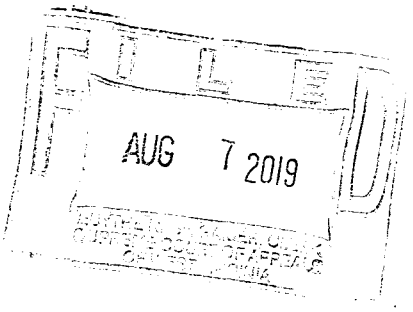
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 19-0361

RICHARD OTTO and
PATRICIA OTTO
Plaintiff's,

vs.

COLDWELL BANKER INNOVATIONS and
CATROW LAW, PLLC,
Defendant's



BRIEF FOR APPEAL

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2. The Court committed reversible and prejudicial error when it found that Plaintiff's expert witness was not qualified to give expert opinion as to Ms. Catrow's breach of the standard of care.
3. The Court committed reversible and prejudicial error when it found that Plaintiffs "have not presented any evidence to demonstrate that Catrow law actually received any bulletins or notices concerning wire fraud..."
4. The Court committed reversible and prejudicial error when it found that Plaintiffs were precluded from establishing Defendant Catrow law was the direct and proximate cause of their damages because the use of the definite article "the" in relevant case law precludes a finding of malpractice where there was another tortfeasor.

IV. Statement of the Case

The case involves Appellant's Richard and Patricia Otto in their quest to recover funds stolen from them as part of a real estate transactions. The Ottos had planned on making a cash purchase for a home at 535 Rivanna Run, Falling Waters, West Virginia for the sum of $266,092.00., and had followed the instructions provided to them for doing so, only to have their $266,000 cash payment diverted to hackers after, presumably, the hackers, surveilling either Coldwell Banker or Catrow Law's email accounts, saw that Ms. Catrow had emailed her wiring instructions to the Ottos via Lynn Frum at Coldwell Banker. [1] The hackers then sent a follow-up

[1] Although the FBI investigation into this matter never returned any information, it is obvious that the hackers must have been surveilling someone's emails to know that wiring instructions had been sent, and that, as a matter

email to the Otto's from Ms. Frum's email address, and the Ottos, not being made aware of the possibility of scams of this nature and believing the new instructions to be legitimate, followed the new instructions.

On June 13, 2017, Petitioners filed suit against Coldwell Banker Innovations ("Coldwell Banker") and Catrow Law, PLLC ("Catrow Law") for damages incurred by Petitioners after emails between Petitioner's, Coldwell Banker, and Catrow Law relating to lost funds from a real estate purchase. The case involved Petitioner's realtor, Coldwell Banker, and Petitioner's closing attorney, Tasha Catrow of Catrow Law, and the injury occurred when one or more of the parties emails were hacked into and an individual pretending to be Lynn Frum of Coldwell Banker sent Petitioner false wiring instructions. (See Petitioner's Amended Complaint appendix pg. 887). This action appeared normal and within the accepted course of dealings, and thereby evaded detection because, prior to the false instruction being given, Respondent Catrow had, in fact, sent her wiring instructions to Petitioners without any further instruction or contact, and thus created the impression that this was how Petitioners would expect wiring instructions to be communicated. Despite the fact that the transaction consisted of Petitioner's wiring a significant sum of money, $266,000, Catrow Law made no effort of any kind to contact Petitioner or otherwise ensure that Petitioner's received the correct wiring instructions and that Petitioner intended to use the correct wiring instructions.

Ms. Catrow's omission in this regard was especially egregious because she had been receiving fraud alert notices from her title insurance company, Old Republic, repeatedly warning all their West Virginia attorneys of the very scam that Respondent's client's suffered in this case.

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of basic rationality, it would not have been the Ottos who were being surveilled. Clearly, any hacker engaged in such a task would be surveilling a commercial establishment who regularly conducts real estate transactions, such a realtor or closing attorney, and not random individuals who may not ever be purchasing a home. Because the scam is dependent upon knowing when cash purchases of real estate are being made, it would be necessary to surveille a commercial establishment who would be arranging such cash purchases.

See Old Republic Bulletins, AR appendix pg. 828. Despite these warnings, Ms. Catrow continued to send her wiring instructions by email and made no effort to communicate to her clients, Petitioners, about the dangers associated with sending wiring instructions by email or to be aware of scams involving last minute changes to wiring instructions.

On May 2, 2018, following a confidential settlement agreement between Petitioners and Coldwell Banker, Petitioners filed a Stipulation of Dismissal as to its claims against Coldwell Banker. See Stipulated Order of Dismissal appendix pg. 9.

On October 23, 2018, Petitioners filed a Motion for Leave to Amend Complaint, wherein additional facts about Respondent's relationship with title insurance Company Old Republic were added, including information about Ms. Catrow being an agent-attorney for Old Republic, Ms. Catrow regularly receiving periodic notices and updates from Old Republic, and Old Republic sending three different fraud alerts warning of the scam perpetrated on Petitioners. See Amended Complaint. Said Motion was granted with respect to the additions as to Catrow Law, and the complaint was amended thereafter.

On December 21, 2018, Respondent filed its Motion for Summary Judgment and corresponding Memorandum of Law, alleging that no genuine issue of material fact had been presented by Petitioner's claims. See Defendant's Motion for Summary Judgment appendix pg. 18. On January 23, 2019, Petitioners filed their Response to Respondent's Motion. See Plaintiffs' Response on Motion for Sumary Judgment appendix pg. 797.

On February 8, 2019, the Court entered its Order Granting Defendant's Motion for Summary Judgment. (see appendix pg. 958) The Order found that Petitioner's "failed to present any genuine issue of material fact which would demonstrate that Catrow Law breached a duty of care owed to them associated with the conveyance of the wiring instructions," and that

"Plaintiffs have failed to establish that Catrow Law was the direct and proximate cause of their alleged damages." On February 18, 2019, Petitioners filed their Rule 59(e) Motion to Alter or Amend the Court's Order Granting Defendant's Motion for Summary Judgment, challenging these assertions as clear errors of law. See Plaintiffs' Rule 59(e) Motion to Alter or Amend appendix pg. 971.

On March 21, 2018, Petitioner's Motion to Alter or Amend was denied. See Order Denying Plaintiffs Rule 59(e) Motion to Alter, AR appendix pg. 1071. This appeal follows.

