

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

GREGORY H. SCHILLACE,

Plaintiff,

v.

CIVIL ACTION NO. 24-C-44

J. BURTON HUNTER, III;
J. BURTON HUNTER, III & ASSOCIATES, PLLC
SCOTT A. CURNUTTE, individually and
doing business as CURNUTTE LAW OFFICE;
DAVID R. REXROAD; and LYNNE W. REXROAD,

Defendants.

**MOTION OF THE PLAINTIFF TO
REFER CASE TO THE BUSINESS COURT DIVISION**

The plaintiff, Gregory H. Schillace, pro se, pursuant to Rule 29.06 of the West Virginia Trial Court Rules, moves to refer the above-styled action to the Business Court Division. The nature of this action involves causes of action for malicious prosecution; abuse of process; the violation of West Virginia Code § 61-5-27a; as well as civil conspiracy among the defendants to maliciously prosecute the underlying action with each of the parties being engaged in business operations at all times relevant.

The civil action which precipitated the above-styled action was: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia (hereinafter "underlying action"). The underlying action was concluded with the entry of a Dismissal Order

on May 13, 2024. See attached hereto as "Exhibit A", a copy of the underlying civil action dismissal order.

The underlying civil action was a consequence of the representations by the plaintiff of James J. LaRosa, et al. In the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GC1, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia. The above-styled civil action as well as each of the underlying civil actions involve or involved "Business Litigation" as defined by Rule 29.4(a) of the West Virginia Trial Court Rules.

This civil action presents a commercial issue in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy. Successful defending litigates have pursued civil actions against adversaries and lawyers for adversaries in West Virginia court in various actions however, the results have been less than consistent.

At the time of the events upon which the causes of action asserted arose, the plaintiff, Gregory H. Schillace, operated the Schillace Law Office as a sole proprietor. Each of the defendants are engaged in business in West Virginia and these causes of action relate to those business operations.

Rule 29.04 of the West Virginia Trial Court Rules provides that the definition of "Business Litigation" does not include the following:

- (a) consumer litigation;
- (b) products liability;
- (c) personal injury;
- (d) wrongful death;
- (e) consumer class action;
- (f) West Virginia Consumer Credit Act claims;
- (g) consumer insurance coverage disputes;
- (h) noncommercial disputes relating to insurance bad faith;
- (i) disputes in which an individual may be covered by a commercial insurance policy;
- (j) employee suits;
- (k) consumer environmental actions;
- (l) consumer malpractice actions;
- (m) consumer and residential real estate such as landlord - tenant disputes;
- (n) domestic relations;
- (o) criminal cases;
- (p) eminent domain or condemnation; and,
- (q) administrative disputes with government organizations and regulatory agencies with the exception of complete tax appeals.

This civil action does not fall within any of the categories excluded from the definition of business litigation.

The principal claims at issue in this civil action involve matters of increasing significance to the transactions, operations and governance between business entities. The West Virginia Supreme Court of Appeals addressed claims similar to those asserted in this civil action in McCammon v. Oldaker, 205 W.Va. 24, 516 S.E.2d 38 (1999).

In McCammon v. Oldaker, *supra.*, a physician filed suit against the lawyers who represented a plaintiff in a civil action against the physician. The medical malpractice action ended with a verdict in favor of the physician.

Although the decision of the West Virginia Supreme Court of Appeals in McCammon v. Oldaker, 205 W.Va. 24, 516 S.E.2d 8 (1999) addressed the accrual of the statute of limitations for malicious prosecution claims, the case highlights the increasing nature of prevailing litigants seeking redress against opposing parties and their lawyers for unfounded claims. Efforts by prevailing defendants to recover damages for unfounded claims was also the subject of the decision of the West Virginia Supreme Court of Appeals in Warner v. Wingfield, 224 W.Va. 277, 685 S.E.2d 250 (2009).

In Warner v. Wingfield, *supra.* the West Virginia Supreme Court of Appeals upheld the award of sanctions pursuant to Rule 11 of the West Virginia Rules of Civil Procedure against the attorney for the plaintiff for the failure to sufficiently investigate the

underlying facts of the case and determine the merits of the allegations of the civil complaint filed by the lawyer. In Burnette v. Wooton, 2019 WL 1118554 (W.Va. Sup.Ct. 2019), the United States District Court for the Southern District of West Virginia addressed a malicious prosecution claim against lawyers representing the complaining party's lawyers.

