**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

ICA EFiled: Sep 19 2024
03:42PM EDT
Transaction ID 74371951

**ROBERT HARRIS,**

**PETITIONER,**

v.

**No. 24-ICA-264**
**(Cir. Ct. Lewis Cnty. No. 23-C-71)**

**WARNER LAW OFFICES PLLC, and**
**CLARKSBURGH PUBLISHING COMPANY,**
**d/b/a the Weston Democrat,**
**a West Virginia Corporation,**

**RESPONDENTS.**

# RESPONDENT WARNER LAW OFFICES PLLC'S RESPONSE BRIEF

**GORDON REES SCULLY MANSUKHANI, LLP**

*/s/ Brant T. Miller*
Brant Miller, Esquire
WV I.D. No. 13822
btmiller@grsm.com
Richard E. Griffith, Esquire
WV I.D. No. 14254
rgriffith@grsm.com
707 Grant Street, Suite 3800
Pittsburgh, PA 15219
T: (412) 588-7400
F: (412) 347-5461

Robert P. Fitzsimmons, Esquire
W.V. I.D. No. 1212
bob@fitzsimmonsfirm.com
1609 Warwood Ave.
Wheeling, WV 26003

*Counsel for Respondent, Warner Offices PLLC*

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## STATEMENT OF THE CASE

All of the allegedly defamatory statements in this case were actually *questions* posted in advertisements. Appx. 247. On Google and Facebook, Respondent Warner Law Offices, PLLC ("Warner") asked "Were you sexually abused by a gynecologist in the Weston, West Virginia area?" and in print advertisements Warner asked "Have you been sexually assaulted by a local gynecologist?" *Id*. The print advertisements were published in The Weston Democrat and The Record Delta, which cover the Lewis County and Upshur County, West Virginia areas, respectively. Appx. 193.

It is undisputed that the advertisements did not include any affirmative statements that sexual assaults had occurred. Appx. 48-79; 247. It is also undisputed that the advertisements made no mention of Petitioner, did not include a picture or any identifying information of Petitioner, and did not state a timeframe. *Id*.

Petitioner filed his initial Complaint on September 4, 2023, against Warner, alleging causes of action for: (1) Libel; (2) Defamation *Per Se*; and, (3) Intentional Infliction of Emotional distress. Warner filed a Motion to Dismiss Petitioner's Complaint on September 21, 2023. Appx. 18-29. In Warner's Motion to Dismiss (and in subsequent Briefs), Respondents asked the Circuit Court to take judicial notice of the advertisements themselves (which Petitioner did not attach to his Complaint), as well as public records establishing that Petitioner was not the only gynecologist in the Weston, West Virginia area. *See* Appx. 38-39; 48-79. Those records yielded the names of 18 practicing gynecologists within 25 miles of Weston. Appx. 36.

At a hearing on February 5, 2024, the Circuit Court heard argument from the parties and took Warner's Motion to Dismiss under advisement. Appx. 126:15. On February 8, 2024, Petitioner filed an Amended Complaint, adding Clarksburg Publishing Company d/b/a the Weston Democrat ("the Weston") as a Defendant. Appx. 94-108. On March 11, 2024, the Weston filed a

Motion to Dismiss the Amended Complaint. Appx. 178-190. On June 1, 2024, Warner filed a Supplemental Brief in Support of the Weston's Motion to Dismiss. Appx. 245-255.

At a hearing on June 6, 2024, the Circuit Court heard argument from the parties and again took the Motions to Dismiss under advisement. Appx. 294:11-12. On June 18, 2024, the Circuit Court issued a final written ruling dismissing Petitioner's Amended Complaint for failure to state a claim upon which relief can be granted. Appx. 299-309.

In issuing its ruling, the Circuit Court considered that the advertisements contained a question rather than a statement; that the "area" referenced in the advertisements may include nearby cities other than Weston (and further that local citizens will travel for medical services to nearby cities); and, that the advertisements were not limited by a time frame. Appx. 302-303.

As to Petitioner's claim for intentional infliction of emotional distress, the Circuit Court considered that the clear intent of the advertisements was to generate legal business for Warner (not to inflict emotional distress upon Petitioner). Appx. 304. Accordingly, the Circuit Court held that Petitioner cannot prove a set of facts in support of his claims that would entitle him to relief. *Id*.

