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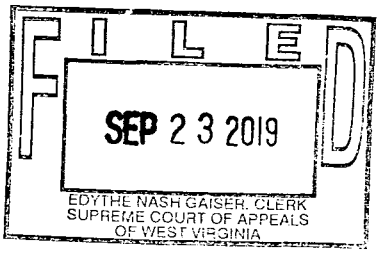


No. 19-0361

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

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**RICHARD OTTO and**
**PATRICIA OTTO,**

**Plaintiffs Below, Petitioners,**

DO NOT REMOVE FROM FILE

**v.**

**CIVIL ACTION NO. 17-C-270**

**CATROW LAW, PLLC,**

**Defendant Below, Respondent.**

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# RESPONDENT'S RESPONSE TO PETITIONER'S BRIEF

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## TABLE OF CONTENTS

I. STATEMENT OF THE CASE ..... 1

A. STATEMENT OF RELEVANT FACTS ..... 1

B. PROCEDURAL HISTORY ..... 12

II. SUMMARY OF ARGUMENT ..... 16

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 17

A. STANDARD OF REVIEW ..... 18

B. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT PETITIONERS FAILED TO MEET THE ESSENTIAL ELEMENTS OF A CLAIM FOR LEGAL MALPRACTICE. ..... 19

1. The Circuit Court did not err when it found that the Petitioners failed to present a genuine issue of material fact as to whether Catrow Law breached a duty of care to Petitioners. ..... 21

2. The Circuit Court correctly found that the Petitioners failed to present a genuine issue of material fact as to whether Catrow Law was the direct and proximate cause of their damages. ..... 27

D. THE CIRCUIT COURT'S FINDINGS WITH RESPECT TO PETITIONERS' EXPERT WERE NOT ERRONEOUS. ..... 32

E. THE COURT DID NOT ERR WHEN IT FOUND THAT PETITIONERS HAVE NOT PRESENTED ANY EVIDENCE TO DEMONSTRATE THAT CATROW LAW ACTUALLY RECEIVED ANY BULLETINS OR NOTICES CONCERNING WIRE FRAUD ..... 36

V. CONCLUSION ..... 38

CERTIFICATE OF SERVICE ..... 40

## TABLE OF AUTHORITIES

### CASES

*Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*,
148 W.Va. 160, 133 S.E.2d 770 (1963) ..... 18
*Andrick v. Town of Buckhannon*,
187 W.Va. 706, 421 S.E.2d 247 (1992) ..... 18
*Calvert v. Scharf*,
217 W. Va. 684, 619 S.E.2d 197 (2005) ..... passim
*Chafin v. Gibson*,
213 W. Va. 167, 578 S.E.2d 361 (2003) ..... 23
*Conn v. Beckman*,
No. 18-0551, 2019 WL 4257294 (W. Va. Sept. 9, 2019) ..... 18
*Folio v. Harrison-Clarksburg Health Dep't*,
222 W. Va. 319, 664 S.E.2d 541 (2008) ..... 37
*Gibson v. Little General Stores, Inc.*,
221 W.Va. 360, 655 S.E.2d 106 (2007) ..... 23
*Guthrie v. Northwestern Mutual Life Insurance Co.*,
158 W. Va. 1,208 S.E.2d 60 (1974) ..... 37
*Humphreys v. Detch*,
227 W.Va. 627, 712 S.E.2d 795 (2011) ..... 19
*Kay v. McGuireWoods, LLP*,
240 W. Va. 54, 807 S.E.2d 302 (2017) ..... passim
*Keister v. Talbott*,
182 W.Va. 745, 391 S.E.2d 895 (1990) ..... passim
*McCullough Oil, Inc. v. Rezek*,
176 W.Va. 638, 346 S.E.2d 788 (1986) ..... 37
*McGuire v. Fitzsimmons*,
197 W.Va. 132, 475 S.E.2d 132 (1996) ..... 20
*McQuade v. Bayless Law Firm*, PLLC,
No. 13-0947, 2014 WL 998483 (W. Va. Mar. 14, 2014) ..... 23
*Painter v. Peavy*,
192 W. Va. 189, 451 S.E.2d 755 (1994) ..... 18
*Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*,
196 W. Va. 692, 474 S.E.2d 872 (1996) ..... 26
*Ramey v. Ramey*,
183 W.Va. 230, 395 S.E.2d 230 (1990) ..... 23
*Rubin Res., Inc. v. Morris*,
237 W. Va. 370, 787 S.E.2d 641 (2016) ..... 19
*Toth v. Bd. of Parks & Recreation Comm'rs*,
215 W. Va. 51, 593 S.E.2d 576 (2003) ..... 18
*West Va. Canine College v. Rexroad*,
191 W. Va. 209 444 S.E.2d 566 (1994) ..... 22, 26, 33
*Williams v. Precision Coil, Inc.*,
194 W.Va. 52, 459 S.E.2d 329 (1995) ..... 37

## STATUTES

W.Va. Code § 55-7-13d(a)(1) ..... 29

## RULES

West Virginia Rule of Appellate Procedure 18(a) ..... 17
West Virginia Rule of Appellate Procedure 19 ..... 18
West Virginia Rule of Civil Procedure 56 ..... 35
West Virginia Rule of Civil Procedure 59(e) ..... 16
West Virginia Rule of Appellate Procedure 10(d) ..... 1
West Virginia Rules of Evidence 701 and 702 ..... 37

## I. STATEMENT OF THE CASE

Pursuant to West Virginia Rule of Appellate Procedure 10(d), the Respondent Catrow Law, PLLC (hereinafter referred to as "Catrow Law"), submits the following factual and procedural recitation. Catrow Law respectfully request that this Court affirm the Circuit Court of Berkeley County, West Virginia's (1) Order Granting Defendant's Motion for Summary Judgment in favor of Catrow Law (**Joint Appendix "JA" 958-969**); and (2) Order Denying Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment (**JA 1079-1082**).

### A. STATEMENT OF RELEVANT FACTS

1. Petitioners formerly resided in Franksville, Wisconsin. **JA 958 at ¶ 1 and 1086 at p. 9, l. 7-8.**

2. Petitioner Richard Otto is an accountant and as part of his profession was familiar with wire transfers. **JA 216-217; JA 1089 at p. 23, ll. 2-5; and JA 1124 at p. 163, ll. 10-16.**

3. In 2015, Petitioners decided to move to West Virginia from Franksville, Wisconsin and began communicating with Lynn Frum ("Frum"), a real estate agent affiliated with Coldwell Banker Innovations ("Coldwell Banker") with respect to same. **JA 958 at ¶ 1; JA 1092 at pp. 33-35; and JA 71-72, 75 and 78-79.**

4. At all times relevant to this action, Frum was working for Coldwell Banker as a realtor. **JA 958 at ¶ 1; JA 161 at ¶ 6 and JA 71-72, 75 and 78-79.**

5. After reviewing, visiting and considering multiple homes and listings in the Eastern Panhandle of West Virginia, Petitioners decided to purchase a home and property located at 535 Rivanna Run, Falling Waters, WV 25419-4378 (the "Subject Property"). **JA 958 at ¶ 1; JA 1094 at pp. 41-42 and JA 161 at ¶¶ 8-9.**

6. On October 5, 2015, Petitioners entered into an Exclusive Buyer/Tenant Agency Agreement and Notice of Agency Relationship with Coldwell Banker. **JA 958 at ¶ 1; and JA 177 to 181.**

7. Pursuant to the Exclusive Buyer/Tenant Agency Agreement, Petitioners authorized Coldwell Banker, its agents and representatives to communicate with them ***via*** Email including but not limited to communications concerning properties and services and information regarding real estate in general. **JA 958 at ¶ 1; and JA 180 at ¶ 16.**

8. Petitioners designated pattieo@wii.rr.com as the Email address for the "Buyer/Tenant" on the Exclusive Buyer/Tenant Agency Agreement. **JA 177.**

9. The address of pattieo@wii.rr.com was the email account of Petitioner Patricia Otto and it is undisputed that her husband had access to, and authority to use, that email account in October of 2015. **JA 1109 at p. 104, ll. 14-18; JA 192 at No. 13; JA 210 at ll. 4-23; and JA 275-276.**

10. The Email address rottowv@gmail.com was an account utilized by Petitioner Richard Otto in October 2015. **JA 192 at No. 13; and JA 210 at ll. 4-23.**

11. The primary means of communication between Petitioners and Frum was *via* Email. **JA 1092 at p. 36, ll. 1-14; JA 1094 at p. 41, ll. 18-24; and JA 1100 at p. 67, ll. 7-10.**

12. The Email address lfrum@cbimove.com was the primary account utilized by the Frum for business purposes in October 2015 which was provided and maintained by Coldwell Banker. **JA 75-77.**

13. Catrow Law is a law firm located in Martinsburg, West Virginia which specializes in real estate law, including but not limited to real estate settlements/closings. **JA 518-520.**

