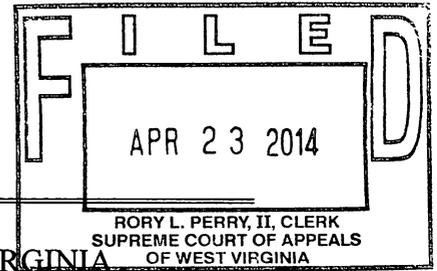


ARGUMENT
DOCKET

No. 14-0280



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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.

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

SUPPLEMENTAL BRIEF OF RESPONDENT MARK A. MILLER

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Dated: April 23, 2014

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III. STATEMENT OF CASE

A. Procedural Background

Respondent Mark A. Miller (“Respondent”) accepts the Procedural Background as set forth in the Statement of the Case in the Petition for Writ of Prohibition, but adds the following which was omitted:

After Petitioner Justin S. Golden, Sr. (“Golden”) moved for summary judgment on October 23, 2013, he filed a Motion to Stay Discovery on November 20 seeking to avoid responding to Respondent’s requests for admissions, interrogatories, and requests for production of documents which had been served on November 1, as well as to avoid the depositions of Golden and Maria Miller, which had been noticed for December 3, and the deposition of the corporate representative of Petitioners New York Life Insurance and Annuity Corporation and NYLIFE Securities, LLC (collectively, “New York Life”) which had been set for December 4. *See* [A. 313]. The discovery deadline had earlier been established as December 6. Respondent opposed Golden’s Motion to Stay Discovery and also served a Rule 56(f) Motion to Permit Discovery.

As noted by Golden, on January 16, 2014, the Circuit Court held a hearing on the various pending motions, but deferred ruling on the dispositive motions and ordered the parties to complete discovery. The Circuit Court also continued the trial which had previously been set for February 17 until March 24, and permitted the Petitioners to take the depositions of the Respondent and his two experts, although they had not been noticed prior to the discovery deadline.

Finally, as noted by Golden in his Supplemental Brief, as the trial began on March 24, 2014, immediately prior to this Court’s issuance of its rule to show cause, Respondent made an

election of remedies and voluntarily dismissed his claims for conversion and intentional infliction of emotional distress.

B. Factual Background

Respondent accepts the Factual Background as set forth in the Statement of the Case in the Petition for Writ of Prohibition, with the following corrections of inaccuracy or omission contained in the Petition:

In order to effect the rollover of her 401(k) retirement account, Maria Miller signed an application for a variable annuity with New York Life, with Golden acting as its agent, on January 26, 2010. The variable annuity was issued by New York Life on March 10, 2011 when the initial premium of \$102,510.87 was paid by the 401(k) rollover. Following the delivery of the variable annuity to Ms. Miller, Golden continued to have ongoing responsibilities to her as the purchaser of a New York Life variable annuity, such as conducting a review of the customer's risk tolerance or her investment objectives regarding any changes.

Golden recalls the affair starting in August 2010. *See* [A. 96]. While Respondent alleges that, as a result of the divorce, he sustained financial damages of \$561,502, these damages consist of (1) \$11,527.44 in attorneys' fees and expenses related to his divorce; (2) \$975 in accounting fees that he incurred in connection with his divorce; and (3) \$549,000 which resulted from his being required to refinance his current residence and relinquish his interest in certain jointly owned real and personal property. *See* [A. 261–62, 264]. Respondent has not claimed medical bills incurred by him as a result of his "fear" that he contracted herpes from his ex-wife, as noted on page 7 of the Petition for Writ of Prohibition.

IV. SUMMARY OF ARGUMENT

The gist of Petitioners' arguments is that a 1969 statute and a later opinion by this Court abolished the centuries-old common law tort of criminal conversation, although neither the statute nor the opinion mention criminal conversation by name. *See* W.Va. Code § 56-3-2a; *Weaver v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105 (1989). However, the statute only abolished the common law causes of action for breach of promise to marry and alienation of affections, and the opinion primarily held that claims for malpractice and intentional interference with the marital relationship asserted against a marriage counselor were tantamount to a claim for alienation of affections, and therefore were impermissible.

The common law torts of criminal conversation and alienation of affections have always been recognized as separate and distinct, originally in England, and subsequently by the Commonwealth of Virginia, by this Court, and by the legislatures and appellate courts of numerous states. Indeed, no court has ever held that the tort of criminal conversation is included within the tort of alienation of affections, as Petitioners argue.

Criminal conversation was not abolished by W.Va. Code § 56-3-2a; not only is it not mentioned in the statute, it also is not included within its title, as required by our Constitution. Moreover, while the West Virginia statute abolishing actions for breach of promise to marry and alienation of affections was enacted in 1969, the Virginia Legislature enacted a similar statute in 1968, which included not only actions for alienation of affections and breach of promise to marry, but also specifically included actions for criminal conversation. While the Petitioners seek to have this Court add the words "criminal conversation" to the statute, this Court has a substantial body of precedent which holds that a judge should not add words to a statute.

Respondent's related claim for damages based on the former adultery criminal statute and W.Va. Code § 55-7-9 are also not barred by W.Va. Code § 56-3-2a and *Weaver* for the same reasons. Petitioners also attack Respondent's claim for breach of fiduciary duty, arguing that it is barred by the W.Va. Code § 56-3-2a and *Weaver*. However, their argument in that regard is not properly before this Court because the Circuit Court, in denying Petitioners' Motions for Summary Judgment, concluded that it first needed to hear evidence before it could properly rule upon that claim, which was well within the Circuit Court's discretion.

Finally, in consideration of this Court's five factor test which applies where it is claimed that the lower tribunal exceeded its legitimate powers, Respondent submits that the Petitioners have failed to satisfy any of the five factors. For these reasons, this Court should deny the Petition for Writ of Prohibition and permit this case to proceed to trial.

V. ARGUMENT

A. Introduction

The proverbial "perfect storm" has been visited upon this Court via the instant Petition for Writ of Prohibition. To grant the relief Golden and New York Life seek, this Court must ignore our State Constitution; disregard or misinterpret several statutes; decline to follow various long-standing precedents; usurp the prerogative of the Legislature; spurn our common law; and, ultimately, abolish a common law cause of action—something this Court has never done in its one hundred fifty year history. Respondent disputes Petitioners' claim that the tort of criminal conversation is no longer a viable cause of action pursuant to W.Va. Code § 56-3-2a and *Weaver v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105 (1989). To the contrary, the tort of criminal conversation continues to exist as part and parcel of West Virginia's common law

inherited from England by way of Virginia, and should so remain until the Legislature acts to abolish it, if it chooses to do so.

