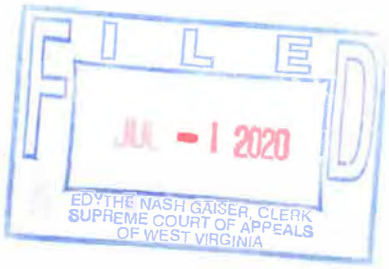
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



KAREN COFFIELD

Defendant Below/Petitioner,

v.

Docket No. 20-0033
Marshall County Civil Action No. 13-C-163

RONALD NEIL ROBINSON, II

Plaintiff Below/Respondent

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENTS OF ERROR

NOW COMES the Respondent, Ronald Neil Robinson, II, by and through his counsel, Amy Pigg Shafer, Esq., and hereby responds to Petitioner's Brief and asserts two cross-assignments of error in the above-captioned case pursuant to the Court's Scheduling Order and the Judicial Emergency Order.

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I. STATEMENT OF THE CASE

A. Statement of the Facts

The parties were previously involved in a romantic/sexual relationship that began in 1997 and ended in February of 2000. Following the breakup of the relationship, the parties had a one-time sexual encounter in Pittsburgh, Pennsylvania in June of 2000. Thereafter, the Defendant advised the Plaintiff that she was pregnant. When the Plaintiff inquired of the Defendant if he was the father, Defendant told him that he was not and stated that the subject pregnancy had resulted from artificial insemination.

The Defendant gave birth to Savannah Rose Coffield on March 18, 2001. The Defendant continued to maintain that her daughter had been conceived through artificial insemination. Plaintiff inquired two more times following the birth of the child if he was the father. Following comments from persons who observed the child's appearance as she grew and finally seeing the child himself, Plaintiff initiated proceedings in the Family Court of Marshall County, West Virginia seeking to determine the paternity of Savannah. On September 27, 2011, DNA test results were filed in the paternity proceeding which confirmed that the Plaintiff was in fact Savannah Rose Coffield's biological father.

The Defendant never underwent a procedure for artificial insemination. The Defendant knew at the time her pregnancy was confirmed that the Plaintiff was the father of Savannah. From before the date of the child's birth until the confirmation of Robinson's paternity through DNA testing, the Defendant actively, fraudulently, and intentionally misrepresented and concealed the fact of Plaintiff's paternity from him.

B. Procedural History

Plaintiff filed his *pro se* Complaint in this matter on or about September 27, 2013. Defendant served a Motion to Dismiss on October 24, 2013 asserting only that plaintiff's Complaint

should be dismissed as West Virginia does not recognize actions for "alienation of affections" and that the plaintiff's claims were barred by *res judicata*.

The undersigned counsel filed a Notice of Appearance for Plaintiff on November 1, 2013 and responded to the motion to dismiss. The Motion to Dismiss was denied. Defendant's Answer, Affirmative Defenses, and Counterclaim was filed on October 23, 2015. No Counterclaim was contained within the Answer.

An Agreed Scheduling Conference Order was sent to the Court for inclusion of Trial and Pretrial dates on March 22, 2017. The Scheduling Conference Order including dates for dispositive motion hearing, pretrial conference, and trial was entered on March 30, 2017 and received by the undersigned counsel on April 3, 2017. The agreed deadline for the cutoff of discovery was October 15, 2017 and the agreed dispositive motion deadline was November 15, 2017.

Defendant improperly filed and served a Counterclaim on September 22, 2017. The matter was heard for oral argument on October 20, 2017. However, the order granting the motion to dismiss the counterclaim was not entered until the Court's Order Reflecting December 2, 2019 Pretrial Hearing and Granting Plaintiff's Motion to Dismiss the Defendant's Counterclaim was entered on December 5, 2019.

Defendant, through new counsel, moved to reopen discovery to take the deposition of Plaintiff. Mr. Robinson's deposition was recorded almost 4.5 years after the case was filed on April 26, 2018. An Order Resetting Trial Date was entered on October 17, 2018. The Order Resetting Trial Date required that Final Witness List, Final Exhibit List, Motions in Limine, proposed Voir Dire, and proposed Jury Instructions be filed by January 7, 2019.

On January 4, 2019, Defendant filed a Motion to Continue Trial Date Currently Set for February 11, 2019 (JA 000227). Plaintiff filed a response opposing the continuance (JA 000232). The same was denied verbally on January 7, 2019 and by Order entered January 16, 2019 (JA

000246). Both Plaintiff and Defendant filed the pretrial filings due on January 7, 2019, with Defendant filing two motions in limine. Responses and objections to the pretrial filings were due by January 25, 2019. Both parties filed various responses and objections, with Defendant filing responses to five of Plaintiff's six motions in limine. Plaintiff filed replies to Defendant's responses to his motions in limine on the morning of February 1, 2019. *See,* certified copy of Docket Sheet in Joint Appendix (JA).

On the morning of February 1, 2019, the Court entered an Order Denying Defendant's Motion for Summary Judgment and Vacating Hearing Set for Monday, August 27, 2018 at 9:00 a.m. (JA 000319). On the afternoon of February 1, 2019, counsel for Plaintiff was advised by the trial court that the Defendant would be filing a writ of prohibition and that, accordingly, the Pretrial Conference set for Monday, February 4, 2019 and the trial set for February 11, 2019 were being vacated. Ms. Coffield's Petition for Writ of Prohibition as to the statute of limitation issue, Docket No. 19-0090, was denied by this Court. By Order dated July 26, 2019, the case was again set for trial. The case commenced trial on December 9, 2019 and concluded with a verdict in favor of the plaintiff on December 10, 2019.

A Trial Order, that was not a Final Judgment Order due to the outstanding issue of attorney's fees, was entered on December 12, 2019 (JA000337). Defendant's Motion for Judgment as a Matter of Law and Order for New Trial submitted without supporting memoranda or a notice of hearing was filed on December 16, 2019 (JA 00350). The Order Denying New Trial as to Defendant's post-trial motions was entered on December 17, 2019 (JA 000361). On December 18, 2019, Plaintiff filed a Motion for Attorney's Fees (JA000357), Memorandum in Support of Attorney's Fees Assessment (See Supplemental Appendix), and a Motion for New Trial as to Damages Only (JA 000339). These matters were briefed and came on for hearing on January 16, 2020. Defendant served a Notice of Appeal on January 15, 2020. Plaintiff's Motion for New Trial as to Damages

Only was denied by order dated January 21, 2020 (JA000380). Plaintiff's Motion for Attorney's Fees was granted as to the entitlement to attorney's fees by the same order dated January 21, 2020. The hearing to consider the amount of a reasonable attorney's fee was held on February 11, 2020. The Court awarded Plaintiff an attorney fee in the amount of $ 6,000.00, plus expenses in the amount of $2,486.20 by order dated February 21, 2020. A Final Judgment Order was entered on March 17, 2020 (JA 000337).

II. SUMMARY OF THE ARGUMENT

A. Response to Petitioner's Arguments

Petitioner claims the case against her is time barred and that the trial court erred when it denied her summary judgment motion and prohibited a statute of limitation defense before the jury at trial. Petitioner asserts that the trigger date for the two year statute of limitation for intentional misrepresentation was the date of a drug store DNA test that preceded the date the results of the official test done in the Family Court of Marshall County, West Virginia. The trial court never reached the issue of the trigger date as it found that the Defendant below had slumbered on her rights by waiting many years to bring her affirmative defense to the trial court's attention. Active participation in the litigation process is the key to finding waiver after a delay in pursuing a pled affirmative defense. There are years of active participation in the litigation process by the Defendant below. Petitioner continued to engage in pretrial preparation and litigation until the eve of the previous February 4, 2019 Pretrial Conference when she filed for extraordinary relief from this Court in Docket No.:19-0090. This Court should uphold the trial court's ruling that Defendant slumbered on her rights by actively participating in the litigation process without ever previously bringing her statute of limitation defense to the attention of opposing counsel or the trial court judge when the facts upon which the motion for summary judgment would have been based had long been known to her.

Petitioner asserts that the trial court erred in not allowing her to present evidence of her "justification defense" to the jury. Ms. Coffield wanted to be able to put on evidence that Mr. Robinson was a "bad guy" and had physically abused her. Had the Defendant not lied about paternity, she could have taken whatever evidence she had to the family court judge and asked for various limitations on visitation with the child. In this case, Mr. Robinson was not able to put on evidence of continuing interference by Ms. Coffield with his relationship with the child because claims for "tortious interference" are limited to third parties like grandparents, other family or friends, or adoption attorneys. Under *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (W.Va. 1998), "justification" is only a defense to a "tortious interference" claim and Plaintiff below was not able to bring a tortious interference claim against the Defendant. Moreover, "justification" would not have aided Ms. Coffield even in the context of a tortious interference claim brought by Mr. Robinson because she would not have been protecting the child from any alleged conduct as outlined in the abuse and neglect code. "Justification" is not a defense to a fraudulent intentional misrepresentation claim. Petitioner is asking this Court to extend "justification" as an affirmative defense to fraud. If this Court were now on a remand for new trial allow such a defense, it would be sending a message to women that they are free to take the law into their own hands and decide when a father is worthy of being a father to their child. The trial court's ruling precluding such a defense was proper.

Petitioner further asserts that the trial court erred when it granted the motion to dismiss her counterclaim which precluded her from being able to present evidence of her abuse of process claim to the jury. The counterclaim was filed without seeking leave of court four years after the original complaint was filed and approximately sixteen (16) months after the family court ruling referenced in its Paragraph 6. Defendant offered no explanation for her delay in seeking to amend or supplement the pleadings. Moreover, substantively, the counterclaim failed to state a claim for

abuse of process upon which relief could be granted as the counterclaim did not allege any willful act in the use of the process not proper in the regular conduct of this proceeding below. Finally, the counterclaim was for abuse of process was barred by the one year statute of limitation. There was no error by the trial court in granting the motion to dismiss the counterclaim.

Petitioner asserts that the trial court erred by failing to bifurcate the issue of punitive damages. Below, Defendant set forth no affirmative defense as to punitive damages. Defendant never filed a motion to bifurcate and never filed written objections to any of Plaintiff's proposed jury instructions or to the proposed verdict form. Defendant did not file any proposed jury instructions herself on the issue of punitive damages and never proposed an alternate verdict form. Defendant waived the opportunity to seek that the trial be bifurcated as to punitive damages. Accordingly, this assignment of error would not be a basis for reversal of the judgment or for remand.

Petitioner asserts that the jury awarded punitive damages on a lesser standard than West Virginia Code Section 55-7-29(a) requires. Petitioner posits that there was no evidence that she had "actual malice toward the plaintiff." The jury was instructed as to the requisite malice in Jury Instruction No. 16. Defendant below did not object to this instruction or offer any proposed instruction with alternate language. Every element of the fraudulent intentional misrepresentation was read to the jury in the trial court's instructions and was contained on the verdict form. In checking all six boxes, "Yes," the jury found that the Defendant represented as true something that she knew was false and that she knew it was false when she made the representation and that she intended for the Plaintiff to rely on her false representation. The Defendant's conduct was the essence of "actual malice." This assignment of error is not a proper basis for reversal or remand.

Petitioner asserts that the trial court should not have awarded Plaintiff attorney's fees. This Court has previously found that a finding of fraud is considered an action in bad faith, vexatiously, wantonly, or for oppressive reasons sufficient to permit the award of attorney's fees. The jury was

instructed as to the elements of fraud and when a misrepresentation is fraudulent. Defendant was impeached with prior admissions stating that she knew after she became pregnant that Mr. Robinson was the father of her child. The trial court did not err in finding an entitlement to attorney's fees.