## SUMMARY OF ARGUMENT

Petitioner's Appeal Brief continues to mischaracterize the allegedly defamatory advertisements as factual statements alleging that Petitioner committed sexual assault (*see* Brief at 7 ["Respondents advertised statements alleging sexual assault was or has been committed by Petitioner"]). This is wholly at odds with the factual record.[1]

The Court properly held (because it cannot be disputed) that Warner placed advertisements containing *questions* asking whether readers had been sexually assaulted by *a* gynecologist in the

[1] Which includes facts of which the Court took—and was entitled to take—judicial notice, as discussed in further detail below.

local area. These advertisements did not refer to Petitioner, either on their face or by inference. The printed advertisements merely mentioned the "local area" which could have been anywhere in the two counties served by the papers (Lewis and Upshur). The social media advertisements likewise referred to the "Weston, West Virginia *area*," which—as the Court concluded—can reasonably be interpreted to mean the area around Weston including other cities.

Petitioner did not attach any copies of the advertisements to his Complaint. On this basis, he argues that the Circuit Court should not have considered the language or placement of the advertisements themselves (instead relying only on his (mis)representation of what the advertisements said). However, it is well-settled that a Court may take judicial notice of certain facts at the motion to dismiss stage. This includes documents that are integral to a complaint, whether or not they were attached. The advertisements at-issue here are most certainly integral to Petitioner's Complaint. The Court may also take judicial notice of matters of public record, and facts generally known within the court's jurisdiction. In so doing, the Court did not make any impermissible findings of fact, nor consider any impermissible extrinsic facts.

Likewise, the Circuit Court did not make any finding that Petitioner was required to *prove* the elements of his claims at the motion to dismiss stage—simply that he must allege facts in support of each element of those claims. He did not do so, and the Circuit Court dismissed his Complaint.

Further, while the Court did not reach the issue of privilege in its ruling, this was an additional argument made by Respondents and is thus preserved on appeal, and is an additional reason to affirm the Circuit Court's dismissal of Petitioner's Complaint.

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by Respondent Warner Law Offices, PLLC.

## STANDARD OF REVIEW

This Court "review(s) a circuit court's ruling on a demurrer de novo." *Webb v. Virginian-Pilot Media Co.*, LLC, 287 Va. 84, 88, 752 S.E.2d 808, 811 (2014).[2]

A complaint should be dismissed when it fails to state a claim upon which relief can be granted. W.Va. R. Civ. P. 12(b)(6). "The task of a court in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint . . . ." *Gable v. Gable*, 245 W.Va. 213, 221, 858 S.E.2d 838, 846 (2021) (quoting *Mountaineer Fire & Rescue Equip.*, 244 W.Va. 508, 520, 854 S.E.2d 870, 882 (2020). The complaint must provide enough information to outline the elements of a claim or permit inferences that the elements exist. *Mountaineer Fire*, 244 W.Va. at 521 (citing *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986)).

A plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint[,]" *see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993), "or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." *Boone v. Activate Healthcare*, LLC, 245 W.Va. 476, 481, 859 S.E.2d 419, 424 (2021).

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[2] Petitioner does not appeal the Circuit Court's decision to deny leave to amend the Complaint, which would be reviewed under an abuse of discretion standard. *See Kole v. City of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994) (holding that the decision whether to grant leave to amend "is a matter resting within the sound discretion of the trial court").

## ARGUMENT

### I. THE CIRCUIT COURT PROPERLY HELD THAT PETITIONER CANNOT ESTABLISH THE ESSENTIAL ELEMENTS OF DEFAMATION BECAUSE RESPONDENTS' ADVERTISEMENTS DO NOT CONTAIN DEFAMATORY STATEMENTS

As Petitioner concedes, to establish a cause of action for defamation, Petitioner must have pled the following basic elements: (1) a defamatory statement was made; (2) the defamatory non-privileged statement was communicated/published to a third party; (3) falsity; (4) reference to the Plaintiff; (5) negligence on part of the publisher; (6) resulting injury. *Belcher v. Wal-Mart Stores, Inc*., 211 W.Va. 712, 719, 568 S.E.2d 19, 26 (2002) (quoting *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1984)).

