/s/ Christopher Wilkes
Circuit Court Judge
Ref. Code: 19YK65IY

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CC-02-2017-C-270
Berkeley County Circuit Clerk
Virginia Sine

In the Circuit Court of Berkeley County, West Virginia

Richard Otto,	)	
Patricia Otto,	)	
Plaintiffs,	)	
	)	
vs.)	)	Case No. CC-02-2017-C-270
	)	
Catrow Law, PLLC,	)	
Coldwell Banker Innovations,	)	
Defendants	)	
	)	

Order Denying Plaintiffs' Rule 59(E) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment

This matter came before the Court this 21st day of March, 2019, upon the Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment. The Court having considered the motions, memoranda, pleadings in this matter, and having reviewed all pertinent legal authorities, hereby declines to disturb its prior rulings, which were set forth in its Order Granting Defendant's Motion for Summary Judgment, which was entered on February 8, 2019.

Having considered the issues presented, the Court hereby **DENIES** Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment based on the Court's prior rulings, which are incorporated by reference herein, and additionally states as follows:

PROCEDURAL HISTORY

For purposes of Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment("Motion to Alter"), the following procedural history is relevant:

1. Plaintiffs filed their Complaint in this matter on June 13, 2017 against Coldwell Banker Innovations ("Coldwell Banker") and Catrow Law, PLLC ("Catrow Law"). This matter

stems from the Plaintiffs' loss of purchase funds for a real estate transaction which they unknowingly sent to an unknown hacker. The Complaint consisted of two causes of action, negligence against Coldwell Banker (Count I) and negligence against Catrow Law (Count II). Both causes of action seek recover for the loss purchase funds and assert that the Defendants negligently failed to warn or otherwise prevent the Plaintiffs from falling victim to a cybercrime in violation of various professional standards of care.

2. Plaintiffs 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.

3. On October 23, 2018, the Plaintiffs filed a Motion for Leave to Amend Complaint, seeking to remove Coldwell Banker from the Complaint because of the settlement, and to revise its factual allegations with respect to its claims against Catrow Law.

4. On December 13, 2018, the Court entered an Order granting in part, and denying in part, Plaintiffs' Motion for Leave to Amend Complaint. More specifically, the Court (a) granted Plaintiffs' request to revise its factual allegations with respect to its claims against Catrow Law; and (b) denied Plaintiffs' request to remove the portions of the Complaint pertaining to Coldwell Banker.

5. On December 21, 2018, Catrow Law filed Defendant's Motion for Summary Judgment and Memorandum of Law in support of same.

6. On January 3, 2019, Plaintiffs filed their Amended Complaint.

7. Pursuant to this Court's Scheduling Order entered on February 27, 2018, discovery closed in this matter on January 21, 2019.

8. On January 15, 2019, Plaintiffs filed Plaintiffs' Witness List.

9. On January 23, 2019, Plaintiffs filed the Plaintiffs' Responses to Defendant's Motion for Summary Judgment.

10. Due to a mistake with respect to exhibits filed in conjunction with their original Response, Plaintiffs' filed their Amended Plaintiffs' Responses to Defendant's Motion for Summary Judgment on January 24, 2019. Notably, Plaintiffs did not include with their original Response or the 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 is necessary.

11. On February 4, 2019, Catrow Law filed Defendant's Reply in Further Support of its Motion for Summary Judgment.

12. On February 8, 2019, the Court entered its Order Granting Defendant's Motion for Summary Judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs filed their Motion to Alter pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure ("W.Va.R.Civ.P."). The Court finds that their Motion to Alter was timely filed, within ten days of the entry of judgment as required by W.Va.R.Civ.P. 59(e).

2. A circuit court's consideration of a motion brought pursuant to Rule 59(e) is discretionary in nature. *See, e.g., Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995); *Stillwell v. City of Wheeling*, 201 W.Va. 559, 604, 558 S.E.2d 598, 603 (2001).