B. Cross-Assignments of Error

The trial court erred in denying Plaintiff's Motion for New Trial as to Damages Only. While it is true that courts are reluctant to set aside jury verdicts as to inadequate damages. Here there was a substantial injury for which the jury made no award of damages in any amount This is a Type 4 case under *Freshwater v. Booth*, 160 W.Va. 156, 233 S.2d 312 (W.Va. 1977). In a Type 4 case, plaintiff would not be entitled to a directed verdict on the matter of liability, but the issue of liability has been so conclusively proven that an appellate court may infer that the jury's confusion was with regard to the measure of damages and not to liability. The jury checked all six boxes "YES" on the six interrogatories setting forth the elements of fraudulent intentional misrepresentation. The jury's award compensated the plaintiff for the expenditure of his attorney fees to establish the paternity of his daughter and awarded money for punitive damages. There is no doubt that plaintiff proved liability against the defendant. The uncontroverted evidence showed the plaintiff had shock, sadness, joy, anger, and other emotional responses to the revelation following the paternity test results that he was the father of Savannah Rose Coffield. However, the jury made no award for loss of solace, society, companionship, and services for ten years. The trial court erred when it did not grant the plaintiff's motion for new trial as to compensatory damages only.

The trial court erred when it awarded inadequate attorney fees by failing to analyze the *Pitrolo* factors. The trial court, without going through the *Pitrolo* factors, found that the 40% contingent fee was a reasonable fee in the present case. The reasonableness of attorney's fees is generally based on broader factors. The trial court further found that not all time required of plaintiff's counsel was spent litigating a successful claim. Apportionment was not appropriate as

both of the plaintiff's claims arose out of the same factual pattern. Finally, the trial court stated that an award of attorney's fees should bear relation to the amount involved in the case and the result obtained. There is no rule that an award of attorney fees cannot exceed the amount recovered. It was simply error to award just the contingent fee amount.

III. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to W.Va. Rule of Appellate Procedure 18(a), the Respondent believes that oral argument is unnecessary as the facts and legal arguments are adequately presented in the briefs and record associated with the previously filed writ of prohibition and in this case and that the decisional process would not be significantly aided by oral argument.

IV. ARGUMENTS IN RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

A. *It Was Not Error for the Circuit Court to Deny Summary Judgment and to Prohibit the Introduction of a Statute of Limitation Defense Before the Jury*

1. Defendant Slumbered on Her Rights in Seeking to Have This Case Dismissed Pursuant to the Statute of Limitation

Defendant accepted service of the Complaint in this matter on October 4, 2013. In response, she filed a motion to dismiss asserting that the case should be dismissed because West Virginia did not recognize alienation of affection as a viable claim and/or *res judicata* applied because Plaintiff's claims had been adjudicated in Family Court. An Order denying the Motion to Dismiss was entered on or about October 13, 2015. Defendant's Answer was filed on or about October 23, 2015. The Defendant's Answer, including form affirmative defenses, did include the statute of limitation in the fifth affirmative defense. Defendant filed a Motion for Summary Judgment on or about March 28, 2017. The unsupported Motion for Summary Judgment again sought dismissal based upon things that had transpired in a family court proceeding. The Motion for Summary Judgment did not assert the statute of limitation as a basis for dismissal. The Motion for Summary Judgment was also denied.

New counsel in the case sought to reopen discovery to depose the Plaintiff as prior counsel never sought the deposition of the plaintiff. Plaintiff filed a written response to the Motion for Discovery Conference and objected to discovery being reopened or to defendant being permitted to file another motion for summary judgment simply because new counsel entered the case. An Agreed Modified Scheduling Order had just been entered by the Court several weeks before Defendant sought to take the plaintiff's deposition. Over Defendant's objection, the plaintiff's deposition was recorded and a summary judgment briefing schedule was entered by the Court.

The case at bar was filed in 2013. Defendant filed a motion to dismiss and a motion for summary judgment. Defendant agreed to two scheduling orders. Defendant served written discovery on the Plaintiff of which none of the questions went to the issue of the statute of limitation. Defendant responded to written discovery. Defendant moved to strike one of plaintiff's experts. Defendant attempted to file a counterclaim. Defendant designated expert witnesses. She requested a discovery status conference. Then, almost five years after the filing of the Complaint, Defendant attempted to assert the affirmative defense of the statute of limitation that she pled in her clumsy Answer and Affirmative Defenses (JA000041) filed then almost three years prior in October of 2015.

The basis for the motion for summary judgment, which could have led to dismissal of the case below, was that the plaintiff knew the result of a private DNA test "in excess of two (2) weeks prior to the Court ordered test." See page 5 of Defendant's MSJ brief (JA 000155). The Court ordered test results were served by the BCSE attorney on September 27, 2011 and filed in the Family Court on September 28, 2011. While the Defendant interestingly did not attach a copy of the private DNA test result to her motion for summary judgment, she did swear out an affidavit that states that "[w]e agreed to have a private paternity test done in addition to the Court ordered test. See Para. 4 of the Affidavit of Defendant attached as Exhibit A to her MSJ brief (JA 000155).

Defendant mailed in a home collection specimen for genetic analysis in addition to the specimens mailed in from the child and from Plaintiff. *See,* Affidavit of Plaintiff attached as Exhibit A to Pl's Response to Def's MSJ on the statute of limitations issue at JA000190. Thus, the fact that a private paternity test was done prior to the court ordered test was information that was always known to the plaintiff. It was known to her from in or around August/September of 2011 when she and the child voluntarily participated in the private DNA testing process. It was information known to her when the Complaint in this matter was filed on September 27, 2013. It was known to her when she filed her Motion to Dismiss on other grounds in October of 2013, when she answered in October of 2015, and when she filed her motion for summary judgment on other grounds in March of 2017. This was not information that was newly discovered during the deposition of Plaintiff taken on April 26, 2018.

Defendant delayed too long to pursue an affirmative defense that was apparently known to her since the case was filed and before. A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver. *See, e.g., Lubrorsky v. Carroll*, No. 15-0787 & No. 16-0329 (W.Va. 2017), *Estate of Grimes v. Warrington*, 982 So.2d 365 (Miss. 2008) (*citing MS Credit Ctr., Inc. v. Horton*, 926 So.2d 167, 181 (Miss. 2006) (finding waiver of right to compel arbitration following active participation in the litigation process) (emphasis added). In *Horton, supra,* 926 So.2d 167 at 181, the Mississippi Supreme Court advised that to pursue an affirmative defense meant to plead it, bring it to the Court's attention, and request a hearing. *Accord, Lubrorsky v. Carrol, supra*, p. 10. Time periods that have been found to constitute waiver of affirmative defenses are illustrated in the following cases: *E. Miss. Sate Hosp. v. Adams*, 947 So.2d 887, 889, 891 (Miss. 2007)(waiver of insufficiency of process and insufficiency of service of process found

where not pursued for more than two years, during which time defendants field a motion for summary judgment, motions to compel, motions for status conferences, and a motion for additional discovery); *Estate of Grimes v. Warrington, supra*, 982 So.2d 365, 369 (Miss. 2008) (waiver of tort-immunity defense found where not pursued five years, during which time the case was twice reset for trial, experts were designated and deposed on the merits of the claim, and defendants filed a motion in limine to exclude portions of the plaintiff's experts testimony), *Meadows v. Blake*, 36 So.3d 1225, 1232-33 (Miss 2010)(defendants waived the defense of plaintiffs' failure to attach a certificate of expert consultation where they did not pursue it for two years, but at the same time, filed a motion for partial summary judgment, participated in discovery, filed a motion to compel, entered into three scheduling orders, and designated experts). Moreover, Plaintiff did not allege in her affirmative defense which claim she believed was time barred or any facts to give the plaintiff notice of a potential statute of limitation problem.

Defendant did not bring her statute of limitations defense on in her Rule 12(b) Motion to Dismiss or in her initial motions for summary judgment. As indicated by Defendant in Paragraph 2 of her post-trial motion, the statute of limitation was included in the Fifth Affirmative defense as only a bare assertion. The affirmative defenses contained in Defendant's somewhat inartful Answer seemed to have been predominantly copied and pasted from an Answer to a car accident Complaint. There was nothing in the affirmative defense as worded to give the Plaintiff notice of why Defendant believed the case was barred by the statute of limitation. Including an affirmative defense in an Answer is not enough. This Court in *Lubrorsky v. Carroll, supra*, p.9, cited various authorities for the proposition that a defendant "may forfeit the right to seek a ruling on the defense at a later juncture through his conduct during the litigation"...because "[w]aiting too long to do so can forfeit the defense." *Id.* It is necessary that a party raise the issue by motion and seek the court's determination of the issue.

Active participation in the litigation process is key to the finding of waiver after delay in pursuing a pled affirmative defense. There are years of active participation in the litigation process by Defendant. Ms. Coffield knew about the private DNA test when the Complaint was filed six years ago. While she raised the statute of limitation as a form affirmative defense in her Answer, she never brought it to the trial court's attention by filing a motion and requesting a hearing until July 20, 2018. This was three years after she answered and after she had filed both a Motion to Dismiss and a previous Motion for Summary Judgment.[1] The Defendant delayed an unreasonable length of time to pursue bringing the statute of limitations affirmative defense to the trial court's attention. All of the lengthy litigation and court time in this case will have been an unnecessary and excessive waste of the time and resources of the parties and of the trial court if plaintiff's claims had been time barred since the moment the Complaint was filed now more than six and one-half years ago. The question the trial court properly considered on summary judgment as to the extremely tardy raising of the statute of limitation was "whether the defendant's conduct in litigating before raising the defense has given plaintiff a reasonable expectation that the defendant will defend the suit on the merits, or whether the defendant has caused the court to go to some effort that would be wasted if the motion asserting the defense is granted." *Lubrorsky v. Carrol, supra*, p. 10. Accordingly, this Court should uphold the trial court's finding that Defendant slumbered on her rights by actively participating in the litigation process without ever previously bringing her statute of limitation defense to the attention of opposing counsel or the trial court judge.

The Court properly ruled at the beginning of the trial of this matter that the issue of the statute of limitation would not be part of the case going to the jury on the basis of its ruling that the

[1] Defendant continued to engage in pretrial preparation and litigation until the eve of the February 4, 2019 Pretrial Conference before seeking extraordinary relief by filing a Petition for Writ of Prohibition to this Court on the Friday before the Pretrial Conference preceding the prior trial date. This was after her motion to continue to the trial date on other grounds was denied. See JA000227, JA 000232, & JA 000246 for the briefing and order denying the motion to continue.

plaintiff had waived the statute of limitation defense by her litigation conduct. In the alternative, Plaintiff states that the claims in his Complaint are not time barred and that genuine issues of material fact exist that preclude this matter being dismissed as a matter of law. These issues were not reached by the trial court when deciding the motion for summary judgment on the statute of limitation issue as the February 1, 2019 Order Denying Defendant's Motion for Summary Judgment reflects that *"[w]ithout reaching the other bases for denial set forth in Plaintiff's Memorandum in Opposition, the Court does find and conclude that the Defendant has slumbered on her rights to have the case dismissed pursuant to the statute of limitation"* (JA 000319).

2. Plaintiff's Cause of Action of Fraudulent Intentional Misrepresentation was Not Time Barred

The Affidavit of Defendant, filed in support of her Motion for Summary Judgment on the issue of the statute of limitations avers in its Paragraph 4 that she and Plaintiff agreed to have a private paternity test done in addition to the Court ordered test (JA000155). Respondent also agreed to the paternity testing done through the Family Court of Marshall County. Paragraph 7 of Defendant's Affidavit attached to her MSJ avers that the private test results were available and known to Respondent/Defendant at the absolute latest on September 11, 2011. Defendant further asserts in Paragraph 8 of her affidavit that Plaintiff posted "that the test was back and he was confirmed to be S.C.'s father." First, the Facebook post purported to be that of the Plaintiff attached at Exhibit 1 to Defendant's post trial motion says nothing about the "test being back" or about a test "confirming" he was S.C.'s father. Second, the copy of a printout of the Facebook post was not admissible evidence as there has been no proper foundation laid as it was simply attached to the motion as an exhibit. Third, the parties had agreed within the context of a formal, statutory court proceeding to DNA testing with LabCorp through the Department of Health and Human Resources, Bureau for Child Support Enforcement *See,* Trial Transcript Excerpts of Karen Coffield at JA 000499-000500. Defendant had agreed that a court ordered paternity test would formally determine

if Plaintiff was the father of her daughter. Defendant has admitted in this case that she testified in a family court proceeding that the day she received the Complaint to Establish Paternity as the "worst day of [her] life" and in her written submission to Dr. Stahl, the custody evaluator in the family court proceeding. Defendant admitted that this was because she knew the paternity test would come back to show Plaintiff to be the father of Savannah Coffield. (Admitted in Response to Request for Admission No. 18).

