d 105. Such torts are certainly distinct from alienation of affections. Nonetheless, those claims are prohibited by W. Va. Code § 56-3-2a when they are “in their essence” claims for alienation of affections. *Id.* While *Weaver* never explicitly mentioned criminal conversation, the purpose of *Weaver* was to apply W. Va. Code 56-3-2a to **all** claims that are “in their essence” claims for alienation of affections. No authority suggests criminal conversation is immune from the *Weaver* analysis. As such, *Weaver* effectively abolished criminal conversation as a cause of action in West Virginia because no spouse will ever be able to bring a criminal conversation claim that is not “in its essence” one for alienation of affections.

The elimination of criminal conversation as a cause of action would have been established long ago if the tort was still in use. However, no decisional law has addressed allegations of criminal conversation since *Kuhn*. The Respondent has never cited to a West Virginia case decided after *Kuhn* that suggests criminal conversation is a viable tort in West Virginia.

2. Judicially eliminating criminal conversation as a cause of action in West Virginia does not violate West Virginia’s Constitution or common law.

Respondent boldly contends that criminal conversation is still a valid claim in West Virginia, and that ruling otherwise, would violate the state’s Constitution. However, this Court has analyzed and expressly rejected Respondent’s argument that Article VIII, Section 13, of the state’s Constitution prohibits the common law from evolving. *See Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 874, 253 S.E.2d 666, 676 (1979); *Mallet v. Pickens*, 206 W. Va. 145, 147, 522 S.E.2d 436, 438 (1999).

In *Morningstar*, this Court recognized that two contradictory lines of cases discussed the judiciary's ability to alter the common law. The first line of cases, which included *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962), suggested that all changes to the common law must come from the Legislature. *See Morningstar*, 162 W. Va. at 863. The second line provides that a common law rule may be modified when that rule no longer meets existing conditions. *Id.* After noting that West Virginia's constitutional and statutory provisions are very similar to the provisions of other states, the *Morningstar* court did a detailed analysis of other states' case law. This analysis determined that West Virginia's constitutional provisions were designed to establish the initial body of law on which the state would operate and were not designed to limit the courts in their historic role of developing the common law. *Id.*, 162 W. Va. at 865.

The *Morningstar* Court explained that:

Certainly, many [other states'] provisions provide, as do ours, that the legislature may alter or amend the common law, but this has never caused the courts in other jurisdictions to conclude that the silence about the courts' right to change the common law must mean that courts could not alter it . . . This construction does violence to the very nature of the common law, which, as we have seen, has been judicially evolved from prior precedents and modified as necessary to meet society's changing needs.

Id., 162 W. Va. at 865. The *Morningstar* Court further said that it would have been redundant for the state's Constitution to have included a provision giving the courts the ability to repeal the common law "since the courts always had the historic power to evolve and alter the common law which they created." *Id.*

Many states have recognized that "[a]s a common-law tort, the action for criminal conversation is a creation of the judiciary. Consequently, 'it is the **duty** of the judiciary to examine it and make such changes as justice requires when the Legislature has chosen not to

act.” *Feldman v. Feldman*, 125 N.H. 102, 104, 480 A.2d 34, 35 (1984) (emphasis added); *see, also, Goller v. White*, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 198 (1963) (recognizing that it is the responsibility of the judiciary to change a court-made rule of law when the change is necessary to the interests of justice); *Ireland v. State*, 310 Md. 328, 331, 529 A.2d 365, 366 (1987) (“Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge.”); *Young v. Beck*, 227 Ariz. 1, 6, 251 P.3d 380, 385 (2011) (“Just as the common law is court-made law based on the circumstances and conditions of the time, so can the common law be changed by the court when conditions and circumstances change.”) (internal citations omitted); 15A Am. Jur. 2d Common Law § 13.

Respondent further claims that any court, which changes the common law, is engaging in “judicial activism.” That assertion certainly misapprehends the role our Court. Furthermore, such an argument is contradicted by West Virginia’s use of the desuetude doctrine. This Honorable Court was the first court in the United States to apply the doctrine of desuetude. *See Comm. on Legal Ethics of the W. Virginia State Bar v. Printz*, 187 W. Va. 182, 416 S.E.2d 720 (1992); *State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 660, 584 S.E.2d 512, 516 (2003).

Desuetude is defined as: “1. Lack of use; obsolescence through disuse. 2. The doctrine holding that if a statute or treaty is left unenforced long enough, the courts will no longer regard it as having any legal effect even though it has not been repealed.” *Canterbury*, 213 W. Va. at 660, citing Black’s Law Dictionary 458 (7th ed.1999).

Desuetude does not technically apply in this action because West Virginia jurisprudence has only applied the doctrine to void criminal statutes when those statutes are no longer used or enforced. *See, e.g., Canterbury*, 213 W. Va. at 661; *Printz*, 187 W. Va. 182.