14. Petitioners authorized Frum to act as their Agent, including, but not limited to reliance upon her to coordinate the purchase and closing for the Subject Property with Brandon McDay and/or his real estate agent and Catrow Law PLLC. Petitioners dealt exclusively with Frum as their Agent and relied solely upon her for communication and direction associated with the purchase and closing upon the Subject Property. **JA 1092 at p. 35; JA 126; JA 177 to 181; and JA 263 at ll. 9-16; and JA 275 at ll. 14-17.**

15. On October 5, 2015, Richard Otto and Patricia Otto entered into a Regional Sales Contract for the purchase of the property located at 535 Rivanna Run, Falling Waters, WV 25419-4378 from Brandon McDay for the purchase price of $265,000.00. **JA 299-320.**

16. On October 6, 2015, Frum sent an unencrypted Email from lfrum@cbimove.com to Petitioners at pattieo@wi.rr.com concerning the executed Regional Sales Contract for the Subject Property which included as an attachment a pdf file named "535RivannaRunContract.pdf." **JA 322-323.**

17. Pursuant to a series of Email exchanges between Petitioners and Frum on or about October 8, 2015, closing for the Subject Property was scheduled for October 26, 2015 at 2:00 p.m. at the offices of Catrow Law, PLLC, 300 Foxcroft Avenue, Suite 200, Martinsburg, WV 25401. **JA 325-326 and JA 1097-1098 at pp. 56-57.**

18. Pursuant to the Regional Sales Contract, the parties agreed that settlement for the Subject Property would occur on or before October 26, 2015. **JA 299-320.**

19. Pursuant to the Regional Sales Contract, Petitioners selected Catrow Law to conduct the settlement for the Subject Property. **JA 299-320.**

20. Petitioners and Brandon McDay each executed an Informed Consent to Representation and Disclosure Pursuant to Advisory Opinion 2010-02 ("Informed Consent"). **JA 328-329.**

21. Pursuant to the informed consent, Petitioners and Brandon McDay each consented to "Catrow Law PLLC representing them to the extent necessary to complete said real estate transaction, including, but not limited to, examination of real estate title, preparation of all necessary documents and conducting closing." **JA 328-329.**

22. On October 6, 2015 Frum sent an unencrypted Email from lfrum@cbimove.com to Petitioners at pattieo@wi.rr.com requesting that they send her proof of funds for the purchase of the Subject Property "ASAP". **JA 331.**

23. On October 7, 2015, Petitioner Patricia Otto sent an unencrypted Email from pattieow@wi.rr.com to Frum at lfrum@cbimove.com which included as an attachment a Ziegler Health Management financial statement. **JA 333-334.**

24. On October 8, 2015, Petitioner Patricia Otto sent an unencrypted Email from pattieow@wi.rr.com to Frum at lfrum@cbimove.com which included as an attachment Petitioners' Account Summary from North Shore Bank as of October 6, 2015 indicating their current bank balance and bank information. **JA 336-337.**

25. On October 9, 2015, Petitioner Richard Otto sent two unencrypted Emails from pattieow@wi.rr.com to Frum at lfrum@cbimove.com requesting that Frum provide Petitioners with wire transfer information. **JA 339-341.**

26. On October 12, 2015 Frum sent an unencrypted Email from lfrum@cbimove.com to Kerri Smith of Catrow Law PLLC at ksmith@catrowlaw.com requesting that wire transfer instructions be provided for the closing of the Subject Property. **JA 343-345 and JA 82-84.**

27. On October 12, 2015, Kerri Smith of Catrow Law PLLC sent an **encrypted** Email from ksmith@catrowlaw.com to Frum at lfrum@cbimove.com which included the wiring instructions for the trust account utilized by Catrow Law PLLC attached as a pdf file named "Wiring Instructions.pdf". **JA 343-345 and JA 82-86.**

28. Frum did not forward Petitioners the October 12, 2015 *encrypted* Email that she received from Kerri Smith of Catrow Law PLLC which included as an attachment a pdf file named "Wiring Instructions.pdf". **JA 347-348 and JA 86-89.**

29. *On October 13, 2015, Frum printed and scanned the wiring instructions* obtained from Catrow Law via encrypted email, thereby creating a new file that was named "SKMBT_50115101311010.pdf. **JA 347-348.**

30. *On October 13, 2015, Frum sent an unencrypted Email* from lfrum@cbimove.com to Petitioners at pattieow@wi.rr.com with the wiring instructions for the trust account utilized by Catrow Law attached as a pdf file named "SKMBT_50115101311010.pdf". **JA 347-348 and JA 82-86 and 89.**

31. On October 13, 2015 Petitioner Richard Otto sent an unencrypted Email from rottowv@gmail.com to Frum confirming that he had received the wiring instructions for Catrow Law and that he would "forward that onto our bank." He also requested that Frum provide "the amount that will need to be wired for closing" and a copy of the "signed offer". **JA 350-351 and JA 89-90.**

32. The Wiring Instructions for Catrow Law as provided to Petitioners by Frum on October 13, 2015 identified the Account Name as Catrow Law PLLC and the financial institution was MVB Bank, Inc. of Fairmont, West Virginia. **JA 347-348.**

33. On October 13, 2015, Frum sent an *unencrypted* Email from lfrum@cbimove.com to Petitioners at pattieow@wi.rr.com which included as an attachment the signed contract for the Subject Property. In his Reply to this Email, Petitioner Richard Otto confirmed receipt of the contract and acknowledged that Frum would provide him the amount to be wired within the next week. **JA 353.**

34. On October 13, 2015, Tasha Catrow of Catrow Law sent an encrypted Email sent from tcatrow@catrowlaw.com to Frum at lfrum@cbimove.com with the preliminary HUD-1 for the Subject Property attached as a pdf file named "HUD oct 13.pdf". **JA 355-358.**

35. Frum did not forward Petitioners the October 13, 2015 encrypted Email that she received from Tasha Catrow of Catrow Law which included a preliminary HUD-1 for the closing on the Subject Property attached as a pdf file named "HUD oct 13.pdf". **JA 360-363.**

36. On October 14, 2015, Frum printed and scanned the preliminary HUD-1 obtained from Catrow Law via encrypted email, thereby creating a new file that was named "SKMBT_50115101412540.pdf". **JA 360-363.**

37. On October 14, 2015, Frum sent an unencrypted Email from lfrum@cbimove.com to Petitioners at the Email addresses pattieo@wi.rr.com and rottowv@gmail.com concerning the executed Regional Sales Contract for the Subject Property which included as an attachment a pdf file named "SKMBT_50115101412540.pdf.pdf. **JA 360-363.**

38. The email sent by Frum to Petitioners by Frum on October 14, 2015 and the preliminary HUD-1 attached to same (a) did not include any reference to a $5,000 credit to be deducted from the amount owed by Petitioners as the purchaser of the Subject Property; and (b) identified the amount due from Petitioners as the purchaser at closing as $266,069.22. **JA 355-358 and JA 360-363.**

39. At some point in October 2015, the Email accounts of Petitioners and/or Frum were breached by a hacker. **JA 164 at ¶ 26.**

40. *Petitioners did not receive any Emails directly from any representative of Catrow Law from October 1, 2015 to October 26, 2015.* It is important to note that Petitioners did not have any direct contact with any representative of Catrow Law prior to the scheduled closing on October 26, 2019. All of Petitioners' contact concerning the transaction was with their realtor, Frum. As succinctly stated by Petitioner Richard Otto "We had no contact with the Catrow Law Office." **See JA 1123 at p. 158, ll. 20-21 and p. 160, ll. 11-16; JA 228 at ll. 19-20; and JA 279 at ll. 17-21.**

41. On October 20, 2015, a hacker sent an Email purportedly from Frum to pattieow@wi.rr.com which stated that "The title company need you to Wire the closing funds, They want to ensure they receive the funds before closing this will enhance a smooth and early closing on this property also buyer to get a credit of $5,000 to the buyer since we will close before the closing date, Please kindly let me know if you can make the closing funds so i can send over the Wire instructions." **JA 365.**

42. On October 20, 2015, Petitioner Richard Otto replied to the Email that he received from the hacker, believing the same to be from Frum, seeking clarification with respect to the $5,000 credit to the buyer. The Header of the Email reflects that he sent the email sent from pattieow@wi.rr.comm to lfrurn@gmail.com. [1]Petitioner Richard Otto has testified he did not observe that he was not sending this email to Frum at her address of lfrum@cbimove.com. **JA 367.**

[1] For purposes of clarification, the legitimate email was LFRURM not LFRURN. (Capitals are used for the Court to note the distinction). Further, the address origination for the legitimate email was cbimove.com and the hacker was using a Gmail account (gmail.com).