The Circuit Court correctly held that the advertisements at-issue were not defamatory, as they contained questions rather than statements of fact, and did not identify or reference Petitioner.

#### A. The Advertisements Contained Questions Rather than Statements of Fact

"Language relied on as libelous must be judged in light of facts known by those to whom it is addressed." *Klein v. Belle Alkali Co.*, 229 F.2d 658, 660 (4th Cir. 1956); *see also* Syl. Pt. 6, *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986) (stating whether statements are capable of defamatory meaning is a matter of law); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 555, 372 N.E.2d 1211, 1217 (1978) (the test for whether defamatory meaning is possible is "the effect which the article is fairly calculated to produce and impression it would naturally engender in the mind of the average person.").

The advertisements posed questions. They were comparable to the ubiquitous "have you been injured by a truck?" advertisements published by personal injury lawyers (as the Court noted in its ruling – see Appx. 302). This is akin to an opinion and is not capable of having a defamatory

meaning, as it is not a "provably false assertion of fact." *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345 (1996).

While Warner has been unable to find a West Virginia case directly on point, other courts have addressed this issue in favor of Respondents. In a case out of the Superior Court of New Jersey, a plaintiff's law firm ran an advertisement in a newspaper that asked whether readers were "treated by Dr. Dello Russo or Dr. William Kellogg at the NJ Eye Center," and whether they "suffered a bad result from eye surgery"—and if so, the firm offered a "free consultation to discuss your legal rights." *Dello Russo v. Nagel,* 358 N.J. Super. 254, 262 (N.J. 2003). Though the advertisements actually mentioned the physicians by name, the New Jersey Superior Court concluded the advertisements were not defamatory statements. The court noted "attorneys are constitutionally and ethically permitted to advertise." *Id.* The court also concluded "an attorney is privileged to publish what may be defamatory information *prior to a proposed judicial proceeding even when the communication is directed at recipients unconnected with the proposed proceeding*." *Id.* (emphasis added). The case is directly analogous to the facts at hand.

A similar opinion was issued by the Wisconsin Court of Appeals. In that case, a plaintiff's firm ran an advertisement about an insurance company. It stated "if anyone has any information regarding Liberty Mutual Fire Insurance Company's delay or failure to pay claims or losses, please contact the undersigned," and then listed the law firm's contact information. *Liberty Mut. Fire Ins. Co. v. O'Keefe,* 205 Wis. 2d 524, 526 (Wisc. Ct. App. 1996). The Wisconsin Court of Appeals concluded the advertisement was not defamatory of Liberty. The court stated "we are to consider [the alleged defamer's] words in the plain and popular sense in which they would be naturally understood in their context and under the circumstances in which they are found. The context is now a familiar one. An attorney is advertising for witnesses, or perhaps clients. The need for

witnesses in a fire loss claim against an insurance company is not an unusual situation. Insurance companies are often sued. The word "if" dilutes Liberty's suggestion that a reader would naturally understand the "delay or failure" statement to accuse Liberty of habitually treating its policyholders unfairly." *Id.* (internal citations omitted).

In both of these cases, the defamation-plaintiff was actually named. Yet, in both cases, the courts concluded that the advertisements seeking information from people who may have been harmed by the defamation-plaintiff were not defamatory because they were posed as questions. The questions did not affirmatively state the defamation-plaintiffs had harmed anyone. Rather, they merely inquired whether anyone had been harmed by the defamation-plaintiffs. This was not defamatory even though the public knew the identity of the potential tortfeasors and the nature of the harm about which the attorneys posed questions.

Here, unlike the above cases, Petitioner was not even named in the advertisements at issue. In any event, questions posed to the reading public regarding potential harms committed are not, and cannot be, defamatory statements.

**B. The Advertisements Did Not Reference or Identify Petitioner**

West Virginia case law is very clear that statements must refer to an ascertainable person. If the words used contain no reflection on any particular individual, no innuendo can make them defamatory. An innuendo cannot make the person certain who was uncertain before. *Neal v. Huntington Publishing Co.,* 159 W.Va. 556, 223 S.E.2d 792 (1976) (quoting *Argabright v. Jones*, 46 W.Va. 144, 32 S.E. 995 (1899)).