V. Summary of Argument

The Court committed reversible error when it found that Petitioners failed to allege a genuine issue of material fact as to the elements of legal malpractice, specifically a breach of the duty of care and causation, where there was ample evidence put forward by Petitioners sufficient to create a genuine issue of material fact as to every single element.

In doing so, the Circuit Court made egregious errors of law, including (a) finding that an expert must be a West Virginia real estate attorney to qualify as an expert on a closing attorney's duty of care in ensuring the security of wired funds necessary to the transaction, (b) finding that notices warning of the fraud perpetrated upon Petitioners were to be disregarded because Petitioners had not "proved" that Ms. Catrow actually received them, and (c) finding that, as a matter of law, the existence of a co-tortfeasor precludes a finding of causation against an attorney accused of malpractice.

Throughout this process, the Court repeatedly abandoned its duties on summary judgment to ensure, when making all inferences in favor of the non-moving party, that genuine issues of material facts existed as to the claims presented, and instead put himself in the place of the jury,

as a finder of fact, and made his decision largely based on his own preference for Respondent's case over Petitioners'. This was inappropriate, and caused many of the errors alleged above.

VI. Statement Regarding Oral Argument and Decision

Petitioners submit that Oral Argument under rule 19 is appropriate for this case because it involves assignments of error in the application of settled law as well as a result against the weight of the evidence (insofar as the Circuit Court alleged that there was insufficient evidence to create a genuine issue of material when there clearly was sufficient evidence to do so).

VII. Argument

Standard of Review

An Appellate Court's review of questions of law, such as whether it was proper for a Circuit Court to dismiss a case on motion for summary judgment, is de novo.

"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." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

A "genuine issue" is "simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

"A Circuit Court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995) (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505 2511, 91 L.Ed.2d 202, 212 (1986)." As such, "we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." Id. at 336 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 1356, 89 L.Ed.2d 538, 553 (1986); Masinter v. WEBCO Co., 164 W.Va. 241, 262 S.E.2d 433 (1980); Andrick, 187 W.Va. at 708, 421 S.E.2d at 249. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995)).

Motions for summary judgment are governed by Rule 56(c) of the West Virginia Rules of Civil procedure, which holds that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." The burden of proof in a motion for summary judgment is on the moving party. See *Painter*, S.E.2d 755 at 758 ("Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper *only where the moving party shows* that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.") (emphasis added). Additionally, "if the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining

why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995).

"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." Syllabus point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In deciding a motion for summary judgment,

In an action for attorney malpractice, the Plaintiff must prove three things in order to recover: (1) the attorney's employment; (2) her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the Plaintiff. " *Calvert v. Scharf*, 217 W.Va. 684, 619 S.E.2d 197 (2005)."

West Virginia is a comparative fault state, and the issue of how much percentage of fault a given Defendant has been explicitly codified as an express question of fact for the trier of fact. Pursuant W.Va. Code §55-7-13d(a)(1), "In assessing percentages of fault, *the trier of fact shall consider the fault of all persons who contributed to the alleged damages* regardless of whether the person was or could have been named as a party to the suit." (emphasis added).

1. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED IN FAVOR OF DEFENDANT CATROWS MOTION FOR SUMMARY JUDGMENT AND FOUND THAT PLAINTIFFS HAD FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO THE ELEMENTS OF MALPRACTICE.

The Circuit Court erroneously held that Petitioners had failed to allege genuine issues of material fact as to the elements of a legal malpractice claim. The elements for a cause of action for negligence by a lawyer (also known as legal malpractice) are separate and distinct from that of routine negligence action. 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.2d197,203(2005) and *Keister v.Talbott*, 182W.Va.745, 748-749,391S.E.2d895, 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).

It is clear and obvious that, contrary to the Court's holding, the evidence collected in the discovery process raises genuine issues of material fact as to whether Ms. Catrow's action met the elements of legal malpractice. Throughout its decisions granting summary judgment and denying Petitioner's Rule 59(e) motion to alter, the Court studiously confused its role in ensuring that that there is a "genuine issue of material fact" as to the elements of liability, with the jury's role in deliberating on and weighing the evidence provided. In doing so, the Court committed clear and obvious reversible and prejudicial error.

Primarily, the Circuit Court took issue with Petitioner's evidence as to the second element, breach of duty. Said the Court, "As far as the second element of proof, the Plaintiffs have failed to present any genuine Issue of material fact which would demonstrate that Catrow

Law breached a duty of care owed to them associated with the conveyance of the wiring instructions." Order Granting Defendant's Motion for Summary Judgment, AR (see appendix pg. 958). In support of its position, the Court favorably highlighted just about every fact which might, if presented to a jury, inure favorably to Defendant Catrow (Final Order, p. 9, AR see appendix pg. 958), before attempting to poke holes in every fact which inured favorably to the Petitioners. This, of course, was not the Circuit Court's job on motion for summary judgment, as the only relevant question is whether sufficient facts have been alleged, and sufficient evidence discovered, to create a genuine issue of material fact as to whether a Defendant committed acts for which liability is proper. It is then up to a jury to decide whose evidence carries the day.

In reality, all the elements of legal malpractice were either uncontested in favor of Petitioners, or were contested, but sufficient evidence had been raised by Petitioner's to create a genuine issue of material fact as to the relevant issue. For the Court's edification, Petitioner will now recount the evidence provided as to each element.

A. IT IS UNDISPUTED THAT DEFENDANT MAINTAINED AN ATTORNEY CLIENT RELATIONSHIP WITH PLAINTIFFS AND THAT PLAINTIFFS SUFFERED DAMAGES.

Defendant's motion for summary judgment, like the Circuit Court's Order Granting the same, unequivocally concedes that "the first element for maintaining a legal malpractice claim is satisfied." Defendant also concedes that Plaintiffs suffered the damages they allege in their complaint. As such, no further argument on these points is necessary.