43. Frum was not the owner of the lfrurn@gmail.com nor did she ever use same. **JA 96 at ll. 12-21.**

44. On October 20, 2015 the hacker sent an Email purportedly from Frum to pattieow@wi.rr.com which stated that "The $5,000 will be credited to you on closing day,This is coming up as a requirement because the title company would like to record the closing funds earlier than we expected, the closing funds is being wired to the title's trust account which will be provided soon as you agree to this, The amount you will wire tomorrow is : $266,069.22 , I will forward you the account today so you can make the wire tomorrow morning." **JA 369-370.**

45. On October 20, 2015, Petitioner Richard Otto sent an email to the hacker seeking clarification with respect to the $5,000 credit to the buyer. The Header of the Email reflects that he sent the email sent from pattieow@wi.rr.comm to lfrurn@gmail.com. In this Email Petitioner Otto stated "The credit kind of makes the $20/day interest seem like a pretty good deal. Does this mean we might walk away with a check Monday as that figure looks familiar? I've already transferred the line of credit to our checking so that's sitting with $286,000 in it - which is a tad more than usual. From what we've been told, we'll just need to stop at the bank tomorrow to initiate the transfer." Petitioner Richard Otto than provided the details of the Catrow Law wiring instruction that he previously received. **JA 372-373.**

46. On October 20, 2015 the hacker sent an Email purportedly from Frum to pattieow@wi.rr.com which stated that "I just confirm from the title company, The closing funds should be wired to the title's trust account which, I will email you the account when they confirm it to me , once payment is made tomorrow , early recording of the transaction and a payment receipt will be issued when it has been received also the wire fees can be deducted from the closing costs too. I will forward you the account details shortly. Congrats." **JA 375-378.**

47. On October 20, 2015 the hacker sent an Email purportedly from Frum to pattieow@wi.rr.com which stated that Petitioners should wire $266,069.22 to the title's trust account and included wire instructions attached as a .doc file named "Catrow Law PLLC Real estate trust acct.doc". **JA 375-378.**

48. The Wiring Instructions sent to Petitioners by the hacker on October 20, 2015, were substantially different from the wiring instructions provided to them by Lynn Frum of Coldwell Banker on October 13, 2015. The instructions identified the Account Name as DRC Global Services, Inc. and to the attention of "JC" and the financial institution to be used was Wells Fargo Bank of Albany, New York. The legitimate wire instructions were on Catrow Law PLLC letterhead, the hacker did not use letterhead. **JA 375-378.**

49. DRC Global Services, Inc. was not a party to the Regional Sales Contract executed on October 6, 2015, nor was it referenced in same. **JA 299-320 and JA 375-378.**

50. DRC Global Services, Inc. was not identified in the Preliminary HUD-1 provided to Frum on October 14, 2015. **JA 353 and JA 355-358.**

51. On October 20, 2015, Petitioner Richard Otto sent an email to the hacker confirming that he had received the wiring instructions. He stated "Just printed it and it is a different bank and account than before. I'll shred the other to avoid confusion - which is way too easy at this point." In response, the hacker stated in a reply Email "Okay, Once payment is made tomorrow, Please send me the proof of payment so i can file it also send it to the title company. Thank you Congrats." **JA 380-382.**

52. Petitioners failed to recognize that the wiring instructions provided to them by the hacker on October 20, 2015, were not legitimate. In fact, Petitioner Richard Otto questioned the replacement wiring instructions as "unusual" because the destination bank was New York which

he indicated "seems strange" in discussing the same with his wife. **JA 1100 at p. 65, ll. 7-17; and JA 273 at ll. 15-19.**

53. On October 21, 2015, Petitioner Richard Otto provided the wire instructions sent to them by the hacker on October 20, 2015 to North Shore Bank and instructed North Shore Bank to initiate a wire transfer in the amount of $266,069.22 from Petitioners' account to the account of DRC Global Services, Inc. **See JA 1120-1121 at pp. 147-50; and JA 1128-1129 at pp. 179-181; and JA 384-387.**

54. Prior to authorizing North Shore Bank to initiate the wire transfer, Petitioners did not contact Frum or Catrow Law. **See JA 1120-1121 at pp. 147-50; and JA 1128-1129 at pp. 179-181.**

55. North Shore Bank did not (a) request that that Petitioners contact Catrow Law or Frum to verify the wiring instructions and/or (b) independently verify the wiring instructions prior to initiating the wire transfer on October 21, 2015. **See JA 1120-1121 at pp. 147-50; and JA 1128-1129 at pp. 179-181.**

56. On October 21, 2015, the hacker emailed Petitioners to see if they had wired the funds. In Response, Petitioner Richard Otto sent an email to the hacker stating that "The transfer was initiated at the bank at 9:17 this morning. It sounded like it gets sent to our bank's HQ in Milwaukee and then they send the transfer. I don't have anything at this point confirming that it was received. All I have at this point is a sheet showing the Originator (us) and Correspondent/Beneficiary info, a successful fax (to corp. HQ) report and receipts for the money coming out of our account and the $25 fee — showing it was complete at 9:18. Do you need any or all of this or will there be anything else coming to us showing that the money has been received? Wouldn't Catrow have something showing the money has been deposited? Let me

know when you get a chance." The Header of the Email reflects that he sent the email sent from pattieow@wi.rr.comm to lfrurn@gmail.com. **JA 384-387.**

57. On October 21, 2015, Petitioner Richard Otto sent multiple emails from pattieow@wi.rr.comm to the hacker at lfrurn@gmail.com once the wire transfer had been initiated. Attached to one of these emails was a jpg file named "wire transfer.jpg" which was the wire transfer information that he received from North Shore Bank. **JA 389-393.**

58. On October 22, 2015 at 1:57 PM, Petitioner Richard Otto initiated contact from his email address rottowv@gmail.com with the hacker by sending an Email to lfrurn@gmail.com. **JA 400-408.**

59. On October 23, 2015 Petitioner Richard Otto sent an Email from rottowv@gmail.com to Frum at lfrum@cbimove.com which said "Any idea if we are able to move the closing dates?" **JA 410-411.**

60. Although there had been no interaction between Frum and Petitioners concerning the movement of closing dates, upon receipt the October 23, 2015 from Petitioner Richard Otto, Frum did not attempt to contact Petitioners and instead only sent an email which asked, "Move the closing dates." **JA 410-411.**

61. On October 26, 2015 Petitioners and Frum appeared at the offices of Catrow Law for the closing on the subject property. Catrow Law informed the parties that it had not received the wired funds. Subsequently, Petitioners presented the second set of wiring instructions that they had received from the hacker. Upon receipt of this information, Catrow Law contacted the authorities. Subsequently, it was determined that Petitioners were victimized by a hacker that was impersonating Frum. **JA 1111-1112 and JA 269-270.**

62. After learning that they were the victims of a hacker, Petitioners did not have their computer systems or Email accounts inspected or analyzed by **any** computer forensic experts to determine if any of their personal email accounts were the source of the hack. **JA 261-262.**

63. Following the closing, Petitioner Richard Otto apologized to Frum and admitted to her that "he was just greedy, he saw that $5,000, and he didn't think." **JA 123 at ll. 3-10.**

64. According to Petitioners' expert, the source of the hack from which the personal financial information of Petitioners was intercepted occurred with the Email account of Coldwell Banker. **JA 503 at ll. 8-13.**

65. At all times pertinent herein, *Catrow Law utilized encryption* with respect to Emails concerning real estate transactions and there is no evidence to demonstrate that the Email account of Catrow Law was breached at any time in October 2015. **JA 538 at ll. 8-13; JA 546 at ll. 15-18; and JA 604-605.**

66. As admitted by Petitioner Patricia Otto, Petitioners "have no knowledge" that would establish that the Email account of Catrow Law was the source of the hack at issue in these proceedings. **See JA 277 at ll. 19-22.**

**B. PROCEDURAL HISTORY**

1. On June 13, 2017, Petitioners filed suit in the Circuit Court of Berkeley County, West Virginia against Coldwell Banker and Catrow Law asserting negligence against Coldwell Banker (Count I) and negligence against Catrow Law (Count II). Both causes of action assert that the Defendants negligently failed to warn or otherwise prevent the Petitioners from falling victim to a cybercrime in violation of various professional standards of care. **JA 1162-1177.**

2. Petitioners reached an agreement with Coldwell Banker with respect to Count I of their Complaint as reflected by a Stipulation of Dismissal which was filed on May 2, 2018. **JA 9-10.**

3. On October 23, 2018, Petitioners filed a Motion for Leave to Amend Complaint, seeking to (a) remove Coldwell Banker from the Complaint because of the settlement; (b) remove "extraneous information relevant only to" Petitioners' claims against Coldwell Banker; and (c) revise their factual allegations with respect to the claims asserted by them against Catrow Law. **JA 1236-1246.**

4. In the proposed Amended Complaint submitted in conjunction with the Petitioners' Motion for Leave to Amend Complaint, the Petitioners added the following allegations: (a) Catrow Law did not have a wire fraud disclaimer in its email prior to the events which gave rise to the instant action; and (b) Catrow Law, as an agent of Old Republic Title Insurance Company (hereinafter referred to as "Old Republic") presumably would have received notices and/or bulletins from Old Republic prior to the events which gave rise to the instant action warning it against the exact wire fraud scam which Petitioners fell victim to, and further recommending certain precautions which allegedly went unheeded by Catrow Law. **JA 1236-1237 and JA 1239-1246.**

5. On December 13, 2018, the Circuit Court entered an Order granting in part, and denying in part, Petitioners' Motion for Leave to Amend Complaint. The Circuit Court (a) granted Petitioners' request to revise its factual allegations with respect to its claims against Catrow Law; and (b) denied Petitioners' request to remove the portions of the Complaint pertaining to Coldwell Banker. In reaching this conclusion the Circuit Court observed that it "is common that Defendants settle out of multi-defendant civil actions. However, it is not proper

procedure to then amend the original Complaint to delete allegations pertaining to that Defendant." **JA 1151-1157.**

6. On December 21, 2018, Catrow Law filed its Motion for Summary Judgment and Memorandum of Law in support of same seeking an Order granting summary judgment as to all remaining claims as against it. **JA 18-780**.