Nonetheless, desuetude is “founded on the constitutional concept of fairness embodied in federal and state constitutional due process and equal protection clauses.” *Canterbury*, 213 W. Va. at 660 (internal citations omitted). Using those constitutional concepts, desuetude gives the judiciary the ability to void *statutes* when those statutes have fallen out of use. *Id.* If those constitutional concepts suggest that unused statutes should be voided, those same concepts almost certainly demand that unused, antiquated and offensive creations of the common law be similarly voided.

Accordingly, this Court would not be engaging inappropriate or unconstitutional “judicial activism” by finding that criminal conversation, a common law tort claim, was abolished by W. Va. Code § 56-3-2a and the *Weaver* decision.

C. The Circuit Court’s Decision to Try This Matter Was an Error as a Matter of Law Because There Has Never Been a Fiduciary Duty Between Mark Miller and Justin Golden.

Respondent alleges that Mr. Golden owed him a fiduciary duty and subsequently breached that duty by having a sexual relationship with Ms. Miller. However, as a matter of law, there has never been a fiduciary relationship between Mr. Golden and Ms. Miller. Under West Virginia law,

For a party to recover based on breach of fiduciary duty, the following must be established: (1) a fiduciary duty exists; (2) the fiduciary duty has been breached; and (3) the plaintiff has suffered damages as a result of this breach.

Affiliated Construction Trades Foundation v. Vieweg, 520 S.E.2d 854, 868 (W.Va. 1999) (Workman, J., concurring). Respondent alleged that the breach of fiduciary duty occurred when Golden used “a sexual relationship as a persuasive tool to obtain [the wife’s] IRA.” The “IRA” [annuity] belonged to Ms. Miller, and Respondent has no right to sue Mr. Golden or New York Life for anything regarding the annuity. The only potential for a fiduciary duty to exist would be

between Mr. Golden and Ms. Miller.³ The Respondent had no relationship whatsoever with Golden; he certainly did not have a fiduciary relationship.

This Court has held that “[a]s a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship.” *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998). There is not a shred of evidence in the record that establishes the kind of relationship between Respondent and Mr. Golden necessary to satisfy the *Elmore* rule. Without a showing of a fiduciary duty, this count should have been dismissed as a matter of law.

Respondent also fails to establish that the alleged fiduciary duty was breached. Not a single allegation in Respondent’s Complaint mentions any problem with the services and investment products of New York Life. Respondent does not allege that any money was misused, or that New York Life did anything wrong when managing the annuity. Nor do the undisputed facts show such misuse/inappropriate behavior. With no actual breach of any fiduciary duty, Respondent’s Complaint should have been dismissed.

Finally, Respondent has no financial damages as a result of the alleged breach of fiduciary duty. Respondent did not obtain ownership of the annuity through his divorce decree, but now seeks this Court to alter that ruling. Respondent did not lose one penny as a result of New York Life’s management of his now-ex-wife’s annuity, and no allegation in the Complaint alleges that any money was lost by Respondent as a result of Mr. Golden’s actions. Without an

³ Mr. Golden did not have a fiduciary relationship with Maria Miller either. A registered representative is not generally considered a fiduciary because the registered representative is merely selling a product and not providing financial investment advice to the customer. Admittedly, certain qualified financial advisors do hold a fiduciary duty; e.g., an investment broker who handles a discretionary account for a customer. Mr. Golden testified that he was not a financial advisor, nor was he qualified as such. Moreover, Mr. Golden sold an annuity and received one-time commission for the sale. Mr. Golden had nothing to do with the performance of the annuity.

allegation showing damages, Respondent's Count for breach of fiduciary duty should be dismissed. The breach of fiduciary duty claim is nothing more than another attempt by Respondent to sue his ex-wife's extra-marital partner (and the partner's principal) for an affair.

D. The Circuit Court's Decision to Deny Petitioners' Motions to Dismiss and Motions for Summary Judgment Raises an Issue of Law That Has Not Been Explicitly Addressed.

The Respondent has consistently argued that (1) criminal conversation was a valid cause of action in West Virginia, (2) criminal conversation has not been expressly abolished in West Virginia and (3) accordingly, criminal conversation is still a valid cause of action. On the first two points, Respondent is correct. *See Kuhn v. Cooper*, 87 S.E.2d 531, 536 (W. Va. 1955).

Accordingly, to the extent the *Weaver* decision does not expressly prohibit criminal conversation, this civil action does address an issue of law of first impression: "did West Virginia's ban of alienation of affections, and its subsequent application of the alienation of affections doctrine in *Weaver*, effectively eliminate criminal conversation as a cause of action in West Virginia?" For the many reasons explained above, this question should be answered with an unequivocal "yes." The prior briefing and oral arguments in this case have revealed a fundamental disagreement among the parties. This disagreement highlights that the foundational question of this case has never been expressly answered, even though the legal analysis is clear. Accordingly, this Writ of Prohibition should be granted to answer this undecided question of law clearly and unequivocally.