B. A GENUINE ISSUE OF FACT CLEARLY EXISTS AS TO WHETHER DEFENDANT CATROW BREACHED HER DUTY OF CARE TO PLAINTIFFS.

The Circuit Court claimed, at page 7 of its Final Order (see appendix pg. 958), that "As far as the second element of proof, the Plaintiffs have failed to present any genuine issue of material fact which would demonstrate that Catrow Law breached a duty of care owed to them associated

with the conveyance of the wiring instruction." As a matter of law, Plaintiffs would note that it is not their duty to "present," a "genuine issue of material fact," such that they are allowed to proceed to the jury. Rather, it is the Defendant's obligation, when moving for Summary Judgment, to prove that no issue of material fact has been raised which would require a finder of fact – the jury – to resolve. As the Court notes, West Virginia courts "do not favor the use of summary judgment," and as such, "summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

In its Amended Complaint, Plaintiffs asserted that Catrow law had the following duties to Plaintiffs: (a) "Defendant Catrow had a duty of care to all parties to the transaction to protect the transaction's integrity"; (b) "As owner of the trust account into which the settlement funds were being deposited, Catrow had a duty to ensure the safe and secure transfer of the Otto's money by directly dealing with the Otto's and their bank to insure that all proper protocols had been followed and that the money would be sent to the proper location"; and (c) that "Defendant Catrow had a duty to advise the parties against transferring funds through any insecure methods." Plaintiffs Amended Complaint, pgs 46, 47, and 48(see appendix pg. 781). As such the allegations as to the duties owed are clearly stated in the record.

Furthermore, Plaintiffs allegations of breach are equally clear-cut. Plaintiffs allege, in its Amended Complaint, that "by sending her wiring account information to Lynn Frum under such conditions, and with the expectation that Ms. Frum was going to email that information to Plaintiffs, Defendant Catrow breached her duty of care." The amended complaint goes on to list the actions which Defendant Catrow should have undertaken in comporting with her duty of care, including:

a. *Prior to wiring any funds, Plaintiffs should have been personally contacted by Defendant Catrow, or, at a minimum, Plaintiffs should have been advised and alerted by Defendant Catrow to call her office to confirm the instructions.*

b. *Although Defendant Catrow appeared to have used an encrypted email, Defendant Catrow, knowing full well that wiring instructions were to be communicated via email, should have taken any and all precautions to determine if Coldwell Banker's and the Otto's emails were encrypted and otherwise secured.*

c. *Defendant Catrow should have informed the Otto's as to the prevalence of wire fraud schemes, and that if an email seemed suspicious, they should take no action until they confirmed, by independent means, that the communication was legitimate.*

Id. at paragraph 51.

The discovery process significantly strengthened these allegations, particularly through Plaintiffs discovery of the following facts:

a. Respondent was, at all times relevant, an agent-attorney of Old Republic Title Insurance Company. Deposition of Tasha Catrow, ll. 16-1 to -8 (see appendix pg. 517);

b. Respondent admitted to making no personal effort to contact Petitioner's either before or after sending her wiring instructions, and being unaware as to whether her staff made any such contact. Id. at ll. 35-3 to-7 (see appendix pg. 517). Respondent further testified that she believed no such confirmation was necessary. Id. at 37-7 to -13 (see appendix pg. 517).

c. Respondent admitted to receiving regular notices from Old Republic as to important information and events in the real estate industry. Id. at ll. 13-3 to 14-4 (see appendix pg. 517); and

d. In the year immediately preceding the incident giving rise to the instant suit (October 2014 through October 2015), Old Republic sent out no less than 4 "ORT Alert!" Bulletins warning of wire schemes which were becoming prevalent in the industry, all of which were provided to Petitioners pursuant to duly authorized subpoena. Said ORT Alerts were as follows:

i. The first such notice was sent on November 14, 2014, and related to a wire fraud scheme where "a party posing as a buyer sends an earnests money deposit in the form of a cashier's check to a title agent. A day two later this 'buyer' informs the title agents that the transaction has fallen through and requests a wire return of the earnest money. The agent wires the funds as instructed without waiting for notification from its bank that the cashiers check has cleared," Plaintiffs Exhibit C (see appendix pg. 159).

ii. The second notice was issued on February 6, 2015, and pertains to the exact wire fraud scheme which was perpetrated upon Plaintiffs in the instant matter. The notice reads, in relevant part. "This fraud involves the hacker sending an email appearing to be both legitimate and from a proper party of the transaction directing an entity to wire funds to an account controlled by the hacker. Since everything appears genuine, the funds are wired as instructed and then stolen by the hacker." The notice goes on to state that, "To avoid this scheme, Old Republic recommends that all emails directing the transfer of funds be verified by using a valid phone number for the party from whom the email was supposedly sent." Plaintiffs Exhibit D (see appendix pg. 176).

iii. The third notice was sent on April 20, 2015, and warned of a substantially similar cashiers check wire fraud scam as noticed in the November 14, 2014 notice. Plaintiffs Exhibit E (see appendix pg. 182).

iv. The fourth notice was sent on September 17, 2015, a mere 39 days before the date of the incident giving rise to the instant action, which stated that "Old Republic Title ("ORT") is seeing increasing numbers of wire transfer fraud attempts, with some

attempts resulting in significant losses to parties involved in transactions ORT agents are representing. The most common form of wire transfer fraud appears as a last minute change to wiring instructions, originating from what appears to be a legitimate party to the transaction." Plaintiffs Exhibit F (see appendix pg. 203). This, of course, was exactly the fraud which was perpetrated upon Plaintiffs.

All of this information was also incorporated into Plaintiffs Amended complaint, at paragraph 29 and 30, which state as follows:

> *29. "In addition to the notices available in the general media, Defendant Catrow operated at all relevant times as an Agent/Attorney for Old Republic Title Insurance Company, who had sent out multiple bulletins and notices to their agents/attorneys prior to this incident regarding wire fraud scams of the type utilized against Plaintiffs which were frequently occurring within the industry, and outlining special precautions that agent attorneys should take with regards to wire transfers, including confirmation via phone calls that the client had received the correct wiring instructions."*
>
> *30. Said advise and warnings from Old Republic was ignored by Defendant, who made no further efforts to ensure the accuracy of the wiring instructions possessed by Plaintiffs subsequent to her office's sending out said instructions to Coldwell Banker. Amended Complaint (see appendix pg. 781).*

West Virginia is a notice pleading jurisdiction (see *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 189 n.4 (W. Va. 2010)). As such, under West Virginia law, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief (W. Va. R. Civ. P. 8(a)). As such, the facts of the Amended Complaint provided ample and appropriate notice to Defendant that her failures as to the standard of care include her failure to take appropriate notice of the alerts which were sent to her by her title company and act in accordance therewith to ensure that her client's did not become victims of such scams. What's more, all of these allegations were supported by evidence produced during discovery, including Ms. Catrow's own deposition testimony and the bulletins/notices provided by Old Republic

pursuant to subpoena. These statements are further encapsulated in paragraph 51(c)'s assertion that "defendant Catrow should have informed the Otto's as to the prevalence of wire fraud schemes, and that if an email seemed suspicious, they should take no action until they confirmed, by independent means, that the communication was legitimate. "

In addition to the evidence described above, Plaintiffs further procured the services of expert witness Thomas Summers Gwynn, III, an attorney based out of College Park, Maryland with over 45 years practice experience as a real estate settlement attorney. Mr. Gwynn's C.V. states that he has searched, abstracted, examined, and/or reviewed over 45,000 real estate titles, title abstracts, and title insurance commitments. It further states that he has settled more than 10,000 real estate transactions, and that he has qualified as an expert in real estate titles and transactions in 5 different Maryland Circuit Courts and the United States Federal District Court. CV of T. Gwynn (see appendix pg. 12).

