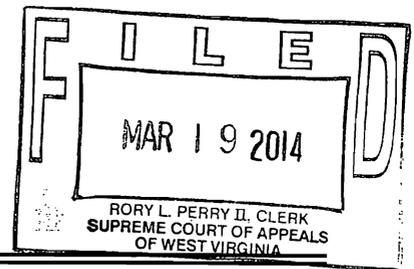


No. *14-0280*



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

**At Charleston**

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

*Petitioner,*

**v.**

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

*Respondents*

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

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**PETITION FOR WRIT OF PROHIBITION**

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Dated: March 19, 2014

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## I. QUESTION PRESENTED

This Petition seeks to prevent the Circuit Court of Kanawha County, Judge Tod Kaufmann presiding, from going forward with a trial on claims that represent claims for “alienation of affections,” which is expressly prohibited by W. Va. Code § 56-3-2a, as recognized by this Court in Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989). The trial is scheduled to begin on Monday March 24, 2014, and Mr. Golden seeks an immediate stay to prevent that trial from going forward and for issuance of a writ of prohibition.

In this case, Respondent Mark Miller alleges that Petitioner Justin Golden, an insurance salesman, initiated a sexual relationship with his then-wife, Maria Miller, in order to sell her an insurance annuity. Mr. Miller further claims that Mr. Golden’s affair with Ms. Miller “destroyed” his marriage with Ms. Miller. As monetary damages, Mr. Miller seeks to recover from Mr. Golden (1) the value of the assets he agreed be awarded to Ms. Miller pursuant to a Property Settlement Agreement entered in their divorce, (2) the legal and accounting fees that Mr. Miller incurred in his divorce from Ms. Miller, and (3) medical bills that he incurred because he had a “fear” of contracting a sexually transmitted disease from his wife, which he alleges (without a shred of evidence) originated with Mr. Golden, for a total of \$561,502.00. Mr. Miller also seeks other, non-monetary damages, including “loss of consortium” of his ex-wife and emotional distress damages.

Clearly aware of the prohibition against “alienation of affections” claims W. Va. Code § 56-3-2a, Mr. Miller’s Amended Complaint disguises his alienation of affections claims by labeling them something else, i.e., conversion, breach of fiduciary duty, intentional infliction of emotional distress, adultery, and criminal conversation. Mr. Miller supports this subterfuge by alleging that, because he was listed as a beneficiary of the annuity that his ex-wife purchased

with her own money, he has a “marital property interest” in the annuity and, therefore, was owed a fiduciary duty by Mr. Golden. Mr. Miller is no longer listed as a beneficiary of the annuity because, after the divorce, Ms. Miller changed the beneficiary from Mr. Miller to Quinton Miller, her 15 year old son.

This Court, however, directly and clearly rejected exactly what Mr. Miller attempts here in Weaver, where this Court directed that circuit courts, when assessing whether a complaint states a claim for alienation of affections, “must look to the substance of the plaintiff’s complaint and not merely to its form.” Weaver, 378 S.E.2d at 109. Here, the Circuit Court failed to analyze Mr. Miller’s claims in light of Weaver, with the result that Mr. Miller will be bringing his alienation of affection claims to trial on March 24, 2014.

In light of the above, the question presented in this Petition is whether Mark Miller may maintain a civil action, based on claims of conversion, breach of fiduciary duty, intentional infliction of emotional distress, adultery, and criminal conversation, against an insurance salesman who engaged in sexual relations with Maria Miller, allegedly to induce her into purchasing an annuity from him, that lead to the dissolution of the Millers’ marriage?