B. Standard for Writ of Prohibition

This Court may grant a writ of prohibition only in “cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W.Va. Code § 53-1-1. Where the latter is alleged, this Court considers the following factors:

- (1) Whether the party seeking the writ has no other adequate means, such as direct appeals, 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. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12, Syl Pt. 4 (1996). While all five factors may not always be applicable, as is the case here, this Court has emphasized that the third factor “should be given substantial weight” in determining whether a writ is proper. *Id.* See also *State ex rel. Miller v. Karl*, 231 W.Va. 65, 743 S.E.2d 876 (2013).

Respondent agrees with New York Life regarding the inapplicability of the fourth factor in this case, as the alleged error is not one that is “oft-repeated” or that “manifests persistent disregard for either procedural or substantive law.” See New York Life’s Supplemental Brief at 9, n. 1. However, while Respondent recognizes that this case presents an issue of law of first impression under the fifth factor—insofar as it asks this Court to hold that a statute and case that do not mention a cause of action nevertheless abolish it *in absentia*—an analysis of the three remaining factors militates strongly against this Court granting Petitioners’ plea for a Writ of Prohibition.

C. Criminal Conversation Remains a Viable Cause of Action in West Virginia.

To paraphrase the words of Mark Twain, the reports of the death of the tort of criminal conversation in West Virginia have been greatly exaggerated by Petitioners. While certainly somewhat related to the tort of alienation of affections, the two claims cannot and should not be conflated. As set forth below, upon examination of the elements and the evolution of these two torts, it is clear that they are completely separate and distinct causes of action. Moreover, the plain language of W.Va. Code § 56-3-2a, historical context of the passage of that statute, and comparison to other state statutes make clear that claims for alienation of affections were abolished in West Virginia in 1969, whereas claims for criminal conversation were not. Therefore, pursuant to our State Constitution and Code, the cause of action for criminal conversation continues to be firmly entrenched within West Virginia's common law.

1. Criminal Conversation Is Distinct from Alienation of Affections.

Criminal conversation and alienation of affections, while related, are nonetheless distinct causes of action. Criminal conversation is a common law tort claim for adultery and is based on sexual intercourse between the defendant and the plaintiff's spouse. *See* 41 Am.Jur.2d, Husband and Wife § 242 (2005). It is akin to a "strict liability" tort because the plaintiff need only prove (1) the actual marriage between the spouses and (2) sexual intercourse between the defendant and the plaintiff's spouse during the marriage. *Id.* *See also* Restatement 2d of Torts § 685 (2005). Alienation of affections, on the other hand, requires three completely different elements of proof: (1) misconduct by the defendant; (2) loss of spousal affection or consortium; and (3) a causal link between the misconduct and loss. *Weaver v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105, Syl. Pt. 2 (1989); 41 Am.Jur.2d, Husband and Wife § 237. *See also* Restatement

2d of Torts § 683 (2005). Thus, the only common ground between these two otherwise entirely distinct causes of action is a prerequisite of a valid marriage.

In further demonstration of the differences between these two causes of action, criminal conversation requires that the disruption to the marriage be “sexual intercourse” between the defendant and the plaintiff’s spouse, whereas alienation of affections merely requires “misconduct” by the defendant which causes loss of spousal affection or consortium. *See* 41 Am.Jur.2d, Husband and Wife § 243. Misconduct is certainly not limited to sexual intercourse, and has been applied to meddling parents or in-laws, siblings, and even strangers. *See, e.g., Rush v. Buckles*, 93 W.Va. 493, 117 S.E. 130 (1923); *Gross v. Gross*, 70 W.Va. 317, 73 S.E. 961 (1912). *See also Ratliffe v. Walker*, 117 Va. 569, 85 S.E. 575 (1915). Because the torts of criminal conversation and alienation of affections involve different elements of proof, and may also involve different parties, these causes of action are considered to be separate and apart, and are clearly distinguishable. *See Kuhn v. Cooper*, 141 W.Va. 33, 42, 87 S.E.2d 531, 536 (1955).

2. Criminal Conversation Has Been Incorporated into West Virginia’s Common Law.

a. Origin of Criminal Conversation.

The formalized tort of “criminal conversation” arose in the common law courts of England in the late seventeenth century. *See* David M. Turner, *Fashioning Adultery: Gender, Sex and Civility in England, 1660–1740* at 172 (Cambridge University Press 2004); Lawrence Stone, *Road to Divorce* at 233 (Oxford University Press 1995); Adam Komisaruk, *The Privatization of Pleasure*, 16 Law & Literature 33, 36 (2004); Danaya C. Wright, “*Well-Behaved Women Don’t Make History*”: *Rethinking English Family, Law, and History*, 19 Wis. Women’s L. J. 211, n. 29 (2004). Criminal conversation was viewed as an extension of the tort of trespass:

The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children.

Subsequently the action of trespass on the case was sustained for the consequent damage, and either form of action was thereafter held proper.

Blackstone, in referring to the rights of the husband, says (3 Bl. Com. edited by Wendell, page 139):

“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. . . . 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.”

Speaking of injuries to what he terms the relative rights of persons, Chitty says that for actions of that nature (criminal conversation being among them) the usual, and, perhaps, the more correct, practice, is to declare in trespass *vi et armis* and *contra pacem*. 1 Chitty, Pl. [2 vol. ed.] 150, and note *h*.

Tinker v. Colwell, 193 U.S. 473, 481–82 (1904); *accord*. Komisaruk at 36.

Criminal conversation ultimately was abolished in England by passage of the Matrimonial Causes Act in 1857. Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 28 Hastings L.J. 195, 219 (1986) (citing Stat. 20 and 21 Vict. Ch. 85, sched. 59); Komisaruk at 38. However, the English common law had long since been adopted by the Commonwealth of Virginia:

The convention of May, 1776, which declared our separation from England, and framed the first constitution of the state, ordained that “the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same

shall be altered by the legislative power of this colony.” St. 9 Hen. p. 127, § 6; St. 13 Hen. p. 23, c. 17; and 1 Rev. Code, pp. 135, 136, cc. 38, 40.