7. After receiving an extension of time from the Court, Petitioners filed their Amended Complaint on January 3, 2019. **JA 1158-1159 and JA 781-791.**

8. On January 23, 2019, Petitioners filed their Response to Catrow Law's Motion for Summary Judgment. **JA 797-857.**

9. On January 24, 2019, Petitioners filed their Amended Response to Catrow Law's Motion for Summary Judgment which corrected errors with respect to the identification of exhibits which appeared in their original Response. **JA 859-886.**

10. Petitioners did not include with their original Response to Catrow Law's Motion for Summary Judgment or their Amended Response any affidavits (a) in support of their claims or to refute the evidence presented by Catrow Law; or (b) indicating that further discovery was necessary. **JA 797-857 and JA 859-886.**

11. On January 15, 2019, Petitioners filed a Witness List identifying without any explanation two representatives from Old Republic National Title Insurance Company ("Old Republic"). **JA 792-795.**

12. Pursuant to the Circuit Court's Scheduling Order entered on February 27, 2018, discovery closed in this matter on January 21, 2019. **JA 1148-1150.**

13. On January 30, 2019, Catrow Law filed its answer to Petitioners' Amended Complaint. **JA 887-905.**

14. On February 4, 2019, Catrow Law filed its Reply in further support of its Motion for Summary Judgment. **JA 907-957**.

15. On February 9, 2019, the Circuit Court entered an Order Granting Summary Judgment in favor of Catrow Law, dismissing all claims of Petitioners as against Catrow Law. The Circuit Court specifically held as follows:

> **In order to prevail, Plaintiffs [Petitioners] must provide evidence Catrow Law was the direct and proximate cause of their damages and "but for the negligence" of Catrow Law, they would not have suffered any damages**. Notwithstanding the fact that Plaintiffs [Petitioners] cannot identify any standard of care or negligence on the part of Catrow, **the actions of multiple other parties either contributed to, or were in fact the proximate cause of their damages. Since Plaintiffs [Petitioners] cannot satisfy their burden of proof to maintain a cause of action for legal malpractice, summary judgment is appropriate** and should be granted because the **Plaintiffs [Petitioners] have "failed to make a sufficient showing on an essential element of the case" that they have a "burden to prove."**

**JA 958-970. (Emphasis added, and internal citations omitted.)**

16. On February 18, 2019, Petitioners filed a Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. **JA 971-1032.**

17. On March 11, 2019, Catrow Law filed its Response in Opposition to Petitioners Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. **JA 1033-1058.**

18. On March 17, 2019, Petitioners filed their Reply to Catrow Law's Response in Opposition to their Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. **JA 1059-1070.**

19. On March 21, 2019, the Circuit Court entered an Order Denying Petitioners' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. In its Order, the Circuit Court affirmed its prior finding that the Petitioners "failed to

make a sufficient showing on an essential element of the case that they have a burden to prove", *i.e.* standards of proof to sustain a legal malpractice claim. The Circuit Court further held as follows:

> Although Plaintiffs' [Petitioners'] Motion to Alter reflects that they wholly disagree with the rulings and findings of the Court in its Order Granting Defendant's [Catrow Law's] Motion for Summary Judgment, they have failed to present any basis for this Court to exercise the **extraordinary remedy** of altering or amending its Order Granting Defendant's Motion for Summary Judgment pursuant to W.Va.R.Civ.P. Rule 59(e).

**JA 1071-1083. (Emphasis in original.)**

## II. SUMMARY OF ARGUMENT

Petitioners were the victims of a cybercrime which is commonly referred to as a phishing scheme.[2] At some point in 2015, an unidentified "hacker" obtained information concerning a prospective real estate purchase of the Petitioners prior to closing. Utilizing an email address similar to that of the Petitioners real estate agent Frum, the hacker sent an email to the Petitioners promising that they would receive a $5,000 "buyer credit" if they would forward their purchase funds in advance of an upcoming closing date. Subsequently, the hacker sent the Petitioners a set of wire instructions directing funds to an account in New York instead of West Virginia. Intrigued by the "buyer credit", the Petitioners fell victim to the scheme and all of their purchase funds were wired to a fictitious escrow account accessible to the hacker and to date have not been recovered. **JA 123; JA 365; JA 367; and JA 1267 ¶ 33. At no point during this process did Petitioners receive any communications from Catrow Law.** All of Catrow Law's communications were with the Petitioners' agent, Coldwell Banker. **JA 1092 at p. 35; JA 126;**

[2] A "phishing" scheme is the fraudulent attempt to obtain sensitive information such as usernames, passwords and personal and financial information by disguising oneself as a trustworthy individual/entity in an electronic communication.

**JA 177 to 181; and JA 263 at ll. 9-16; JA 275 at ll. 14-17; JA 1123 at p. 158, ll. 20-21 and p. 160, ll. 11-16; JA 228 at ll. 19-20 and JA 279 at ll. 17-21.**

As reflected in the record, Petitioners do not know the identity of the hacker, nor do they know whether their email or that of Coldwell Banker's was compromised. Petitioners did not have a forensic examination conducted of their computer system or email. **JA 12-16 and JA 261-262**. Nonetheless, Petitioners filed suit against Coldwell Banker **and** Catrow Law alleging that they each violated certain standards of professional care. The cause of action asserted against Catrow Law constitutes a legal malpractice action. **JA 963.**

It is well established in West Virginia that to prevail in a malpractice action against a lawyer, the plaintiff must establish not only his or her damages, but must establish that, but for the negligence of the lawyer, he or she would not have suffered those damages. *Calvert v. Scharf*, 217 W. Va. 684, 695, 619 S.E.2d 197, 208 (2005). The record in this matter reflects that the actions of multiple other parties either contributed to, or were in fact the proximate cause of, the Petitioners' damages, including but not limited to the hacker, Coldwell Banker and the actions of the Petitioners. Thus, the Circuit Court correctly found that the Petitioners did not, and cannot, satisfy the requisite burden of proof to maintain a cause of action for legal malpractice since they did not produce any evidence to demonstrate that "but for" the actions or inactions of Catrow Law they would not have been the victim of a cybercrime. In reaching this decision, the Circuit Court properly applied the law to the facts at issue and did not commit "reversible and prejudicial error".

## III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Catrow Law maintains that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure because (a) the parties have

not agreed to waive oral argument; and (b) the petition is not frivolous. Catrow Law further states that this case is suitable for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure as it involves assignments of error in the application of settled law.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

It is axiomatic in this state that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). This Court's review of a trial court's decision is governed by the principle that:

> [a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992). *Painter*, 192 W. Va. at 190, 451 S.E.2d at 756, Syl. Pt. 2. *See also Conn v. Beckman*, No. 18-0551, 2019 WL 4257294 (W. Va. Sept. 9, 2019).

As stated by this Court "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Syl. Pt. 5, *Toth v. Bd. of Parks & Recreation Comm'rs*, 215 W. Va. 51, 593 S.E.2d 576 (2003).

The Circuit Court did not err in granting summary judgment in favor of Catrow Law. The Circuit Court correctly applied the law enumerated by this Court as it relates to the granting of

summary judgment, the appropriate standard, and found that sufficient discovery had been conducted to establish uncontroverted facts that formed a basis for the Circuit Court's decision.

### B. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT PETITIONERS FAILED TO MEET THE ESSENTIAL ELEMENTS OF A CLAIM FOR LEGAL MALPRACTICE.

As correctly noted by the Circuit Court in its Order granting summary judgment in favor of Catrow Law, Petitioners' cause of action "against Catrow Law constitutes a legal malpractice claim." **JA 963**. This finding is supported by the allegations set forth against Catrow Law in their Amended Complaint (**JA 781-791**) as well as the representations made by the Petitioners in their filings below. Petitioners have not identified the classification of their claims against Catrow Law as a legal malpractice claim as an assignment of error for purposes of this appeal. In that regard, it is undisputed that the matter before this Court is a legal malpractice claim.