E. Trying this Case Will Cause Damage That is Not Correctable on Appeal, and Petitioners' Writ of Prohibition is the Only Way to Prevent That Damage.

If this civil action is tried, both Ms. Miller and Mr. Golden will be forced to reveal intimate details about their sex lives. Ms. Miller will be forced to reveal details about her relationship with Mr. Miller, why they divorced, when their relationship soured and the

circumstances surrounding the extra-marital affair that she had with Mr. Golden. Counsel for all parties to this case will be forced to ask prospective jurors, during *voir dire*, whether they have ever had an extra-marital affair and whether they have ever been cheated on by a spouse.⁴ Trying this case would not only harm Ms. Miller, Mr. Golden, and the participants to the trial, but also would reverse forty years of legal progress and provide precedent encouraging wronged spouses to file similar claims. Such claims are not consistent with a modern society's views of love and marriage.⁵

When eliminating alienation of affections as a cause of action, the South Dakota Supreme Court reasoned that “[w]ives are not property. Neither are husbands. The love and affection[s] of a human being . . . devoted to another human being [are] not susceptible to theft. There are simply too many intangibles which defy the concept that love is property.” *Hunt v. Hunt*, 309 N.W.2d 818, 821 (S.D. 1981) (recognizing that wives are not property and love and affections are not susceptible to theft). If Respondent is allowed to continue with this cause of action, West Virginia will have endorsed the view that love is a property right which can be sued for in open court. This Court should recognize the harm Respondent's claim would cause, and grant Petitioner's Writ of Prohibition accordingly.

CONCLUSION

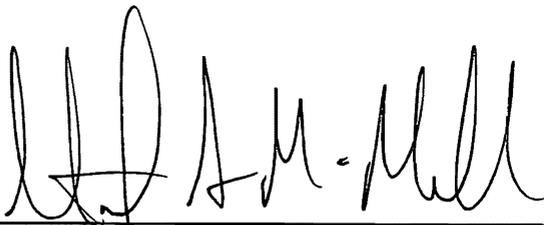
Respondent brings a claim prohibited in West Virginia for over forty-two years. Respondent's entire claim is for alienation of affections, which is no longer a cause of action

⁴ The parties engaged in a discussion regarding *voir dire* with the Kanawha County Circuit Court before this Court stayed the trial. During that discussion, Judge Kaufman made clear that the parties would not be permitted to ask the jurors about their experiences with extra-marital affairs and other similar topics. Presumably, parties were prohibited from asking these questions because they are crude and overly personal. New York Life agrees that these questions are blatantly offensive. Nonetheless, Petitioners cannot fairly assess the bias that each perspective juror may have without asking these questions. This problem highlights one of the many reasons why this case should not be tried.

⁵ These matters are better handled in our family court system.

recognized by any modern jurisprudence. Respondent's Complaint is the story of an unraveling marriage. Although it is sympathetic, it is neither uncommon in today's society, nor actionable in civil court under West Virginia law.

Suing the partner of your estranged spouse (and his former principal) for money damages in a court of law, based upon emotional damages during the affair, was barred and prohibited by the West Virginia legislature. This civil immunity is long recognized in West Virginia and every other jurisdiction adhering to the modern view. Trying to improperly "trojan horse" such a claim into court through a breach of fiduciary duty or criminal conversation claim is similarly barred. *See Weaver*. Respondent's Complaint should have been dismissed by the Circuit Court of Kanawha County. However, because that court failed to do so, New York Life requests that this Court (1) grant Petitioners' Writ of Prohibition, (2) hold that Respondent's entire lawsuit, including his allegation of criminal conversation, is barred by West Virginia Code § 56-3-2a and (3) grant all other relief it deems just and proper.



**NEW YORK LIFE INSURANCE AND
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NYLIFE SECURITIES, LLC,**

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

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

Petitioners,

v.

Docket Number: 14-0280

**THE HONORABLE TOD KAUFMAN,
JUDGE
OF THE CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA AND MARK A.
MILLER**

Respondents,

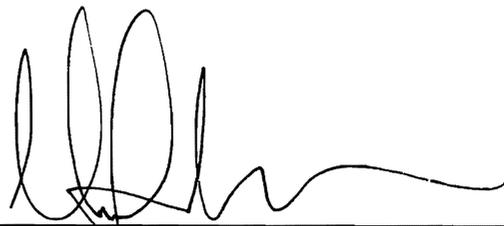
CERTIFICATE OF SERVICE

I, Stuart A. McMillan, counsel for Defendants, New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC, do hereby certify that a true and correct copy of *NEW YORK LIFE'S SUPPLEMENTAL BRIEF IN SUPPORT OF JUSTIN S. GOLDEN AND NEW YORK LIFE'S WRIT OF PROHIBITION* and *APPENDIX*, was forwarded via U.S. Mail upon counsel of record, postage prepaid and addressed as indicated below, on this 8th day of April, 2014.

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