On deposition, Mr. Gwynn testified that he has never had a malpractice claim brought against him, nor has he ever been sued in his individual capacity, nor subject to any attorney disciplinary proceedings. Deposition of T. Gwynn, ll. 22-22 to -24, 25-3 to -7 (see appendix pg. 415). He further testified that he has been called on to provide presentations at seminars as to various aspects of real estate transactions to real estate companies, the bar association, and other professional organizations. *Id.* at ll. 36-3 to -13 (see appendix pg. 415).

In discussing his opinion as to the standard of care for real estate attorneys, he articulated the duty of care as follows:

> *Well, I think the primary [standard] that I have an opinion on is this, if you are hired to be a settlement attorney or a settlement agent in a real estate settlement transaction, you have a duty of care to your client, which is the person that hires you, and you also have a duty of care to any other party to the contract... And I think that duty of care, if it includes having your office be a depository of funds to complete the transaction, the duty of care includes you making direct contact with the person who is going to be depositing*

the funds, that is your client in that regard, and to take every action possible to confirm and be sure that this transaction is secure, and that the transaction is secure, and to preserve its integrity.

Id. at 42-8 to -23.

Mr. Gwynn was then asked whether "in any of those 10,000 transaction [that you executed as a settlement attorney], did you speak to the actual purchaser or seller every time..." to which Mr. Gwynn replied, "yes." *Id.* at 43-6 to -18. He further clarified that his opinion was that personal contact with the buyer, and not the real estate agent (as done by Respondent), was necessary, and had always been undertaken by him whenever the buyer is transferring funds into the attorneys trust account. *Id.* at 43-23 to 44-21. When he was asked to "describe the role of a settlement attorney at a closing," Mr. Gwynn stated "The settlement attorney is to conduct the transaction in such a way that the parties understand what they are doing... what's going on, and to try and take such actions as may be requisite to cause a safe transfer of the documents and funds that make up the transaction." *Id.* at 37-17 to -24. When asked how he, in his real estate practice, conveys his wiring instructions to clients, he said "Either personally, or by telephone, or by email which is followed up by telephone calls, or a personal contact or writing of some kind." *Id.* at 56-16 to -18. As such, Mr. Gwynn, an attorney practicing in the exact same area of law as Respondent, who is in with more experience than Respondent, testified that he believed that she violated proper protocols in almost every respect regarding the transmission of her wiring instructions. It is, therefore, indisputable that Petitioners put forward evidence that Catrow Law violated her duty of care with respect to ensuring the safe and secure transfer of funds by a client.

While it is true Respondent procured her own expert, who testified that she did not violate the standard of care, and while it is also true that there were additional facts discovered which would have inured in Respondent's favor (such as some of the facts elicited at page 9 of the Courts Order of dismissal), Petitioners respectfully remind the Court that A "genuine issue"

is "simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. Petitioners can point to all the facts listed above as sufficient evidence for a reasonable jury to return a verdict in favor of Plaintiffs. Moreover, "The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). Obviously, whether Ms. Catrow violated a duty of care to Petitioners by conveying her wiring instructions in the manner in which she did amounts to a disputed fact which is material because it would have a clear ability to sway the outcome of the litigation.

C. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEFENDANT WAS THE PROXIMATE CAUSE OF PLAINTIFFS INJURIES.

It is undisputed that Petitioners suffered injuries as a result of the hack. Plaintiffs have alleged that those injuries would have been avoided had both Respondent and Coldwell Banker, as professionals being paid by Petitioners to ensure the efficacious purchase of real property, upheld their duty of care, the violation of which was sufficiently evinced through the discovery, as discussed in part 1B above.

West Virginia is a comparative fault state, and the issue of how much percentage of fault can be attributed to a given Defendant has been explicitly codified as an express question for the trier of fact. Pursuant W.Va. Code §55-7-13d(a)(1), "In assessing percentages of fault, *the trier of fact shall consider the fault of all persons who contributed to the alleged damages* regardless of whether the person was or could have been named as a party to the suit." (emphasis added).

As such, Petitioners should have been afforded the right to make the cause before the jury as to causation, for which there was surely sufficient evidence to present a genuine issue of material fact.

The Circuit Court, however, precluded such a showing, as a matter of law, based on an erroneous interpretation of case precedent, which will be discussed more fully in part 4.

2. THE COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT FOUND THAT PETITIONERS' EXPERT WITNESS COULD NOT QUALIFY AS AN EXPERT

The Circuit Court, in its Order Granting Respondent's Motion for Summary Judgment, stated that:

> *Although the Plaintiffs designated T. Summer Gwynn as a legal expert in this matter, he only provided a general synopsis of how he personally conducts real estate transactions in the state of Maryland. 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.*

Order Granting Respondent Motion for Summary Judgment, p. 10 (see appendix pg. 958).

The Circuit Court further cited a waiver that Mr. Gwynn had himself issued, making clear that he was not purporting to provide expert opinion as to West Virginia Law and was not a member of the West Virginia Bar. The Circuit Court found this to be sufficient basis to find that "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." Ibid. No authority whatsoever was ever given by the Court for the implied holding that one must be a West Virginia attorney in order testify as to the standard of care for a real estate transaction, nor was any aspect of West Virginia law ever identified as the basis for such standard of care.

Mr. Gwynn's C.V. states that he has searched, abstracted, examined, and/or reviewed over 45,000 real estate titles, title abstracts, and title insurance commitments. It further states that

he has settled more than 10,000 real estate transactions, and that he has qualified as an expert in real estate titles and transactions in 5 different Maryland Circuit Courts and the United States Federal District Court. CV of T. Gwynn (see appendix pg. 12). He is, by anyone's account, an expert in conducting real estate settlements.