In comparison to a standard tort action, the elements of proof necessary to establish malpractice are elevated and more stringent under current West Virginia law. As this Court observed in 2016, the "purpose of this requirement is to safeguard against speculative and conjectural claims." *Rubin Res., Inc. v. Morris*, 237 W. Va. 370, 374, 787 S.E.2d 641, 645 (2016)

Pursuant to the controlling law of this State, in a suit against an attorney for negligence, Petitioners must establish (1) that Catrow Law served as their counsel during the relevant time period for each claim; (2) that Catrow Law breached a duty of care owed to Petitioners; and (3) that such breach resulted in and was the direct and proximate cause of Petitioners' alleged damages. This standard of proof was enunciated by this Court in the oft-cited cases of *Calvert v. Scharf,* 217 W. Va. 684, 690, 619 S.E.2d 197, 203 (2005) and *Keister v. Talbott,* 182 W.Va. 745, 748-749, 391 S.E.2d 895, 898-899 (1990). As noted by this Court in *Humphreys v. Detch,* 227

W.Va. 627, 712 S.E.2d 795 (2011), "the essential elements of a legal malpractice claim are set forth in Syllabus Point 1 of *Calvert* at 712 S.E. 799.

This Court in *McGuire v. Fitzsimmons*, 197 W.Va. 132, 475 S.E.2d 132 (1996), specifically noted that "in a legal practice action, there are two suits: the malpractice against the lawyer and the underlying suit for which the client originally sought legal services, which may be considered a 'suit within a suit'." In that case, the Court noted that a "Plaintiff is required to prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted and was the proximate cause of loss to the client." 197 W.Va. 137, citing *Keister*.

Upon consideration of Catrow Law's Motion for Summary Judgment, the Circuit Court correctly applied the law as set forth by the Court in *Calvert* and *Keister* and held that Petitioners failed to meet the essential elements of a claim for legal malpractice. Specifically, the Circuit Court stated:

> In a suit against an attorney for negligence, the Plaintiffs must establish (1) that Catrow Law served as their counsel during the relevant time period for each claim; (2) that Catrow Law breached a duty of care owed to plaintiffs; and (3) that such breach resulted in and was the direct and proximate cause of Plaintiffs' alleged damages. *See Calvert v. Scharf,* 217 W. Va. 684, 690, 619 S.E.2d 197, 203 (2005) and *Keister v. Talbott,* 182 W.Va. 745, 748-749, 391 S.E.2d 895, 898-899 (1990).
>
> To establish that an attorney has breached a reasonable duty, it is necessary that the Plaintiffs prove that Catrow Law failed to exercise the "knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances" in the performance of her duties. *Keister,* 182 W.Va. at 748, 91 S.E.2d at 898. "In order to prevail in a malpractice action against a lawyer, the plaintiff must establish not only his or her damages, but must additionally establish that, but for the negligence of the lawyer, he or she would not have suffered those damages." *Kay v. McGuireWoods, LLP,* 240 W. Va. 54, 60, 807 S.E.2d 302, 308 (2017)

**JA 963.**

The Circuit Court appropriately analyzed Petitioners' claims as set forth in their Amended Complaint and determined that they had failed to satisfy two of the three requisite standards for maintaining a legal malpractice claim.[3] The Circuit Court found that the Petitioners failed to demonstrate that Catrow Law breached a duty of care owed to them. The Court further found that even if there had been a breach of some unknown duty, Petitioners failed to prove that the actions or inactions of Catrow Law were the direct and proximate cause of their damages. **JA 968.**

On appeal, Petitioners argue that the Circuit Court "studiously confused its role in ensuring that there is a 'genuine issue of material fact' as to the elements of liability". **Petitioners' Appeal Brief ("Appeal Brief"), p. 8**. Petitioners maintain that the Circuit Court committed reversible error when it determined that Petitioners failed to demonstrate a genuine issue of fact as to whether Catrow Law (a) breached a duty of care to Petitioners; and (b) was the proximate cause of Petitioners' damages. (Assignment of Error No. 1). Additionally, Petitioners argue that the Circuit Court's reliance upon the proximate cause standard was erroneous. (Assignment of Error No. 4). For the purposes of its Response and the sake of simplicity, Catrow Law will address Assignments of Error Numbers 1 and 4 together as part its discussion of the standards of proof at issue in this matter.

**1. The Circuit Court did not err when it found that the Petitioners failed to present a genuine issue of material fact as to whether Catrow Law breached a duty of care to Petitioners.**

As noted above, to prevail in a legal malpractice action, the Petitioners must demonstrate that Catrow Law breached a duty of care owed to them. The record reflects that Petitioners

[3] With regard to the first element, it was undisputed that Catrow Law was the attorney for Petitioners. Petitioners consented "to Catrow Law PLLC representing them to the extent necessary to complete said real estate transaction, including, but not limited to, examination of real estate title, preparation of all necessary documents and conducting closing." **JA 328-329.**

failed show that Catrow Law owed breached any duty owed to them. **JA 964-965**. However, Petitioners appeal on this issue is without merit and constitutes a recitation of their "disappointment with the conclusions of drawn by the [Circuit] Court from the evidentiary facts presented by the parties". **JA 1077.** The Circuit Court found that there were no genuine issues of material fact presented by the Petitioners to demonstrate that Catrow Law breached a duty of care owed to them, a finding supported by the record. **JA 964-965.**

As represented by the Petitioners both to the Circuit Court and this Court, Petitioners' entire cause of action against Catrow Law hinges upon one purported standard of care. Specifically, Petitioners argue that Catrow Law "breached her [sic] duty of care by failing to ensure the safe and secure transmission of funds into her trust account despite having known or should have known about the risks of wire fraud." **Appeal Brief, p. 31; JA 817; JA 879; and JA 963.** After a review of the evidence, the Circuit Court was led to the only conclusion which could be reached: Petitioners failed to adduce evidence and, therefore, summary judgment was appropriate.

In a legal malpractice action, the standard of care for an attorney in performing his or her duty is "to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances." *Keister,* 182 W.Va. at 748-749, 391 S.E.2d at 898-899 (emphasis added); *West Va. Canine College v. Rexroad,* 191 W. Va. 209, 211 444 S.E.2d 566, 568 (1994).

In light of the forgoing, Petitioners are required to demonstrate that Catrow Law failed to properly ensure the delivery of its wiring instructions with respect to the real estate transaction at issue. The fact that West Virginia is a notice pleading jurisdiction as relied upon by Petitioners in their Appeal Brief is irrelevant and does not lessen their burden of proof. The mere contention

by Petitioners that Catrow Law violated some duty and that issues are disputable is not enough. A party opposing a summary judgment motion may not rest upon the allegations contained in the pleadings, but rather must carry the burden to set forth specific facts showing that there is a genuine issue for trial. *Chafin v. Gibson*, 213 W. Va. 167, 174, 578 S.E.2d 361, 368 (2003) and *Ramey v. Ramey*, 183 W.Va. 230, 233, 395 S.E.2d 230, 233 (1990).

Moreover, mere reliance upon supposition or conjecture by Petitioners and their counsel is insufficient to carry their burden of proof regarding liability in this regard. **JA 968**. In *Gibson v. Little General Stores, Inc.*, 221 W.Va. 360, 364, 655 S.E.2d 106, 110 (2007), this Court affirmed a summary judgment where the circuit court determined that the plaintiff had failed to produce evidence sufficient to allow the trier of fact to consider her claims "without completely basing its determination upon pure speculation and conjecture". See also, *McQuade v. Bayless Law Firm*, PLLC, No. 13-0947, 2014 WL 998483, at *2 (W. Va. Mar. 14, 2014).

In the present matter, Petitioners entire cause of action against Catrow Law is based upon conjecture, speculation and their own unsubstantiated opinions as to what Catrow Law should have done with respect to the transmission of its wiring instructions. This pattern of reliance upon speculation by the Petitioners is exhibited from the outset in their Appeal Brief, specifically footnote no 1. **Appeal Brief, p. 1-2**. Even though there is no evidence in the record, Petitioners attempt to absolve any liability on their part by submitting a theory that they proffer must be taken as true because of "basic rationality" when their opinion as to how the scam against them was actually perpetrated is considered. It is important to note that Petitioners did not present any evidence in this matter to demonstrate that their email addresses were not compromised by the hacker. In fact, Petitioners did not retain a computer forensic expert to review this matter. **JA 12-16 and JA 261-262**. Moreover, the record is replete with evidence that Petitioners

communicated with the hacker for days from multiple email addresses. **JA 365; JA 367; JA 369-370; JA 372-373; JA 375-378; JA 380-382; JA 384-387; JA 389-393; and JA 400-408.**