The timeline of events on the Labcorp testing that was done by Court Order is as follows. Plaintiff filed a Complaint to Establish Paternity on or about May 17, 2011. By Agreed Order entered July 28, 2011, the parties and the minor child were ordered to submit to paternity testing procedures at such dates and times as are arranged by the BCSE. The parties and child were further ordered to submit themselves to the withdrawing of samples of blood or tissue, such samples to be drawn, sealed with appropriate identification and transferred with documented chain of custody according to the established protocols of Labcorp. Labcorp was to report the results of the testing to the Court. *See,* Trial Transcript Excerpts of Karen Coffield at JA 000499-00502. The BCSE attorney served the Labcorp DNA test results on or about September 27, 2011 and the same were filed by the Court on September 28, 2011.

Following the filing of Plaintiff's Complaint to Establish Paternity, Defendant agreed along with Plaintiff to the paternity testing through the court and further understood and agreed that the paternity testing would be arranged by the BCSE. She further agreed along with Plaintiff that there would be documented chain of custody according to the protocals of Labcorp and that Labcorp was appointed as an expert by the family court to analyze and interpret the results of the testing. *See,* Karen Coffield Trial Transcript Excerpts, JA 000499-000502.

In West Virginia, paternity is established in three ways pursuant to West Virginia Code Section 16-5-10: (1) Marriage – if the birth parents are legally married when the wife becomes

pregnant or when the child is born; (2) Voluntary Acknowledgement of Paternity – unmarried parents can sign a Declaration of Paternity Affidavit within one year of the child's birth; (3) filing a Petition to Establish Paternity seeking genetic testing pursuant to W. Va. Code §48-24-101. Plaintiff filed a Petition to Establish Paternity which contemplated confirmation or nonconfirmation of his paternity by genetic testing ordered by a court. The specimens were collected from Plaintiff, Defendant, and the child at the Marshall County Health Department on September 9, 2011 where identification would have been taken and thumbprints taken with chain of custody verifications signed at the collection site and at the lab with the final notarized report of a Ph.D. employee at the LabCorp lab being sent back to the BCSE for filing with the Court.

It is more than unlikely that if any litigant in the Family Court of Marshall County or in the circuit court had come into court waving a drugstore DNA test result that the judge would have found such evidence admissible for any purpose. Generally, mail-in test kit results are not admissible in court because the court does not have information from the lab as to verification of the parties, collection procedures, chain of custody, or reputation of the lab. *See, e.g., In the Matter of Paternity of T.M. v. S.K.,* 953 N.E.2d 96 (Ind. App. 2011) (upholding nonadmissiblity of Identigene DNA mail-in test kit where test specifically stated that it was not to be used for legal purposes, and there was no information from the purported laboratory where the tests were conducted, or the persons conducting those tests, establishing a foundation to support the reliability of the results). West Virginia Code §48-24-101 (g) states that "[b]lood or tissue samples taken pursuant to the provisions of this article may be ordered to be taken in such locations as may be convenient for the parties so long as the integrity of the chain of custody of the samples can be preserved" (emphasis added).

Importantly, Plaintiff was aware at the time that he and Karen Coffield did the drugstore DNA test that it would not accepted in court to establish paternity. Plaintiff specifically recalled that

the packaging for the Identigene DNA test that they purchased at a CVS drugstore had a disclaimer stating that courts will not accept test results were DNA was collected at home. *See*, Affidavit of Pl. attached to his Memo. in Opp. to the Def's MSJ at JA 000190. Identigene's website materials are indeed filled with information explaining why a personal paternity test is not admissible in court and cannot be upgraded to a legal one after samples are taken. Defendant was aware that the drug store test was not for use in court. Moreover, Defendant was told by Attorney Artimez, his prior family court counsel, that a private test was not reliable enough to be accepted by a court. *See*, Affidavit of Pl. attached to his Memo in Opp. to the Def's MSJ at JA000190. Plaintiff always understood that his paternity of Savannah Coffield could only be confirmed through the court-ordered genetic testing.

The Notice of Filing of Paternity Results was served on Plaintiff's family court counsel on September 27, 2011 and filed with the Court on September 28, 2011. On September 27, 2011, or arguably a few days thereafter depending on when the Notice of Filing of Paternity Results was received by Attorney John Artimez and then shared with Plaintiff, is when Plaintiff knew or reasonably should have known that he was the father of Savannah Coffield (JA 000502). It was then that the misrepresentations and fraudulent conduct of Defendant were exposed and made known to Plaintiff.

While the statute of limitation was not an issue before the jury at the trial of this matter, there was testimony from Plaintiff at the trial of this matter that the Defendant never "fessed up" about her "artificial insemination story" during the proceedings in Family Court which would have been even after any private DNA test result. Mr. Robinson remained unsure during the time the proceedings were going on in family court about Savannah being his child. Mr. Robinson further stated that the Ms. Coffield never admitted that he was the father during the family court proceeding and that she waited for the state paternity testing results to come back. *See*, Trial Transcript Excerpts of Neil

Robinson JA000515-000517. The Plaintiff had been mislead by the Defendant for a decade. There was testimony that she never apologized. *See*, Trial Transcript Excerpts of Neil Robinson at JA 000515-000517. In essence, the Defendant's fraudulent conduct continued until the DNA test ordered by the Family Court of Marshall County showed that plaintiff was the father of defendant's child. Plaintiff filed his *pro se* Complaint in this matter on September 27, 2013. The court ordered test was the only statutory way to establish the paternity of Savannah Coffield and was the only way that the Plaintiff could have known or should have known that he was the father of Savannah Coffield given the years of deceit by the child's mother and her continued silence as to whether Plaintiff was the father of her child even after the Petition to Establish Paternity was filed. Genuine issues of material fact existed as to when the Plaintiff knew or should have known about his paternity of the child.

3. The Doctrines of Equitable Estoppel and Equitable Tolling Would Further Serve to Counter Any Argument that the Applicable Statute of Limitation Was Tolled Following the Drugstore DNA Test

Plaintiff's case is grounded in fraud and the longstanding misrepresentations of the Defendant coupled with the Plaintiff's knowledge that the Defendant had sexual relations with several other men in the same time period that he had the one-night encounter with the Defendant. *See*, Trial Transcript Excerpts of Neil Robinson at JA000512-000514. This was admitted by the Defendant. *See*, Trial Transcript Excerpts of Karen Coffield JA000486-000487 & JA000503-000504. The Defendant never "fessed up" even after the filing of the Petition to Establish Paternity that Plaintiff was the father of Savannah. Defendant never apologized for her intentional misrepresentations during the life of the paternity case. *See*, Trial Transcript Excerpts of Neil Robinson JA00515-000517. She had always told Mr. Robinson that she wanted to wait for the results of the official DNA test. All of this continuing to cast doubt on Plaintiff reasonably knowing if he was the father of the child. Thus, the fraudulent acts of the Defendant continued until the results of the official

DNA paternity test. The continuing wrongful conduct on the part of the Defendant either continued to toll the statute of limitation or did so on an equitable basis. *See, Metz v. E. Associated Coal, LLC*, 239 W.Va. 157, 799 S.E.2d 707 (W.Va. 2017) (discussing equitable tolling and equitable estoppel).

For all the reasons set forth immediately above, the plaintiff's claims would not have been barred on substantive grounds had the Court reached that issue in deciding against the Defendant on her motion for summary judgment. The official DNA test result was the trigger or genuine issues of material fact existed as to when plaintiff knew or should have known of his paternity of Savannah Rose Coffield given the longstanding denial of his paternity even after the filing of the family court proceeding to establish paternity.

Ultimately, however, Plaintiff submits that his Complaint was properly found not to be time barred by the statute of limitation as the Defendant, similar to her late filing of the dismissed Counterclaim, waited too long after actively participating in litigation to assert the statute of limitation. The Plaintiff would have been severely prejudiced by any other decision on the motion for summary judgment and Defendant would have wasted years of the Court's time. Plaintiff's Complaint was not time barred as a matter of law and Defendant is not entitled to either a dismissal of the case or a remand for new trial that includes a statute of limitation defense going to the jury.

B. The Circuit Court Did Not Err When it Prohibited Ms. Coffield From Presenting Evidence of Her Justification Defense to the Jury

This assignment of error by Defendant arises out of the trial court granting Plaintiff's Motion in Limine No. 4. *See*, JA 000248 for the parties' briefing of this issue. Rulings on motions in limine lie within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *See, McKenzie v. Carroll International Corporation*, 216 W.Va. 686, 610 S.E.2d 341, 347 (W.Va. 2004) (citing additional cases).

In *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (W.Va. 1998), a case involving a wrongful adoption, this Court announced for the first time that a cause of action for tortious interference with

parental rights exists. *See, Kessel v. Leavitt, supra*, 511 S.E.2d, *supra,* at 765-767. However, this Court held that "a parent cannot charge his/her child's other parent with tortious interference with parental or custodial relationship if both parents have equal rights, or substantially equal rights. *Id.* at 766. The Court in *Kessel* explained as follows:

> Further, we hold that where a parent presents a *prima facie* case of tortious interference with his/her parental or custodial relationship, the party interfering with such relationship may assert the affirmative defense of justification, *i.e.,* the party possessed a reasonable, good faith belief that interference with the parent's parental or custodial relationship was necessary to protect the child from physical, mental, or emotional harm, as contemplated by W. Va.Code § 49-1-3 (1994) (Repl.Vol.1996). A party also cannot be held liable for tortious interference with a parental or custodial relationship if he/she acted negligently, rather than intentionally; possessed a reasonable, good faith belief that the interference was proper (*i.e.,* no notice or knowledge of an original or superseding judicial decree awarding parental or custodial rights to complaining parent); or reasonably and in good faith believed that the complaining parent did not have a right to establish or maintain a parental or custodial relationship with the minor child (*i.e.,* mistake as to identity of child's biological parents where paternity has not yet been formally established).
>
> Lastly, we hold that a parent cannot charge his/her child's other parent with tortious interference with parental or custodial relationship if both parents have equal rights, or substantially equal rights (as in the case of a nonmarital child where the putative biological father seeks to establish a meaningful parent-child relationship with his child and, until such a relationship has been commenced, does not have rights identical to those of the child's biological mother), to establish or maintain a parental or custodial relationship with their child. In other words, when no judicial award of custody has been made to either parent, thereby causing the parents' parental and custodial rights to be equal, no cause of action for tortious interference can be maintained by one parent against the other parent. Likewise, where no judicial decree has been entered awarding custody of a nonmarital child to one or the other of the child's biological parents, the complaining biological parent cannot assert a claim of tortious interference with parental or custodial relationship against the other biological parent.
>
> ***
>
> As our holding indicates, a parent who has been deprived of his/her parental or custodial relationship with his/her child generally is not prevented from asserting such a claim against other nonparental relatives of his/her child. ***Instead, it appears that these types of tortious interference claims are quite often asserted against the child's grandparents, aunts, and uncles who have participated in the removal or retention of the child from the complaining parent.*** Thus, John is not precluded from prosecuting his tortious interference claim against the remaining defendants.

Kessel v. Leavitt, 511 S.E.2d 720, 766-767 (footnotes and some internal citations omitted) (emphasis added).

As in *Kessel*, no court had ever granted either parent exclusive custody of the child prior to

paternity being established in September of 2011. Thus, each of Savannah's parents had substantially equal rights prior to paternity being established. Like John Kessel, Mr. Robinson is not able to bring an action for tortious interference with parental rights against the mother of his child under West Virginia law.

As this Court noted in its analysis in *Kessel*, Section 700 of the Restatement (Second) of Torts articulates the elements of a claim for "tortious interference with parental or custodial relationship. *Kessel, supra,* 511 S.E.2d at 760. Pursuant to the Restatement "Causing a Minor Child to Leave or not to Return Home," one who, with knowledge that the parent does not consent, abducts, or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent. *Id.* at 760-761. As outlined in *Kessel*, other states relying on Section 700 of the Restatement to support a claim for tortious interference have involved a child being forcibly abducted from the custody of his or her parent or prevented from returning home. *Id.* at 761.