In the year 1792, so much of the ordinance of 1776 as adopted the acts of parliament of a general nature, made in aid of the common law, prior to the fourth year of James I., was repealed by the legislature; but that part of the ordinance of 1776 which established the common law until it should be altered by legislative power has never been repealed.

The revisers of the Code of 1849 prepared, and the legislature adopted, the following statute, prescribing the force and effect to be given to the common law:

“The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, shall continue in force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly.” Code 1849, c. 16, § 1.

And this is, by statute, the force and effect to be given to it at the present time. Code 1887, § 2.

Consequently the common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this state, or has not been modified by our written law, is in full force in this state, and constitutes the rule of decision on all subjects, whether of a civil or criminal nature. *See* Report of Revisers of Code 1849, p. 68, note.

Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503, 504 (1898).

Virginia’s case law makes clear that the tort of criminal conversation was part of its common law that it adopted from England. *See, e.g., Ligon v. Ford*, 19 Va. 10 (1816) (action for criminal conversation). It was still a viable cause of action in Virginia upon the separation of West Virginia in 1863, and it endured for more than a century thereafter. *See, e.g., Bowen v. Pernell*, 190 Va. 389, 57 S.E.2d 36 (1950) (action for criminal conversation). The Virginia General Assembly explicitly abolished causes of action for criminal conversation, along with alienation of affection and breach of promise to marry, in 1968. Va. Code § 8.01-220.

Because the tort of criminal conversation was part of Virginia’s common law when West Virginia became a state, so too it was incorporated into West Virginia’s common law. In its initial Constitution, West Virginia adopted the English common law as it existed in Virginia as

of 1863. W.Va. Const. Art. XI, § 8 (1863) (“Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature.”). *See also* John Marshall Hagans, “Sketch of the Erection and Formation of the State of West Virginia from the Territory of Virginia,” *in* 1 W.Va. 73 (1866); *Cunningham v. Dorsey*, 3 W.Va. 293, Syl. Pt. 1 (1869). The state’s second (and current) Constitution, adopted in 1872, contains a similar provision. W.Va. Const. Art. VIII, § 13 (1872) (“Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.”). The English common law also became statutorily engrafted into the West Virginia common law as of 1882. W.Va. Code § 2-1-1 (“The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.”).

b. Origin of Alienation of Affections.

The tort of alienation of affections shares a similar history. It, too, arose in early English common law, albeit under the guise of its predecessor, the cause of action for “enticement” or “abduction.” *See* Michele Crissman, *Alienation of Affections: An Ancient Tort — But Still Alive in South Dakota*, 48 S.D. L. Rev. 518, 518–519 (2002–03); Jill Jones, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 Pepp. L. Rev. 61, 66–67 (1999); *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992). Alienation of affections, as it came to

be known, was subsequently adopted into Virginia's common law, where it existed as a viable civil action until its abolition together with criminal conversation and breach of promise to marry, in 1968. *Hoye*, 824 S.W.2d at 424; Va. Code § 8.01-220. The cause of action for alienation of affections also passed into West Virginia's common law by virtue of the same Constitutional and statutory provisions discussed above. *See, e.g., Kuhn v. Cooper*, 141 W.Va. 33, 87 S.E.2d 531 (1955) (action for alienation of affections).

c. Passage of W.Va. Code § 56-3-2a.

Thus, the torts of alienation of affections and criminal conversation were jointly imported into West Virginia's common law and there coexisted by virtue of the West Virginia Constitution and the W.Va. Code, which explicitly provide for the continuation of the common law unless and until its alteration or repeal by the Legislature. *See* W.Va. Const. Art. VIII, § 13 (1872); W.Va. Code § 2-1-1. It was by this mechanism that the two torts eventually parted ways. In 1969—the year after Virginia passed Va. Code § 8.01-220 abolishing criminal conversation, alienation of affections, and breach of promise to marry—West Virginia passed its own version of the same, expressly abolishing *only* alienation of affections and breach of promise to marry. W.Va. Code §56-3-2a provides:

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.

3. Criminal Conversation Has Not Been Statutorily Abolished.

W.Va. Code § 56-3-2a does not mention, much less abolish, the tort of criminal conversation. Nor may it be interpreted to implicitly include criminal conversation among the two causes of action it abolishes. As this Court has repeatedly warned, a statute “must be strictly

construed, and should not be enlarged in its operation beyond what its terms express.” *Shiflette v. Lilly*, 130 W.Va. 297, 303, 43 S.E.2d 289, 292 (1947). In other words:

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

Longwell v. Board of Educ. of County of Marshall, 213 W.Va. 486, 491, 583 S.E.2d 109, 114 (2003) (internal citations and quotation marks omitted) (emphasis in original). Additionally, “[t]he common law is not to be construed as altered or changed by statute *unless legislative intent to do so be plainly manifested*.” *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605, Syl. Pt. 4 (1962) (emphasis added). When the language of a statute is not ambiguous, “its plain meaning is to be accepted and applied without resort to interpretation.” *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384, Syl. Pt. 2 (1970).

The statutory language of W.Va. Code § 56-3-2a is hardly ambiguous. It abolishes only two causes of action: breach of promise to marry and alienation of affections. The Legislature did not plainly manifest its intent to abolish criminal conversation in W.Va. Code § 56-3-2a as it did with alienation of affections or breach of promise to marry by explicitly stating that “no civil action shall lie or be maintained” for those latter two causes of action. If the Legislature had wished to abolish criminal conversation in W.Va. Code § 56-3-2a, it would have done so by including criminal conversation in the statute—just as Virginia did the previous year, and as a number other states have done.¹ The historical context of this statute makes it abundantly clear

¹ Other states that have statutorily abolished criminal conversation have done so explicitly. See Ala. Code § 6-5-331 (“There shall be no civil claims for alienation of affections, *criminal conversation*, or seduction of any female person of the age of 19 years or over.”); Cal. Civ. Code § 43.5 (“No cause of action arises for: (a) Alienation of affection. (b) *Criminal conversation*. (c) Seduction of a person over the age of legal consent. (d) Breach of promise of marriage.”); Colo. Rev. Stat. § 13-20-202 (“All civil causes of action for breach of promise to marry, alienation of

that this was no mere coincidence; rather, it was a purposeful omission on the part of the Legislature.