The Circuit Court correctly ignored Petitioners' unsubstantiated allegations, speculation and conjecture when it determined that Petitioners failed to present any genuine issue of material fact which would demonstrate that Catrow Law breached a duty of care owed to them with respect to Catrow Law's conveyance of wiring instructions. The facts at issue are straightforward and demonstrate that to the extent a duty with respect to the wiring instructions was owed by Catrow Law, such was satisfied. In support of same, Catrow Law would direct the Court to the following evidence that is **actually** a part of the record:

a. Petitioners retained Coldwell Banker/Frum to act as their real estate agent to handle all matters associated with the purchase of the subject property. Petitioners also consented to the use of email in communicating with Frum and have admitted that their primary means of communication with her was via email. **JA 1092, p. 35; JA 126; JA 177-18; JA 263 at ll. 9-16 and JA 275 at ll. 14-17.**

b. At no time did Petitioners communicate with Catrow Law prior to closing, via telephone or email. Petitioners "relied on their agent, Coldwell Banker/Frum, to set up the closing logistics, as is typical in real estate transactions." **JA 677 at No. 9.** More specifically, Petitioners handled everything through Lynn [Frum]." **JA 275 at ll. 14-17.**

c. Frum sent an Email to Catrow Law requesting that wire instructions be provided for transmission of Petitioners' purchase funds on October 12, 2015. **JA 339-341; JA 343-345; JA 82-84.** In response, Catrow Law provided via encrypted email a set of wiring instructions directly to Petitioners' agent Frum. **JA 343-345; JA 82-86; JA 538 at ll. 8-13; JA 546 at ll. 15-18; and JA 604-605.**

d. Rather than forward the encrypted email as sent by Catrow Law with the wire instructions, Frum created a new email and a new attachment (the wiring instructions that she printed and rescanned) which she subsequently forwarded to Petitioners in an unencrypted format.[4] **See JA 347-348.**

e. Frum's email with the correct wiring instructions to Petitioners was sent only by Frum, not Catrow Law. **See JA 347-348.**

It is important to note that Petitioners were less than clear in this appeal as to the parties to whom wiring instructions were conveyed. **Appeal Brief, pp. 10-12.** As the foregoing

[4] This is apparent from the header within the email chain which references an email that Frum received from a scanner cbihagscanner@cbimove.com.

reflects, Frum received the wiring instructions in an encrypted format from Catrow Law. Petitioners did not expect to receive any communications whatsoever from Catrow Law as they were relying upon Frum to serve as their intermediary for information, instructions or any cautionary warnings related to the real estate transaction. *It is undisputed that Catrow Law never emailed wiring instructions directly to Petitioners.* Since Catrow Law provided the wiring instructions to Frum in an encrypted format it no longer possessed any control over same. How the information was provided by Frum to Petitioners, and what Petitioners did with that information, was beyond Catrow Law's control and it owed no duty with respect to same. In addition, Catrow Law's expert, Randall Conrad ("Conrad"), testified that the process followed by Catrow Law with respect to the conveyance of the wiring instructions at issue was the same customary process followed by real estate attorneys in the Eastern Panhandle of West Virginia. In this regard, Conrad opined that "what she did in providing wiring instructions to an experienced agent met her duty". **JA 709-710 at ll. 7-12; JA 717-718 at ll. 24, 1-17; JA 756-757 at ll. 14-24, 1-4; and JA 768-769 at ll. 24, 1-5.**

Despite the clear evidence that no legal standard was violated by Catrow Law, Petitioners argued below, and now on appeal, that the opinions of their expert T. Summers Gwynn ("Gwynn") and the existence of notices and bulletins issued by a title insurance company created the existence of genuine issues of material fact. The Circuit Court was not persuaded by such "evidence." [5]

First, Gwynn was an attorney that (a) is **not** licensed in West Virginia; (b) is not aware of any standards of care owed by real estate attorneys practicing in the state; and (c) limited his own disclaimer that his opinions are "not represented to be expert opinions of West Virginia

[5] Since Petitioners have raised the Court's consideration of this evidence as separate assignments of error, a more detailed discussion of these issues follows in the subsequent sections. **JA 347-348.**

law." **JA 421; JA 454 and JA 692-693**. Gwynn specifically testified that "I don't know about West Virginia." **JA 454**. Gwynn only provided the practice that he personally followed as an attorney in Maryland **which did not create** a genuine issue of material fact. **JA 420; JA pp. 16, 470-471 and JA 473-474.**

With respect to the bulletins/notices from Old Republic, those documents simply present more "conjecture" and "speculation" and do not constitute evidence that Catrow law violated a duty of care owed to Petitioners. **JA 828-832 and JA 966-967**. The record before the Circuit Court at the time summary judgment was granted reflected that there was no evidence to demonstrate that Catrow Law actually received any bulletins or notices concerning wire fraud transfer in 2015, much less the four notice/bulletins produced as evidence by Petitioners. **JA 473-474.** The four notice/bulletins produced by Petitioners did not specify that they were sent to attorneys in West Virginia. **JA 828-832.** On this basis, the Circuit Court correctly noted that the Petitioners failed to "articulate the precise manner" how such "evidence" supports their claims and creates a genuine issue of material fact. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996).

In light of the foregoing, the Circuit Court concluded that Catrow Law performed its duties with respect to the conveyance of the wiring instructions in accord with "the knowledge, skill, and ability ordinarily possessed *and exercised by members of the legal profession in similar circumstances*" and that she did not breach any duty owed to Petitioners. **JA 963-966**. *Keister,* 182 W.Va. at 748-749, 391 S.E.2d at 898-899 (emphasis added); *West Va. Canine College v. Rexroad*, 191 W. Va. 209, 211 444 S.E.2d 566, 568 (1994).

**2. The Circuit Court correctly found that the Petitioners failed to present a genuine issue of material fact as to whether Catrow Law was the direct and proximate cause of their damages.**

The third element that must be satisfied for a party to maintain a legal malpractice action is that the alleged negligence or breach of duty on the part of the attorney must be the proximate cause of loss to the client. Petitioners have asserted two assignments of error on this issue: (1) they maintain that they had presented a genuine issue of material fact which should have precluded grant of judgment to Catrow Law; and (2) the Circuit Court's application of the proximate cause standard was contrary to West Virginia law.

As noted above, the standard to be applied in a legal malpractice action is that the negligence or duty violated must be "the direct and proximate cause of the loss" to the Petitioners. More specifically, this Court has held:

> With respect to damages in an action against a lawyer for malpractice, we have held that "[i]n an attorney malpractice action, proof of the attorney's negligence alone is insufficient to warrant recovery; **it must also appear that the client's damages are the direct and proximate result of such negligence**." Syl. pt. 2, *Keister v. Talbott*, 182 W.Va. 745, 391 S.E.2d 895 (1990). Thus, in order to prevail in a malpractice action against a lawyer, **the plaintiff must establish not only his or her damages, but must additionally establish that, but for the negligence of the lawyer, he or she would not have suffered those damages**.

*Calvert*, 217 W. Va. at 694–95, 619 S.E.2d at 207–08. See also, *Keister,* 182 W. Va. at 749, 391 S.E.2d at 899 and *Kay*, 240 W. Va. at 60, 807 S.E.2d at 308.

In other words, Petitioners are required to demonstrate that "but for the negligence" of Catrow Law, they would not have suffered any damages. The record reflects that multiple other parties caused or contributed to the damages sustained by Petitioners. Catrow Law would direct the Court to the following:

a. As admitted in their Amended Response to Catrow Law's Motion for Summary Judgment and as substantiated by their Complaints, Petitioners "have not alleged Defendant Catrow Law's negligence as being the sole proximate cause of their

damages. . . Rather, from the beginning of this suit, Petitioners have alleged that there were two tortfeasors, both of whose actions proximately (foreseeably) caused Petitioners' losses." **JA 878; JA 1162-1177; and JA 781-791.**

b. As pled in their Amended Complaint, the money lost by Petitioners was "diverted when the hacker was able to intervene in email correspondences between Petitioners and Lynn Frum by surveying the email communications of Coldwell Banker and intervening with false wiring instructions once they found a client who intended to wire funds for a closing." **JA 784 at ¶ 22.** The actions of the hacker alone are facts which make it clear that Catrow Law was not "the direct and proximate cause" of the Petitioners' damages.

c. The actions of Petitioners, and specifically Petitioner Richard Otto, were a cause of the damages they sustained. Despite clear and identifiable signs that the hacker was attempting to perpetuate a fraud and his own experience as an accountant familiar with wire transfers, they requested and authorized the wiring of their funds directly to the hacker because of a promise of a $5,000 credit. **JA 365-373; JA 216-217; JA 1089 at p. 23, ll. 2-5; and JA 1124 at p. 163, ll. 10-16**. As testified by Frum, and not denied by Petitioners in their Amended Motion, Petitioner Richard Otto has admitted that "he was just greedy, he saw that $5,000, and he didn't think." **JA 123 at ll. 3-10.**

Since the pleadings and record suggests negligence to some degree on the part of Coldwell Banker, the hacker and the Petitioners themselves, as a matter of law, Catrow Law cannot be "the" proximate cause of Petitioners' damages in this matter. On this basis, the Circuit Court correctly concluded that the actions of multiple other parties either contributed to or were in fact the proximate cause of the Petitioners' damages and found that summary judgment was appropriate. **JA 967-968.**

Although Petitioners recognized below and in their Appeal Brief that legal malpractice actions carry an elevated standard of proof, they are seeking to reverse controlling law in West Virginia with respect to the same. (Assignment of Error No. 4.) Specifically, Petitioners maintain that the Circuit Court's application of "the direct and proximate cause standard" was erroneous. However, for this to be accomplished this Court would also have to overturn its prior decisions which hold that a party must demonstrate that the actions of a litigant's attorney were

"the direct and proximate cause" of their damages. *Calvert, supra; Keister, supra* and *Kay, supra.*

In support of their position, Petitioners maintain that West Virginia is a comparative fault state and the issue of how much percentage of fault can be attributed to a given defendant is codified as an express question for the trier of fact pursuant to W.Va. Code § 55-7-13d(a)(1). Although it was initially unclear whether Petitioners were asserting a legal malpractice claim when their Complaint was originally filed, Petitioners have since acknowledged on the record that it is. In that regard, Petitioners reliance upon W.Va. Code § 55-7-13d(a)(1) is misplaced.