The United States District Court for the Northern District of West Virginia addressed claims against the lawyers for an adversary in Miller v. Ashton, 2019 WL 5342529 (W.Va. Sup.Ct. 2019). Lawyers for an adversary were also sued by a victorious party in Teefy v. Allred, 2005 WL 5533036 (W.Va. Sup.Ct. 2005).

Referral of this action to the Business Court Division permitting the specialized nature of claims against the lawyer for an adversary in prior litigation to be addressed uniformly. The referral of this action to the Business Court Division is consistent with the purposes for which the Business Court Division was authorized by West Virginia Code §51-2-15.

Pursuant to Rule 29.06(a)(1) of the West Virginia Trial Court Rules attached hereto are the following documents:

- (a) Complaint;
- (b) Answer of the defendants, J. Burton Hunter, III and J. Burton Hunter, III & Associates, PLLC;
- (c) Answer of the defendants, David R. Rexroad and Lynne W. Rexroad;

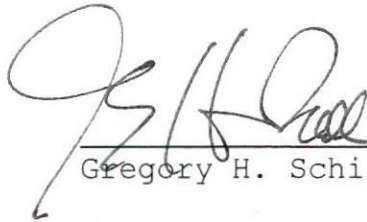
(d) Answer of the defendant, Scott Curnutte; and,

(d) Docket sheet with respect to this action.

Referral to the Business Court Division of this civil action is warranted.

WHEREFORE, the plaintiffs respectfully request that the above-styled civil action be referred to the Business Court Division.

Dated this 16th day of October, 2024.

A handwritten signature in black ink, appearing to read 'G. H. Schillace', is written over a horizontal line.

Gregory H. Schillace, pro se

Post Office Box 1526
Clarksburg, WV 26302-1526
Telephone: (304) 624-1000
Facsimile: (304) 624-9100

EXHIBIT A

In the Circuit Court of Upshur County, West Virginia

David R. Rexroad, as a member of
Pottsville Energy, LLC,
Plaintiff,

v.

Case No. CC-49-2021-C-64
Judge Jacob E. Reger

Gregory H. Schillace,
Defendant

Dismissal Order

Plaintiffs, by counsel J. Burton Hunter, III, and Scott Curnutte; and Defendant, pro se; appeared 31 January 2024 for a previously-noticed hearing in the above-captioned action. Upon consideration of the evidence and argument presented, the Court makes these findings of fact, conclusions of law, and rulings:

1. Plaintiffs have requested voluntary dismissal.
2. Defendant has agreed to voluntary dismissal.
3. At the request of the Parties, the dismissal is with prejudice.
4. The Clerk of this Court is directed to deliver a copy of this Order to any Party who will not receive electronic service via eFile.

Prepared by:

/s/ Scott Curnutte
Scott Curnutte, W.Va. Bar #5780
Curnutte Law
P.O. Box 1605
Elkins, WV 26241
CurnutteLaw@gmail.com
Counsel for Plaintiffs

/s/ Jacob E. Reger
Circuit Court Judge
26th Judicial Circuit

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



West Virginia E-Filing Notice

CC-49-2021-C-64

Judge: Jacob E. Reger

To: Gregory H. Schillace
ghs@schillacelaw.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA
David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace
CC-49-2021-C-64

The following order - case - final was FILED on 5/13/2024 12:10:40 PM

Notice Date: 5/13/2024 12:10:40 PM

Brian P. Gaudet
CLERK OF THE CIRCUIT COURT
Upshur County
38 W. Main Street, Room 304
BUCKHANNON, WV 26201

(304) 472-2370
Brian.Gaudet@courtsww.gov

GREGORY H. SCHILLACE

HUNTINGTON BANK BUILDING
SUITE 303
POST OFFICE BOX 1526
CLARKSBURG, WEST VIRGINIA 26302-1526

GREGORY H. SCHILLACE
ghs@schillacelaw.com

TELEPHONE 304-624-1000

FACSIMILE 304-624-9100

May 23, 2024

Brian P. Gaudet, Clerk
Circuit Court of Upshur County
38 West Main Street
Buckhannon, West Virginia 26201

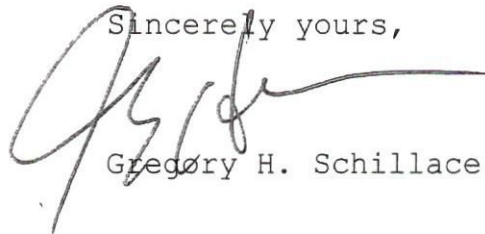
Re: Gregory H. Schillace
Vs: J. Burton Hunter, III, et al.
Civil Action No. _____
Circuit Court of Upshur County
West Virginia