John Kessel acknowledged in his appeal brief that the facts of his case involved not forcible abduction, but a situation where he was prevented from ever forming a relationship with the child did not fit neatly within the Restatement §700 definition of "tortious interference," however drawing on various other contexts for tortious interference in employment relationships or in the criminal context that did exist in West Virginia jurisprudence did find a valid cause of action for tortious interference in the parental rights context. Yet, significantly, this Court following the lead of §700 of the Restatement and other courts, limited the cause of action in situations when parents had equal rights.[2] John Kessel could only bring his cause of action against third parties. *Accord, Wyatt v. McDermott*, 283 Va. 685,

[2] The Kessel Court also cautioned that their "discussion of tortious interference as limited to tortious interference with a parent's parental or custodial relationship with his/her child *as distinguished from tortious interference with a parent's visitation rights. Kessel*, 511 S.E.2d at 760 n. 44 (emphasis added); *Cf. Wilson v. Bernet*, 625 S.E.2d 706 (not reaching the certified question of whether litigant must first seek and obtain relief from judgment entered in child custody/visitation case as condition precedent to asserting the tortious interference claim if factual issues arose in custody proceeding).

725 S.E.2d 555 (2012) (wrongful adoption case involving adoption agency and attorneys). *See, also, Wilson v. Bernet*, 218 W.Va. 628, 625 S.E.2d 706 (W.Va. 2005) (holding no cause of action for tortious interference with parental or custodial relationship may be maintained against adverse expert witness (third party) due to civil immunity).

As acknowledged in *Kessel*, a cause of action for tortious interference with parental or custodial rights is generally found in those cases to arise against family or attorneys or others who conspired with a parent to abduct or conceal a child from the complaining parent. In the context of a case where a parenting plan exists, the complaining parent could not file for contempt in family court against such conspirators as they would not be subject to the family court's jurisdiction. Such third parties may be entitled to explain their alleged wrongful conduct. For instance, maybe Aunt Jane did not know that a family court had just awarded full custody of little Jimmy to his father when Jimmy's mother asked her to help her move with Jimmy across the country. Perhaps, the worker at the domestic violence shelter should be entitled to explain that when Jimmy and his mother arrived at the shelter, it was believed that their location needed to be kept secret from Jimmy's father to protect Jimmy and the mother until various actions could be taken in court.

In the case at bar, there are no claims against third parties and there can be no claim for tortious interference with parental custody against Ms. Coffield. The essence of the plaintiff's claims arise from the plaintiff's admitted, repeated, false misrepresentations as to whether he was the father of her child. The plaintiff's first cause of action is for fraudulent intentional misrepresentation/concealment. Defendant posited below that Plaintiff is trying to "circumnavigate the affirmative defense of 'justification' by relying solely on a theory of fraudulent misrepresentation and concealment versus the legal theory of tortious interference." *See*, p. 2 of Def's Resp to Pl's MIL No. 4 at JA 000252. Mr. Robinson certainly feels that Ms. Coffield has also tortuously interfered with his parental rights after paternity was established, however, there is simply no basis under West Virginia law for him to bring a

tortious interference claim. Interestingly, instead of wanting to make sure that such a claim was not part of what was being alleged against her, Ms. Coffield actually wanted, or had believed, this case to be more of a tortious interference case so that she had some defense.

This case is about lying. Ms. Coffield has admitted that she did not tell the truth when Mr. Robinson would ask if he was the father of her child. The primary cause of action against Ms. Coffield is for fraud. Under our law, "[t]he essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by her; (2) that it was material and false; (3) that the plaintiff relied on it and was justified under the circumstances in relying on it; and (4) that he was damaged because he relied on it." *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 752 (W.Va. 1998) (internal citations omitted; *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927)." Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); *Sneberger v. Morrison*, 235 W.Va. 654, 776 S.E.2d 156 (W. Va. 2015). The Kessel Court, unable to "condone the actions of the defendants (including the mother) who, by their conduct, wrongfully interfered with [the father's] ability to establish and assert his parental rights" found that the father did have a cause of action sounding in fraud under West Virginia law. *Kessel* at 756. Nowhere in *Kessel* did this Court state that there was a "justification" defense to a fraud claim. Nowhere did Defendant in her response brief to Motion in Limine No. 4 (JA000252) cite a case, in any context, where a lie somehow being "justified" is a defense to an intentional and fraudulent misrepresentation or concealment. Plaintiff has not located any case in any jurisdiction that seems to hold that there is a "justification" defense to fraud. [3] Fraud is fraud is fraud. The elements of fraud are the same despite the context in which the intentional misrepresentation or concealment occurs. In this case, the first several elements of the fraud claim have been admitted either in the Answer or in discovery

[3] Courts across the country have either recognized a cause of action of "paternity fraud" under traditional schemes for fraud. In none of the paternity fraud cases was there any mention of an affirmative defense that the mother was "justified in lying about who was the father of the child. *See*, JA 000264-000267 for further discussion and cases.

responses. The jury ultimately found every element of a fraudulent intentional misrepresentation to have been shown by clear and convincing evidence. The artificial insemination story was false.

Ms. Coffield essentially posits with this assignment of error that she should have been allowed to lie when asked by Mr. Robinson if he was the father of her child. Plaintiff submits that it would be a slippery slope indeed for this Court to start carving out instances where it is permissible to make intentional misrepresentations. Moreover, Defendant is asking this Court to extend an affirmative defense from one cause of action to another.

Yet, Ms. Coffield is essentially asking this Court to allow mothers to have the ultimate discretion to decide when a father is worthy of being a father. She is asking this Court to grant her potential immunity from civil liability for concealing that Mr. Robinson was the father of her child for a decade. Ms. Coffield wants to put forth evidence at any new trial in this matter that Mr. Robinson was abusive toward her and others as a justification for lying to him about his paternity of her daughter. First, Plaintiff does not read the "justification defense" set forth in the tortious interference of parental rights context as "justifying" a person to lie for ten years – or in this case, eighteen years or forever, if paternity had not been established. The "justification" defense to tortious interference set forth in *Kessel* talks about safeguarding a child from physical, mental, or emotional harm as contemplated in West Virginia's abuse and neglect code at Section 49-1-3.[4]

In this case, the decision to lie about paternity started shortly after conception and continued for years. That is Ms. Coffield's lie was not exposed until the results of the paternity test when the child was ten years old. This child was never neglected or abused as defined in the West Virginia code. This child never witnessed domestic violence. Thus, the Defendant's alleged good faith, reasonable, belief that interference with Mr. Robinson's parental or custodial rights cannot be grounded in the code section set forth in the justification defense in *Kessel*. Moreover, Ms. Coffield had already in her

[4] See JA 000267-268 for further discussion of the relevant code sections.

discovery responses admitted intentional conduct rather than negligent conduct and had admitted that she knew that Mr. Robinson would have some parental rights. *See, also,* Trial Transcript Excerpts of Karen Coffield JA000497-000498. She was not under any mistaken belief. *See, also,* Trial Transcript Excerpts of Karen Coffield at JA000494-00495. *See, Kessel, supra,* 511 S.E.2d at 766.

Ms. Coffield wanted to rely on various criminal complaints against Mr. Robinson, including instances of domestic violence between her and Mr. Robinson, to show that she was justified in lying about paternity for years. She further wanted to give testimony herself that she was abused and to call other witnesses that purportedly could attest to the alleged abuse by Mr. Robinson. However, such a justification defense to fraud does not exist and even as to a tortious interference claim, her sought affirmative defense would not lie.

Further, Ms. Coffield had other options following the birth of her daughter. Armed with much of the same material identified in her exhibits that were precluded from being introduced, Ms. Coffield could have filed a Petition to Allocate Custodial Responsibility and sought to limit the manner of Mr. Robinson's parenting time.[5] West Virginia Code section 48-9-209 sets forth the limitations a family court can impose if there is evidence of domestic violence. That is, if either parent so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan has committed domestic violence, as defined in section 48-27-202, a court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to those set forth in West Virginia Code §48-9-209.[6] *See, also, E.O.R. v. M.D.W.*, No 17-0355 (W.Va. 2018). If Ms. Coffield believed at the time of her daughter's birth in March of 2001 that Mr. Robinson was a danger to her newborn she could have gone to the Family Court of

[5] The trial court commented during the November 8, 2019 Pretrial Conference that there were other legal options available to Ms. Coffield. *See*, JA 000439-000442.

[6] See limitations a court may impose at JA 000270.

Marshall County seeking to have Mr. Robinson allocated only supervised visits with no overnights. She could have asked that exchanges of the child take place at the police department or through grandparents. She could have asked that Robinson complete a domestic violence intervention program. The ball would have then been in Mr. Robinson's court to contest the allegations or agree to the limitations placed upon him for some period of time while being allowed to bond with his daughter under the court ordered parameters. If Mr. Robinson did not comply, Ms. Coffield would have had further recourse to further modify the allocation of parental time.

Instead, Ms. Coffield decided to sit as judge and unilaterally allocate Mr. Robinson no parental time with his daughter. Effectively, Ms. Coffield did what even a family court cannot do — she terminated Mr. Robinson's parental rights to his only child. The justification defense outlined in the "tortious interference" with parental rights section of the *Kessel* case would not have aided Ms. Coffield even in that context because she was not protecting a child from any alleged conduct outlined in the abuse and neglect code. Ms. Coffield's fraudulent actions cannot be "justified" because there is no justification to fraud. If this Court were to now on a remand for new trial allow such a novel and unsupported defense in this context, it would be sending a message to women that they are free to take the law into their own hands and decide when a man is worthy of being a father to their child.

Based on all of the foregoing and after considering oral argument from counsel, Plaintiff's Motion in Limine No. 4 was properly granted in the discretion of the trial court and the Defendant was properly precluded from asserting any evidence that would serve to show that she was somehow "justified" in keeping the paternity of her child a secret from Mr. Robinson. *See,* transcript of Nov. 8, 2019 Pretrial Conference, JA 000434-000445 & JA 000448-000454. Respondent posits that the trial court never changed course on the justification defense as the same was never squarely before

the trial court and fully briefed until motions in limine were submitted. The decision of the trial court judge was proper and was not an abuse of his discretion.

C. *The Circuit Court Did Not Err in Failing to Permit Ms. Coffield from Presenting Evidence of Her Counterclaim to the Jury*

1. Dismissal of the Counterclaim Was Warranted on Procedural Grounds

Defendant Coffield filed a Counterclaim with the Clerk without the Court's permission and then undertook to have the "Counterclaim" served directly on the Plaintiff while he was represented by counsel. Defendant below cited to West Virginia Rule of Civil Procedure 13(e) as the basis for her improperly filed and served "Counterclaim." Rule 13(e) states that "[a] claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading" (emphasis added). Not only did Defendant fail to allege how her "Counterclaim" "matured...after serving a pleading," Defendant failed entirely to abide by the rules of civil procedure for amended and/or supplemental pleadings.

Amended and Supplemental Pleadings are addressed in Rule of Civil Procedure 15. Specifically Rule 15(a) states that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires (emphasis added)."

Even if Defendant's improperly filed and served "Counterclaim" was more rightly construed as a supplemental pleading under Rule 15(d) of the Rules of Civil Procedure, permission of the Court to bring it was still required as Rule 15(d) states "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental

pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented" (emphasis added). Whether the purported "Counterclaim" is construed as an amendment to the previously filed Answer or as a supplement to the previously filed Answer, Defendant needed the Court's permission to file it. Defendant did not seek the Court's permission and therefore the "Counterclaim" should be dismissed in its entirety.