## **II. STATEMENT OF THE CASE**

This Petition arises from an oral Order issued by the Circuit Court on March 18, 2014, which summarily denied Mr. Golden’s Renewed Motion for Summary Judgment. By failing to apply W. Va. Code § 56-3-2a and this Court’s decision in Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989), the Circuit Court will commence a civil trial on March 24, 2014, which will focus on why Mr. and Ms. Miller divorced, whether Ms. Miller’s affair with Mr. Golden caused or contributed to that divorce, and whether Mr. Miller can recover damages caused by the divorce – including the loss of his ex-wife’s consortium and the value of the assets he agreed be awarded to his ex-wife in the divorce -- from Mr. Golden, who Mr. Miller alleges

caused the divorce. Worse, by allowing this case to go to trial, the Circuit Court will force Maria Miller, who is not a party to this lawsuit, to testify in court with respect to her sex life, her medical history, and the personal, intimate and difficult details of her divorce from Mr. Miller – topics that are extremely sensitive and private. Of course, both Mr. Miller and Mr. Golden will likewise be forced to testify about difficult and intimate details concerning their relationships with Ms. Miller, their respective medical histories, and their sexual histories.

The purpose of W. Va. Code § 56-3-2a, as recognized by this Court in Weaver, is, in part, to prevent these kinds of cases from going forward because the civil court system is “ill-equipped to fairly and objectively assess” claims for alienation of affections and it is simply not the proper venue for such disputes. See Weaver, 378 S.E.2d at 108. In addition, “[p]ossibly the most widely cited reason [for barring alienation of affections claims] is the potential for blackmail and extortion between spouses.” Weaver, 378 S.E.2d at 108. Here, Ms. Miller could be added as a third-party defendant by Mr. Golden and/or NY Life such that, if Mr. Miller is permitted to recover what he relinquished to her in the divorce, she would, in essence, be blackmailed or extorted through Mr. Miller’s lawsuit to give up what she obtained in the divorce. While neither Mr. Miller nor NY Life have, to date, moved to add Ms. Miller as a third-party defendant, this Court has already deemed the possibility of such a scenario as justification for barring all lawsuits that are, in substance, alienation of affection claims – and rightfully so. The idea that after their divorce, Mr. Miller can, in essence, re-litigate and reopen his divorce with Ms. Miller through the edifice of a civil action against his ex-wife’s lover is offensive, distasteful, and demeaning to Ms. Miller.

That is why West Virginia’s ban on suits for “alienation of affections” prohibits far more than claims that are entitled “alienation of affections.” The formal tort claim of “alienation of

affections” contains the following three elements: (1) wrongful conduct of defendant, (2) plaintiff’s loss of affection or consortium with the other spouse, and (3) a causal connection between such conduct and loss. Weaver, 378 S.E.2d at Syl. Pt. 2. This Court, however, mandates that circuit courts “must look to the substance of the plaintiff’s complaint and not merely to its form” in order to determine whether a plaintiff’s claims are in reality for alienation of affections – an analysis that the Circuit Court completely failed to perform in this case. Weaver, 378 S.E.2d at 109.

The reason circuit courts are to look beyond the form of a plaintiff’s complaint is to prevent cases like this one from going to trial. When the substance of Mr. Miller’s complaint, and not merely its form, is evaluated, only one reasonable conclusion is possible – Mr. Miller has brought a claim of alienation of affections. Mr. Miller alleges that “Defendant Golden’s adulterous relationship with the Plaintiff’s former wife destroyed the Plaintiff’s marriage,” and Mr. Miller seeks to recover damages due to this divorce. A clearer claim of alienation of affections is difficult to imagine.

**A. Procedural Background.**

On June 5, 2012, Mr. Miller filed his Complaint alleging claims for conversion, intentional infliction of emotional distress and breach of fiduciary duty against Mr. Golden. See [A.27-34]. On September 7, 2012, Mr. Golden moved to dismiss the Complaint based upon W.Va. Code § 56-3-2a and Weaver. See [A.35-48]. The Circuit Court denied Mr. Golden’s Motion to Dismiss, finding that it was “premature.” See [A.49-50].

On April 29, 2013, Mr. Miller moved for leave to amend his Complaint in order to assert claims for “adultery” and “criminal conversation” against Mr. Golden. See [A.51-64]. Mr. Golden opposed this motion on the grounds that such an amendment would be futile as claims for adultery and criminal conversation are clearly barred by W.Va. Code § 56-3-2a and Weaver.