The advertisements do not name, depict, or refer to Petitioner. Nor did they indicate a specific timeframe for the potential sexual assaults, indicate whether the gynecologist is male or female, nor indicate a place of employment or specific location.

This is totally different from West Virginia cases in which courts have found that statements refer to an ascertainable person. In such cases, the statements are not so vague; for instance, they include images of the plaintiff or pointed comments about a single individual. *See Neal*, 159 W. Va. at 562 (printed newspaper ad referred to particular individual "the sheriff," because it "does not refer to sheriffs generally or sheriffs of several area counties, or the like; it is rather pointedly singular in its attack upon an individual whose identity may be ascertainable"); *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 704, 320 S.E.2d 70, 75 (1983) (newspaper article refers to particular plaintiff when it discusses discrimination faced by women miners and is accompanied by a photograph of plaintiff, a woman miner); *Bell v. Nat'l Republican Cong. Comm.*, 187 F. Supp. 2d 605, 609 (S.D.W. Va. 2002) (political pamphlet refers to particular person when it shows a photo of plaintiff beside a political candidate adjacent to text stating the political candidate defended sex offenders as a defense attorney).

Petitioner's erroneous contention that he was the "only licensed, regularly practicing gynecologist in the Weston, West Virginia area"—even if it were true (it is not)—does not cure this referential deficit or create defamation by implication. Further, the terms "area" and "local" presented purposefully vague geographic boundaries, and the past tense language in the advertisements means they are not temporally limited and could refer to gynecologists who were no longer practicing when the advertisements ran (or even to a timeframe before Petitioner began practicing).

Further, the Circuit Court took judicial notice of directory records establishing that there have been as many as 18 practicing gynecologists within less than a 30-minute drive of Weston, West Virginia. *See* Appx. 55-79.

### C. The Advertisements Were Privileged

While the Circuit Court did not reach the issue of privilege in its ruling, this argument was properly raised before the Circuit Court and is thus preserved on appeal. *See argument at* Appx. 250-252; *State v. Grimm*, 165 W. Va. 547, 552 (1980). This is an additional basis on which Petitioner's Complaint should have been dismissed.

There are two classes of privileges available in defamation actions: absolute and qualified. Absolute privilege is limited to those situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives. *Crump v. Beckley Newspapers, Inc.* 173 W.Va. 699, 706 (1983).

"An absolute privileged communication is one in respect of which, by reason of the occasion on which, or the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously." *Id.* "Judicial and quasi-judicial proceedings" enjoy absolute privilege. *Id.*

Whether pre-suit client solicitations are considered judicial and quasi-judicial proceedings and enjoy absolute privilege in a defamation claim appears to be an issue of first impression in West Virginia. The vast majority of the courts who have considered this issue have concluded such advertisements are absolutely privileged from a defamation suit as part of a judicial or quasi-judicial proceeding.

The Restatement (Second) of Torts directly addresses whether pre-suit litigation advertisements enjoy absolute privilege in a defamation case. The Restatement states: "an attorney at law is absolutely privileged to publish defamatory matters concerning another in communications *preliminary* to a proposed judicial proceeding, or in the institution of, or during

the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts at § 586 (emphasis added). The comments to that section indicate that absolute privilege extends to communications made prior to the filing of suit. Restatement (Second) of Torts at § 586 at cmt. e.

Following the guidance of the Restatement, the Supreme Court of Tennessee has concluded that pre-suit advertisements made by attorneys enjoy absolute privilege in a defamation suit. *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell,* 232 S.W.3d 18, 21. The Court of Appeals of Maryland reached a similar result in finding a plaintiff's attorney enjoyed absolute privilege to communicate sound bites to newspapers regarding a potential class action prior to the action being filed. *Norman v. Borison*, 418 Md. 630, 717-18 (Md. 2011). Many other courts have extended the judicial privilege to statements made to the press seeking clients in potential class actions claims. *See, e.g.*, *Killmer, Lane, and Newman v. BKP, Inc.*, 535 P.3d 91, 100 (Colo. 2023); *Helena Chem. Co. v. Uribe,* 281 P.3d 237, 245 (N.M. 2012).