Even if the Court was inclined to look beyond the blatant procedural defect in Defendant's inartful attempt to perfect a counterclaim, the "Counterclaim" should be dismissed as the allegations in this civil action have been known to the defendant since the Complaint was filed in 2013. The liberality allowed in the amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect the case for a long period of time. *See, Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (W.Va. 1998). It had been sixteen (16) months since the Family Court ruling referenced in Paragraph 6 of Defendant's "Counterclaim" and it had been four years since the original complaint was filed. In *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, this Court held that a trial court did not abuse its discretion in denying plaintiff leave to amend to add new claims where the plaintiff waited approximately sixteen months. *Id.* at 110. Defendant offered no explanation for her delay in seeking to amend or supplement the pleadings.

In addition to the untimeliness of the effort to assert a counterclaim, Defendant waited until after an agreed Scheduling Order has been entered containing a dispositive motion deadline and a trial date. Plaintiff would have been unduly prejudiced had Defendant been permitted to perfect a counterclaim. Finally, the "Counterclaim" was also properly dismissed because it was futile as will be analyzed in the next subsections.

2. The Counterclaim Alleging "Abuse of Process" Failed to State a Claim Upon Which Relief Can be Granted

The improperly filed and served Counterclaim failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the Complaint. *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (W.Va. 1978). Defendant could prove no set of facts in support of her claim of abuse of process by the plaintiff which would entitle her to relief.

The allegations contained in the improperly filed and served Counterclaim (JA 000107) seemingly attempt to set forth a cause of action for abuse of process against the plaintiff in response to him continuing his complaint alleging fraudulent intentional misrepresentation/concealment. Defendant continued to allege in her Counterclaim (Para. 4) that plaintiff's claim in this action was at the time of the filing the subject of another pending action in the Family Court of Marshall County, West Virginia. The trial court stated in its Order denying Defendant's Motion to Dismiss that "[t]he Plaintiff's Complaint alleges a cause of action, which if true, began many years prior to, and is independent of, issues regarding child custody, support, petitions for contempt, parenting plans, psychological evaluations, etc., which have occurred since his paternity was established." The trial court further found "the Plaintiff's cause of action viable pursuant to *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998)."

Defendant's Counterclaim next alleged that the specific findings and ruling made by the Family Court of Marshall County are *res judicata* (Paras. 7 & 8). Defendant argued this same point in her memorandum and reply in support of her motion to dismiss. As previously argued by the plaintiff, this argument is misguided and utterly without merit. *Res judicata* requires that "the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." *See,* Syl. Pt. 1, *Antolini v. West Virginia Div. of Natural Resources*, 220 W.Va. 255, 647 S.E.2d 535 (W.Va. 2007)(per curiam). The Order Denying Defendant's

Motion to Dismiss stated, "the Court is not persuaded by the Defendant's *res adjudicata* [sic] argument. The issues presented and relief requested in the present matter are separate and distinct from those over which the Family Court has jurisdiction." *See*, SA 1-4 at pg. 3

Defendant then argued the doctrine of collateral estoppel in her Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Again, the doctrine of collateral estoppel also requires that the issues in both actions be identical. Defendant, in her improperly filed and served Counterclaim, went back to an argument of *res judicata*. The issue of the nature and extent of the Defendant's fraudulent misrepresentations as to the Plaintiff's paternity was not the matter being decided by the Family Court of Marshall County, West Virginia and could not have been as a family court would not have jurisdiction over such a matter. Defendant continued to cite in her pleadings various findings[7] made by the Family Court of Marshall County. The doctrines of *res judicata* and collateral estoppel have application to claims and issues and not to a prior court's findings of fact. The assertion of *res judicata* in the Defendant's improperly filed and served Counterclaim at best represented a defense that has been previously denied by the trial court as inapplicable and was not the basis for any actionable claim back against the Plaintiff.

Defendant alleged in Paragraph 8 of her improperly filed and served Counterclaim that "[n]otwithstanding the specific findings and rulings which are res judicata, Plaintiff has continued to prosecute this civil claim against Defendant." Defendant goes on in Paragraph 8 to state that "[h]is actions constitute an abuse of process for which Defendant is entitled to recover damages." Plaintiff continued to prosecute his claims in this matter as the trial court denied the Defendant's Motion to Dismiss by Order dated October 13, 2015 because it found that his cause of action was viable under *Kessel v. Leavitt*, 511 S.E.2d 720 (W.Va. 1998). The trial court also did not find well taken the

[7] "[W]hile a court may take judicial notice of the orders of another court, such notice is "'not for the truth of the matters asserted in such litigation, but rather to establish the fact of such litigation and related filings.'" *Arnold Agency v. W.Va Lottery Commission*, 206 W.Va. 583, 526 S.E2d 814 (W.Va. 1999)(*citing Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)).

Defendant's argument of *res judicata*. Thus, a cause of action for claimed "abuse of process" cannot arise from Plaintiff continuing to prosecute a case that the trial court ruled in 2015 was viable and not barred by the defense of *res judicata*. Beyond doubt, Defendant could prove no set of facts entitling her to relief on the basis that Plaintiff opted not to voluntarily dismiss his case after the trial court ruled his Complaint had stated a claim for relief. Moreover, by Order dated September 21, 2017, the trial court denied the Defendant's Motion for Summary Judgment confirming that genuine issues of material fact exist for determination by a jury.

Paragraph 12 essentially continues the *res judicata* argument by Defendant by stating that the "Plaintiff's claims have been litigated and found to be meritless by the Family Court and his continued quest constitutes an abuse of process." As was repeatedly explained by Plaintiff in his briefs submitted in this proceeding and by the trial court itself in its Order Denying Defendant's Motion to Dismiss, claims arising under *Kessel v Leavitt* for intentional fraudulent misrepresentation and the damages arising therefrom were not claims that the Family Court of Marshall County had jurisdiction to consider.

The family court litigation that resulted in an order in May of 2016 was on a motion to modify parenting plan. Essentially, Defendant's improperly filed and served Counterclaim asserted that Mr. Robinson had wrongfully continued his case against the Defendant following the Family Court's Order of May 20, 2016.[8] However, the trial court ruled both before and after May 20, 2016 that Plaintiff's case could continue on toward the jury trial previously set for March 14, 2018. As a matter of law, Plaintiff's actions of continuing to pursue his claims against the defendant cannot give rise to a cause of action for abuse of process when the trial court twice ruled that his case may

[8] Defendant asserts for the ***first time*** on appeal that "Respondent field the *pro se* complaint after the statute of limitation had expired and for the collateral purpose of retaliating against Ms. Coffield for her obtaining safety protection order against the Respondent." *See,* Petitioner's Brief, pg 7. These allegations were not contained in the Counterclaim filed below and no evidence supporting them was ever put forth below.

continue by denying the defendant's motion to dismiss and by denying the defendant's motion for summary judgment.

Paragraph 11 of the improperly filed and served Counterclaim alleges that "Plaintiff continues his prosecution of this civil law suit for an ulterior motive of continuing emotional harassment of the Defendant, and act which continues the perpetration [sic] of domestic abuse." The trial court twice ruled that plaintiff's case can continue. Quite probably many defendants in civil litigation feel that the plaintiff's case against them is "harassing and abusive." Defendant sets forth no facts which support the "ulterior motive" necessary to attempt to make out an abuse of process case.

Defendant's allegations in her improperly served filed and served "Counterclaim," are based on Plaintiff continuing his prosecution of this civil action after the Order entered by the Family Court of Marshall County on May 20, 2016. As detailed above, the trial court twice ruled that Plaintiff's suit may continue when it denied defendant's Motion to Dismiss and defendant's Motion for Summary Judgment. Yet, bringing a case or continuing a case is not what gives rise to a claim for abuse of process.

"Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." *Preiser v. MacQueen*, 177 W.Va 273, 352 S.E.2d 22, 28 fn.8 (W.Va. 1986)(*quoting* W. Prosser, *Handbook of the Law of Torts* §121 (1971)). "The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." *Id.* Seeking money damages due to the Defendant misrepresenting the paternity of the parties' child is

the basis and purpose of the suit. There is no ulterior motive and Defendant has set forth no facts below alleging one.

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion...." *Id.* At the time that Defendant improperly filed and served her Counterclaim, Plaintiff had no opportunity to undertake any actions in this case due to responding to Defendant's Motion to Dismiss and then Defendant's Motion for Summary Judgment.

Defendant's Counterclaim did not allege any willful act in the use of a process not proper in the regular conduct of this proceeding. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." *Id.* "There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Id*

Defendant did not allege any facts showing that Plaintiff took any action in this case that could not be logically explained without reference to the Plaintiff's alleged improper motives or that that a court process was utilized by the Plaintiff in a fashion inconsistent with legitimate litigation goals.

Based on all of the reasons set forth above, Defendant's "Counterclaim" for Abuse of Process fails to set forth a claim upon which relief can be granted. Finally, the Counterclaim is time barred on its face.

3. Defendant's "Counterclaim" for Abuse of Process was Barred by the One-Year Statute of Limitation

An action for abuse of process must be brought within one year from the time the right to bring the action accrued. *Preiser v. MacQueen*, Syl. Pt. 3, 177 W.Va. 273, 352. S.E.2d 11 (W.Va. 1985). Defendant alleged below that the abuse of process was Plaintiff continuing to prosecute his

civil case in the Circuit Court of Marshall County, West Virginia after the findings and conclusions entered by the Family Court of Marshall County, West Virginia on May 20, 2016. The date of May 20, 2016 is the only date referenced in the "Counterclaim. It was sixteen months from May 20, 2016 until the Defendant's "Counterclaim" was improperly filed with the Circuit Clerk and improperly served directly on the Plaintiff. It was four years prior that this civil action was filed. Accordingly, even if the improperly filed and served "Counterclaim" had merit, it was not timely filed and is barred by the statute of limitations.

The trial court's ruling to dismiss the defendant's counterclaim was proper because the improperly filed and served "Counterclaim" should have been dismissed because it was improperly filed and served, because it failed to state a claim upon which relief can be granted under Rule 12(b)(6), and because it was barred by the applicable one year statute of limitation. Respondent concedes that the Circuit Court was well within its discretion to dismiss the counterclaim. The Counterclaim was properly dismissed, for many reasons, by the trial court judge. No basis exists for Petitioner to present such a counterclaim should this Court remand this for a new trial on any issue.

D. *The Circuit Court Did Not Err in Failing to Bifurcate Punitive Damages Until After Liability Was Established*

Defendant cites two issues at trial involving punitive damages. The statute cited by defendant states as follows in pertinent part:

> §55-7-29. Limitations on punitive damages.
>
> (a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.
>
> (b) Any civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:
>
> (1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

> (2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.
>
> (3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.
>
> (4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

Defendant asserts that punitive damages should have been bifurcated until after liability was established pursuant to West Virginia Code Section 55-7-29(b). Subsection (b) provides that "[a]ny civil action tried before a jury involving punitive damages may, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:" Defendant's Answer did not include any mention of any limitation or anything at all related to punitive damages and no mention of this aspect of the case was forthcoming in the many years since the case was filed. Under Section 55-7-29(b) of the West Virginia Code, the Defendant could have filed a motion to bifurcate punitive damages. Defendant never filed a motion to bifurcate the punitive damages aspect of the case. Plaintiff's Complaint included punitive damages in its prayer for relief. The *Kessel* case upon which Plaintiff's case was grounded was extensively briefed during the life of the case and a reading of the case law or plaintiff's Complaint and briefs would have solidified notice early on that punitive damages were available and sought. Plaintiff requested Defendant's tax returns in discovery as an indication of Defendant's wealth and the same were produced. Plaintiff filed proposed jury instructions and a proposed verdict form that included punitive damages in January of 2019 in advance of another prior trial date. *See*, JA 000273 & 000295. Defendant never filed a motion to bifurcate and did not file written objections to any of Plaintiff's proposed jury instructions or to the proposed verdict form. *See* certified copy of docket sheet. Defendant did not file any proposed jury instructions herself on the issue of punitive damages. *See,* JA 000301. Defendant

also never proposed an alternate verdict form.

Counsel for Plaintiff inquired at the November 8, 2019 pretrial hearing about how to handle evidence going to punitive damages. The Court stated, "[n]ormally I would bifurcate a punitive you know, but the fraud in and of itself, if it's found, gives rise to punitive damages. *See,* Transcript of November 8 Pretrial Conference, JA 000458-00459. The only comments from defense counsel again went to why Defendant believed she should be able to present their affirmative defense of "justification." *See,* Transcript of November 8 Pretrial Conference, JA 000459.