This matter is not a standard tort action. The elements of proof necessary to establish legal malpractice are more stringent under current West Virginia law and this Court has held that "[w]ithout the requisite causal connection between an attorney's malpractice and a loss to the client, a malpractice case simply cannot go forward." *Calvert*, 217 W. Va. at 695, 619 S.E.2d at 208. The statements "but for the negligence of the lawyer" and "that such negligence resulted in and was the proximate cause of loss to the [plaintiff]" are synonymous. "But for" is a preposition which means "except for". *Merriam-Webster Dictionary.* It is clear that a plaintiff in a malpractice action must establish that *absent negligence on the part of his or her counsel, he or she would not have suffered any damages.*

Ignoring these basic precepts and arguing that the contributory negligence standard is applicable, Petitioners maintain that "West Virginia case law is replete with examples of malpractice claims which have involved multiple tortfeasors." **Appeal Brief, p. 26**. In support of this assertion, Petitioners cite two cases, *Keister, supra* and *Kay, supra.* The *Kay* decision involved one tortfeasor, a law firm, which does not support Petitioners contentions in this appeal.

The only issue before the Court in *Keister* was the issue of damages, and specifically whether the actual damages of the Keisters were proximately caused by the underlying defendants' negligent conduct. This Court deemed it necessary to provide a "brief analysis of the elements of an attorney malpractice claim" and articulated the standards of proof necessary for maintaining a legal malpractice action. The effect of any negligence on the part of the Clerk of the County Court upon the legal malpractice claim was not discussed, as that was not the subject of the appeal. As such, nothing is known as to the pretrial proceedings and rulings of the trial court concerning the defenses raised by the litigants, such as contributory negligence. However, this Court still held under existing West Virginia law that in a legal malpractice claim "[p]roof of the attorney's negligence alone is insufficient to warrant recovery; it must also appear that the client's damages are the direct and proximate result of such negligence." *Keister*, 182 W. Va. at 749, 391 S.E.2d at 899.

Petitioners also argue that the Court's opinion in *Kay, supra*, provides a "relatively expansive overview of the law on whether the settlement of claims against a third party precludes a claim against an attorney for malpractice, and explicitly found that no such prohibition exists under West Virginia law." **Appeal Brief, p. 28**. However, *Kay* involves a matter were a group of company shareholders who retained "McguireWoods to represent their interests in the sale of their company (Kay Co.). The shareholders specifically sought tax advice with regard to the sale of the company's stock, and their concern that gains from the sale and distribution of the stock could be taxed twice, first to the company and then to individual shareholders. McguireWoods provided advice on this issue and also agreed to structure the sale such that the gains would only be taxed once. Subsequently, the IRS assessed twelve former shareholders of the company $2.7 million in taxes and $556,000 in penalties. Eleven of the

assessed shareholders elected to settle the tax dispute with the IRS. The remaining shareholder successfully fought the taxes and penalties.

As a result of the foregoing, the shareholders and the company filed suit against McguireWoods asserting claims for legal malpractice. McguireWoods sought summary judgment on the basis that the shareholders' settlement with the IRS was a bar to any final adjudication concerning the legality of the IRS assessment and the related issue of whether its tax advice to petitioners constituted legal malpractice. The trial court granted the motion and found that the IRS settlement prevented petitioners from establishing the requisite causal connection between the alleged wrongful acts or omissions of McguireWoods and any damages.

On appeal, this Court concluded that the trial court erred in (a) finding that the settlement with the IRS prohibited petitioners from going forward on all of their claims; and (b) finding that the lack of a settlement with the IRS by the one shareholder who did not settle with the IRS precluded her from asserting any claims against McguireWoods. Specifically, the Court held:

> Despite the uncertainty of whether the petitioners can prove any of their claims, one thing is certain—the existence of the IRS settlement does not serve as a bar to the petitioners' attempt to prove they were damaged as a result of the legal advice McGuireWoods provided to them. As the court articulated in Parnell, although damages in a legal malpractice claim are measured with reference to the underlying claim of negligence, the malpractice claim is a separate and distinct claim. As a result, a settlement agreement does not automatically extinguish a legal malpractice claim.

*Kay*, 240 W. Va. at 62, 807 S.E.2d at 310. (Internal citations omitted).

Contrary to the representations made by Petitioners in this case, this Court's ruling in *Kay did not* lower the standard of care in legal malpractice claims and the facts at issue in that matter are distinguishable from those in the instant matter. In *Kay,* the IRS was not a co-tortfeasor with McGuireWoods. The action filed by the IRS gave rise to the malpractice claim and Petitioners *did not* file claims against any other parties.

In the instant matter, Petitioners filed suit against Coldwell Banker *and* Catrow Law seeking recovery for the same damages, that being the loss of their purchase funds that they transmitted to an unknown hacker. **JA 781-791**. In its Order granting summary judgment, the Circuit Court correctly concluded that "the actions of multiple other parties either contributed to or were in fact the proximate cause of their damages" and found that Petitioners "cannot satisfy their burden of proof to maintain a cause of action for legal malpractice." **JA 968.**

### D. THE CIRCUIT COURT'S FINDINGS WITH RESPECT TO PETITIONERS' EXPERT WERE NOT ERRONEOUS.

The Circuit Court found that although Petitioners had designated Gwynn as a legal expert, he was never licensed to practice law in West Virginia, had never been involved in a real estate transaction in West Virginia, and did not offer any opinions as to what is typically followed and adhered to by members of the West Virginia Bar in the Eastern Panhandle of West Virginia with respect to the transmission of wiring instructions for real estate closings. **JA 966.**

It is important to recognize that Gwynn's retainer agreement with Petitioners requires that a disclosure be given "throughout any legal proceedings, whenever testimony of the undersigned [Gwynn] is given or referenced." **JA 692-693.** In their Appeal Brief, Petitioners failed to comply with their terms of their retainer agreement with Gwynn. While their Appeal Brief includes vague references to Gwynn's opinion in support of their various positions, Petitioners did not disclose to this Court that Gwynn placed a **<u>self-imposed</u>** limitation on all of his opinions. **Appeal Brief pp. 14-24.** The disclaimer reads follows:

> **IT IS UNDERSTOOD BY ALL PARTIES HERETO THAT ANY OPINIONS AND TESTIMONY OF THE UNDERSIGNED GIVEN PURSUANT TO THIS ENGAGEMENT ARE NOT REPRESENTED TO BE EXPERT OPINIONS OF WEST VIRGINIA LAW. THE UNDERSIGNED IS NOT A MEMBER OF THE WEST VIRGINIA BAR, AND HAS NEVER PRACTICED LAW IN WEST VIRGINIA.**

**JA 692-693.** According to Gwynn, this disclosure was necessary so that it was understood by the parties that all of his opinions rendered in this matter "are not represented to be expert opinions of West Virginia law." **JA 454.** It is also important to note that Gwynn insisted that the foregoing disclaimer be read into the record at his deposition before he would discuss his "opinions" in any detail. **JA 421 and 454**.

Petitioners take the position that Circuit Court's failure to give any deference to the expert testimony of Gwynn was erroneous and that the Circuit Court improperly attacked Gwynn's qualifications. Conversely, Catrow Law maintains that in a legal malpractice action the standard of care for an attorney in performing his or her duty is "to exercise the knowledge, skill, and ability ordinarily possessed *and exercised by members of the legal profession in similar circumstances.*" *Keister,* 182 W.Va. at 748-749, 391 S.E.2d at 898-899 (emphasis added); *West Va. Canine College*, 191 at 211 444 S.E.2d at 568.

In the instant matter, Petitioners chose to retain as expert an attorney that (a) was not licensed and had never practiced in West Virginia, and (b) possessed no knowledge whatsoever with respect to West Virginia law or the standards and actions routinely followed by real estate practitioners in the state. Under oath Gwynn was asked what rules or policies would govern a real estate attorney in the State of West Virginia, Gwynn replied "No, I don't know of those . . . I don't know about West Virginia." **JA 453-454.** In response to further questions concerning his opinion as to the standards to be followed by a West Virginia attorney and the provision of wiring instructions, Gwynn stated:

> Q. Your opinion is that a real estate attorney in the state of West Virginia should not provide wiring instructions via an agent, even if authorized to do so by contract or agency agreement, correct?

> A. **I don't have any opinion about what should be done in West Virginia. I can only tell you what I believe should be done, in general**, and that's what I have tried to do.