4. Criminal Conversation Has Not Been Eliminated from the Common Law by “Falling Out of Use.”

New York Life appeals to the doctrine of desuetude to argue that the lack of opinions on criminal conversation in West Virginia since the 1955 case of *Kuhn v. Cooper*, 141 W.Va. 33, 87 S.E.2d 531 (1955) suggests that it no longer exists. However, this is nothing more than an attempt to fit a square peg into a round hole. By New York Life’s own admission, “[d]esuetude

affections, *criminal conversation*, and seduction are hereby abolished.”) Conn. Gen. Stat. Ann. § 52-572(f) (“No action may be brought upon any cause of action arising from *criminal conversation*”); Del. Code. § 10-39-3924, (“The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, enticement, or breach of contract to marry are abolished. No act done in this State shall operate to give rise, either within or without this State, to any such right of action. No contract to marry made or entered into in this State shall operate to give rise, either within or without this State, to any cause or right of action for its breach.”); D.C. Code § 16-923 (“Cause of action for breach of promise, alienation of affections, and *criminal conversation* are hereby abolished.”); Fla. State. § 771.01 (“The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are hereby abolished.”); Ga. Code § 51-1-17 (“Adultery, alienation of affections, or *criminal conversation* with a wife or husband shall not give a right of action to the person’s spouse. Rights of action for adultery, alienation of affections, or *criminal conversation* are abolished.”); Ind. Code § 34-12-2-1(a) (“The following civil causes of action are abolished: (1) Breach of promise to marry. (2) Alienation of affections. (3) *Criminal conversation*. (4) Seduction of any female person of at least eighteen (18) years of age.”); Mich. Comp. L. § 600.2901 (“The following causes of action are abolished: (1) alienation of affections of any person, animal, or thing capable of feeling affection, whatsoever; (2) *criminal conversation*); (3) seduction of any person of the age of 18 years or more; (4) breach of contract to marry.”); Minn. Stat. § 553.02 (“All civil causes of action for breach of promise to marry, alienation of affections, *criminal conversation*, and seduction are abolished.”); Nev. Rev. Stat. § 41.380 (“All civil causes of action for breach of promise to marry, alienation of affections, and *criminal conversation*, are hereby abolished; but this section does not abolish any cause of action for criminal conversation which accrued before July 1, 1979.”); N.J. Stat. § 2A:23-1 (“The rights of action formerly existing to recover sums of money as damage for the alienation of affections, *criminal conversation*, seduction or breach of contract to marry are abolished from and after June 27, 1935.”); N.Y. Civ. Rights Law § 80-a (“The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction and breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach.”); Ohio Rev. Code § 2305.29 (“No person shall be liable in civil damages for any breach of a promise to marry, alienation of affections, or *criminal conversation*, and no person shall be liable in civil damages for seduction of any person eighteen years of age or older who is not incompetent”); Or. Rev. Stat. § 31.982 (formerly § 30.850) (“There shall be no civil cause of action for *criminal conversation*.”); Vt. Stat. § 15-1001 (“The rights of action to recover sums of money as damages for alienation of affections, *criminal conversation*, seduction, or breach of promise to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach.”); Va. Code § 8.01-220(A) (“Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or *criminal conversation* upon which a cause of action arose or occurred on or after June 28, 1968.”) (emphasis added throughout).

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.” *Id.* Since the tort of criminal conversation is a *common law* cause of action, it is immune from death by desuetude.

Furthermore, even applying this Court’s test for desuetude to the tort of criminal conversation would not result in its being void. As this Court announced in *Committee on Legal Ethics on the West Virginia State Bar v. Printz*:

The first factor [in this Court’s three factor test to determine whether a criminal statute is void due to desuetude] is the distinction between crimes that are *malum in se* and crimes that are *malum prohibitum*. Crimes that are *malum in se* will not lose their criminal character through desuetude, but crimes that are *malum prohibitum* may.

187 W.Va. 182, 188, 417 S.E.2d 720, 726 (1992). Because adultery is a crime which is *malum in se* (i.e., one which is inherently immoral) rather than *malum prohibitum* (i.e., one which is merely prohibited by statute, such as running a red light), it is not void under the doctrine of desuetude.

Moreover, the fact that a tort has been little-used in West Virginia jurisprudence does not mean that it does not exist. In *TXO Production Corp. v. Alliance Resources Corp.*, this Court held that slander of title is actionable under West Virginia common law. 187 W.Va. 457, 419 S.E.2d 870, Syl. Pt. 2. (1992), *aff’d*, 509 U.S. 443, 113 S. Ct. 2711 (1993). In pertinent part, this Court held that “[b]ecause of the West Virginia Constitution’s incorporation of the common law of England, we find that an action for slander of title could always be brought in West Virginia.” *Id.*, 187 W.Va. at 466, 419 S.E.2d at 879. This was so despite the fact that, prior to this Court’s decision, “there is no West Virginia case on record directly recognizing an action for slander of title.” *Id.*, 187 W.Va. at 464, 419 S.E.2d at 877. The same reasoning applies to the tort of

criminal conversation which, as demonstrated herein, was part of the common law that West Virginia adopted from England through Virginia.

5. Criminal Conversation Has Not Been, and Should Not Be Judicially Abolished.

Petitioners emphasize, and Respondent acknowledges, this Court's recognition that "Article VIII, Section 13 of the West Virginia Constitution and W.Va. Code, 2-1-1 were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law." *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666, Syl. Pt. 2 (1979). Yet it is one thing to "alter and amend" a common law principle or doctrine, and quite another to altogether *abolish* a common law cause of action. In *Cunningham v. County Court of Wood County*, this Court held:

[T]he Constitution provides that the common law shall continue in force in this state 'until altered or repealed by the Legislature.' Similar language has been a part of the statutes of this state throughout the years of its existence. Code, 1931, 2-1-1. *This Court, therefore, is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the state government.*

148 W.Va. 303, 308, 134 S.E.2d 725, 728 (1964) (emphasis added). To abolish a common law cause of action constitutes a much more "drastic change" than a mere alteration or amendment.