The issue of the handling of punitive damages was again raised in chambers prior to the commencement of trial on December 9, 2019. Counsel for plaintiff specifically sought direction from the court as to the scope of opening argument and the examination of the defendant with respect to the topic of punitive damages. The court again commented that there was no sense in bifurcating punitives. *See,* Transcript of Conference with Court on December 9, 2019 Before Impaneling Jury, JA 000477-00478 (JA items 56 & 57 in reverse order). The only comment from defense counsel was, "Of course, Judge, you know we object to that." JA 000477. There was no substantive argument from counsel as to the handling of the punitive aspect of the case and no oral motion to bifurcate.

Defendant could have requested that the punitive phase of the trial be bifurcated until after liability was established. Defendant never made that motion in writing or orally. Defendant waived the opportunity to seek that the trial be bifurcated as to punitive damages. Accordingly, Plaintiff respectfully submits that this would not be a basis for reversal of the judgment and bifurcation should not now be permitted if this Court should remand the case.

E. *The Jury Did Not Award Punitive Damages on a Lesser Standard Than the Statute Requires*

Defendant asserts that the jury found punitive damages on a lesser standard than that required under West Virginia Code Section 55-7-29(a) which states that "[a]n award of punitive damages

may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety, and welfare of others." Defendant submits that there was no evidence that the defendant had "actual malice toward the plaintiff." The jury was instructed that the burden of proof was "clear and convincing" and counsel for the defendant emphasized the same in his closing argument. As to the jury being instructed as to the requisite malice, the jury was instructed as follows in Jury Instruction No. 16:

> **You are further instructed by the Court that in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear, the jury may assess punitive damage based on the facts and circumstances surrounding the defendant's wrongful conduct.**
>
> **Accordingly, if you find that the defendant intentionally and fraudulently interfered with plaintiff's ability to assert his parental rights and to establish a relationship with his daughter, you are permitted to consider and to award punitive damages.**

See, JA 000288 & 00463-00474 at 000465 (JA Items 56 & 57 reversed). First, Counsel for Defendant did not object generally to this instruction or offer any proposed instruction with alternate language. *See,* transcript of Charge and Verdict Form Conference, JA 000465. *See, also,* JA 000288 for the proposed instruction language. Second, the instruction given is not of a lesser standard than West Virginia Code Section 55-7-29(b). Black's Law Dictionary defines "actual malice" as express malice and gives an example from libel law where "actual malice" can be established either by proving the publication was made with knowledge of its falsity of its contents or with reckless disregard of whether or not it was false (emphasis added). In *Hayseeds v. State Farm Fire & Cas.,* 177 W.Va. 323, 352 S.E2d 73 (W.Va. 1986), the West Virginia Supreme Court of Appeals explained, "[b]y 'actual malice' we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim.

The claim for which punitive damages were awarded in this matter was fraudulent intentional misrepresentation. Every element of the claim was read to the jury in the court's instructions and was contained on the verdict form. In checking all six boxes "Yes," the jury found that the Defendant represented as true something that she knew was false and that she knew it was false when she made the representation and that she intended for the Plaintiff to rely on her false representation. *See,* signed Verdict Form at JA 000337. The jury found that the Defendant knew that the "artificial insemination" story was false and intentionally told the same to the Plaintiff intending that he rely on the same to his detriment. The elements of the claim itself showed knowledge, willfulness, and intent. This case was not about negligent conduct. Defendant admitted that what she told the Plaintiff about the source of her pregnancy was not "an accident." *See,* Trial Transcript Excerpts of Karen Coffield, JA 000494-495. The defendant's conduct was the essence of "actual malice." Boiled down, "actual malice" is when you lie on purpose to hurt another person. Ms. Coffield admitted most of the elements in her testimony. Mr. Robinson was harmed. The jury agreed that the Defendant purposefully lied to hurt Mr. Robinson. The Defendant did not raise any issue as to the proposed jury instruction on punitive damages before or during trial. Defendant never proposed an alternate jury instruction on punitive damages (see JA 000301) and did not propose an alternate verdict form (see certified copy of Docket Sheet).

The jury did not find punitive damages on a standard less than "actual malice" toward the plaintiff. Accordingly, this issue is not a proper basis for reversal or remand.

F. *The Trial Court's Finding that Plaintiff was Entitled to Attorney's Fees Was Not Error*

The cause of action in this matter was grounded on the case of *Kessel Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 815, 816 (W.Va. 1998). The *Kessel* Court cited *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 425 S.E.2d 144 (W.Va. 1992), for the proposition that "[w]here it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has

injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct." It is generally well known that "[a]s a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (W.Va. 1986). However, "[a] well established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *see also*, *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., supra*, 425 S.E.2d 144, 151 (1992) (citing additional cases).

This Court specifically addressed in *Yost v. Fuscaldo*, 185 W.Va. 493, 500, 408 S.E.2d 72, 79 (W.Va. 1991) "whether a finding of fraud is considered an action in bad faith, vexatiously, wantonly, or for oppressive reasons is sufficient to permit the award of attorney fees." In *Yost*, the Court "[a]fter reciting the 'bad faith' exception to the American Rule," concluded the defendant's actions were 'oppressive and wanton, and should be discouraged." *Yost v. Fuscaldo, supra,* 408 S.E.22d at 79. Accordingly, the *Yost* court ruled that the plaintiff should be reimbursed by the defendants for the attorney's fees he incurred in litigating the fraud action. *Id.* Other courts have also found that fraud falls within the "bad faith" exception to the American rule. *See, Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc. supra*, 425 S.E.2d at 151 (collecting cases). In *Bowling*, the defendant took the position that attorney's fees could not be awarded because the jury did not assess punitive damages. This Court disagreed and held that the showing of fraudulent conduct on the part of the defendant was enough...even without the jury awarding any punitive damages. *Id.* at 150-151. In the case at bar, the jury found fraudulent intentional misrepresentation on the part of the defendant by clear and convincing evidence and awarded punitive damages.

Defendant argues that Plaintiff did not "substantially prevail" at trial because the jury only

awarded approximately $15,000.00 in total damages. The proper inquiry is whether the case falls within the "bad faith" exception to the American Rule. Defendant does not seem to dispute that fraud falls within the "bad faith" exception to the American Rule. This Court specifically addressed in *Yost v. Fuscaldo*, 185 W.Va. 493, 500, 408 S.E.2d 72, 79 (W.Va. 1991) "whether a finding of fraud is considered an action in bad faith, vexatiously, wantonly, or for oppressive reasons is sufficient to permit the award of attorney's fees" and concluded that fraud falls within the "bad faith" exception to the American Rule. *Id.*

The jury at the trial of this matter was instructed in Jury Instruction No. 6 that

> **You are further instructed that a "misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be." An action for fraud can also arise by the concealment of the truth. That is, "[f]raud is the concealment of the truth, just as much as it it is the utterance of a falsehood."**
>
> **That is, fraud is usually shown by either establishing a suggestio falsi [false representation] or a suppresso veri [concealment of truth].**

That is, the shorthand label of "fraud" can cover both intentional misrepresentations and fraudulent concealment of the truth. The jury was further instructed in the second paragraph of Jury Instruction No. 5 as to the essential elements of fraud as follows:

> **Under our law, '[t]he essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by her; (2) that it was material and false; (3) that the plaintiff relied on it and was justified under the circumstances in relying on it; and (4) that he was damaged because he relied on it."**

Plaintiff did not object to either of these jury instructions. *See,* Plaintiff's proposed Jury Instructions at JA 000277 and Transcript of Charge and Verdict Form Conference at JA 000464.

Defendant's effort to argue that the jury did not determine "fraud" falls flat. The Verdict Form (JA 000337) clearly spells out all of the elements of fraud and the jury was instructed on all of the elements necessary to prove fraud. There is no argument that the jury checked all of the boxes as to the elements of the fraudulent misrepresentation in the affirmative. The awarding of attorney's fees is an issue for the Court and not for the jury. Plaintiff respectfully submits that the *Kessel v. Leavitt* case

upon which Plaintiff's cause of action was based was extensively briefed during the life of this case. With all due respect, there is no surprise to the trial court or counsel that this case was grounded in fraud and that the recovery of attorney's fees was always something to which plaintiff believed they would be entitled if they prevailed in proving the elements of the defendant's fraudulent statements by clear and convincing evidence.

Plaintiff did prove up fraud by clear and convincing evidence as set forth on the jury's verdict form. This is further made clear by the fact that the jury also awarded punitive damages. Defendant argues that because Defendant testified at trial that she did not know who the father was that she could not have acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." The Defendant's credibility was put in serious question from the first few moments of her trial testimony when she was confronted with previous admissions to the contrary made in 2015 and 2017 in her Answer to the Complaint and in her answers to Requests for Admission wherein she admitted that after she became pregnant, she knew Mr. Robinson was the father. *See,* Trial Transcript Excerpts of Karen Coffield at JA 000488 489 & JA 000506- 000510. The jury spoke its decision on Ms. Coffield's credibility when it checked the verdict form as it did. Mr. Robinson may have known that Ms. Coffield had sexual relations with several other men in the relevant time period, but Ms. Coffield was in the best position to know her menstrual cycle and whether a form of birth control was used. These were all issues within the purview of the jury and they decided them against Ms. Coffield.

In sum, "fraud," whether by intentional misrepresentation or by fraudulent concealment, falls within the "bad faith" exception to the American Rule on attorney fees. This Court determined many years ago that a finding of fraud is considered an action in bad faith, vexatiously, wantonly, and for oppressive reasons sufficient to permit the award of attorney fees. *See, Yost v. Fuscaldo*, 185 W.Va. 493, 408 S.E.2d 72, 79 (W.Va. 1991). Accordingly, Plaintiff respectfully submits that the trial court did not err in finding entitlement to attorney's fees.

V. CROSS-ASSIGNMENTS OF ERROR

A. The Trial Court Erred in Denying Plaintiff's Motion for New Trial as to Damages Only

This case involved the Defendant's intentional misrepresentations as to the paternity of the parties' child. A jury trial commenced in this matter on December 9, 2019. The jury reached a verdict on December 10, 2019. Count I on the Verdict Form was for Intentional Misrepresentation/Fraudulent Concealment. The jury marked each interrogatory question setting forth the elements of the fraudulent intentional misrepresentation with a "YES." The jury awarded the plaintiff the reasonable costs and expenses expended in legal fees in his successful attempt to establish paternity. The jury did not award any amounts for past or future mental pain and suffering, anguish and anxiety. The jury did not award any amount for the plaintiff's loss of solace, society, companionship, and services of the child for ten years that were proximately caused by the conduct of the defendant, Karen Coffield. The jury did award punitive damages against the defendant.

Plaintiff moved for a directed verdict at the close of his case in chief. The directed verdict motion was denied. During closing argument, counsel for Defendant told the jury to check the first three interrogatories setting forth the first three elements of the fraudulent intentional misrepresentation claim with a "YES."

Count II was for Intentional Infliction of Emotional Distress. The jury did not find for the plaintiff on this count and awarded no damages.

The damages returned by the jury were clearly too low in light of the evidence and it is requested by the Plaintiff that the case be set for a new trial on the issue of damages alone. It is true that courts are reluctant to set aside jury verdicts as to damages, and this is particularly true as to inadequate damages. *See, Keiffer v. Queen*, 155 W.Va. 866, 189 S.E.2d 842 (W.Va.1972). However, ""[a] different issue is presented, ...where there is uncontroverted evidence that there was substantial injury for which the jury has made no award of damages in any amount." *Id.* "In determining whether the

verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl. Pt. 2, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (W.Va.1982). In *Freshwater v. Booth*, 160 W.Va. 156, 233 S.E.2d 312 (1977), this Court set forth a typology of inadequate verdicts and explained why particular facts mandate a particular result.