3. The reconsideration of a prior ruling pursuant to Rule 59(e) "**is an extraordinary remedy which should be used sparingly.**" *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 57, 717 S.E.2d 235, 244 (2011)

4. Under West Virginia law, a motion to alter or amend a judgment "should be granted where: (1) there is an intervening change in controlling law, (2) new evidence, not previously available comes to light, (3) it becomes necessary to remedy a clear error of law, or (4) to prevent obvious injustice." Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. at

50, 717 S.E.2d at 237.

5. W.Va.R.Civ.P. 59(e) is not an appropriate instrument for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *Mey*, 228 W. Va. at 56, 717 S.E.2d at 243. Even in circumstances where a party intends to rely upon newly discovery evidenced, the party "must produce a legitimate justification for not presenting the evidence during the earlier proceeding." *Mey*, 228 W.Va. at 57, 717 S.E.2d at 244, quoting *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996).

6. Consideration of the Plaintiffs' Motion to Alter reflects that the Plaintiffs did not directly address any of the four enumerated grounds for Rule 59(e) motions articulated by the Supreme Court of Appeals of West Virginia ("Supreme Court") in *Mey*. Instead, the basis for Plaintiffs' Motion to Alter is that the Court's order granting summary judgment in favor of Catrow Law was "clearly in error" and based upon "erroneous premises of law".

7. The first factor to be considered by the Court when confronted with a W.Va.R.Civ.P. Rule 59(e) motion is whether there has been an "intervening change in controlling law". As previously admitted to by the Plaintiffs, their cause of action against Catrow Law constitutes a legal malpractice claim. In that regard, the following standard of proof that must be satisfied by the Plaintiffs as set forth by this Court in its Order granting summary judgment, is as follows:

> 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, 619S.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. McGuire Woods, LLP,* 240 W. Va. 54, 60, 807 S.E.2d 302, 308(2017)

8. The decisions of the Supreme Court in *Calvert, supra; Keister, supra*, and *Kay, supra* constitute the current controlling law in West Virginia with respect to the standard of proof that must be satisfied in order to prevail in a legal malpractice action. These cases have not been overturned, in whole or in part, and the Supreme Court has not issued any further opinions which would otherwise change or alter the requisite standards as set forth above.

9. While Plaintiffs may disagree with this Court's application of controlling law to the matter at hand, that disagreement does not constitute an "intervening change". In that regard, Plaintiffs have not provided this Court with any basis to alter or modify its Order Granting Defendant's Motion for Summary Judgment based upon this factor.

10. In their Motion to Alter, Plaintiffs have also not specifically argued that they have uncovered newly discovered evidence and therefore they likewise failed to establish this element of the standards set forth in *Mey, supra* with respect to W.Va.R.Civ.P. Rule 59(e).

11. In their Motion to Alter, Plaintiffs have argued that they submitted a witness list on January 15, 2019, indicating that Robert Wasserman of Old Republic National Title Insurance Company ("Old Republic"), or another agent of Old Republic would testify at trial as to the "origin use and authenticity of the bulletins" that were purportedly sent to all of its West Virginia attorney-agents, and that such testimony creates a genuine issue of material fact. Plaintiffs could have presented affidavits from these purported witnesses and discussed how their testimony created a genuine issue of material fact with respect to their claims in their Response to Catrow Law's Motion for Summary Judgment, but they chose not to do so. Plaintiffs further failed to proffer any such proof to support their Rule 59(e) Motion.

12. Plaintiffs have failed to offer any explanation as to why this evidence could not have been presented in their Response to Catrow Law's Motion for Summary Judgment prior to the entry of the Court's Order granting summary judgment. The record before the Court does not reflect that such testimony would constitute newly acquired evidence for the purposes of W.Va.R.Civ.P. 59(e). Nor did Plaintiffs proffer that any such evidence was newly discovered.