Dear Clerk:

Enclosed please find the original and eleven (11) copies of the **COMPLAINT** prepared with respect to the above-referenced matter. Additionally, enclosed please find my draft, made payable to the Circuit Clerk of Upshur County, in the amount of \$280.00, the fee for filing said Complaint. Additionally we have enclosed our firm draft in the amount of \$20.00 payable to the West Virginia Secretary of State for service of the complaint upon the corporate defendant. The individual defendants will be served by private process server.

Thank you for your time and consideration in this matter. If you have any questions or comments, please do not hesitate to contact me.

Sincerely yours,



Gregory H. Schillace

GHS/cld
Enclosure

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES

In the Circuit Court, Upshur County, West Virginia.

I. CASE STYLE:

Plaintiff(s)

Case # _____

Gregory H. Schillace

Judge _____

vs.

Defendant(s)

Days to
Answer

Type of Service

J. Burton Hunter, III

1 West Main Street

Street

Buckhannon, West Virginia 26201

20

Private Process

City, State, Zip

J. BURTON HUNTER, III AND ASSOCIATES, P.L.L.C.

Agent: J. Burton Hunter, III

1 West Main Street

Street

Buckhannon, WV 26201

30

Secretary of State

City, State, Zip

Scott A. Curnutte

Curnutte Law Office

312 Railroad Avenue

Street

Elkins, WV 26241

20

Private Process

City, State, Zip

David R. Rexroad

3 Lincoln Heights

Street

Buckhannon, West Virginia 26201

20

Private Process

City, State, Zip

Lynne W. Rexroad

3 Lincoln Heights

Street

Buckhannon, West Virginia 26201

20

Private Process

City, State, Zip

Original and 11 copies of complaint furnished herewith.

PLAINTIFF: Gregory H. Schillace	CASE NUMBER:
DEFENDANT: J. Burton Hunter, III, et al.	

II. TYPE OF CASE:

TORTS	OTHER CIVIL	
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input checked="" type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): 05/25

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRED SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ Yes ☒ No
IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: _____

Name: Gregory H. Schillace

Representing:

Firm: _____

☒ Plaintiff ☐ Defendant

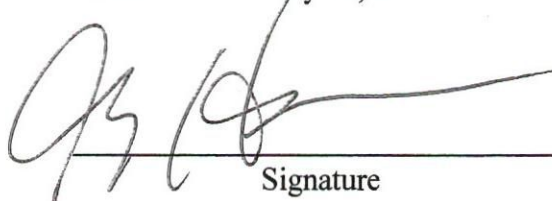
Address: PO Box 1526, Clarksburg, WV 26302

☐ Cross-Complainant ☐ Cross-Defendant

Telephone: (304) 624-1000

Dated: May 23, 2024

☒ Pro Se


Signature

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

GREGORY H. SCHILLACE,

Plaintiff,

v.

CIVIL ACTION NO. _____

J. BURTON HUNTER, III;
J. BURTON HUNTER, III and ASSOCIATES, PLLC
SCOTT A. CURNUTTE, individually and
doing business as Curnutte Law Office;
DAVID R. REXROAD; and LYNNE W. REXROAD,

Defendants.

COMPLAINT

1. The plaintiff, Gregory H. Schillace, at times relevant hereto, operating individually as well as doing business as Schillace Law Office was a sole proprietor with the principal place of business located in the City of Clarksburg, Harrison County, West Virginia.

2. Upon information and belief, the defendant, J. Burton Hunter, III, at all time relevant hereto, is and has been a resident of West Virginia and engaged in the active practice of law in various West Virginia Counties, including, but not limited to, Upshur County, West Virginia.

3. Upon information and belief, the defendant, Scott A. Curnutte, at all time relevant hereto, is and has been a resident of West Virginia and engaged in the active practice of law in

various West Virginia Counties, including, but not limited to, Upshur County, West Virginia.

4. Upon information and belief, the defendant, Scott A. Curnutte, operates the Curnutte Law Office as a sole proprietorship with its principal office located in Randolph County, West Virginia.