**JA 491 at ll. 9-16.** (Emphasis added.)

The Circuit Court below articulated why it chose not to give any deference to the personal opinions of Gwynn. In adherence to Gwynn's disclosure requirement, the Circuit Court incorporated Gwynn's disclosure into its Order granting summary judgment, and when it held as follows:

> Gwynn is not and has never been licensed to practice law in West Virginia and has never been involved in a real estate transaction in West Virginia. Gwynn did not offer any opinions as to what is typically followed and adhered to by members of the bar in the Eastern Panhandle of West Virginia with respect to the transmission of wiring instructions for real estate closings. Recognizing his limitations on the opinions that he could provide, Gwynn placed a disclaimer in his retainer agreement, which was signed by the Plaintiffs, that stated that he was unable to render an opinion as to West Virginia law.
>
> . . .
>
> In light of the foregoing, **Gwynn's opinions fail to identify any actions taken by Catrow Law in this matter that were a "departure by members of the legal profession in similar circumstances**." *Keister,* supra.

**JA 966.**

The Circuit Court found that the personal opinions of a Maryland practitioner (who has only conducted four or five closings a month over the past four years solely in the state of Maryland) did not constitute the same actions that would be exercised by fellow members of the legal profession in similar circumstances in West Virginia, and specifically the Eastern Panhandle, i.e. a West Virginia real estate practitioner. **JA 966.**

As observed by the Circuit Court below, Petitioners cannot cite to any fact in the record which demonstrates that any action taken by Catrow Law was a "departure by members of the legal professional in similar circumstances" as required by *Keister, supra.* **JA 966.**

Conversely, the Circuit Court concluded that the expert testimony of Catrow Law's expert, Conrad, did appropriately address the standard of care at issue in this proceeding. Specifically, the Court held as follows:

> g. Catrow Law retained Randall Conrad ("Conrad") as a legal expert in this matter. Conrad is a licensed West Virginia attorney that has been conducting real estate transactions in West Virginia since 1992. Since that time, he has served as a real estate attorney for approximately 20,000 real estate transactions in Berkeley, Jefferson and Morgan Counties, in West Virginia, including consumer residential and commercial matters. **He practices in the same region as Catrow Law**.
>
> h. **Conrad testified that the process followed by Catrow Law**, i.e. communication solely with a purchaser's real estate agent and the emailing of wiring instructions to said agent **is a process followed by real estate attorneys in the Eastern Panhandle of West Virginia as testified Randall Conrad on behalf Catrow Law**. Conrad opined that what Catrow Law "did in providing wiring instructions to an experienced agent met her duty" which is what is routinely done in this region and that he had followed the same process "thousands and thousands of times." He further indicated that he did not feel it was necessary to call and verify the wiring instructions with the transmitter prior to any and all transactions.

**JA 991.**

As reflected in its Order granting summary judgment in favor of Catrow Law, the Circuit Court considered as part of its analysis under W.Va.R.Civ.P. Rule 56 whether the expert opinions presented by the parties in this matter were rendered in accordance with controlling West Virginia law, specifically *Keister, supra*. The trial Court determined that Gwynn (a) intentionally limited his opinions by virtue of his own disclosure; (b) admitted that since he was not licensed to practice law in West Virginia that he was **unable** to render an opinion as to West Virginia law; (c) admitted that he has never been involved in a real estate transaction in West Virginia; and (d) did not offer any opinions as to the procedure that is typically followed and adhered to by members of the bar in the Eastern Panhandle of West Virginia with respect to the transmission of wiring instructions. Based on these factors, the Circuit Court determined that

Gwynn did not and could not offer any opinions as to the actions that are routinely taken and followed by members of the bar in the Eastern Panhandle of West Virginia with respect to the transmission of wiring instructions for real estate closings. On this basis, the Circuit Court in accord with *Keister, supra.* further determined that Gwynn "only provided a general synopsis of how he personally conducts real estate transactions in the state of Maryland" and that Petitioners failed to produce any testimony which would reflect that the actions taken by Catrow Law in this matter were a "departure by members of the legal profession in similar circumstances." **JA 966.**

### E. THE COURT DID NOT ERR WHEN IT FOUND THAT PETITIONERS HAVE NOT PRESENTED ANY EVIDENCE TO DEMONSTRATE THAT CATROW LAW ACTUALLY RECEIVED ANY BULLETINS OR NOTICES CONCERNING WIRE FRAUD

Petitioners also argue that it was reversible error for the Circuit Court to **not find** that the very existence of certain bulletins/notices issued by a title company related generally to wire transfers created a genuine issue of fact as to the duties owned by Catrow Law in this matter. However, as they did below, Petitioners have once again failed to precisely demonstrate to this Court how the documents in question create a genuine issue of material fact.

After considering this argument from the Petitioners below, the Circuit Court noted:

> The Plaintiffs have not presented any evidence to demonstrate that Catrow Law actually received any bulletins or notices concerning wire fraud transfer in 2015, much less the four notice/bulletins produced as evidence by Plaintiffs. Moreover, the four notice/bulletins produced by the Plaintiff do not specify that they were sent to attorneys in West Virginia. Thus, **the Plaintiffs will not, and cannot, prove that Catrow Law actually received, much less reviewed, the notices/bulletins they have produced. Moreover, the mere issuance of a notice/bulletin by a title insurance company does not create a duty, obligation or standard that must be followed by a West Virginia attorney**.

**JA 967 (Emphasis added.)**

While Petitioners argue that the admission by Catrow Law during its deposition that it was an agent of Old Republic and received email updates from that company, such testimony

does not constitute an admission that it received any bulletins concerning wire transfers, nor did the very existence of same create a duty or standard required to be followed by Catrow Law. Petitioners arguments in this respect amount to nothing more than factual assertions by their counsel and "[s]ummary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." *Guthrie v. Northwestern Mutual Life Insurance Co.*, 158 W. Va. 1,208 S.E.2d 60 (1974); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61 n. 14, 459 S.E.2d 329, 338 n. 14 (1995), *McCullough Oil, Inc. v. Rezek*, 176 W.Va. 638, 346 S.E.2d 788 (1986); *Folio v. Harrison-Clarksburg Health Dep't*, 222 W. Va. 319, 324, 664 S.E.2d 541, 546 (2008).

On appeal, Petitioners also argue that they had witnesses "who could testify as to the origin, use, and authenticity of these bulletins" at issue", and refer to a witness list filed after Catrow Law filed its Motion for Summary Judgment. **JA 792-795**. At the outset, it is important to recognize that Petitioners classification of the Old Republic witnesses as "fact witnesses" is not consistent with the West Virginia Rules of Evidence. The testimony to be offered by these witnesses would not be of someone with personal knowledge of events pertaining to the case. Pursuant to West Virginia Rules of Evidence 701 and 702, these witnesses would not be deemed fact witnesses. Rather, they would be classified as potential expert witnesses. This is critical because the Petitioners did not designate any individuals from Old Republic as experts in any disclosure. Petitioners' expert disclosure deadline was September 3, 2018 and they did not disclose any Old Republic witnesses until January 15, 2019. **JA 792-795 JA 1148-1150**. The time period to identify the Old Republic witnesses as experts had passed pursuant to the Court's Scheduling Order. **JA 1148-1150.**

Notwithstanding the foregoing procedural defect concerning such testimony, the Petitioners also failed to present any affidavits or documentary evidence below concerning the testimony of these witnesses in response to the Catrow Law's Motion for Summary Judgment, or in support of their Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. **JA 797-885 and JA 971-1032**. There is nothing in the record concerning any *anticipated* testimony of these witnesses from Old Republic, other than assertions made by Petitioners' counsel.

As stated above, Petitioners failed to supplement their written discovery requests to include any information concerning the information possessed by these "witnesses" and how such information supported their claims. **JA 183-202 and JA 671-685**. The filing of a list of potential witnesses and arguing that they will testify concerning the bulletins does not create a genuine issue of material fact. Petitioners could have raised these matters in further detail below, but they failed to do so. In addition, Petitioners did not submit an affidavit to the Court to indicate that they were unable to resist or defeat Catrow Law's Motion for Summary Judgment because of inadequate discovery. **JA 183-202.** In light of the foregoing, the Circuit Court did not commit reversible error when it found that the title bulletins/notices did not independently create a genuine issue of material fact in this matter.

## V. CONCLUSION

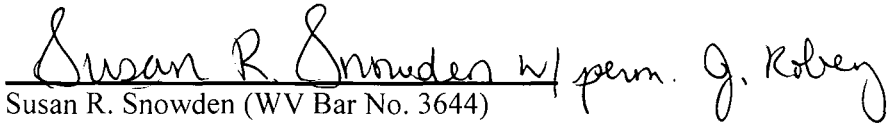
The Order from the Circuit Court granting Summary Judgment, which is subject of this appeal, should not be overruled as the rulings set forth in the Circuit Court's Order correctly apply West Virginia law to the facts at issue in this matter.

**WHEREFORE**, for the foregoing reasons, this Court should affirm the Circuit Court of Berkeley County's granting of summary judgment in favor of Catrow Law, PLLC.

Respectfully submitted this the 23rd day of September, 2019.

**CATROW LAW, PLLC**
**BY COUNSEL**

**JACKSON KELLY PLLC**



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