See [A.65-80]. On June 25, 2013, the Circuit Court granted Mr. Miller's Motion to Amend, finding that Mr. Golden's arguments for dismissal were, again, "premature." See [A.81-83].

Mr. Miller's Amended Complaint, therefore, alleges claims for conversion, breach of fiduciary duty, intentional infliction of emotional distress, "adultery," and "criminal conversation" against Mr. Golden. See [A.84-93]. Mr. Golden denied these claims, but admitted to having an affair with Ms. Miller that began in July 2010, approximately 6 months after she purchased the annuity. See [A.94-103].

On October 23, 2013, Mr. Golden moved for Summary Judgment pursuant to W. Va. Code § 56-3-2a and Weaver.<sup>1</sup> See [A.104-186]. On November 1, 2013, Mr. Miller moved for Judgment on the Pleadings against Mr. Golden with respect to his claim for "criminal conversation" based upon the fact that Mr. Golden admitted to having an affair with Ms. Miller. See [A.187-190]. On January 16, 2014, the Circuit Court held a hearing on these motions, but it did not rule on either motion, instead ordering the parties to complete discovery.<sup>2</sup>

On March 14, 2014, Mr. Golden renewed his Motion for Summary Judgment and also submitted an affidavit from Maria Miller in support of his Motion. See [A.191-270]. On March 18, 2014, the Circuit Court held a pretrial conference during which it denied Mr. Golden's Renewed Motion for Summary Judgment. See [A.1-26]. In denying Mr. Golden's Motion for Summary Judgment, the Circuit Court refused to make findings of fact and conclusions of law on the record, despite being explicitly requested to do so for the benefit of review. See [A.20-21]. The Circuit Court, however, did discuss its opinion that the annuity was "marital property" in which Mr. Miller had a property interest that would support his claims for conversion and breach

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<sup>1</sup> One of the exhibits to Mr. Golden's motion for summary judgment, a copy of the Miller's Final Divorce Order and Property Settlement Agreement, was filed under seal with the Circuit Court. Pursuant to W. Va. R. A. P. 40(c), Mr. Golden gives notice that this exhibit [A.147-171 and A.234-258] is likewise being filed under seal with this Court.

<sup>2</sup> The Circuit Court did not enter a written order with respect to its decisions at this hearing.

of fiduciary duty, that Mr. Golden owed a fiduciary duty to Mr. Miller (as well as Ms. Miller), and that a claim for breach of that alleged fiduciary duty could be maintained by Mr. Miller. See [A.14-16].

**B. Factual Background.**

Remarkably, virtually no contested issues of material fact remain in this case. In January 2010, Maria Miller, then wife of Mr. Miller, decided to rollover her 401(k) retirement account with United Health Care into an annuity account with NY Life. See [A.86]. The rollover took place on January 26, 2010, and Mr. Golden was the NY Life employee who assisted Ms. Miller with the rollover. See [A.86]. Importantly, Ms. Miller was the sole owner of the 401(k) account, which Mr. Miller concedes. See [A.220-221, and A.230-231]. Mr. Miller alleges that he was a beneficiary of the 401(k) account because it was “marital property as defined by W. Va. Code § 48-1-233.” See [A.88]. Mr. Miller was listed as a beneficiary of the annuity. See [A.231].

Several months after Ms. Miller purchased the annuity, she and Mr. Golden began having an affair. Mr. Golden recalls the affair starting in July 2010, while Ms. Miller recalls the affair starting in April or May 2010. See [A.226 and A.269]. Ms. Miller’s decision to purchase the annuity was not influenced by any romantic inclination she felt towards Mr. Golden or by any romantic overtures by Mr. Golden. See [A.269]. Notably, Mr. Miller admits that he does not know when the affair between Mr. Golden and his ex-wife started; hence, the only evidence in the record of this case as to when the affair began is the testimony of Mr. Golden and the affidavit of Ms. Miller. See [A.219].