## II. THE CIRCUIT COURT DID NOT MAKE ANY IMPERMISSIBLE EVIDENTIARY DETERMINATIONS

### A. The Circuit Court Was Entitled to Take Judicial Notice of Certain Facts at the Motion to Dismiss Stage

While material extrinsic to the [C]omplaint may not generally be considered under Rule 12(b)(6) without converting a motion to summary judgment under Rule 56, there are exceptions:

> The complaint is deemed to include . . . any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference [in a Complaint], the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.

> . . . [G]enerally, the harm to the plaintiff when a court considers material extrinsic to a complaint is the lack of notice that the material may be considered. Accordingly, where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated. . . . [O]n a motion to dismiss, a court may consider . . . ***matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit***. . . .

*Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008) (quoting *Chambers v. Time Warner, Inc*., 282 F.3d 147, 152–53 (2d Cir. 2002) (emphasis added); *see also Forshey* 222 W.Va. 743, 748, 671 S.E.2d 748, 753 (2008) (quoting *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (C.C.Cir.2007) ("[w]hen ... a complaint's factual allegations are expressly linked to-and admittedly dependent upon-a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)").

Because Petitioner framed his Complaint around Warner's advertisements, they are integral to his Complaint. Indeed, publication of the advertisements is the entire basis for Petitioner's claims: all of Petitioner's claims relate to Respondents' publication of the advertisements. As such, while Petitioner did not attach the advertisements to his Complaint, they nonetheless merge into the pleadings (and may be reviewed on a motion to dismiss).

Further, a circuit court may take judicial notice of an adjudicatory fact if it "is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; [or] (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." W.V.R. Evid. 201(b) (2014). The use of judicial notice is often an expression of common sense: "[W]here a fact is well-known by all reasonably intelligent people in the community, or its existence is so easily determinable with certainty from unimpeachable

sources, it would be not good sense to require formal proof." *In re S.C.,* 248 W.Va. 628, 889 S.E.2d 710 (2023) (quoting *Harper v. Killion,* 345 S.W.2d 309, 311 (Tex.Civ.App.), 162 Tex. 481, 348 S.W.2d 521 (1961); *see also* 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004) (a court may consider matters of public record); *Katrib v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 247 W. Va. 763, 769, 885 S.E.2d 894, 900 (2023) (noting it is proper in deciding a motion under Rule 12(b)(6) to take judicial notice of matters of public record).

Thus, it was appropriate for the Circuit Court to take judicial notice of public records establishing that Plaintiff is not the only gynecologist listed in the Weston, West Virginia area, as well as facts generally known within its jurisdiction, including that local citizens will travel for medical services to nearby cities, including Morgantown, Clarksburg/Bridgeport, and Buckhannon, West Virginia. *See* Appx. 303; Brief at 9-10.

### B. The Circuit Court Correctly Evaluated the Advertisements as a Matter of Law

Insofar as Petitioner alleges that the Circuit Court erred by determining the advertisements: (1) contained a question rather than a statement; (2) were comparable to an attorney advertisement for motor vehicle accidents; (3) were not limited to an area that would identify Petitioner; (4) were not limited to a timeframe; and (5) did not result in a false statement or show a reckless disregard for the truth (*see* Brief at 9-10), these are legal holdings. Based on the Circuit Court's review of the advertisements themselves, it held that the advertisements are not legally capable of being defamatory.

Petitioner provides no authority in support of his contention that a question can be defamatory. The cases cited above, at Section I.A, indicate that it cannot. The advertisements are not substantively different to an advertisement for motor vehicle accidents. Contrary to Petitioner's

assertion, the advertisements are *not* specific to Petitioner—as is plain from the face of the advertisements. The Court was entitled to conclude that the terms "area" or "local" are not specific enough to identify Petitioner (particularly as he is only one of many gynecologists practicing locally) as a matter of law.