Petitioners submit that there is no requirement under the law that a Plaintiffs expert, on claim for legal malpractice, must be an attorney within the state. Nor is there any law, rule, or regulation which is specific and germane to West Virginia which governs the standard of care in this matter. Rather, the standard of care for a legal malpractice is simply whether the Defendant attorney failed to exercise the "knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances." *Keister v. Talbott*, 391 S.E.2d 895, 898 (W.Va. 1990). This precedent does not require that a defendant attorney exercise the knowledge and ability ordinarily possessed by members of the legal profession only *in the same state* as Defendant. It requires that they exercise the knowledge and ability ordinarily possessed by Defendants in similar circumstances. It is clear and obvious that Mr. Gwynn's work as a real estate attorney in Maryland qualifies in every conceivable way as the work of a legal professional in similar circumstances as Defendant Catrow.

The Circuit Court, in granting Respondent's Motion for Summary Judgment, failed to even attempt to demonstrate how the circumstances under which Mr. Gwynn conducts real estate settlements in Maryland materially differs, for the purposes of this case, from the circumstances under which Defendant Catrow conducts real estate settlements in West Virginia such that the standard of care as to the handling of wired funds would be different. The issue was pressed further in Petitioner's Rule 59(e) Motion to Alter or Amend (see appendix pg. 971), when Petitioner stated that

> *As such, should the Court respond to this motion by affirming its prior decision, Plaintiffs implore this Court to state clearly and unambiguously its basis for distinguishing the relevant circumstances under which Mr. Gwynn practices from the relevant circumstances under which Ms. Catrow practices such that his testimony would be precluded as irrelevant as to the standard of care. To date, neither the Court nor the Defendant has asserted a single aspect of West Virginia or Maryland law, or the practice of real estate law in West Virginia vis-a-vis Maryland, which would preclude such testimony.*

Petitioners Rule 59(e) Motion to Alter, p. 6-7 (see appendix pg. 971).

Despite Petitioners explicit pleas for the court to articulate the specific aspect of West Virginia law or the practice of real estate law in West Virginia which would preclude an out-of-state attorney from being "similarly situated," The Circuit Court's denial of Petitioners Rule 59(e) motion again failed to so articulate. Instead, the Court simply reiterated the exact same points it had made in its prior Order about Mr. Gwynn not being a West Virginia attorney and his disclaimer about not being an expert in West Virginia law. But the issue, of course, was that ***he didn't need to be an expert in West Virginia real estate law in order to be similarly situated because the standard of care is not germane to West Virginia specifically,*** but applies equally to real estate attorneys across the country. We know that this is true because both Petitioner's expert and Respondents expert testified as such on deposition.

Mr. Gwynn testified on deposition that the standard of care as to a real estate attorney's duties and responsibilities are not codified by rule or statute. *Gwynn deposition* at 40-3 to 41-4 (see appendix pg. 415). Mr. Conrad, Defendants own expert, said approximately the same thing. Mr. Conrad stated that he believed a real estate settlement attorney owed a duty to the parties as well as to the transaction. Deposition of Randall Conrad, ll. 37-10 to -16 (see appendix pg. 695). Undersigned counsel then asked him "where do you derive this duty of care? What I mean by that, is it based on any sort of specific law or case or rule of professional responsibility or is it more general than that," to which Mr. Conrad replied, "***I'd say it's a very general legal***

obligation." Id. at 37-17 to -21 see appendix pg. 695. As such, ***both experts*** **retained in this matter have testified that the standard of care is not a matter of West Virginia law**, nor is it germane to a particular rule of the West Virginia bar, but is instead based on general legal principles which would surely apply in Maryland as well as in West Virginia.

Respondent, for her part, exhibited a similar inability on Motion for Summary Judgment and subsequent filings to identify which precept of West Virginia law controlled such that an out- of-state real estate attorney would not be similarly situated, and instead offered the conclusory assertion that "It is well known in the real estate industry, and legal profession alike, that laws very from state to state, particularly when dealing with real estate transactions." Respondent's Motion for Summary Judgment, p. 22 (see appendix pg. 18). ***But which specific law makes the difference here?*** This would have been the perfect opportunity for Defendant to provide the Court with some examples of important distinctions between the laws of West Virginia and Maryland which would impact the duty of care owed to a client in ensuring the safe and secure transmission of funds into the attorney's trust account. Yet, even after Petitioners mentioned this failure in both its response on Motion for Summary Judgment as well as it Rule 59(e) Motion to Alter, Respondent still failed to articulate even a single precept of West Virginia law which would have differentiated the practice of real estate law in West Virginia from the same practice in Maryland. Her silence on this point, like the Circuit Court's, is deafening.

In truth, there is no meaningful distinction between Maryland and West Virginia real estate law which would impact the standard of care in this case, and Petitioners directly challenge Respondent to demonstrate otherwise in its Responsive brief. Unless Respondent is prepared to argue that West Virginia residents and home buyers are, for some reason, entitled to and deserving of a lower standard of care with respect to their home purchases and the security

of their hard earned money than Maryland residents (which Plaintiffs would emphatically dispute), it's hard to see how one might articulate a meaningful distinction such that Mr. Gwynn's testimony should be disregarded or excluded.

Mr. Gwynn testified on deposition that the standard of care as to a real estate attorney's duties and responsibilities are not codified by rule or statute. Gwyn Depo at 40-3 to 41-4 (see appendix pg. 415). The Defendant is not in a position to dispute this because Mr. Conrad, Defendants own expert, *said the same thing*. During his deposition, Mr. Conrad stated that he believed a real estate settlement attorney owed a duty to the parties as well as the transaction. Deposition of Randall Conrad, ll. 37-10 to -16 (see appendix pg. 695). Undersigned counsel then asked him "where do you derive this duty of care? What I mean by that, is it based on any sort of specific law or case or rule of professional responsibility or is it more general than that," to which Mr. Conrad replied, "I'd say it's a very general legal obligation." Id. at 37-17 to -21 (see appendix pg. 695). As such, *both experts* retained in this matter have testified that the standard of care is not a matter of West Virginia law, nor is it germane to a particular rule of the West Virginia bar, but is instead based on general legal principles. As such, the evidence produced in this case utterly fails to suggest any tenet of West Virginia law which would articulate a particular standard of care for West Virginia real estate attorneys that might be distinguishable from the duties owed by a real estate attorney in another state.