At some point in time in late 2010 or early 2011, Mr. Miller became suspicious that Ms. Miller was having an affair, and he eventually filed for divorce in May 2011. See [A.87]. Mr. Miller testified that Ms. Miller confessed in October 2011 to having an affair with Mr. Golden, and on November 22, 2011, a Final Agreed Order of Divorce and a Property Settlement

Agreement was entered. See [A. 232 and A.234-258].<sup>3</sup> According to Mr. Miller’s discovery responses, “Defendant Golden’s adulterous relationship with the Plaintiff’s former wife destroyed the Plaintiff’s marriage.” See [A.293-294]. After the divorce, Ms. Miller changed the designated beneficiary of her NY Life annuity from Mr. Miller to Quinton Miller, their 15 year old son. See [A.269].

Mr. Miller alleges that, as a result of the divorce, he sustained financial damages of \$561,502. See [A.261-262 and A. 264]. Notably, these damages consist of (1) the total amount of the marital assets that Mr. Miller agreed to give Maria Miller pursuant to the Property Settlement Agreement that was entered into during their divorce; (2) legal and accounting bills that Mr. Miller incurred with respect to his divorce; and (3) medical bills incurred by Mr. Miller as the result of his “fear” that he contracted herpes from his ex-wife – although Mr. Miller admits that he did not contract herpes. See [A.261-262 and A. 264]. In addition, Mr. Miller seeks non-monetary damages for, among other things, loss of consortium of his ex-wife and the emotional distress caused by the dissolution of his marriage.

### III. SUMMARY OF THE ARGUMENT

The Circuit Court’s denial of Mr. Golden’s Renewed Motion for Summary Judgment represents clear legal error under W. Va. Code § 56-3-2a and Weaver. Mr. Miller’s claims for “adultery” and “criminal conversation” are obviously prohibited by West Virginia’s ban on suits for alienation of affections because the gravamen of these claims is that Mr. Golden had an affair with Ms. Miller. See Weaver, 378 S.E.2d at 109 and Kuhn v. Cooper, 87 S.E.2d 531, 536 (W. Va. 1955).

Mr. Miller’s claims for intentional infliction of emotional distress, conversion and breach of fiduciary duty are also, substantively, claims for alienation of affections because they are

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<sup>3</sup> As discussed above, A.234-258 has been filed under seal as they are divorce documents.

premised upon Mr. Golden's affair with Ms. Miller, and the damages Mr. Miller seeks to recover are the value of the assets that he relinquished to Ms. Miller in the divorce and the legal, medical and accounting costs he incurred as the result of his divorce. As this Court directed in Weaver, circuit courts "must look to the substance of the plaintiff's complaint and not merely to its form." Weaver, 378 S.E.2d at 109. Where a "plaintiff seeks only damages that relate to the impairment of [his] marriage and to [his] eventual divorce ... [allowing such a] suit would run counter to the policies underlying the legislative abolition of suits for alienation of affections." Id.

In this case, it is clear that Mr. Miller seeks only damages that relate to the impairment of his marriage and eventual divorce because he wants to recover the expenses he incurred in the divorce, the value of the assets he agreed be awarded to Ms. Miller in their divorce, and the loss of his wife's consortium. The substance of Mr. Miller's claims, therefore, are alienation of affections, and are clearly barred by W. Va. Code § 56-3-2a and Weaver.

The Circuit Court's finding that Mr. Miller had an ownership interest in Ms. Miller's 401(k) and her annuity because it was "marital property" under W. Va. Code § 48-1-233 is also clear legal error. The concept of "marital property" applies only to divorce actions, not civil actions, W. Va. Code § 48-1-233 makes that explicitly clear. Likewise, the Circuit Court's finding that Mr. Miller has a "property interest" in the NY Life annuity purchased by Maria Miller because he was named as a beneficiary was also clearly legal error. As a beneficiary, Mr. Miller's interest in the annuity was merely an expectancy during the life of Ms. Miller, which was contingent upon him remaining the beneficiary at the time of her death. See Occidental Life Ins. Co. v. Row, 271 F. Supp. 920, 924 (S.D. W. Va. 1967). Not only is Ms. Miller still alive, she changed the beneficiary of her annuity from Mr. Miller to Quinton Miller, their son. Mr.