This Court has indeed altered and amended the common law in various instances over the years, but principally to add or alter causes of action, or to eliminate or alter defenses. *See, e.g., Morningstar*, 162 W.Va. at 684, 253 S.E.2d at 891 (adopting strict liability in tort and products liability); *Bradley v. Appalachian Power*, 163 W.Va. 332, 256 S.E.2d 879, Syl. Pt. 3 (1979) (embracing comparative negligence over contributory negligence); *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 387 S.E.2d 511, Syl. Pt. 3 (1989) (adopting comparative assumption of risk over pure assumption of risk); *Mallet v. Pickens*, 206 W.Va. 145, 155, 522 S.E.2d 436, 446 (1999)

(abandoning the distinction between licensees and invitees). However, this Court has never in its one hundred fifty year history abolished a common law cause of action.

Of course, the Petitioners disagree. Each relies heavily upon *Weaver v. Union Carbide Corp.*, 180 W.Va. 556, 378 S.E.2d 105 (1989) in their respective Supplemental Briefs—and, indeed, throughout this litigation—to support their arguments that the Respondent is barred from asserting his claims of criminal conversation, adultery, and breach of fiduciary duty. However, *Weaver* is simply inapplicable to this case. (This is, once again, an attempt by the Petitioners to fit a square peg into a round hole.) In *Weaver*, this Court held that “[t]he claim for intentional interference with the marital relationship is, in its essence, one for alienation of affections and is barred by W.Va. Code, 56-3-2a.” 180 W.Va. at 560, 378 S.E.2d at 109.

Respondent fully recognizes that the plaintiff in that case did not bring a claim for alienation of affections. However, this does not alter the fact that the *Weaver* opinion does not once mention the types of claims that Petitioners insist Respondent is barred from asserting—a fact that the *Petitioners* “steadfastly ignore.” See Golden’s Supplemental Brief at 2. Moreover, criminal conversation and alienation of affections are not “substantially similar,” as this Court has deemed intentional interference with the marital relationship and alienation of affections to be. *Weaver*, 180 W.Va. at 559, 378 S.E.2d at 108. As established herein, and as recognized by this Court in *Kuhn v. Cooper*, criminal conversation and alienation of affections are completely separate torts. 141 W.Va. at 42, 87 S.E.2d at 536 (“Alienation of affections is distinguished from an action for criminal conversation.”). See also Michie’s Jurisprudence, Husband and Wife § 101 (2012) (“While actions for alienation and criminal conversation could have properly been joined, such causes of action have been stated in separate counts. Where they were joined,

recovery could have been had for criminal conversation although there was no proof of alienation.”).

Although New York Life alludes to the part of *Kuhn* that “explains that the damages suffered as a result of criminal conversation is the alienation of a spouse’s affections,” New York Life fails to place this part of the opinion in context. New York Life’s Supplemental Brief at 12. The plaintiff in *Kuhn* was a woman. *Id.*, 141 W.Va. 33, 34, 87 S.E.2d 531, 532. Because *Kuhn* was decided prior to the enactment of former W.Va. Code § 48-3-19(a) in 1969, making the common law cause of action for loss of consortium available to women, it was necessary to characterize the plaintiff’s resulting damages as akin to alienation of affections. *See Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605, Syl. Pts. 1–4 (1962) (holding that, in the absence of a statute changing the common law, “[a] wife, whose husband is injured by the negligence of a tort-feasor, may not maintain an action for loss of consortium of her husband against such a tort-feasor”); W.Va. Code § 48-29-302, *formerly* W.Va. Code 48-3-19(a) (“A married woman may sue and recover for loss of consortium to the same extent and in all cases as a married man.”). Thus, a claim for criminal conversation is not “in its essence, one for alienation for affections” such that it is barred under W.Va. Code § 56-3-2a. *Weaver*, 180 W.Va. at 560, 378 S.E.2d at 109.

Even more untenable is Golden’s claim that *Weaver* represents the notion that W.Va. Code § 56-3-2a “abolished all claims ‘for alienation of affections’ and not merely claims *titled* ‘alienation of affections.’ ” Golden’s Supplementary Brief at 2 (emphasis in original). This Court announced no such contrived theory of statutory construction its opinion. The Legislature admittedly used the word “for” in W.Va. Code § 56-3-2a, but so did Virginia’s Va. Code § 8.01-

220—and Virginia expressly included criminal conversation.² To argue that prefacing a cause of action with the word “for” expands that cause of action to include other causes of action not explicitly named in the statute is absurd, as it goes far beyond the plain meaning of the statute.

Additionally, it directly contravenes this Court’s self-imposed mandate:

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

Longwell, 213 W.Va. at 491, 583 S.E.2d at 114 (internal citations and quotation marks omitted) (emphasis in original). As such, this Court is bound to give effect to the Legislature’s intent as it is set forth in the statute. *See Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995) (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146 (1992))).

Additionally, our State Constitution provides:

No act hereafter passed shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed

W.Va. Const. Art. VI, § 30 (1872); *State ex rel. Davis v. Oakley*, 156 W.Va. 154, 157, 191 S.E.2d 610, 612 (1972) (“The purpose of Article VI, Section 30 of the Constitution of West Virginia is to prevent the concealment of the true purpose of an act from the public and the legislature and to advise the legislators and the public of the contents of the proposed act of the legislature.”). *See also* Va. Const. Art. IV, § 12 (1971), *formerly* Va. Const. Art. IV, § 52 (1901)

² Respondent additionally notes that other state Legislatures do not appear to endorse Petitioners’ all-inclusive interpretation of the word “for,” as their Heart Balm statutes use the preposition “for” but also specify criminal conversation among the causes of action abolished therein. *See* statutes referenced in n. 1, *supra*.

(“No law shall embrace more than one object, which shall be expressed in its title. . . .”). Criminal conversation is not only absent from the body of W.Va. Code § 56-3-2a, but also from the title of that statute. *See* W.Va. Code § 56-3-2a (entitled “Actions for breach of promise to marry and for alienation of affections prohibited.”). Thus, the Legislature explicitly and unambiguously abolished only alienation of affections and breach of promise to marry.

