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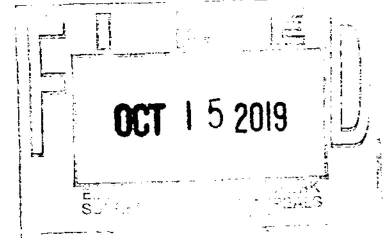
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 19-0361



RICHARD OTTO and
PATRICIA OTTO
Plaintiff's,

vs.

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

PLAINTIFF'S REPLY BRIEF

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Come now Petitioners, by counsel, and offers its reply to Respondent's Response brief. In support of their appeal, Petitioners make the following points in rebuttal to Respondent's arguments.

1. **THERE IS NO TENET OF WEST VIRGINIA LAW WHICH CONTROLS THE STANDARD OF CARE IN THIS CASE, AS DEMONSTRATED BY RESPONDENT'S REPEATED FAILURES TO IDENTIFY ONE. MOREOVER, A DECISION AFFIRMING THE CIRCUIT COURT'S RULING ON THIS POINT WOULD FUNCTIONALLY DESTROY THE ABILITY OF CLIENTS TO SEEK REDRESS FOR LEGAL MALPRACTICE ACTIONS IN THE STATE OF WEST VIRGINIA MOVING FORWARD.**

One of the main issues of contention in this case was the fact that the Circuit Court excluded Petitioners' expert, T. Summers Gwynn, exclusively on the basis that he was not a West Virginia attorney and without identifying any precept of West Virginia law of which Mr. Gwynn's ignorance might have precluded his testimony. Petitioners repeatedly asked for both the Circuit Court as well as Respondents to provide an example of *any* aspect of West Virginia law or West Virginia Rules of Professional Responsibility might have been controlling on this point, and none was ever provided.

On appeal, Petitioners entire argument as to the erroneous exclusion of Mr. Gwynn was that the relevant standard of care was not germane to West Virginia law, and that it was therefore improper to find that he was not similarly situated under the Standard elicited in *Keister v. Talbott*, 391 S.E.2d 895, 898 (W.Va. 1990). Petitioner made unequivocal objection to the fact that the Circuit Court "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," (Petitioners brief, p. 18) even after Petitioners practically begged the Court, in its Rule 59(e) Motion to Alter, to "state clearly and unambiguously its basis for distinguishing the *circumstances under which Mr. Gwynn practices from the relevant circumstances under which Ms. Catrow." Appendix p. 971.* Petitioners further noted in their brief that "We know that this is true [that the standard of care isn't germane to West Virginia law] because both Petitioners' expert and Respondent's expert testified as such on deposition," before referencing relevant deposition testimony where each expert stated as much. *See Petitioners' brief*, p. 19.

In response, Respondent has again failed to answer this singularly important question. The response to this Court constituted the fourth distinct time that Respondent had an opportunity to outline which provisions of West Virginia law she claims as controlling as to the standard of care such that a Maryland real estate attorney would be precluded from testifying as an expert.[1] Yet again, she has failed to make any attempt at doing so. This is plainly because ***there is no provision of any law or rule in West Virginia which controls as to the standard of care in this case.*** It is instead a "very general legal obligation," as Respondent's own expert clearly stated. *Appendix p. 695*, ll. 37-17 to -21. As such, Mr. Gwynn is just as capable of testifying as to the standard of care as Mr. Conrad or any other practitioner of real estate law. In fact, Mr. Gwynn, who practices directly across the border in Maryland and is based only 80-90 miles away from Berkeley County, is significantly closer, from a regional perspective, than many of the other West Virginia real estate attorneys who the Circuit Court would have, presumably, accepted as an expert.

[1] The first opportunity was in Respondent's Motion for Summary Judgment, the second was in her Reply on Motion for Summary Judgment, and the third was in her Response to Petitioner's Rule 59(e) Motion to Alter.