Miller, therefore, did not have, and does not have, any actual ownership interest in Ms. Miller's 401(k) or annuity.

#### IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of fundamental public importance concerning West Virginia's abolition of suits for alienation of affections.

#### V. ARGUMENT

##### A. Standard for issuance of a 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) relevant factors:

(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, 729 S.E.2d 808, 814 (W. Va. 2012); see also In re W. Va. Rezulin Litig. v. Hutchison, 585 S.E.2d 52, 62 (W. Va. 2003).

In evaluating the above factors to determine whether a writ is proper, however, the Court need not find that all factors are present; rather, it may use a combination of the factors to grant the writ. This Court has noted that "it is clear that the third factor, the existence of clear error as

a matter of law, should be given substantial weight.” In re W. Va. Rezulin Litig., 585 S.E.2d at 62.

**B. Mr. Golden has no other adequate means to obtain his desired relief, and he will be irreparably harmed if the trial goes forward.**

Given the Circuit Court’s oral Order, the trial of this case will commence on March 24, 2014, unless this Court intervenes. As such, Mr. Golden has no other adequate means to obtain his desired relief. If the trial of this case goes forward, Mr. Golden will be irreparably harmed in a way that cannot be adequately remedied on appeal. Mr. Golden’s private and personal life will be paraded in front of the jury on claims that this Court has said may not be maintained. This public spectacle cannot be undone simply by waiting to remedy the Circuit Court’s erroneous Order on appeal.

Perhaps even more importantly, Maria Miller, who is not a party to this case, but who is Mark Miller’s ex-wife, will also suffer irreparable harm. If this case goes to trial, Maria Miller will have to testify about her private sex life, whether she has herpes, and the intimate details and reasons for her divorce from Mr. Miller – all this while sharing custody with and trying to co-parent their 15 year old son. In addition, she has to worry about formally being made a party to this lawsuit and, possibly, having to repay some (or all) of what she was given in the form of marital assets during the divorce. Again, this worry, this angst, and this public spectacle cannot be remedied by allowing this trial to continue and addressing the Circuit Court’s errors on appeal.

**C. The Circuit Court's order is clearly erroneous as a matter of law.**

- i. All of Mr. Miller's claims – and especially his claims for “adultery” and “criminal conversation” -- must be dismissed pursuant to W.Va. Code § 56-3-2a because they are all grounded in the fact that Mr. Golden had sex with Mr. Miller's wife, which led Mr. Miller to divorce her.**

As noted above, Mr. Miller asserts five (5) causes of action against Mr. Golden, including the torts of “adultery” and “criminal conversation.” The reason for this is simple – he seeks to hoodwink the Circuit Court into believing that he makes claims for something other than alienation of affections. This Court, however, has already addressed this same exact ploy and admonished circuit courts that, when assessing whether a complaint states a claim for alienation of affections, a circuit court “must look to the substance of the plaintiff's complaint and not merely to its form.” Weaver, 378 S.E.2d at 109. When the substance of Mr. Miller's claims are examined, it becomes clear that all of Mr. Miller's claimed damages stem from his divorce from Maria Miller, which he alleges was caused by the affair between Maria Miller and Mr. Golden.

An action for alienation of affections consists of: (1) wrongful conduct of defendant, (2) plaintiff's loss of affection or consortium with the other spouse, and (3) a causal connection between such conduct and loss. Weaver, 378 S.E.2d at Syl. Pt. 2. These elements are exactly what Mr. Miller alleges: (1) wrongful conduct by Mr. Golden (the affair), (2) Mr. Miller's loss of affection with Ms. Miller (the divorce), and (3) a causal connection between such conduct and loss (the affair caused the divorce). A clearer claim for alienation of affections is difficult to imagine.