For example, in *Bryan v. Lincoln*, this Court considered whether the abolition of claims for breach of promise to marry in W.Va. Code § 56-3-2a could be interpreted to also encompass “the appellant’s cause of action seeking recovery of a specific sum of money allegedly given to the appellee in contemplation of marriage.” 168 W.Va. 556, 556, 285 S.E.2d 152, 152 (1981). This Court ultimately held that it did not. *Bryan*, 168 W.Va. at 558, 285 S.E.2d at 153 (“[T]he Legislature could not have intended by enactment of the statute to permit the unjust enrichment of persons to whom property had been transferred while the parties enjoyed a confidential relationship.”). In doing so, this Court explained:

To hold otherwise, and prohibit the appellant from seeking relief would deprive him of the benefit of article 3, section 17 of the West Virginia Constitution, which provides, “The Courts of this State shall be open, and every person, for an injury done to him, in his person, property, or reputation, shall have a remedy by due course of law; and justice shall be administered without sale, denial or delay.” In the fact of this constitutional mandate the circuit court’s interpretation must yield.

168 W.Va. 558, 285 S.E.2d at 153–54.

In addition to the precedent established by this Court, the Supreme Court of Pennsylvania has considered an issue identical to the one presented here—namely, whether a 1935 statute explicitly abolishing only alienation of affections also abolished criminal conversation. *Antonelli v. Xenakis*, 363 Pa. 375, 69 A.2d 102 (1949). After recognizing the various differences between the two causes of action, the Court ultimately held:

We think there can be no doubt that alienation of affections and criminal conversation are two separate and distinct torts and that, for each, the common law afford a right of action unless, of course, the same has been statutorily abolished.

The Act of 1935, *supra*, did not abolish rights of action for criminal conversation. Nowhere therein is that cause mentioned or referred to. Nor may it be read into the statute by implication. The Act being in diminution of the jurisdiction of the courts of Common Pleas of the Commonwealth, it is not to be presumed that the legislature intended thereby to abolish a right of action not expressly brought within the statute's purview.

363 Pa. at 378, 69 A.2d at 103–104. This reasoning is equally applicable to W.Va. Code § 56-3-2a, which neither mentions nor refers to criminal conversation. Therefore, the statute cannot reasonably be interpreted to abolish the tort of criminal conversation.

D. Adultery is a Distinct Cause of Action from Alienation of Affections.

Respondent also has a claim for damages premised upon W.Va. Code § 55-7-9, which states that “[a]ny person injured by the violation of a statute may recover from the offender such damages as he may sustain by reason of the violation” Respondent has alleged that the violation of the former adultery criminal statute in W.Va. Code § 61-8-3 has resulted in injuries to him, giving rise to damages under W.Va. Code § 55-7-9. Admittedly, the adultery criminal statute was repealed in 2010, though its repeal was effective June 11, 2010, and not June 1, 2010, as Golden incorrectly states on page 5 of his Supplemental Brief. *See* 2010 W.Va. Acts 34; 2010 W.Va. S.B. 457. Its repeal, however, does not bar Respondents’ claim. Respondent’s ex-wife’s affidavit states that the affair began in April or May 2010, prior to the deate of repeal. *See* [A. 269]. Without question, “[a] statute is assumed to be prospective in its operation unless expressly made retroactive.” W.Va. Code § 2-2-10(bb). Furthermore, the repeal of a law does not affect any offense committed, or penalty or punishment incurred, before the repeal took

effect. W.Va. Code § 2-2-8. Accordingly, the repeal of the adultery criminal statute has no effect on Respondent's claim for adultery occurring before its repeal.

In addition, the same reasoning discussed above that distinguishes alienation of affections from criminal conversation may be applied to Respondent's damages claim based on the adultery criminal statute. As was the case with criminal conversation, neither W.Va. Code § 56-3-2a nor this Court's decision in *Weaver* mention or refer to adultery at any point. The notion that W.Va. Code § 56-3-2a abolished adultery is further undermined by the fact that W.Va. Code § 61-8-3, which made adultery a misdemeanor, was repealed over forty years later.³ See 2010 W.Va. Acts 34; 2010 W.Va. S.B. 457. Presumably, the Legislature would not have enacted legislation to repeal a crime that Petitioners argue has been effectively abolished for nearly half of a century. Furthermore, the continued existence of the crime of adultery until 2010 is bolstered by a case from as recently as 1990, in which this Court recognized the existence of (former) W.Va. Code § 61-8-3 dictated that "under West Virginia law, we must take a dim view of adulterous relationships." *Thomas v. LaRosa*, 184 W.Va. 374, 400 S.E.2d 809, n. 1 (1990).

E. Breach of Fiduciary Duty is a Distinct Cause of Action from Alienation of Affections.

New York Life argues that 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 Respondent and Golden. New York Life's Supplemental Brief at 16. Furthermore, Golden argues that because Respondent did not have a professional relationship with Golden, *Weaver* bars his claim for breach of fiduciary duty. Golden's Supplemental Brief at 6. However, these arguments by Petitioners are not properly before the Court. At the March 18, 2014 hearing on Petitioners' Motions for Summary Judgment, the Circuit Court denied their Motions on this issue because the

³ Such repeal was effective June 11, 2010, and not June 1, 2010, as Golden incorrectly states on page 5 in his Supplemental Brief.

Circuit Court wanted to hear the evidence first before making a ruling. *See* [A. 16–17]. The reason for the Circuit Court’s ruling in this regard was the poor argument advanced by Golden at the hearing. *See* [A. 4–20]. Under these circumstances, the Circuit Court did not clearly err in denying the Motions for Summary Judgment for the reasons stated by the Circuit Court.

The latitude afforded to the Circuit Court in this regard was emphasized in *State ex rel. Shelton v. Burnside*, in this Court reiterated that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” 212 W.Va. 514, 575 S.E.2d 124, Syl. Pt. 5 (2002). Additionally, “[w]here prohibition is sought to retrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” *Id.* at Syl. Pt. 4. This Court applied these principles to deny a Writ of Prohibition where the Petitioner challenged the Circuit Court’s pre-trial ruling on the admissibility of evidence. *Id.*, 212 W.Va. at 518–20, 575 S.E.2d at 128–30. In pertinent part, the Court stated:

The fact remains that the piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice. Said another way, writs of prohibition should not be issued nor used for the purpose of appealing cases upon the installment plan.