As to the differing opinions of the two experts, it is the province of the finder of fact, not the province of the Court, to determine the credibility of conflicting testimony. Indeed, the *Keister* court itself noted that, "wherein the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong." *Keister* at Syl. Pt. 7. Rather, it is for the jury to

decide, as a matter of fact, whether Defendant Catrow's actions in disregarding her Old Republic notices and in sending her wiring instructions by email without any contact or warnings made to the client, constitute an exercise of the knowledge, skill, and ability ordinarily exercised by lawyers in similar circumstances. Petitioners expert, in and of itself, provided more than enough evidentiary basis for the Court to conclude that a genuine issue of material fact existed as to whether Respondent violated a standard of care to Petitioners, and the Court's decision to take this question away from the jury was a clear, obvious, and highly prejudicial error of law.

3. THE COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT FOUND THAT PLAINTIFFS HAD NOT "PRESENTED ANY EVIDENCE TO DEMONSTRATE THAT CATROW LAW ACTUALLY RECEIVED ANY BULLETINS OR NOTICES CONCERNING WIRE FRAUD," AND HAD THEREFORE FAILED TO "PROVE THAT CATROW LAW BREACHED ANY DUTY OF CARE".

The Circuit Court, in its Order of dismissal, stated that,

> *As for the various bulletins and notices produced by the Plaintiffs from Old Republic National Title Insurance Company ("Old Republic"), they do not prove that Catrow Law breached any duty of care it owed to the Plaintiffs nor do they create a genuine issue of material fact. 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.*

Order Granting Defendant's Motion for Summary Judgment, p. 10-11 (see appendix pg. 958).

As a preliminary matter, the Court, with this holding, has again confused the matter of "proving" a violation of the standard of care, which is to be done before a jury, with the Court's own obligation, on Motion for Summary Judgment, to ensure that, when viewing all the evidence in the light most favorable to the non-moving party (i.e. Petitioners in this case), there exists a genuine issue of material fact for a jury to consider.

What the Court should have done is evaluate whether the evidence collected in discovery, when looked at in the light most favorable to Petitioners, create a genuine issue of fact as to whether Respondent received the Old Republic Bulletins and, if so, whether her failure to act on the warnings specified therein amounted to a breach of her duty of care to her clients.

As stated above, Respondent freely admitted that she was, at all time relevant, an agent-attorney of Old Republic Title Insurance Company. *Deposition of Tasha Catrow, ll.* 16-1 to -8 (see appendix pg. 517. She further testified received regular updates from Old Republic, saying that "I follow – Old Republic as my title insurance underwriter issues monthly, quarterly e-mails, updates. I get them – I get them from several underwriters actually." ll. 13-12 to -15 (see appendix pg. 517). In response to this answer, Petitioners then served a subpoena upon Old Republic, duly filed with the Circuit Court and entered into the record, demanding production of "any and all Bulletins, Memorandums or other notices sent out to West Virginia Agents/Attorneys in 2014 and 2015 regarding wire fraud schemes, wire-transfer fraud attempts, fraud schemes directed at escrow accounts, or other attempts to divert wired funds from their intended destinations." (Old Republic Subpoena, AR). In response, Old Republic then produces the bulletins which are now the subject of the instant Defendant's Motion for Summary Judgment. These bulletins were then noticed to Defendant as supplemental discovery, along with a witness list which expressly noticed Old Republic agents who could testify as to the origin use, and authenticity of these bulletins. Petitioners Witness List (see appendix pg. 792). Thus, there is ample evidence in the record to conclude that Ms. Catrow, as an agent/attorney for Old Republic who admitted to receiving their periodic notices and updates, received the notices and updates produced by Old Republic upon subpoena. This true particularly when one makes all favorable inferences on behalf of Petitioner, as was required in this case.

However, even if Respondent had not admitted to receiving Old Republic's notices, the issue of whether Defendant Catrow actually received these notices would still amount to an obvious question of material fact that the jury, not the Circuit Court, must decide. The fact that Respondent was an Old Republic Agent/Attorney, and that Old Republic sent warnings out to its Agents/Attorneys regarding wire fraud scams would be enough to raise a genuine issue of material fact as to whether Respondent received the notices from her own title insurance company. The mere existence and production of these notices, in response to Plaintiffs subpoena, combined with the admitted fact of Respondent's role as agent/attorney for old Republic, constitutes enough evidence to raise a genuine issue of fact as to whether Defendant Catrow received the notices such that she would have had actual or constructive notice of the increasingly prevalent risks involved in transferring funds and conveying wiring instructions. Whether she did or not, or whether she should have or not, is very clearly a question of fact that a jury, not a Court, must determine. "Courts must strenuously avoid assuming the role of trier of fact in ruling on motions for summary judgment ." *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737 (W. Va., 2000).

4. THE COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT FOUND THAT PLAINTIFFFS WERE PRECLUDED, AS A MATTER OF LAW, FROM ASSERTING LIABILITY AGAINST CATROW LAW BECAUSE OF THE USE OF THE DEFINITE ARTICLE "THE" IN RELEVANT PRECEDENT ON MALPRACTICE REQUIRES THE DEFENDANT ATTORNEY BE THE SOLE CAUSE OF THE INJURY.

The Circuit Court, in granting Respondent's Motion for Summary Judgment, erroneously held that a malpractice claim requires a defendant to be the sole cause of the injury, an assertion which is not at all supported by precedent. Said the Court:

> The W.Va. Supreme Court's use of the definite article "the" in Calvert, supra and Keister, supra demonstrates that the negligence of the attorney in a malpractice case must be "the" direct and proximate cause of the Plaintiffs' damages. If the actions of any other actor or tortfeasor were a cause of the Plaintiffs damages, then by law, the Plaintiffs' malpractice claim against Catrow Law fails as a matter of law.

Order Granting Defendant's Motion for Summary Judgment, p. 11 (see appendix pg. 958).

As such, the Circuit Court pinned its entire "sole cause" theory on the fact that the standard elicited used a "the" instead of an "a." This represents a grievous mischaracterization of the law on this point. Even a cursory reading of relevant West Virginia case history shows the erroneous nature of this holding. In fact, the very cases cited by the Court disprove the Court's assertion on this point. The *Calvert* decision itself, when discussing the causation prong, says nothing about the affect of another potential tortfeasor and does not in any way discuss the use of the definite article. Instead, *Calvert* notes that "[I]n 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 v. Scharf*, 619 S.E.2d 197, 208, 217 W.Va. 684 (W. Va., 2005). Thus, all a plaintiff needs to show is that, but for Respondent's failures to uphold her duty of care they would not have suffered the losses complained of. This is manifestly true in the case at bar. All Ms. Catrow or her employees would have needed to do is pick up a phone and confirm the wiring instructions, or in the alternative, warn Petitioners against any last minute changes to said wiring instructions, or, in the alternative, make Petitioners aware that there were wire fraud scams prevalent in the industry at the time (which Ms. Catrow should have known based on her experience in the industry as well as her Old Republic updates), and Petitioners would never have fallen prey to the scam perpetrated upon them. There was, at a minimum, enough evidence here to create a trial worthy

issue as to causation such that a genuine issue of material fact existed for a jury to be called to decide.