Finally, this Court should think hard about the precedent which might be set by a affirming the Circuit Court's ruling on this point. Most attorneys who practice in West Virginia also live in West Virginia, and it is difficult to find one who is willing to testify against a member of not only their own legal community, but their own specific practice group to boot. The legal community here is small, and if a Plaintiff was forced to procure a West Virginia attorney to testify against another West Virginia attorney, it is likely that many extremely meritorious cases would not be able to be made for reasons which have nothing at all to do with the merits of the case. Thus, the practical effect of the Circuit Court's ruling, were it to become precedent moving forward, would be to functionally destroy most malpractice claims in the state. While this may sound like a good idea to the legal community, it is not at all in the interests of justice nor of the people of this great state.

2. RESPONDENTS CAUSATION ARGUMENTS, LIKE THEIR ARGUMENTS AS TO PETITIONERS' EXPERT, ARE LARGELY NOT RESPONSIVE TO THE ARGUMENTS MADE IN PETITIONERS' BRIEF, AND TO SUCH EXTENT SHOULD BE DISREGARDED.

Respondent, in attempting to support the Circuit Court's erroneous decision as to causation, appears to largely ignore the points made by Petitioner as to the Circuit Court's incorrect ruling.

Petitioners' first argument in opposition to the Circuit Court's ruling on this point was that such a holding is belied by the very case that the Court cited in establishing it, (*Calvert v. Scharff*, 619 S.E.2d 197 (W.Va. 2005)

Plaintiff argued that the *Calvert* decision "says nothing about the effect of another potential tortfeasor and does not in any way discuss the use of the definite article." Petitioners' Brief, p. 25. Petitioners then cite *Calvert's* holding which requires a showing only that "but for the

negligence of the lawyer, he or she would not have suffered those damages." *Ibid.*[2] Petitioners' brief than offers a very clear cut case as to its theory on "but for" causation, and offers examples of the many ways that Respondent, but for her failure to exercise her duty of care, would have averted the scam perpetrated on her clients. Petitioners Brief, p. 25.

Respondents offer absolutely nothing in response to this argument, save a blanket reiteration of the Circuit Court's conclusory assertion. Instead, Respondent's brief notes only that "Since the pleadings and the 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 Petitioner's damages in this matter." Respondent's brief, p. 28.

Next, Petitioners reference the *Keister v. Talbott* decision, 182 W.Va. 745, 391 S.E.2d 895 (W.Va., 1990), which was also cited by the Circuit Court, in order to highlight the fact that this case was a malpractice action involving multiple tortfeasors and that, although the Court ultimately upheld the jury's award of $0 in damages, the case nevertheless provides an example of a malpractice action which involved more than a single tortfeasor and which was permitted to go to a jury trial. Had the rule implemented by the Circuit Court in the case at bar been actual law, this matter would never have been permitted to proceed to trial at all. Petitioner's brief also mentioned that the Keister court "applied an individual analysis of proximate cause against each tortfeasor, and made findings of causation against both," and that "at no point did the Court mention that there was an issue with finding proximate cause against more than one tortfeasor."

In Response, Respondents attempts to dismiss the *Keister* decision by stating that, "The only issue before the Court in Keister was the issue of damages, and specifically whether the actual

[2] As a reminder, Calvert holds 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." Id. at 619 S.E.2d 208.

damages of the Keisters were proximately caused by the underlying defendant's negligent conduct... As such, nothing is known as to the pretrial proceedings and rulings." *Respondents brief*, p. 30. This is both incorrect and beside the point. We know, as to the pretrial proceedings, that the Circuit Court in that case "excluded evidence offered by the plaintiffs as to the value of the coal in place under the property," and that "evidence of damages at trial was limited to testimony as to the fair market value of the property without the coal," and that these decisions formed the basis of the appeal. *Id.* at 898. None of this, however, negates the fact that *Keister* represents a clear and obvious example of a malpractice case which was permitted to go to a jury and which involved multiple tortfeasors, and we know that the West Virginia Supreme Court said nothing which would indicate that the existence of more than one tortfeasor should have precluded, as a matter of law, any finding of liability.