5. Upon information and belief, the defendant, J. Burton Hunter, III, and Associates, PLLC, is a West Virginia Professional Limited Liability Company with its principal place of business located in Upshur County, West Virginia.

6. Upon information and belief, the defendant, J. Burton Hunter, III, is the organizer, member and manager of the defendant, J. Burton Hunter, III and Associates, PLLC and the sole person licensed to practice law in West Virginia or any other state employed by the defendant, J. Burton Hunter, III and Associates, PLLC.

7. Upon information and belief, the defendant, David R. Rexroad, at all time relevant hereto, is and has been a resident of West Virginia and was an attorney licensed to practice law in the State of West Virginia.

8. Upon information and belief, the defendant, Lynne W. Rexroad, at all time relevant hereto, is and has been a resident of West Virginia and was an attorney licensed to practice law in the State of West Virginia.

9. The defendant, David R. Rexroad, and the defendant, Lynne W. Rexroad, are, at all times relevant hereto, were husband and wife.

10. The defendant, J. Burton Hunter, III, and the defendant, Scott A. Curnutte, represented the defendant, David R. Rexroad, as the plaintiff in the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GC1, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia. (Hereinafter "LaRosa action").

11. In the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GC1, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia, the plaintiff, Gregory H. Schillace, was engaged to represent James J. LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC and GC1, LLC, who were the defendants in the LaRosa action.

12. In the LaRosa action the defendant, David R. Rexroad, as plaintiff, alleged that money had been loaned and/or invested by him with James J. LaRosa, et al., at various times and that James J. LaRosa, et al., failed to repay the money loaned; failed to pay

accumulated interest with respect to the money loaned and/or invested; and, failed to provide the defendant, David R. Rexroad, evidence of his investment.

13. On or about January 7, 2021 in the LaRosa action the Circuit Court entered a judgment in favor of the defendant, David R. Rexroad, and Fairskies Corporation as plaintiffs against Pottsville Energy, LLC in the amount of \$1,617,340.27. See, attached hereto as "Exhibit A", a copy of the order granting motion for default judgment in a sum certain entered January 7, 2021.¹

14. By order entered October 25, 2021, in the LaRosa action the Circuit Court dissolved Pottsville Energy, LLC, which was a defendant in the LaRosa action. See attached hereto as "Exhibit B", a copy of the October 25, 2021 Dissolution Order Regarding Pottsville Energy, LLC.

15. The orders entered in the LaRosa action were appealed to the West Virginia Supreme Court of Appeals with the rulings of the Circuit Court being affirmed by the West Virginia Supreme Court of Appeals on August 13, 2023.

16. On September 24, 2021, the defendant, David R. Rexroad, initiated the civil action styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia. (Hereinafter, "underlying action").

¹ Judgments were also entered against the other LaRosa action defendants, however, the judgment entered against Pottsville Energy, LLC, was in the amount of \$1,617,340.27.

17. The defendant, David R. Rexroad, was represented by the defendants, J. Burton Hunter, III and Associates, PLLC, J. Burton Hunter, III, and, the defendant, Scott Curnutte, in the civil action styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia. (Hereinafter "underlying action").

18. Upon information and belief, the defendant, Lynne W. Rexroad, consulted with; conspired with; contributed to; participated in; and encouraged the filing and prosecution of the underlying action against the plaintiff along with the remaining defendants. See attached hereto as "Exhibit C", a copy of the October 23, 2023 correspondence from the defendant, J. Burton Hunter, III.

19. In the civil action styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia, (underlying action) the defendant, David R. Rexroad, as plaintiff, alleged that:

- (a) the civil action instituted with the defendant, David R. Rexroad, as plaintiff claimed it was a derivative action was on behalf of Pottsville Energy, LLC pursuant to West Virginia Code §31B-11-1101, et seq.;
- (b) that David R. Rexroad was a member of Pottsville Energy, LLC; and,

- (c) that as a "direct and proximate" result of defendant's [plaintiff herein] legal malpractice, Pottsville Energy, LLC, suffered injuries including, but not limited to, the default judgment in the sum of \$2,508,089.35.

See, attached hereto as "Exhibit D", a copy of the complaint in the underlying action.

20. The complaint in the underlying action executed by the defendants, J. Burton Hunter, III, J. Burton Hunter, III, and Associates, PLLC, and the defendant, Scott A. Curnutte, on behalf of the defendant, David R. Rexroad, falsely; untruthfully; and fraudulently alleged that a default judgment had been entered against Pottsville Energy, LLC in the amount of \$2,508,089.35.