That Mr. Miller's claims – substantively – represent claims for alienation of affections is reinforced by the damages he claims to have suffered. Mr. Miller alleges \$561,502.00 in damages as a result of his divorce from Ms. Miller – the exact amount of (1) the property that he

agreed to cede to his ex-wife in the Property Settlement Agreement, plus (2) the amount of his legal and accounting bills incurred in his divorce proceeding, plus (3) medical bills from his alleged “fear” of contracting herpes from his ex-wife, a fear that he claims stems from the fact that she had an affair with Mr. Golden. See [A.261-262 and 264].

The facts in Weaver mirror those here. In Weaver, the plaintiff, the ex-wife, filed a civil action against Hallenberg, the female marriage counselor who had counseled her husband, and Hallenberg’s employer, Union Carbide. During the course of the marriage counseling provided to the husband (but *not* to the wife), the female marriage counselor and the husband began a sexual affair, which led to a divorce. The ex-wife thereupon filed claims against Hallenberg and Union Carbide for (1) malpractice and (2) intentional interference with the marital relationship.

First, the Weaver court dismissed the malpractice claim for the simple, and common sense, reason that the “plaintiff’s claim does not rest on any professional relationship that she had with the counselor” because “[i]t is undisputed that . . . only [the husband] was counseled” by the counselor. Weaver, 378 S.E.2d at 107. Likewise, here, it is undisputed that Maria Miller owned the prior 401(k), that all of the money she moved to the NY Life annuity was her money, that she, and only she, made the decision to make the rollover, and that she at all times owned the NYLife annuity.<sup>4</sup> Mr. Golden assisted only Maria Miller with the rollover transaction. He *may* owe a fiduciary duty to *Maria* Miller; however, as illustrated by Weaver, he did not owe any legal duty to *Mark* Miller.

Second, the Weaver court found that the plaintiff’s “claim for intentional interference with the marital relationship becomes substantially similar to one for alienation of affections[,]” which had to be dismissed because of W.Va. Code §56-3-2a. Notably, the plaintiff in Weaver,

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<sup>4</sup> As discussed below, Mr. Miller’s allegation that he had an ownership interest in Ms. Miller’s 401(k) and annuity fails as a matter of law.

like Mr. Miller here, did not make an explicit claim for the formal tort of “alienation of affections.” This Court, however, ignored the “form” of the claims asserted and looked to the “substance” of what was claimed, and in doing so, it noted with approval the following reason for this approach:

Here [the plaintiff] is suing because of alleged sexual misconduct that interfered with his marriage. His wife did not join the lawsuit, which alone would not bar the action, but does indicate at least the possibility of a vengeful motive or a so-called 'forced sale' on the part of a wronged husband. As such, this lawsuit is so similar to an alienation of affections action that as a matter of policy it falls within the prohibitions of [a prior case that abolished suits for alienation of affections].

Weaver, 378 S.E.2d at 109 (quoting Lund v. Caple, 675 P.2d 226, 231 (Wash. 1984) (en banc)).

As a result, and ignoring that the plaintiff phrased her claim as “intentional interference with the marital relationship” instead of “alienation of affections,” this Court stated:

We 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. She did not have a professional relationship with the counselor on which to predicate a malpractice claim. To allow her suit would also run counter to the policies underlying the legislative abolition of suits for alienation of affections.

Weaver, 378 S.E.2d at 109.

The clear lesson of Weaver is that if it looks like a duck, has feathers like a duck, quacks like a duck, and waddles like a duck, then it’s a duck. This Court in Weaver realized that disgruntled plaintiffs will go to great lengths to wreak vengeance against former spouses as the result of a former spouse’s affair, and for that reason, it required that the Circuit Court “look to the substance of” Mr. Miller’s “complaint and not merely to its form.” Weaver, 378 S.E.2d at 109.