Id., 212 W.Va. at 519, 575 S.E.2d at 129 (internal citations and quotation marks omitted). *See also State ex rel. Williams v. Narick*, 164 W.Va. 632, 638–39, 264 S.E.2d 851, 856 (1980) (discussing policy reasons for denying a Writ of Prohibition involving a preliminary ruling on a question of admissibility of evidence). Likewise, the instant Petition for Writ of Prohibition should be denied because it seeks to overturn the Circuit Court’s discretionary pretrial ruling.

Furthermore, to the extent that Petitioners claim that Respondent's claim for breach of fiduciary duty is somehow barred by this Court's holding in *Weaver*, Respondent disagrees that such a claim is "in its essence" a claim for alienation of affections. Like criminal conversation, breach of fiduciary duty is a distinct cause of action defined by a unique set of elements that is different than what must be established in a claim for alienation of affections. *See State ex rel. Affiliated Constr. Trades Foundation v. Vieweg*, 205 W.Va. 687, 701, 520 S.E.2d 854, 868 (1999) (recognizing the elements of a cause of action for a breach of fiduciary duty as "the existence of the fiduciary relationship, its breach, and damage proximately caused by that breach."). These two causes of action cannot be conflated.

F. The Relevant Factors Weigh Against Granting the Petition for a Writ of Prohibition.

As stated previously, Respondent recognizes that this case presents an issue of law of first impression under the fifth factor—insofar as it asks this Court to hold that a statute and case that do not mention a cause of action nevertheless abolish it *in absentia*—and further agrees with New York Life regarding the inapplicability of the fourth factor in this case, as the alleged error is not one that is "oft-repeated" or that "manifests persistent disregard for either procedural or substantive law." *See* New York Life's Supplemental Brief at 9, n. 1. Thus, the remaining three factors to be analyzed by this Court are (1) whether the Petitioners have no other means, such as direct appeals, to obtain their desired relief; (2) whether the Petitioners will be damaged or prejudiced in a way that is not correctable on appeal; and (3) whether Judge Kaufman's decision to try this case is clearly erroneous as a matter of law. *State ex rel. Hoover*, 199 W.Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996). These three factors—particularly the third factor, which is to be given the greatest weight—weigh heavily against this Court granting Petitioners' request for a Writ of Prohibition. *Id.*

1. The Petitioners Have Other Adequate Means to Obtain the Desired Relief.

In the initial Petition for Writ of Prohibition, Golden expresses his concern that “the trial of this case will commence on March 24, 2014, unless this Court intervenes.” Petition at 10. However, the Petitioners’ situation is hardly as dire as they portray it to be. The Petitioners may seek an appeal of any adverse judgment resulting from the trial. *See* W.Va. Code § 58-5-1. The Petitioners also had the option of seeking certification of the questions of law presented herein. *See* W.Va. Code § 58-5-2. Further, Golden waited until the eve of trial to file his Petition for Writ of Prohibition. This Court has clearly stated that whenever a Petition for Writ of Prohibition is interposed to delay or confuse and confound legitimate workings of criminal or civil process in the lower courts, the Writ will be denied. *See Hinkle v. Black*, 164 W.Va. 112, 119, 262 S.E.2d 744, 749 (1979). This is precisely the situation here. Petitioners have pursued a Writ of Prohibition to stave off trial simply because they did not prevail on their Motions for Summary Judgment. In short, Respondent respectfully submits that the Petition is a thinly-disguised interlocutory appeal of the adverse rulings on the Petitioners’ Motions for Summary Judgment.

2. The Petitioners Will Not Be Damaged or Prejudiced in a Way That Is Not Correctable on Appeal.

Petitioners assert that the Respondent “obvious brought this case to ruin the reputations of his ex-wife and Mr. Golden, and to vilify them in front of a jury by forcing them to testify about the intimate details of their affair.” Golden’s Supplementary Brief at 8. However, nothing in the record supports the Petitioners’ characterization of Respondent’s motives, and nothing could be further from the truth. To the contrary, this case has been brought to redress the injuries visited upon Respondent by the Petitioners by their various actions and failures to act. Respondent is unquestionably entitled to such redress by virtue of the “open courts” provision of

our State Constitution. *See* W.Va. Const. Art. III, § 17 (1872) (“The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay.”). Respondent is not seeking to force his ex-wife to wear a scarlet letter; rather, he is seeking damages from the Petitioners—plain and simple.

Additionally, New York Life expresses its concern that prospective jurors will be asked “whether they have ever had an extra-marital affair and whether they have ever been cheated on by a spouse.” New York Life’s Supplementary Brief at 19. As New York Life also indicates in a footnote, “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.” *Id.* However, only the Petitioners proposed such *voir dire* questions. New York Life astutely observes that “[p]resumably, [the] parties were prohibited from asking these questions because they are crude and overly personal.” *Id.* The Circuit Court was certainly correct, as “the official purposes of *voir dire* are to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges. The means and methods that the trial judge uses to accomplish these purposes are within his discretion.” *Michael on Behalf of Estate of Michael v. Sabado*, 192 W.Va. 585, 592, 453 S.E.2d 419, 426 (1994). Thus, it was well within Judge Kaufman’s sound discretion to disallow invasive questions involving matters of such a private nature. *See also id.*, 192 W.Va. at 593, 453 S.E.2d at 427 (“[T]his Court has consistently held: ‘The inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused.’ ” (quoting *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994))). Notwithstanding Petitioners’ worries about *voir dire*, this is not the first case which has involved

issues of a sexual nature to be heard by a jury; juries have been successfully empanelled in these other cases.

Finally, the Petitioners assert various policy arguments essentially stating that allowing this suit to go forward will cause the State to regress from “modern society’s views of love and marriage” to those “that love is a property right which can be sued for in open court.” New York Life’s Supplemental Brief at 19. *See also* Golden’s Supplemental Brief at 8. However, this implicitly suggests that the State ought to embrace a public policy that invites disruptions to the marital relationship. It is difficult to imagine such a policy being adopted by a state in which, according to a 2004 Gallup poll, the vast majority of West Virginians consider themselves to be Christian.⁴ Indeed, the cause of action for criminal conversation is based upon two of the Ten Commandments prohibiting adultery and coveting another’s wife. *See Moore v. Strickling*, 46 W.Va. 515, 278 33 S.E. 274 (1899) (“The morality of our laws is the morality of the Mosaic interpretation of the Ten Commandments . . .”).