21. Pursuant to Rule 11(b) of the West Virginia Rules of Civil Procedure, the defendant, J. Burton Hunter, III, and the defendant, Scott Curnutte, by their execution of the complaint in the underlying civil action, represented that:

- (1) the complaint in the underlying action was not being presented for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
- (2) that the claims and legal contentions in the complaint in the underlying civil action were warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and,
- (3) that the allegations and other factual contentions of the complaint in the underlying action had evidentiary support or where specifically so identified were likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

22. The defendant, J. Burton Hunter, II, and the defendant, Scott Curnutte, filed the complaint in the underlying civil action in violation of Rule 11(b) of the West Virginia Rules of Civil Procedure.

23. The civil action against the plaintiff, Gregory H. Schillace, styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia, was dismissed with prejudice on May 13, 2024.

24. A dismissal with prejudice pursuant to Rule 41(a) of the West Virginia Rules of Civil Procedure is an adjudication in the merits. Hall v. Ensor, 2023 WL 8680714 (W.Va. Sup.Ct. 2023).

25. As the civil action styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, was dismissed with prejudice on May 13, 2024, the termination of the underlying action was in favor of the plaintiff, Gregory H. Schillace.

26. The plaintiff, Gregory H. Schillace, was not engaged, hired or retained by the defendant, David R. Rexroad, with respect to the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GCl, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia.

27. The individuals and entities represented by the plaintiff, Gregory H. Schillace, in the LaRosa action were the adverse parties in the claims asserted by the defendant, David R. Rexroad.

28. A party such as the defendant, David R. Rexroad, not in privity of contract with an attorney such as the plaintiff, Gregory H. Schillace, may not maintain a legal malpractice action against an attorney for negligence absent fraud or collusion. National Savings Bank v. Ward, 100 U.S. 195 (1879); Calvert v. Scharf, 217 W.Va. 684, 619 S.E.2d 197 (2005).

29. The underlying civil action contains no allegation of fraud or collusion on the part of the plaintiff, Gregory H. Schillace.

30. In order to sustain an action for legal malpractice in West Virginia the complaining party is obligated to establish the following:

- (1) the employment of the attorney by the complaining party;
- (2) the negligence by the attorney of a reasonable duty; and,
- (3) that such negligence resulted in and was the proximate cause of loss to the complaining party.

Calvert v. Scharf, 217 W.Va. 684, 619 S.E.2d 197 (2005); Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990); Sheetz v. Bowles, Rice, McDavid, Graff & Love, PLLC, 209 W.Va. 318, 547 SE.2d 256 (2001).

31. The only exception to the requirement that the attorney be employed by the party complaining of legal malpractice recognized in West Virginia is for a direct intended and specifically identified beneficiary of a will prepared by the lawyer who is the subject of a legal malpractice action related to the preparation of the will. Calvert v. Sharf, 217 W.Va. 684, 619 S.E.2d 197 (2005).

32. The defendant, David R. Rexroad, was not a direct intended and specifically identified beneficiary of any services provided by the plaintiff, Gregory H. Schillace, to the LaRosa defedants.

33. Prior to the institution of the underlying civil action against the plaintiff, Gregory H. Schillace, by the defendants binding West Virginia legal precedent provided that:

An attorney for a party in a civil lawsuit does not owe a duty of care to that party's adversary in the lawsuit such that the adversary may assert a cause at action for negligence against the opposing attorney.

Clark v. Druckman, 218 W.Va. 427, 624 S.E.2d 864 (2005).

34. The defendant, David R. Rexroad, was without standing to assert a legal malpractice claim against the plaintiff, Gregory H. Schillace, and all of the defendants knew or should have known that the defendant, David R. Rexroad, was without standing to pursue the underlying action against the plaintiff, Gregory H. Schillace.

35. The defendants, J. Burton Hunter, III; J. Burton Hunter, III, and Associates, PLLC; and, the defendant, Scott A. Curnutte, on behalf of the defendant, David R. Rexroad, initiated and maintained the civil action styled: David R. Rexroad, as a member of Pottsville Energy, LLC v. Gregory H. Schillace, Civil Action No. 21-C-64, Circuit Court of Upshur County, West Virginia, knowing that the allegations were false, materially misstated, and unsupported by clear West Virginia binding precedential legal authority.