Regardless of what Mr. Miller calls his claim, therefore, substantively he has made a claim for alienation of affections. All of Mr. Miller's claims, therefore, must be dismissed in order to uphold the legislative intent and purpose of W.Va. Code § 56-3-2a, which prohibits claims for alienation of affections. See Weaver, 378 S.E.2d at 109. The Circuit Court, therefore, committed clear legal error by failing to grant summary judgment in favor of Mr. Golden on all claims.

**ii. Mr. Miller did not, and does not, have any ownership interest in Ms. Miller's 401(k) or her annuity.**

In order to bypass the fact that Ms. Miller was the sole owner of the 401(k) account and the annuity, Mr. Miller alleged that he was a "beneficiary" of the 401(k) account because it was "marital property as defined by W. Va. Code § 48-1-233." See [A.88]. That code section, however, only applies to domestic relations actions as defined by W. Va. Code § 48-1-222, and Mr. Miller admitted that this civil action is not a domestic relations action. See [A.218-219]. Because this is a civil action, not a domestic relations action, the Circuit Court committed clear legal error by relying upon §48-1-233's definition of "marital property" to find that Mr. Miller had a "property interest" in the annuity that Maria Miller purchased with her own money.

The Circuit Court also committed clear legal error by finding that Mr. Miller had a property interest in his ex-wife's NYLife annuity because he was, for a short time, Ms. Miller's designated beneficiary for the annuity. Mr. Miller conceded during his deposition, however, that Maria Miller owned the NYLife annuity and had the right to change the beneficiary, a right that she exercised by changing the beneficiary from Mr. Miller to the Millers' 15 year old son. See [A. 230-231 and A.269].

As a beneficiary, Mr. Miller's interest in 401(k) or the annuity was merely an expectancy during the life of Ms. Miller, which was contingent upon him remaining the beneficiary at the

time of her death. See Occidental Life Ins. Co. v. Row, 271 F. Supp. 920, 924 (S.D. W. Va. 1967). As noted in Perkins v. Prudential Ins. Co., 455 F. Supp. 499, 501 (S.D. W. Va. 1978), “a named beneficiary of an insurance policy has but a conditional interest subject to defeasance.” Here, Ms. Miller had the right to, and did, change the beneficiary. As a result, Mr. Miller had, and has, no property interest in the NYLife annuity. The Circuit Court, therefore, committed clear legal error by failing to grant summary judgment in favor of Mr. Golden on all the claims.

**iii. Adultery and criminal conversation are clearly barred by W. Va. Code § 56-3-2a and Weaver.**

Adultery, former W.Va. Code § 61-8-3, and its common law counterpart, criminal conversation, are a very specific type of claim for alienation of affections – alienation of affections caused by sexual intercourse. In 1955, when a wife was viewed as her husband’s chattel, the West Virginia Supreme Court defined criminal conversation as “a physical debauchment of plaintiff’s spouse” and that the damages a plaintiff was entitled to recover were the “alienation of affections thereby resulting.” Kuhn v. Cooper, 87 S.E.2d 531, 536 (W. Va. 1955) (superseded by Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989)).

In 1969, the State of West Virginia took a step forward for women’s rights and abolished claims for alienation of affections. See W. Va. Code § 56-3-2a. In 1989, the West Virginia Supreme Court recognized that suits for alienation of affection can be plead as other torts, and that circuit courts “must look to the substance of the plaintiff’s complaint and not merely to its form” in order to determine if the plaintiff’s claims are in reality an alienation of affections claim. Weaver, 378 S.E.2d at 109.

To that end, this Court quoted with approval the Washington Supreme Court’s finding that claims based upon a spouse’s extra-marital affair are barred by the abolition of suits for alienation of affections:

Here [the plaintiff] is suing because of alleged sexual misconduct that interfered with his marriage. His wife did not join the lawsuit, which alone would not bar the action, but does indicate at least the possibility of a vengeful motive or a so-called 'forced sale' on the part of a wronged husband. As such, this lawsuit is so similar to an alienation of affections action that as a matter of policy it falls within the prohibitions of [a prior case that abolished suits for alienation of affections].