A Type I case is one where the plaintiff would have been entitled to a directed verdict on liability as a matter of law and the damages are inadequate even when viewed most strongly in favor of the defendant. The Freshwater Court explained that "[i]n this type of case an appellate court need not agonize about reversing and remanding for a new trial on the issue of damages alone and that is the proper course." *Freshwater v. Booth, supra,* 233 S.E.2d at 315. In the case at bar, Plaintiff moved for a directed verdict on liability, but the motion was denied as the Court indicated that there was a jury question as to Interrogatory No. 5 that asked "[W]as the Plaintiff, Ronald Neil Robinson, justified under the circumstances in relying on the representations of the Defendant, Karen Coffield." Plaintiff's counsel conceded in opening and closing that this issue would likely be the center of the defense's argument.

A Type 2 case is one where liability is strongly contested and the award of damages is clearly inadequate if liability were proven. In these cases, "an appellate court cannot infer from the jury verdict alone whether the jury was confused about the proper measure of damages or whether they were confused about the proper rules for determining liability, or both." *Id.* These cases are generally remanded for a new trial on all issues. *Id.* at 316. In the case at bar, the verdict form for Count I Intentional Misrepresentation/Fraudulent Concealment included six interrogatories setting forth the elements of intentional misrepresentation. The jury checked all six interrogatories with a "YES." In addition, the jury awarded punitive damages solidifying that the jury found that the defendant's

fraudulent intentional misrepresentations not only were proven by the plaintiff, but should be punished. Thus, this case is clearly not a Type 2 case.

Type 3 cases were described as those where "the defendant's verdict is perversely expressed and involves a factual situation in which liability is either tenuous or at least strongly contested by the defendant and the award of damages is so inadequate as to be nominal under the evidence in the case." *Id.* at 316. In these cases, "the appellate court may reasonably infer that even though the jury [was] sympathetic toward the plaintiff they could award him only a nominal sum as an act of mercy, and if interrogated in depth would have admitted that they did not really believe the defendant to be liable. Here the inference is that the error of the jury was as to liability. *Id.* at 317. It is clear from the jury verdict form where all six boxes setting forth the elements of fraudulent intentional misrepresentation are checked "YES" and the jury awarded punitive damages that this is not a Type 3 case.

Type 4 is described as the "mirror image of the Type 3 case in which, while the plaintiff would not be entitled to a directed verdict on the matter of liability, the issue of liability has been so conclusively proven that an appellate court may infer that the jury's confusion was with regard to the measure of damages and not to liability." *Freshwater v. Booth, supra,* 233 S.E.2d at 317. The case at bar is a Type 4 case. The jury checked all six boxes "YES" on the six interrogatories setting forth the elements of fraudulent intentional misrepresentation. The jury's belief as to liability is solidified by the fact that they not only awarded the plaintiff the legal fees expended to establish the paternity of his daughter, but they responded with a "YES" when asked if punitive damages should be assessed against the defendant and they awarded money for punitive damages. This is clearly a Type 4 case. The Freshwater Court explained, "[i]n this type of case an appellate court can feel justified in remanding the case for a new trial on the issue of damages alone because it would be unfair to put the plaintiff to the expense and aggravation of again proving liability once again when he has been denied a proper and just verdict by the caprice and incompetence of a particular jury." *Id.* The court in *Freshwater* went on

to explain, "[w]here liability has been proven once, and where a jury has found liability but not found adequate damages, the plaintiff is placed at a severe disadvantage and the defendant, if the case is remanded for a new trial on all issues enjoys a pure windfall." *Id.* The case before the Court fits squarely within a Type 4 case. Given the inclusion of the special interrogatories setting forth each element of fraudulent intentional misrepresentation and the same each being checked "YES" by the jury, there can be no doubt that liability was proven against the defendant. This is, again, bolstered by the fact that the jury also agreed that punitive damages should be assessed against the Defendant and punitive damages were assessed.

Yet, the uncontroverted evidence showed that the plaintiff had shock, sadness, joy, anger, and other emotional responses to the revelation following the paternity test results that he was the father of Savannah Rose Coffield. *See,* Trial Transcript Excerpts of Ronald Neil Robinson, II, JA 000517-000526 & Photos at JA 000534-00542. This was confirmed by the testimony of his now wife, Michelle Robinson. *See,* Trial Transcript Excerpts of Michelle Wayne Robinson, JA 000528- 000533. There was no contrary evidence that Plaintiff did not have any mental pain and suffering, aguish, and anxiety as a proximate result of the defendant's proven wrongful conduct. Moreover, there was no evidence to refute the testimony that the plaintiff missed every one of the child's firsts, including birthdays and Christmas, and other childhood milestones, not just for one year, but for *ten* years. However, the jury made no award for loss of solace, society, companionship, and services. In a Type 4 case like this, the solution set forth by this Court over forty years ago, is to grant the motion for new trial on the issue of damages alone. Plaintiff respectfully submits that the trial court erred in not granting his motion for new trial as to compensatory damages only.

B. *The Trial Court Erred by Awarding Inadequate Attorney Fees When it Failed to Analyze the Pitrolo Factors*

The principle case discussing the test of what should be a reasonable attorney fee is *Aetna Cas. & Sur. Co., v. Pitrolo*, 176 W.Va. 190,342 S.E.2d 156 (W.Va. 1986). In *Pitrolo*, the Court explained that

> The reasonableness of attorney's fees is generally based on broader factors such as those listed *in Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974). In *Johnson*, the Fifth Circuit established the following list of factors relevant to the calculation of reasonable attorney's fee awards: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Pitrolo, supra, 342 S.E.2d at 161 and Syl. Pt. 4 (adopting factors to consider award of reasonable attorney fees). The *Pitrolo* factors for determining the reasonableness of attorney's fees have been used in a many types of cases. *See, Landmark Baptist Church v. Brotherhood Mut. Ins. Co.*, 199 W.Va. 312, 484 S.E.2d 195, 198, (W.Va. 1997) (collecting cases).

An analysis under *Pitrolo* is undertaken factor by factor, starting with (1) the time and labor required: Here we have a case that started with a *pro se* Complaint, but where representation by the undersigned plaintiff's counsel commenced in or around mid-October of 2013 with the Contingent Fee Contract having been signed on October 24, 2013. After extensive motion practice throughout the case, the deposition of the plaintiff, multiple trial dates, the filing of extensive motions in limine and other pretrial filings, and a change of counsel, the case went to verdict in the Circuit Court of Marshall County, West Virginia on December 10, 2019. In the interim, the plaintiff also defended a Petition for Writ of Prohibition to the West Virginia Supreme Court of Appeals (Docket No. 19-0090). Over the course of six years, and erring on the conservative side, plaintiff's counsel spent 428 billable[9] hours toward the development and prosecution of plaintiff's claim against the defendant for fraudulent intentional misrepresentation arising from the defendant's "artificial insemination" story. *See* Affidavit of Amy Pigg Shafer at SA 13-15. This amount of hours was somewhat increased by defending against plaintiff's multiple unsupported dispositive motions and untenable counterclaim. This includes all labor

[9] As of the date the Memorandum in Support of Attorney's Fees Assessment was filed. Plaintiff reserved the right to seek additional fees and costs pending success defending the appeal and on any remand.

attendant to the aggressive prosecution of what was a complex and unique legal claim for intentional fraudulent misrepresentations as to the paternity of Savannah Rose Coffield.

(2) the novelty and difficulty of the questions: While plaintiff's counsel has over twenty-three years of experience litigating a wide variety of civil, criminal, and family court matters, the case herein was novel in its subject matter and there were not form pleadings, briefs, jury instructions, or motions in limine at the disposal of plaintiff's counsel.

(3) the skill requisite to perform the legal service properly: In order to properly present such a unique and legally complex case and to see it through extensive motion practice, to the West Virginia Supreme Court of Appeals and back, and then to verdict at trial following the briefing of extensive motions in limine, plaintiff's counsel called not only on courtroom skills, but extensively on research and writing skills developed since her days on law journal at The Ohio State University College of Law.

(4) the preclusion of other employment by the attorney due to acceptance of the case: In pursuit of a just result and favorable finding on the elements of fraudulent intentional misrepresentation, this case has carried a high priority over the course of many years. Plaintiff's counsel does not recall having any other case active in her office for such a long period of time. Amy Pigg Shafer has a full workload of other civil, criminal, abuse and neglect, and family court cases. The opportunity cost inherent in taking on such a case is a substantial factor to consider. That is, the prompt resolution of this matter would not have resulted in a work vacuum for plaintiff's counsel. The additional time would have been spent on other income-producing matters.

Viewed together, the next two factors are (5) the customary fee and (6) whether the fee is fixed or contingent. Locally, the customary fee for handling such a claim is between 33 1/3% and 40% of the recovery. As set forth in the Affidavit of Amy Pigg Shafer (SA 13-15), the fee set by Mr. Robinson's Contingent Fee Contract provided for "33 1/3 of all monies, subrogation savings, and things of value recovered in said claim whether for compensatory or punitive damages, if said claim is settled out of

court eleven (11) calendar days prior to the date of trial. Acknowledging that Shafer must dedicate a substantial portion of her time to trial preparation for the last ten (10) calendar days before trial and in consideration therefore, client agrees to pay and gives and hereby assigns Shafer an additional .6667% per day up to a maximum of forty percent (40%) of all monies, in said claim ten (10) days prior to trial, through the trial and thereafter." Aside from the contractual contingency fee, and respecting hourly rates, it is believed that $250.00 per hour, conservatively, for Ms. Shafer would be in keeping with what is currently customary and proper in the northern panhandle of West Virginia for legal work involving such a matter. Moreover, plaintiff's counsel conservatively incurred $2, 486.20 in expenses during the life of this case to date (See Affidavit of Amy Pigg Shafer attached as Exhibit 1 and Expense Itemization attached as Exhibit 2 at SA 13-15 & 16-91).

(7) time limitation imposed by the client or circumstances. While Mr. Robinson cannot be said to have "imposed" any time limitation for the work performed in the case. However, after filing his *pro se* Complaint, he was met with a Motion to Dismiss that necessitated finding counsel and the undersigned counsel then quickly filing a Memorandum in Opposition. Moreover, in addition to the deadlines set forth by the Court or presented by the Rules of Civil Procedure, there was time pressure to respond to Defendant's Petition for Writ of Prohibition filed shortly before the previous trial date. (8) the amount involved and the results obtained. The only "hard number" in the case was the attorney fee of Attorney Artimez in bringing the Petition to Establish Paternity in the Family Court of Marshall County, West Virginia. The other items of damage where for non-economic damages like mental pain and suffering, anguish and anxiety and loss of solace, society, companionship, and services with the child. Additionally, punitive damages were sought and were awarded. With such a case, it is difficult to "predict" the value of the case. Also important to the plaintiff, was the finding that the plaintiff's conduct was wrongful and was the type of misrepresentation that needed exposed with a message that lying about paternity is not acceptable in

our society. Ultimately, the jury found liability by clear and convincing evidence in favor of the plaintiff and awarded modest compensatory and punitive damages. Thankfully, plaintiff finally received a declaration by a jury that the defendant's misrepresentations regarding paternity were intentional and wrong.

(9) the experience, reputation, and ability of the attorney. Amy Pigg Shafer has been practicing law since 1996. She was admitted in the state of Ohio on November 12, 1996 and in the state of West Virginia on April 23, 1997. Ms. Shafer has generally always been engaged in cases involving some type of litigation. Ms. Shafer has handled the development and discovery of many types of cases, does trial work, as well as numerous evidentiary hearings, and has also handled appellate work. It is submitted that she is a competent lawyer with a good reputation in the legal community and the community at large.

(10) the undesirability of the case. Assisting Mr. Robinson with this legal matter was not an "undesirable experience." However, the nature of the case and the uncertainty as to the amount of recovery in such a unique case made the matter one that many attorneys would not have taken, thus leaving fathers like Mr. Robinson without a means to vindicate their rights.

(11) the nature and length of the professional relationship with the client. Ms. Shafer has served as counsel for Mr. Robinson since mid-October of 2013. The attorney-client relationship will last through post-trial motions and any appeal. Additionally, several months after noticing her appearance in this case, Ms. Shafer also became counsel for Mr. Robinson in proceedings involving the child in the Family Court of Marshall County, West Virginia.