36. The complaint initiating the underlying civil action claimed to be authorized by West Virginia Code §31B-11-1101 et seq., which permits a member of a limited liability company to maintain an action in the name of the of company if the members or managers having authority to prosecute the action have refused to do so or where an effort to cause those members to commence the action is not likely to succeed, however, the complaint in the underlying civil action did not contain the minimum requirements for a complaint in such an action as mandated by West Virginia Code §31B-11-1101; §31B-11-1102; §31B-11-1103; and, Rule 23.1 of the West Virginia Rules of Civil Procedure.

37. West Virginia Code §31B-11-1103 requires any complaint filed pursuant to West Virginia Code §31B-11-1101 et seq., to set forth with particularity the effort to secure initiation of the action by a member or manager or the reason for not making the effort.

38. The complaint filed by the defendants, J. Burton Hunter, III; J. Burton Hunter, III, and Associates, PLLC; and the defendant, Scott A. Curnutte, on behalf of the defendant, David R. Rexroad, does not comply with West Virginia Code §31B-11-1103 as it does not set forth with particularity or even generally the effort of the plaintiff to secure initiation of the action by a member or manager or the reasons for not making the effort.

39. Upon information and belief, the defendants made no effort to secure initiation of the underlying civil action by the manager/member of Pottsville Energy, LLC.

40. Upon information and belief, the defendants made no effort to contact the managing member of Pottsville Energy, LLC regarding the allegations of the underlying civil action.

41. The underlying complaint alleged that Pottsville Energy, LLC suffered injury as a consequence of the legal malpractice of the plaintiff, however, the defendant, David R. Rexroad, in the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GCL, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia, swore, under oath, in support of his motion for the dissolution of Pottsville Energy, LLC that:

- (a) Pottsville Energy, LLC had no known liabilities;
- (b) the economic purpose of Pottsville Energy, LLC was likely to be reasonably frustrated;
- (c) one of the defendants in the underlying action, Leigh Ann LaRosa, engaged in conduct making it not reasonably practicable to carry on the business of Pottsville Energy, LLC;
- (d) it was not reasonably practicable to carry on the business of Pottsville Energy, LLC in conformity with the articles of organization and the operating agreement; and,
- (e) the manager of Pottsville Energy, LLC underlying defendant, Leigh Ann LaRosa, acted in a manner that was illegal, oppressive, fraudulent, or unfairly prejudicial to the plaintiff.

42. The defendant, David R. Rexroad, provided further sworn testimony on September 30, 2021 in the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GC1, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia, that the assets of Pottsville Energy, LLC had little value.

43. Based upon the sworn testimony of the defendant, David R. Rexroad, which such sworn testimony was known to the remaining defendants, that Pottsville Energy, LLC had no assets and little value, the defendants could not in good faith claim that damages were suffered by Pottsville Energy, LLC as a consequence of any alleged malpractice of the plaintiff.

44. Upon information and belief, the defendant, David R. Rexroad, never submitted any documents to the Internal Revenue Service or other governmental entity claiming or establishing any ownership interest in Pottsville Energy, LLC.

45. Rule 23.1 of the West Virginia Rules of Civil Procedure requires that any derivative action brought by a member of a limited liability company seeking to enforce a right of the company must allege the following in the complaint:

- (1) that the complainant was a member of the company at the time of the transaction of which the complainant complains;
- (2) that the action is not collusive to confer jurisdiction on a court of the United States which it would not otherwise have; and,
- (3) particular allegations detailing the efforts, if any, made by the complainant to obtain the action the complainant desires from the company and reasons for the failure of the complainant to obtain the action or for not making the effort.

46. The complaint filed by and on behalf of the defendants did not comply with the requirements of Rule 23.1 of the West Virginia Rules of Civil Procedure.

47. Rule 23.1 of the West Virginia Rules of Civil Procedure expressly provides that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests" of the company members in enforcing the rights of the company.

48. The defendant, David R. Rexroad, could not fairly and adequately represent the interests of Pottsville Energy, LLC as the judgment against Pottsville Energy, LLC was obtained by the defendant, David R. Rexroad.

49. The entity identified as Pottsville Energy, LLC as a defendant in the underlying civil action, had its charter revoked by the West Virginia Secretary of State on November 1, 2015, therefore, the defendant, David R. Rexroad, could not have been member of Pottsville Energy, LLC on September 27, 2021 when the underlying civil action was filed against the plaintiff or at the time the events alleged in the underlying action occurred.