3. RESPONDENT COMPLETELY MISCONSTRUES THE CAUSATION ASPECT OF A MALPRACTICE CLAIM AS BEING "ELEVATED" WHEN IN FACT IT REQUIRES THE SAME CAUSATION ELEMENTS AS AN ORDINARY NEGLIGENCE CLAIM, AND SHOULD BE TREATED AS SUCH.

Throughout Respondents discussion of the causation element of a malpractice claim, she continuously attempts to misconstrue the fact that the slightly different elements of a malpractice claim create an entirely different standard for causation. Respondent's brief states, "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 'without the requisite causal connection between an attorney's malpractice and a loss to the client, a malpractice case simply cannot go forward." *Respondents brief*, p. 29 (quoting *Calvert*, 217 W.Va. at 695.). Based on this logic, Respondent attempts to support the Circuit Court's "sole cause" theory of malpractice causation and further attempts to argue that the comparative fault

provisions of W.Va. Code § 55-7-13 do not apply. She offers no case precedent whatsoever in support of this position.

In reality, ordinary negligence claims require the same causation as an attorney malpractice claim, and West Virginia law is abundantly clear that "[**a**] **party in a tort action is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of the injury**." Syl. Pt. 2, *Everly v. Columbia Gas of West Virginia, Inc.*, 171 W.Va. 534, 301 S.E.2d 165 (W. Va., 1982) (emphasis added). Plaintiffs would note that malpractice is, of course, a tort, and although there is a different standard for determining an attorney's breach of duty, to wit, whether the 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), the tort of attorney malpractice is otherwise functionally identical to the tort of ordinary negligence, as each require a breach of duty, causation, and damages.

Calvert holds unequivocally 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." *Id.* at 619 S.E.2d 208. This, of course, is the exact same "but for" standard of causation used in ordinary negligence cases. *See Restatement (Third) of Torts*, § 26.

But we need not rely only on common law jurisprudence to establish this similarity. Just this year, the West Virginia Supreme Court of Appeals held, in *Humphrey v. Westchester Ltd.* P'ship (W. Va., 2019) that:

> *This Court has also stated that "[t]he proximate cause of an injury is the last negligent act contributing to the injury and* ***without which the injury would not have occurred."***

Syl. Pt. 5, Hartley v. Crede, 140 W.Va. 133, 82 S.E.2d 672 (1954), overruled on other grounds by State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). Further, ***"[a] tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct."*** *Syl. Pt. 13, Anderson v. Moulder, 183 W.Va. 77, 394 S.E.2d 61 (1990).*

The phrase "without which" is completely synonymous with the phrase "but for." As such, "but for" causation, as it is generally understood both nationwide under the common law and specifically in West Virginia, applies to both ordinary negligence as well as attorney malpractice claims and is not precluded, in either case, by the foreseeable acts of negligent third parties. As such, just because Defendant Catrow was not the only negligent party involved in the transaction giving rise to Petitioners suit does not mean that she is relieved from liability. It was entirely foreseeable for an attorney in Respondents position that her wiring instructions, sent over the internet, to a client or a client's agent, might be subject to surveillance or "phishing," and that such activity could result in the total loss and diversion of purchase funds. This is especially true given the fact that a reasonably prudent attorney working in the field of real estate would have been aware of common scams and fraud's being perpetrated on would-be home buyers, *particularly when said attorney's own title insurance company was sending her wire-fraud alerts*, as was the case here.

4. **RESPONDENT'S ARGUMENT AS TO PETITIONERS' FOURTH ASSIGNMENT OF ERROR MISAPPLIES THE RELEVANT RULES OF EVIDENCE AND ERRONEOUSLY IGNORES THE CLEAR CIRCUMSTANTIAL EVIDENCE WHICH PLAINLY EXISTS IN THE RECORD AND WHICH IS SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT.**

Respondent argues, as to Assignment of Error 3, that "Petitioners have once again failed to precisely demonstrate to the court how the documents in question [Old Republic Bulletins]

create a genuine issue of material fact," and that "While Petitioner's 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." Respondents brief p. 36-37. While Petitioners would agree that the evidence produced regarding (a) Respondents admission to being an Old Republic Agent and receiving Old Republic legal notices and update, and (b) Old Republics subpoenaed production of bulletins sent to West Virginia agents relating to the wire fraud scheme, do not necessarily prove "precisely" that Respondent actually received the wire fraud bulletins, such demanding proofs are not necessary, particularly on motion for summary judgment. This case is basic civil lawsuit which requires proof by a simple preponderance of the evidence, which, as this Court well knows, simply means more likely than not. What's more, the standard on summary judgment is even lower than that, requiring only that a genuine issue of material fact exist.