Weaver, 378 S.E.2d at 109 (citing Lund v. Caple, 100 Wn.2d 739, 747; 675 P.2d 226, 231 (Wash. 1984)).

Mr. Miller is suing Mr. Golden because of “alleged sexual misconduct that interfered with his marriage” to Ms. Miller. Id. Ms. Miller did not join this lawsuit, which indicates “at least the possibility of a vengeful motive or a so-called 'forced sale' on the part of a wronged husband.” Id. Mr. Miller’s claims of criminal conversation and adultery, therefore, “[are] so similar to an alienation of affections action that as a matter of policy it falls within the prohibitions of” West Virginia’s abolition of suits for alienation of affections, W.Va. Code § 56-3-2a. Id. In fact, Kuhn makes it clear that the damages caused by criminal conversation (i.e. having sex with someone’s spouse) are the alienation of the affections of the spouses. Kuhn, 87 S.E.2d at 536. The Circuit Court, therefore, committed clear legal error by failing to grant summary judgment to Mr. Golden on Counts IV and V of the Amended Complaint.

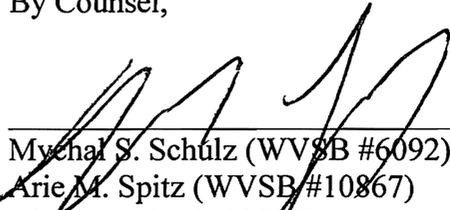
## VI. CONCLUSION

As this Court noted in Weaver, the civil court system is “ill-equipped to fairly and objectively assess” claims of alienation of affections. See Weaver, 378 S.E.2d at 108. For the reasons detailed above, therefore, Mr. Golden respectfully requests that the Court issue a Writ of Prohibition barring enforcement of the Circuit Court’s Order denying Mr. Golden’s Motion for Summary Judgment. Additionally, Mr. Golden respectfully requests that this Court apply W. Va. Code §56-3-2a and its holdings in Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989) to the facts presented in this case and grant Summary Judgment in favor of Mr. Golden.

Finally, Mr. Golden asks that this Court stay the Circuit Court proceedings during the pendency of this Writ, and for any additional relief the Court deems proper.

Respectfully submitted,

JUSTIN S. GOLDEN, SR.  
By Counsel,



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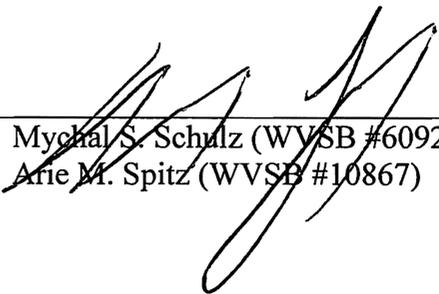
Dated: March 19, 2014

**VERIFICATION**

**Per West Virginia Code § 53-1-3**

I, the undersigned counsel for the Petitioners, hereby certify that the facts and allegations contained in the **Petition for Writ of Prohibition** and **Appendix** are true and correct to the best of my belief and knowledge.

Dated: March 19, 2014



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Mychal S. Schulz (WVSB #6092)  
Arie M. Spitz (WVSB #10867)

**CERTIFICATE OF SERVICE**

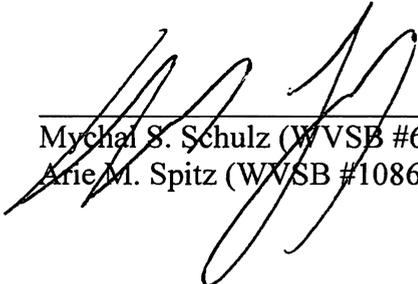
I, the undersigned counsel for the Petitioners, hereby certify that I served a true copy of the foregoing **Petition for Writ of Prohibition** and **Appendix** upon the following individuals, on this 19<sup>th</sup> day of March, 2014.

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