50. At the time that the underlying civil action was filed the law of the State of West Virginia was clearly established and provided that:

- (a) a claim asserted against the lawyer for a litigation adversary for legal malpractice is contrary to public policy of the State of West Virginia. Delaware CWC Liquidation Corp. v. Martin, 213 W.Va. 617, 584 S.E.2d 473 (2003).
- (b) the doctrine of judicial estoppel prevented the defendant, David R. Rexroad, from taking a position in the underlying civil action completely opposite from the position taken by the defendant, David R. Rexroad, in the civil action against James J. LaRosa, et al. Bison Interests, LLC v. Antero Resources Corporation, 244 W.Va. 391, 854 S.E.2d 211 (2020).
- (c) The claim asserted by the defendant, David R. Rexroad, in the underlying action was contrary to the absolute litigation privilege which operates to preclude civil actions against the attorney for the opposing party arising from the conduct of the

attorney in the litigation process. Clark v. Druckman, 218 W.Va. 427, 624 S.E.2d 864 (2005).

51. Upon information and belief, the defendant, Lynne W. Rexroad, participated in the decision making process regarding the underlying civil action; actively conspiring with the remaining defendants.

52. By correspondence of October 23, 2023 the defendants, J. Burton Hunter, III, and J. Burton Hunter, III and Associates, PLLC, confirmed the involvement of the defendant, Lynne W. Rexroad, in the civil conspiracy to wrongfully file the underlying civil action. See attached hereto as "Exhibit C", a copy of the October 23, 2023 correspondence of J. Burton Hunter, III and J. Burton Hunter, III and Associates, PLLC.

53. On or about October 27, 2023 the plaintiff, Gregory H. Schillace, served a motion for judgment on the pleadings or in the alternative motion for summary judgment and incorporated memorandum of law in the underlying action.

54. The motion for judgment on the pleadings or in the alternative motion for summary judgment was based, in part, upon the prohibition of claims against an attorney for an adversary of the claimant in an underlying litigation arising from conduct of the attorney in the litigation process pursuant to the clearly established common law of West Virginia. Clark v. Druckman, 218 W.Va. 427, 624 S.E.2d 864 (2005).

55. The clear public policy at the time the defendants caused the underlying civil action to be instituted as well as at all times the defendants wrongfully pursued the underlying civil action, preclude the assignment of legal malpractice claims particularly to the adversary of the client of the attorney in the underlying litigation. Delaware CWC Liquidation Corp. v. Martin, 213 W.Va. 617, 584 S.E.2d 473 (2003).

56. The motion for judgment on the pleadings or in the alternative motion for summary judgment filed by the plaintiff, Gregory H. Schillace, in the underlying action was further based upon the doctrine of judicial estoppel which prevented the defendants from taking a position in the underlying action completely opposite from the position taken by the defendants in the civil action styled: David R. Rexroad, and Fair Skies Corporation, a West Virginia corporation, v. James Joseph LaRosa, Leigh Ann LaRosa, Pottsville Energy, LLC, a West Virginia limited liability company, GC1, LLC, a West Virginia limited liability company, Civil Action No. 19-C-64 Circuit Court of Upshur County, West Virginia. Bison Interests, LLC v. Antero Resources Corporation, 244 W.Va. 391, 854 S.E.2d 211 (2020).

57. The defendants did not identify; provide the citation to; or discuss in any way, any legal authority in any jurisdiction of the United States, including but not limited to, West Virginia which contradicted the legal authority upon which the motion for

judgment on the pleadings or in the alternative motion for summary judgment filed by the plaintiff in the underlying action was based.

58. In the underlying action the defendants made no argument for the extension; modification; or reversal of the existing law precluding the claims made by the defendants in the underlying action.

59. The underlying action filed by and on behalf of the defendants was frivolous as a matter of law. Warner v. Wingfield, 224 W.Va. 277, 685 S.E.2d 250 (2009).

60. When faced with the obligation to provide legal authority to support the frivolous claims asserted in the underlying action the defendants sought the dismissal of the underlying civil action and wrongfully demanded that the plaintiff execute a release of claims against the defendants.

61. The defendants wrongfully attempted to force the plaintiff to execute a release of claims against the defendants in exchange for the dismissal of the underlying civil action which the defendants knew had no legal or factual basis.

62. The defendants wrongfully, maliciously and unlawfully pursued the underlying civil action when they knew or should have known it had no legal or factual basis.