As such, and contrary to Respondent's assertions, Petitioners' arguments are not "nothing more than factual assertions by their counsel," (Respondent's brief, p. 37). They are conclusions that a jury might reasonably infer based on the circumstantial evidence that is plainly within the record of this case, and which creates the genuine issue of material fact needed to survive summary judgment.[3] Circumstantial evidence is enough to sustain liability on a preponderance of the evidence standard, and is even sufficient proof, in some cases, to sustain guilty verdicts in

[3] It is, of course, a technical possibility that Respondent could testify on cross examination, when presented with the bulletins, that she never received or read them, but such an admission would give rise to further proof of negligence insomuch as it would mean that she disregarded her own Title Insurance companies legal updates, which could easily amount to a failure to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.

criminal trials, which involve the much more stringent beyond a reasonable doubt burden of proof. See *State v. Parsons*, 380 S.E.2d 223, 181 W.Va. 56 (W. Va., 1989).

Moreover, Respondents assertion that Petitioners' Old Republic witness must qualify as an expert witness because the testimony "would not be of someone with personal knowledge of events pertaining to the case," is patently absurd and obviously wrong. The Old Republic witnesses would be expected to testify as to their personal knowledge that Old Republic sent the relevant bulletins to its agent-attorneys in West Virginia, which Respondent has already admitted to be. Rule 603 of the West Virginia Rules of Evidence states that "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Rule 901 states that "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

Meanwhile, Rule 702 states that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Additionally, Rule 701 states witnesses who are not testifying as experts must limit their testimony to one that is: (1) Rationally based on the witness's perception; (2) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and; (3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

As one might expect, the witnesses identified from Old Republic were intended to authenticate the Bulletins and state their *personal knowledge* as to such Bulletins being sent out

to all WV agent-attorney. In fact, one of the named witnesses on Petitioners' witness list was "any agent/employee named by Old Republic National Title Insurance Company to Authenticate the Bulletins/Alerts issued to all West Virginia agents/attorneys as presented in discovery." There should be no surprise that this witness is intended to authenticate the Old Republic bulletins and verify that they were sent out to all West Virginia agent attorneys. This is permissible under Rule 602, and required for admission of the bulletins under Rule 901. Obviously, these witnesses were *not* intended to offer "scientific, technical, or other specialized knowledge," such that offering their testimony would require expert qualification under Rule 702.

Finally, Respondent takes issue with the fact that "Petitioners also failed to present any affidavits or documentary evidence below concerning the testimony of these witnesses." This is erroneous insomuch as the subpoena's which generated the bulletins, as well as the bulletins themselves, do in fact constitute documentary evidence. More importantly, however, is the falsehood that has been repeatedly proffered by Respondent as to the necessity of providing affidavits in support of witnesses in order to survive a motion for summary judgment. Respondent, despite reiterating this argument in multiple briefings, has not offered any legal authority for the implied proposition that a witness must be accompanied by an affidavit in order to count as evidence for the purpose of a summary judgment motion. This is because there isn't any.

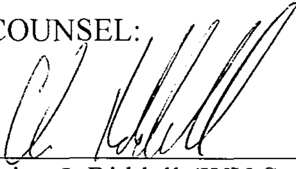
CONCLUSION

For all the reasons stated above, Petitioners respectfully requests that this Honorable Court REVERSE the Berkeley County Circuit Court's Order Granting Motion for Summary Judgment and REMAND this matter for trial.

Respectfully,

APPELLANTS

BY COUNSEL:



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