Even more detrimental to the Court's conclusion of the law on this point is the fact that West Virginia case law is replete with examples of malpractice claims which have involved multiple tortfeasors. In fact, one of the cases cited by the Court above, *Keister v. Talbott*, 182 W.Va. 745, 391 S.E.2d 895 (W.Va., 1990), involved multiple tortfeasors. In *Keister*, the West Virginia Supreme Court of Appeals considered an appeal from Plaintiffs Ralph and Ruby Keister of a jury verdict which found in favor of the Plaintiffs on the liability issue, but awarded them no damages. Id at 897. Regarding the existence of two tortfeasors the *Keister* Court notes as follows:

> *In November, 1986, the plaintiffs instituted a civil action in the Circuit Court of Webster County against Mr. Talbott and Charles F. Herold, former Webster County Clerk. The complaint alleged that the plaintiffs had been deprived of the ownership of the coal underlying the property by virtue of the negligence 3 of Mr. Talbott and/or Mr. Herold and sought compensatory damages in the amount of $10,000,000... On November 2, 1988, the jury returned a verdict against both defendants, but assessed damages in the amount of "$0." By order dated February 21, 1989, the trial court denied the plaintiffs' motion to set aside the verdict. This appeal ensued.*
>
> *In this appeal, the negligence of Mr. Talbott and Mr. Herold is not contested. The central issue is whether their negligence was the proximate cause of the damages claimed by the plaintiffs. The plaintiffs contend that the trial court should have allowed them to present evidence of the value of the coal under the property or of the profits they could have made from extracting it.*

Id. at 897-98.

As shown above, the *Keister* case concerned an appeal on an evidentiary issue as to proving damages. However the case involved two tortfeasors who were involved all the way through trial, and for which liability was found against both parties. Thus, the *Keister* case makes plain that it is legally permissible to pursue a malpractice action while maintaining a negligence action

against another tortfeasor and present both claims to the jury, who can then find liability as to both parties if it so chooses. There is no basis to argue that there can be only one proximate cause of an injury, nor, as the *Keister* case makes clear, is there any basis for arguing that such a limitation exists in legal malpractice claims.

However, for the purposes of completeness, it must be noted that the *Keister* court did address potential deficiencies in the plaintiffs causation proof, but in so doing they actually provided support for Petitioners' contention as to the standard for determining proximate cause in a malpractice case, to wit, whether, but for the attorneys improper conduct, the plaintiff would have suffered the damages alleged. None of the *Keister* Court's criticism of the plaintiffs had anything at all to do with the existence of another potential tortfeasor, and, in fact, the Court's analysis implies the possibility that both tortfeasors could potentially be responsible for the plaintiff's damages. Said the Court,

> *Moreover, the plaintiffs overlook the proximate cause issue in this case. As the court stated in* Ballou, *the attorney's negligence did not cause the loss of the mineral rights. "It is not [the attorney's] fault that the land turned out to have no coal, but it is [his] fault that the plaintiff bought the land. Had it not been for [the attorney's] negligence (i.e., had [the attorney] told [the plaintiff] about the deficiency in acreage and about the [adverse mineral] interest), [the plaintiff] would not have bought the land at all." 839 F.2d at 1176. The test of proximate cause in an attorney malpractice case was discussed in Gill v. DiFatta, 364 So.2d 1352, 1356 (La.App.1978): "The proper method of determining whether a party's omission to perform an act imposed by a duty is a cause in fact of damage to another is to determine whether performance of that act would have prevented the damage."*
>
> *Here, at the time Mr. Talbott undertook the title search, the grantor, Mrs. Brown, had no title to the coal under her property. Had Mr. Talbott correctly examined the title, his discovery of the prior outconveyance would not have altered that fact. Thus, the plaintiffs were not deprived of the coal rights as a proximate result of Mr. Talbott's negligence. Consequently, the plaintiffs' damages for the loss of their bargain, i.e., the failure to acquire ownership of the coal, cannot be charged against Mr. Talbott. What they did lose as a result of his negligence was the opportunity to rescind the purchase contract.*

> *These same principles apply to limit any recovery against defendant Herold. If Mr. Herold had properly indexed the outconveyance in 1946, the plaintiffs would not have acquired any greater interest in the coal rights. Any negligence on his part in failing properly to index the prior conveyance was, therefore, clearly not the proximate cause of the plaintiffs' failure to acquire title to the coal. Accordingly, defendant Herold is liable, at most, for any difference between the purchase price and the value of the property the plaintiffs actually acquired.*

Id. at 900-01.

As can be clearly seen above, the *Keister* Court, at its own prompting, applied an individual analysis of proximate cause against each tortfeasor, and made findings of causation against both (albeit for significantly less than Plaintiffs demanded). At no point did the Court mention that there was an issue with finding proximate cause against more than one tortfeasor, nor did it mention anything about the definite article "the" in relation to multiple defendants where one of them was subject to a legal malpractice claim while the other was subject to a negligence claim (the exact situation before our Circuit Court in the case at bar).

Recently, in 2017, the West Virginia Supreme Court provided a relatively expansive overview of the law on whether the settlement of claims against a third party (as in the case at bar) precludes a claim against an attorney for legal malpractice, and explicitly found that no such prohibition exists under West Virginia law. In *John F. Kay, Jr., et al. v. McGuirewoods, LLP*, No. 15-0606 (W.Va. 2017), the Court stated as follows:

> ***...The critical issue of whether causation and damages can be demonstrated in a legal malpractice case following a settlement is one that necessarily must be determined on a case by case basis.*** *This is clear from a review of our cases in this area. See, e.g., Rubin Resources, Inc. v. Morris, 237 W.Va. 370, 787 S.E.2d 641 (2016) (reversing circuit court's ruling that malpractice plaintiff's settlement with third party precluded finding that alleged damages were proximately caused by attorney's negligence); Burnworth v. George, 231 W.Va. 711, 749 S.E.2d 604 (2013) (upholding summary judgment for lawyer because plaintiff was unable to prove he sustained damages from failure to conduct title search where plaintiff disregarded attorney's advice to delay closing for deed of trust inspection and then, through stipulated settlement, forgave collateral including allegedly defective deed of trust); Sells v. Thomas, 220 W.Va. 136, 640 S.E.2d 199 (2006)*

(reversing grant of summary judgment to attorney in malpractice case due to genuine issues of fact regarding whether attorney's failure to pursue underinsured motorist claim prior to settlement caused damage to client)....