As set forth above, the Legislature did *not* abolish the tort of criminal conversation in W.Va. Code § 56-3-2a, and has not in the more than forty years since, which is a fairly good indicator of its policy stance on this issue. Apparently the Petitioners are not aware that this Court has previously determined that an action for criminal conversation does not violate public policy. *See Ohlinger v. Roush*, 119 W.Va. 272, 193 S.E. 328, 329 (1937). Although the Petitioners argue that the tort of criminal conversation is outmoded and has no place in present-day jurisprudence, it nonetheless will remain a part of our common law unless and until the Legislature acts to abolish it. *See* W.Va. Const. Art. VIII, § 13 (1872); W.Va. Code § 2-1-1.

⁴ *See* Jeffrey M. Jones, *Tracking Religion Affiliation, State By State*, Gallup (June 22, 2004), available at <http://www.gallup.com/poll/12091/tracking-religious-affiliation-state-state.aspx> (last visited April 22, 2014) (stating that the religious makeup of West Virginia is 75.4% Protestant; 5.6% Other Christian; 7.0% Catholic; 0.4% Mormon; 0.2% Jewish; and 6.5% None).

Respondent appreciates that the lurking “elephant in the room” is easily spotted: Is the tort of criminal conversation popular—and, if not, should it be abolished? However, the answers to these questions are within the province of the Legislature pursuant to W.Va. Const. Art. VIII, § 13 (1872).

3. The Circuit Court’s Decision to Try This Matter Is Not Clearly Erroneous As a Matter of Law.

The third and most important of the five factors is “whether the lower tribunal’s order is clearly erroneous as a matter of law.” *State ex rel. Hoover v. Berger*, 199 W.Va. at Syl. Pt. 4. Golden claims that the Circuit Court’s order denying his Motion for Summary Judgment is clearly erroneous as a matter of law because he claims that all of Respondent’s causes of action must be dismissed pursuant to W.Va. Code § 56-3-2a and *Weaver*. Petition at 11–16. However, as established above, the Petition for Writ of Prohibition is essentially an interlocutory appeal of the denial of the Petitioners’ Motions for Summary Judgment which attempted to conflate Respondent’s claims with the tort of alienation of affections. Criminal conversation is a unique cause of action which, unlike alienation of affections, has not been abolished by our Legislature and, therefore, remains a part of West Virginia’s common law pursuant to our State Constitution and Code. *See* W.Va. Const. Art. VIII, § 13 (1872); W.Va. Code § 2-1-1. Adultery was illegal under the W.Va. Code until very recently. *See* 2010 W.Va. Acts 34; 2010 W.Va. S.B. 457. Furthermore, the *Weaver* decision stands solely for the principle that “[t]he claim for *intentional interference with the marital relationship* is, in its essence, one for alienation of affections and is barred by W.Va. Code, 56-3-2a.” 180 W.Va. at 560, 378 S.E.2d at 109 (emphasis added). This Court did not mention, much less judicially abolish, criminal conversation, adultery, or breach of fiduciary duty.

New York Life also claims that the Circuit Court's order was erroneous as a matter of law because there is no fiduciary duty between Respondent and Golden. However, as set forth above, the Circuit Court's denial of Petitioners' Motions for Summary Judgment was premised on its desire to hear the evidence first prior to ruling on this issue. As such, the Circuit Court's decision to try this case was not clearly erroneous as required by the third and most important factor of the analysis for Writs of Prohibition. Therefore, on the basis of this and the other two factors analyzed herein, the Petition for Writ of Prohibition should be denied and this case should be permitted to proceed to trial in the Circuit Court.

VI. CONCLUSION

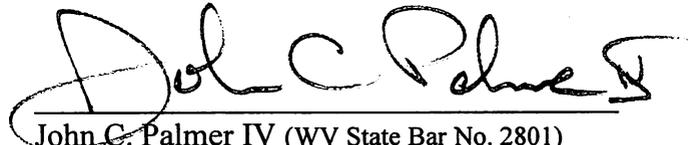
"Judges swear an oath to uphold the Constitution of the United States, and the Constitution of the State of West Virginia. If we keep that oath, we are not free to selectively pick and choose which provisions of that constitution we will uphold." *West Virginia Trust Fund, Inc. v. Bailey*, 199 W.Va. 463, 489, 485 S.E.2d 407, 433 (1997) (Workman, C.J., concurring). Here, this Court is compelled to adhere W.Va. Const. Art. VIII, § 13 (1872) and W.Va. Code § 2-1-1, which declare the common law to be the law of the land in West Virginia until it is altered or repealed by the Legislature. The tort of criminal conversation has passed into our common law from England by way of Virginia; the Legislature did not abolish it in enacting W.Va. Code § 56-3-2a, nor did this Court abolish it in *Weaver*. Therefore, criminal conversation remains a part of our common law as a viable cause of action which is distinct from any other, including alienation of affections. As such, the Circuit Judge's decision to go forward with this trial was not error. This, coupled with the Petitioners' ample opportunity for appeal from an adverse verdict, militates strongly against granting the Writ of Prohibition sought by the Petitioners.

WHEREFORE, for the reasons set forth above, Respondent respectfully requests that this Court deny the Petition for Writ of Prohibition and permit this case to proceed to trial.

Respectfully submitted,

MARK A. MILLER

By Counsel

A handwritten signature in black ink, appearing to read "John C. Palmer IV", written over a horizontal line.

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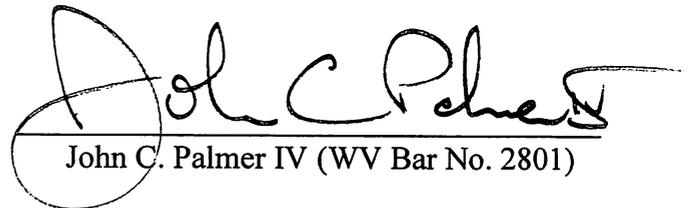
CERTIFICATE OF SERVICE

I, John C. Palmer IV, counsel for Respondent Mark A. Miller, hereby certify that I served true copies of the attached **SUPPLEMENTAL BRIEF OF RESPONDENT MARK A. MILLER** upon counsel of record on April 23, 2014:

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