(12) awards in similar cases. While it is clear that attorney's fees are awarded in cases where fraud has been proven, plaintiff's counsel generally believes that not a large number of cases alleging fraudulent intentional misrepresentation go to trial given the risk of punitive damages and an award of attorney's fees. Plaintiff's counsel continues to believe that $250.00/hour rate requested

is generally on the very low side as she is aware that area attorneys, even in the realm of family court cases, generally charge that amount or more.[10] Moreover, upon information and belief, plaintiff's counsel believes that the Defendant was paying at least $250.00/ hour for her prior defense counsel and is believed to have been paying $350.00/hour for the counsel who took the case to trial.[11] Based on the 428 hours expended to present and the $250.00/hour rate, plaintiff sought $107,000.00 in attorney's fees and $2, 486.20 in expenses, reserving the right to additional fees if the case is appealed and/or remanded for new trial.[12]

The trial court entered an Order Regarding Plaintiff's Motion for Attorney's Fees and Attorney's Fees Assessment on February 21, 2020 and awarded attorney's fees in the amount of $6,000.00 and expenses in the amount of $2, 486.20. The trial court commented in its Order Regarding Plaintiff's Motion for Attorney's Fees and Attorney's Fees Assessment (JA 000427) that "[D]espite the contingency fee agreement, the plaintiff is seeking attorney fees based on an hourly rate." The trial court found that the $107, 000.00 in attorney's fees for work completed since 2012 was not reasonable, but instead stated, "The Court finds that 40% of the plaintiff's recovery, the amount contracted for in the Plaintiff's Contingent Fee Agreement, is a reasonable attorney's fee in the present case." With all due respect to the trial court, the test of what should be considered a reasonable fee is not determined solely by the fee arrangement between the attorney and his client. *See, Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 161 (W.Va. 1986); *Fauble v. Nationwide*, 222 W.Va. 365, 664 S.E.2d 706 (W.Va. 2008). The reasonableness of attorney's fees is generally based on broader factors. *Aetna Cas. & Sur. Co., v. Pitrolo, supra,* 342 S.E.2d at 161 (citing to cases outlining a multi factor analysis). The West Virginia Supreme Court has also cited Rule 1.5(a)

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[10] Seven years ago, the United States District Court for the Northern District of West Virginia found the average market rate for a general litigator in the Northern District of West Virginia was between $200.00 and $250.00 per hour. *Gen Motors LLC v. Bill Kelley, Inc.* (Civil Action No. 2:12-CV-51), N.D.W.Va. 2013, p.13.

[11] Defendant did not contest the hourly rate of $250.00/hour.

[12] Attorney fees for services rendered on appeal are recoverable. *See, Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359, 370 (W.Va. 2006) ; *Quicken Loans, Inc. v. Brown*, No: 13-076 (W.Va. 2014)

of the West Virginia Rules of Professional Conduct, which sets forth similar factors, as guidance in determining the reasonableness of attorneys' fees. *Fauble v. Nationwide Mut. Fire Ins. Co., supra,* 664 S.E.2d at 714. A contingent fee as arranged between attorney and client is not a ceiling with regard to the fee award an attorney can receive. *See, Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359, 366 (W.Va. 2006). While "the trial [court] ... is vested with a wide discretion in determining the amount of ...court costs and counsel fees, [sic] and the trial [court's] ...determination of such matters will not be disturbed upon appeal that [it] has abused [its] discretion." *See, Pauley v. Gilbert*, 206 W.Va. 114, 522 S.E.2d 208 (W.Va. 1999) (citing cases). This Court has stated that "'[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.'" *State v. Hedrick*, 204 W.Va. 547, 553, 514 S.E.2d 397, 403 (*quoting Gentry v. Mangum*, 195 W.Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (W.Va. 1995)). The trial court did abuse its discretion when it failed to go through an analysis of the *Pitrolo* factors in calculating a reasonable attorney fee and simply decided to award what would have been the applicable contingent fee.

The Court further found that "not all time and labor required of plaintiff's counsel was spent litigating a successful claim for which attorney's fees are recoverable" as "plaintiff brought claims for both fraud and intentional infliction of emotional distress against the defendant" and the "jury returned a verdict answering "yes" to the question of Intentional Misrepresentation/Fraudulent Concealment, and "no" to the issue of Intentional Infliction of Emotional Distress ("IIED"). Both claims arose from the same set of facts outlining the defendant's wrongful conduct. Both claims required intent as opposed to negligence. There was no additional evidence developed or work done to support the intentional infliction of emotional distress claim for which the jury did not award damages. None of the briefing done in the case was targeted at the IIED claim. Apportionment of

attorney's fees may be appropriate where some of the claims and efforts of a plaintiff were unsuccessful. Here, however, there was no additional work done to support the intentional infliction of emotional distress claim. Neither the defendant nor the trial court enumerated any billing entries that were believed to only support the IIED claim. In any event, any "apportionment" would not be to the tune of a 50% reduction as advocated by the Defendant in her Objections to Plaintiff's Memorandum in Support of Attorney's Fees Assessment (JA000382 &00385 fn.1). [13] Most significantly, the Verdict Form (JA000337) stated that

> **If you found in favor of plaintiff and awarded monetary damages to him in Count I above, you cannot award monetary damages in Count II below.**

The trial court had already ruled that Plaintiff could not recover twice for the same damage. *See,* JA 000470-000473 for discussion by the trial court and counsel. Thus, a reduction in attorney fees given that the jury did not find intentional infliction of emotional distress was not warranted.

Further, as this Court explained in *Heldreth v. Rahimian*, 637 S.E.2d 359 (W.Va. 2006),

> Often Plaintiffs will have one basic problem which, in a complaint, they express in numerous alternative ways, each corresponding to a slightly different legal theory. When this occurs, ... the fact that the commission or court selects one of the theories upon which to award relief does not necessarily mean that the plaintiff has not substantially prevailed. However, when a complainant sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on or more such distinct causes of action, ... attorneys' fees for the unsuccessful causes of action should not be awarded.
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> ***
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> What is critical in parsing out fees for unsuccessful claims, as Bishop Coal makes clear, is determining whether a separate and distinct factual development was required to support those alternative theories of recovery upon which recovery was not obtained. If this is the case, then those fees arising in connection with the unsuccessful claims are to be culled out. When, however, the plaintiff's counsel relies on the same factual pattern to assert different types of potential recovery, the fee shifting process becomes more difficult.

Id. at 364-365. The Heldreth Court then relied on *Hensley v. Eckerhart*, 461 U.S. 424 (1983) for the

[13] "[A trial court cannot calculate what constitutes a reasonable award of attorney's fees by utilizing a mathematical formula that compares the successful to the unsuccessful claims. *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359 (W.Va. 2006) (*discussing Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

following proposition:

> [T]he plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expened on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id. at 435. In the *Heldreth* case, the trial court had applied a twenty percent multiplier to arrive at the hours that were reasonably spent. *Heldreth, supra*, 637 S.E.2d at 365. *Heldreth* found that this methodology of calculating attorney's fees has been expressly rejected by other courts. *Id.*

In any event, the trial court did not cite to the *Pitrolo* case or undertake an analysis of the factors enumerated therein. This Court has stated, "[w]e have made clear that while a court is not required to make detailed findings on each and every element of the *Pitrolo* test, some being irrelevant in a given situation, the court must make findings sufficient to permit meaningful appellate review." *Multiplex Inc. v. Town of Clay*, 231 W.Va. 728, 749 S.E.2d 621,632 (W.Va. 2013) (citing cases); *see also, Shafer v. Kings Tire Serv. Inc.*, 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (W.Va. 2004) ("Because our abuse of discretion review is limited to analyzing whether the circuit court engaged in a proper balancing of applicable factors, we have found that a 'circuit court is required to make findings of fact and conclusions of law on the issue of attorneys' fees.'"). While the trial court made some findings relative to the fee award in this case, the findings did not comport with West Virginia law under *Pitrolo, Bishop Coal Co. v. Salyers,* 181 W.Va. 71, 380 S.E.2d 238 (W.Va. 1989), and similar cases. Simply, the trial court did not go through the *Pitrolo* factors at all and simply awarded the applicable contingent fee amount.

Further, the trial court stated "[a]wards of attorney's fees should bear relation to the amount involved in the case and the result obtained." This was not a case involving a sum certain. The trial court further commented that "[t]he amount of attorney fees sought by the plaintiff is over seven (7) times the amount awarded by the jury." Yes, the fees are high. They represent over six years of

work, including the defense of many misguided motions, to ultimately have a jury find that the plaintiff's intentional fraudulent conduct was wrong and worthy of monetary punishment. Mr. Robinson feels much vindication by the jury's finding that Ms. Coffield's misrepresentations were intentional and wrong. Ms. Coffield had many opportunities both before and after the filing of the Complaint in this matter to acknowledge the wrongfulness of her misrepresentations regarding the paternity of Savannah Coffield. She kept her secret for over a decade and then never apologized. Instead, once this litigation was filed, she filed countless inartful motions that required a defense. She is directly responsible for the years of fees incurred.

Moreover, there is no rule that an award of attorney fees cannot exceed the amount recovered. For instance, in *Young v. Spencer,* 405 P.3d 701 (Okla. Civ. App. 2017), the plaintiff sued for damages to his land, timber, and crops. The plaintiff was granted judgment for actual damages in the amount of $22, 900.00 and punitive damages in the same amount for a total judgment of $48,500.00. *Young v. Spencer, supra,* 405 P.3d at ¶27. Plaintiff sought attorney fees in the amount of $74, 866.50. The court had adjusted the lodestar fee of $57, 287.50 to $45,000.00 "whereby the fee will bear a reasonable relation to the results obtained in this case." *Id.* The Court of Civil Appeals of Oklahoma stated "[T]he trial court, clearly concerned that the lodestar fee amount exceeded the damages award, reduced the fee to $45,000 to bring it into alignment with the $45,800 awarded. There is no strict rule that the award of attorney fees may not exceed the amount of recovery." *Young v. Spencer,* 405 P.3d 701, ¶ 28; *See,also Spencer v. Oklahoma Gas & Elec.*, 171 P.3d 890 (Okla. 2007) (1.3 times the recovery); *Arkoma Gas Co. v. Otis Engineering Corp.*, 849 P.2d 392 (Okla. 1993) (affirming attorney fee award of $5,500 in a breach of warranty case in which the plaintiff sued for more than $70,000 and ultimately recovered only $100); and *Southwestern Bell Tel. Co. v. Parker Pest Control, Inc.*, 737 P.2d 1186 (Okla. 1987) (2 times the recovery)($3,000 fee awarded for a suit in which the plaintiff sought $3,867 and the defendant confessed judgment for

$1,500.00). Similarly, in *Beattle v. CMH Homes, Inc.*, Civil Action No.: 3:12-2528 (S.D.W.Va. 2015), the United States District Court for the Southern District of West Virginia, applying West Virginia law, calculated $351,850.00 in attorney fees for three lawyers and $18, 700.00 for two paralegals, and $19,828.00 in expenses as the lodestar figure, but based on the fact that the jury only awarded $25,000.00 in damages, reduced the recovery of attorney fees to $70, 370.00 for the attorneys' fees and $3, 740.00 for the paralegal fees.

The trial court erred when it did not undertake an analysis of the *Pitrolo* factors on the amount of hours and hourly rate claimed by Plaintiff's counsel. It was, with all due respect to the trial court, error to simply award the contingent fee amount.

VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court (1) uphold the trial court's ruling as to the statute of limitations and uphold the trial court's ruling as to the other assignments of error put forth by Petitioner, but (2) remand for a new trial as to compensatory damages only, (3) remand the issue of attorney fees to the trial court for calculation in accordance with the *Pitrolo* case and other relevant law.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KAREN COFFIELD

Defendant Below/Petitioner,

v.

Docket No. 20-0033
Marshall County Civil Action No. 13-C-163

RONALD NEIL ROBINSON, II

Plaintiff Below/Respondent

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing *Respondent's Brief* was served on the parties listed below *via hand delivery* this 26th day of June, 2020 as follows:

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