Furthermore, in Morris this Court squarely rejected the position advanced by MW. Like this case, the malpractice at issue was transactional as opposed to litigation-based malpractice. Based on a negligent title examination that failed to identify a declaration of pooling, the malpractice plaintiff, Rubin Resources, sought to recover damages for its lost opportunity to substitute a different piece of property in the event of a title defect and lost proceeds from a gas production agreement that fell through upon discovery of the title defect. 237 W.Va. at 372-73, 787 S.E.2d at 643-44. When the owner of the oil and gas leasehold estate informallyasserted claims against Rubin Resources, a settlement agreement was reached. Relying on Calvert, the trial court determined that the settlement precluded any finding that the malpractice damages sought by Rubin Resources were proximately caused by the attorney's admitted negligence. ***When Rubin Resources argued that Calvert does not stand for the proposition that plaintiffs cannot maintain a legal malpractice action after settling a lawsuit, this Court emphatically agreed****. 237 W.Va. at 376, 787 S.E.2d at 647.*

Id. at Slip Op pp. 11-13 (emphasis added).

As such, there is simply no basis in the law for this Court to conclude that the existence of another tortfeasor or the settlement of a related claim amounts to a bar to recovery against an attorney for legal malpractice.

From the beginning of this suit, Plaintiffs have alleged that there were two tortfeasors, both of whose actions proximately (foreseeably) caused Plaintiff's losses. As noted above, it is a question for the jury, not this Court, to decide how much fault lies with each party. See W.Va. Code §55-7-13d(a)(1), ("In assessing percentages of fault, *the trier of fact shall consider the fault of all persons who contributed to the alleged damages* regardless of whether the person was or could have been named as a party to the suit."). If, as a matter of law, Petitioners were precluded from asserting malpractice liability, we might have expected this issue to be raised by Respondent's counsel, a highly experienced lawyer well versed in these matters. No such motion ever issued, for obvious reasons.

Thus, the relevant question for determining whether a genuine issue of material fact existed as to the third element of legal malpractice is whether Defendant's actions or omissions were ***a*** "proximate cause of loss." Plaintiffs roundly aver more than enough evidence exists on the record to create a genuine issue of material fact as to whether she was. Defendant, on Motion for Summary Judgment, argued that Plaintiffs can produce no evidence which would show that, but for Defendant's negligence, Plaintiffs would not have suffered the injury. This assertion is, on its face, ridiculous. Plaintiffs have provided ample evidence that (a) Defendant had a duty of care to safeguard the transaction and ensure the secure transfer of funds into her trust account, (b) that she knew or should have known of the prevalence of wire fraud scams in the real estate industry, particularly with respect to wiring of funds, and (c) that she failed to exercise this duty by (i) failing to communicate in person with her client's to insure that they would be using the proper wiring instructions, and/or (ii) by failing to warn her clients against accepting last minute changes to wiring instructions without verbal confirmation. All Defendant would have had to do was communicate to Plaintiffs about the wire fraud scams which were prevalent in the real estate industry in 2015, and for which she was amply and repeatedly warned by her title insurance company, Old Republic, and Plaintiffs would not have fallen prey *to the exact scam referred to by Old Republic*. Or, in the alternative, Respondent could have

Nevertheless, it would be expected that Respondent would argue that it was entirely the negligence of Plaintiffs and Coldwell Banker which caused the damages Plaintiffs incurred, while Plaintiffs intend to argue that it was the negligence of Catrow Law and Coldwell Banker. This dispute constitutes a genuine issue of material fact which the jury, as trier of fact, must resolve.

Defendant, on Motion for Summary Judgment, leaned heavily on the fact that Ms. Catrow was using an encrypted email service, and that Plaintiffs have not demonstrated that Defendant's computer systems were compromised. Of course, this argument is a red herring, as neither of these facts matter. The issue is not whether Defendant Catrow breached her duty of care by operating an unsecure email or computer system - such a fact has not been alleged anywhere at any time by Plaintiffs. Rather, the issue is whether Defendant Catrow breached her duty of care by failing to ensure the safe and secure transmission of funds into her trust account despite her having known or should have known about the risks of wire fraud. It is this failure that Plaintiffs allege as a proximate cause of their damages. Had Defendant Catrow exercised her duty of care to safeguard the transmission of wired funds against reasonably foreseeable risks (like those Defendant was specifically alerted to through her title insurance company) by warning Plaintiff of the danger, requiring them to confirm any changes to wiring instructions in writing, and/or conveying said wiring instructions in person or by phone and warning against any last minute changes, Plaintiffs obviously would not have been mislead by the hacker. They would have known that they should contact Ms. Catrow or their realtor and confirm, or would have disregarded the fraudulent entreaties entirely. Naturally, Plaintiffs will testify as such, the evidence will be argued as such, and it will be a question for the jury as to whether the remedies suggested by Plaintiffs and their expert would have or could have prevented the damages Plaintiffs suffered.

VIII. Conclusion

For all the reasons stated above, Petitioners respectfully request that this Honorable Court reverse the Circuit Court's Order Granting Defendant's Motion for Summary Judgment and remand the case back to the Circuit Court for a jury trial.

It was an egregious miscarriage of justice for the Circuit Court to take this matter away from the jury. Petitioners did nothing but comply with the instructions they were given by their realtor and their attorney, and they lost $266,000 for doing so. Both Respondent and Coldwell Banker were being paid, as expert professionals, to ensure that the real estate purchase went smoothly, and they both completely failed in this respect. A jury should have been able to determine exactly how much fault lies with each party, as is Petitioners constitutional right in the state of West Virginia. But this right was taken from them by a Circuit Court judge who put himself in the place of the jury and decided the facts in favor of Respondent. All they want is the opportunity to make their case to a jury, and let the chips fall where they may. This Court should afford them that right.

Respectfully,

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