13. A party who relies on newly discovered evidence 'must produce a legitimate justification for not presenting the evidence during the earlier proceeding,"' *Mey*, 228 W. Va. at 50, 57, 717 S.E.2d at 237, 244. Failure to file documents in an original motion does not convert the late filed documents into "newly discovered evidence." *Powderidge Unit Owners Ass'n v. Highlands Properties, Ltd.*, 196 W. Va. 692, 706, 474 S.E.2d 872, 886 (1996),

14. Plaintiffs filed a Witness List on January 15, 2019. In this Witness List, Plaintiffs, for the first time, identified: (1) any agent/employee named by Old Republic; and (2) Robert Wasserman Old Republic; and (3) Sarah Newcomb, Associated Regulatory Counsel Old Republic. The filing of Plaintiffs' Witness List on January 15, 2019, preceded their initial response to Catrow Law's Motion for Summary Judgment, filed January 23, 2019.

15. In addition, the purported testimony of these witnesses from Old Republic would not constitute testimony from someone with personal knowledge of events pertaining to the case. *See* West Virginia Rules of Evidence 701, 702. Notably, Plaintiffs did not designate these witnesses as experts and the time period to identify them as experts had passed pursuant to the Court's Scheduling Order.

16. Plaintiffs failure to appropriately demonstrate the relevance of testimony from potentially witnesses in conjunction with their Response to Catrow Law's Motion for Summary Judgment does not make such "new evidence" for the purposes of W.Va.R.Civ.P. Rule 59(e). On this basis, Plaintiffs have failed to establish this element of the standards set forth in *Mey, supra*

with respect to W.Va.R.Civ.P. Rule 59(e).

17. The third prong under *Mey* provides that a W.Va.R.Civ.P. 59(e) may be altered if it becomes necessary to remedy a clear error of law.

18. A clear error of law is "the wholesale disregard, misapplication, or failure to recognize controlling precedent. This is a high standard that is not demonstrated by the disappointment of the losing party." Franklin D. Cleckley, Robin J. Davis and Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure § 59(e)[2] at 119 (4th Ed. Supp. 2016). Moreover, "Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance arguments that could and should have been presented to the trial court prior to judgment." Id., § 59(e)[2] at 1285 (4th Ed. 2016).

19. Plaintiffs argue that this Court's Order granting summary judgment was erroneous because (a) the record reflects that a genuine issue of material fact exists for the jury's consideration; and (b) the existence of another tortfeasor does not preclude a malpractice claim against Catrow Law. However, these arguments do not identify a "clear error of law." Plaintiffs' Motion to Alter simply outlines their disappointment with the conclusions drawn by the Court from the evidentiary facts presented by the parties and seeks to have the Court reconsider Plaintiffs' position by reviewing the same arguments and "evidence" that they advanced in opposition to Catrow Law's Motion for Summary Judgment.

20. In support of their Argument, Plaintiffs argue that the Court (a) failed to give any deference to the expert testimony of their expert T. Summers Gwynn ("Gwynn") and improperly attacked Gwynn's qualifications; (b) failed to acknowledge that bulletins of Old Republic created a genuine issue of material fact; and (c) based its ruling concerning proximate cause on a "draconian interpretation of legal malpractice liability" and an "erroneous premise of law."

21. The Court's findings with respect to the purported expert testimony of Gwynn were made in conjunction with the standard of care that is applicable in a legal malpractice action in West Virginia. 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).

22. Plaintiffs retained as expert an attorney that (a) 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. When specifically asked under oath 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." 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.

23. In addition, Gwynn placed a **self-imposed** limitation on all of his opinions. As indicated in the retainer agreement between Gwynn and Plaintiffs, "**whenever** testimony of [Gwynn] is given or referenced", the following disclosure must be given, and Gwynn further read this disclaimer into the record of his deposition:

> **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.

24. As fully set forth in this Court's Order granting motion for summary judgment, 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" and this Court's refusal to accept testimony from an expert which failed to comply with the requisite standard of proof for this matter does not constitute a clear error of law. *Keister,* 182 W.Va. at 748-749, 391 S.E.2d at 898-899; *Painter v. Peavy,* 192 W. Va. 189, 190, 451 S.E.2d at 756; and *Woods v. Jefferds Corp.,* 17-0970.