63. The Circuit Court of Upshur County, West Virginia has original and general jurisdiction with respect to this civil action as the amount in controversy exceeds \$7,500.00, excluding interest, W.Va. Code §55-2-2(b).

Count I
Malicious Prosecution

64. The plaintiff realleges each and every allegation hereinabove set forth in paragraphs 1 through 63 of its complaint as if each such allegation is set forth verbatim herein.

65. A claim for malicious prosecution requires establishment of the following three elements:

- (1) that the prosecution was malicious;
- (2) that it was without reasonable or probable cause;
and,
- (3) that it terminated favorably to the plaintiff.

Norfolk Southern Railroad Company v. Higginbotham, 228 W.Va. 522, 721 S.E.2d 541 (2011).

66. A civil proceeding can give rise to a malicious prosecution claim. Presier v. MacQueen, 177 W.Va. 273, 352 S.E.2d 22 (1985).

67. The conduct of the defendants in filing and the pursuit of the underlying civil action satisfies each of the elements required to maintain an action for malicious prosecution claim.

68. The defendants initiated and maintained the underlying civil action based upon information the defendants knew or should have known was false, incorrect and/or incomplete.

69. The defendants conducted no or inadequate inquiry into the legal foundation of the claims asserted in the underlying civil action.

70. The defendants failed and/or refused to conduct any significant legal research prior to the filing of the underlying civil action.

71. The defendants failed and/or refused to conduct any significant legal research prior to filing the inadequate and insufficient response to the motion for judgment on the pleadings or in the alternative motion for summary judgment filed by the plaintiff in the underlying civil action. See attached hereto as "Exhibit E", a copy of the response to the motion for judgment on the pleadings or in the alternative motion for judgment filed by the defendants herein in the underlying civil action.

72. The defendants filed a frivolous motion to compel discovery in the underlying action.

73. The motion to compel discovery and the renewed motion to compel discovery were frivolous; did not comply with the West Virginia Rules of Civil Procedure; and, were interposed only to harass the plaintiff and cause delay.

74. The defendants wrongfully, maliciously and unlawfully filed a renewed motion to compel discovery substantially identical to a motion to compel discovery already denied by the circuit court.

75. The defendants instituted and pursued the underlying civil action with the intent to harm the plaintiff and to detrimentally impact the well being of the plaintiff.

76. During the pendency of the underlying civil action the defendants knew or should have known that there was no legal basis for the claims asserted.

77. The prosecution of the underlying civil action was without reasonable or probable cause.

78. The underlying civil action was terminated on its merits, with prejudice, in favor of the plaintiff.

79. As a direct and proximate result of the malicious prosecution of the underlying civil action by the defendants, the plaintiff suffered damages.

Count II
Abuse of Process

80. The plaintiff realleges each and every allegation hereinabove set forth in paragraphs 1 through 79 of its complaint as if each such allegation is set forth verbatim herein.

81. A cause of action for abuse of process in the context of the prosecution of a civil action is recognized in West Virginia. Preiser v. MacQueen, 177 W.Va. 273, 352 S.E.2d 22 (1985).

82. By the institution and maintenance of the underlying civil action the defendants willfully and maliciously misused and/or misapplied lawfully issued process to accomplish a purpose not intended or warranted by that process. Wayne County Bank v. Hodges, 175 W.Va. 723, 338 S.E.2d 202 (1985).

83. The defendants willfully and maliciously used the judicial process based upon falsities, misstatement, unsupported

accusations and causes of action specifically rejected in West Virginia.

84. The use of the judicial process as well as the false, wrongful and defamatory statements made by the defendants were in furtherance of the wrongful purpose of the defendants to interfere in the life of the plaintiff.

85. The defendants instituted the underlying civil action against the plaintiff, Gregory H. Schillace, for the improper purpose of extorting money from the plaintiff by asserting claims on behalf of defendant, David R. Rexroad, which the defendants knew or should have known had no basis in fact or law.

86. The acts and conduct of these defendants in the attempt to obtain funds from a lawsuit with no factual or legal basis is the willful and intentional misuse and/or abuse of the litigation process.

87. The defendants acted with the ulterior purpose of obtaining money and/or other items of value such as a release of claims for which they were not entitled, thereby enriching themselves.

88. The willful and wrongful conduct of the defendants included the use of the litigation process outside of the proper course of the regular conduct of the proceeding as there was no legal or factual basis for the underlying civil action.