25. With respect to the bulletins/notices from Old Republic relied upon by the Plaintiffs, the record reflects that the Plaintiffs failed to "articulate the precise manner" how such "evidence" supports their claims and creates a genuine issue of material fact. *Powderidge*, 196 W. Va. at 699, 474 S.E.2d at 879.

26. In response to Catrow Law's Motion for Summary Judgment, Plaintiffs did not present 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.

27. While Plaintiffs maintain that they had witnesses that could have testified to support their claims. The mere filing of a list of potential witnesses and factual assertions in a brief that those individuals may testify concerning bulletins does not create a genuine issue of material fact. Plaintiffs could have, and under West Virginia law should have, raised these

matters in further detail in their Response to Catrow Law's Motion for Summary Judgment, but they failed to do so. A "motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." *Mey,* 228 W.Va. at 56, 717 S.E.2d at 243.

28. Entry of a motion for summary 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. *Painter, supra* and *Woods, supra.* On this basis, the Court's finding that the bulletins/notices from Old Republic did not create a genuine issue of material fact and did not constitute clear error of law.

29. Concerning Plaintiffs' objections to the Court's conclusions concerning the proximate cause standard applicable in this legal malpractice action, such are misplaced and directly contradict controlling law in West Virginia. This Court's Order conforms with the Supreme Court's prior holdings in *Calvert, supra* and *Keister, supra.* Pursuant to these holdings, the Plaintiffs are required to demonstrate that their damages are "the direct and proximate result" of the negligence of Catrow Law, or said another way, that "but for" the negligence of Catrow Law, they would not have suffered the damages sought in this matter. *Calvert*, 217 W. Va. at 694–95, 619 S.E.2d at 207–08 and *Keister,* 182 W.Va. at 748-749, 391 S.E.2d at 898-899.

30. 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. 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. It is apparent that the requisite standard of proof that is necessary to prevail in a legal malpractice claim was intentionally elevated by the Supreme

Court in order to "safeguard against speculative and conjectural claims." *Rubin Res., Inc. v. Morris*, 237 W. Va. 370, 374, 787 S.E.2d 641, 645 (2016),

31. In the instant matter, Plaintiffs filed suit against Coldwell Banker **and** Catrow Law seeking recovery for the same damages, the loss of their purchase funds that they transmitted to an unknown hacker. Applying controlling law as set forth above, this Court concluded that "the actions of multiple other parties either contributed to, or were in fact the proximate cause of their damages" and found that Plaintiffs "cannot satisfy their burden of proof to maintain a cause of action for legal malpractice."

32. As to the fourth prong of *Mey*, Plaintiffs **did not** argue in their Motion to Alter that the Court's Order granting summary judgment must be altered or modified in order to prevent obvious injustice or that the Court's Order granting summary judgment was manifestly unjust. In that regard, Plaintiffs have failed to demonstrate that any injustice would occur if this Court were to deny their Motion to Alter.

33. W.Va.R.Civ.P. Rule 56(c) provides that summary judgment shall be granted where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Summary 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." *Painter*, 192 W.Va. at 190, 451 S.E.2d at 756. This is exactly what this Court appropriately deemed to be the case in the instant matter, finding that "Plaintiffs cannot satisfy their burden of proof to maintain a cause of action for legal malpractice, summary judgment is appropriate and should be granted because Plaintiffs have failed to make a sufficient showing on an essential element of the case" that they have a "burden to prove."

34. Although Plaintiffs' Motion to Alter reflects that they wholly disagree with the

rulings and findings of the Court in its Order Granting Defendant'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).

It is accordingly **ADJUDGED** and **ORDERED** that Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's February 9, 2019 Order Granting Summary Judgment is **DENIED**. Further, it is **ADJUDGED** and **ORDERED** that the February 9, 2019 Order Granting Defendant's Motion for Summary Judgment continues in full force and effect, including the ruling that all Plaintiff's claims are **DISMISSED**.

The Circuit Clerk is directed to distribute a copy of this Order to all counsel of record.

The exceptions and objections of any party aggrieved by the entry of this Order are hereby preserved.

Enter: March 21, 2019

/s/ Christopher Wilkes
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.