That the advertisements are not limited by time is also beyond reasonable dispute. Petitioner argues that, because civil claims are subject to a two-year statute of limitations, the advertisements are effectively limited to this time frame. But Petitioner provides no authority in support of this interpretation, and the Circuit Court declined to follow it. It also conflicts with Petitioner's characterization of the advertisements—made in the same paragraph—as containing *criminal felony* accusations.[3] Finally, the Circuit Court did not make a finding that the statements were true, but that they were not provably false. For the same reason, the statements simply could not, as a matter of law, have been made with reckless disregard for the truth.

### C. The Court Did Not Improperly Consider "Extrinsic Evidence"

As described above, the Circuit Court took judicial notice of the advertisements and public records demonstrating Petitioner was not the only gynecologist practicing in the area. This is an exception to the general rule that only matters contained in the pleading can be considered. With respect to copies of the advertisements, they merge into the pleading and can (and should) be evaluated accordingly. This is necessary to avoid the very issue present here: Petitioner's mischaracterization of the substance of the advertisements in his Complaint, which is easily contradicted by a review of the publications themselves.

As to the public records showing a list of other gynecologists practicing in the area, the Circuit Court did not actually rely on these records in its written ruling (*see* Appx. 300-304), but

[3] In West Virginia, there is no statute of limitation for criminal prosecution of felony sex offenses.

in any case, "it is 'clearly proper' in deciding a motion to dismiss under Rules 12(b)(1) and (6) 'to take judicial notice of matters of public record.'" *Katrib v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 247 W. Va. 763, 769 (2023).

## III. THE CIRCUIT COURT PROPERLY HELD THAT PETITIONER CANNOT ESTABLISH THE ESSENTIAL ELEMENTS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To establish a claim for intentional infliction of emotional distress, a plaintiff must allege facts supporting the following elements:

> (1) that the defendants conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Syl. pt. 3, *Travis v. Alcon Laboratories, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998). Here, the first and second elements are lacking.

### A. The Advertisements Were Not So Extreme and Outrageous as to Exceed the Bounds of Decency

In *Travis,* the Court noted that the outrageous conduct must be more than "unreasonable, unkind, or unfair; it must truly offend community notions of acceptable conduct." *Travis 202 W.Va. 369, 375.* When viewing the publications at issue, a reasonable person would not find the advertisement to be extreme or outrageous in any manner.

Rather, a reasonable person would find the advertisements commonplace and understand that attorneys litigate various types of cases, some of which cover serious and unpleasant issues. Advertising for legal consultation regarding potential unpleasant legal litigation does not amount

to outrageous content. Further, the general population relies on a free media to investigate and report on societal wrongdoings.

Moreover, the advertisements could not be extreme because Petitioner was not identified or identifiable. Far from exceeding the bounds of decency, these advertisements contain inquiries to potential readers who may have experienced sexual harassment or be witnesses without any time limitation, rather than accusations against Petitioner. That Petitioner voluntarily linked himself to the advertisements by notifying his employer is irrelevant given that the advertisements themselves did not identify or refer to Petitioner.

**B. Petitioner Failed to Allege the Requisite Intent**

As above, to proceed with a claim for intentional infliction of emotional distress a plaintiff must establish either actual intent or—at the very least—recklessness. Again, these were advertisements that included the name of a law firm, a phone number, and an invitation to call for a case review or click a link to learn more. Indeed, as Petitioner himself described them, the advertisements were simply "eliciting pursuit of a civil sexual abuse claims." Appx. 101 (Complaint).

Warner did *not* identify Petitioner (who was not ascertainable because he was not the only gynecologist practicing in the Weston, West Virginia area). Any harm suffered by Petitioner was neither intentional nor the result of recklessness on the part of Petitioner, as the Circuit Court correctly concluded.

In this respect, the Circuit Court did not err by stating that the collateral result of every lawsuit is emotional distress. Warner understands the Circuit Court to have simply been making the point that by advertising for clients, the result may be that third parties will file sexual assault lawsuits against Petitioner (or other gynecologists). The existence of those lawsuits would not

support a claim for emotional distress.

In any case, Petitioner does not allege this. He alleges that publication of the advertisements themselves caused him emotional distress. However, as Petitioner was not identified and could not reasonably have been identified by the advertisements, the Circuit Court correctly concluded that Petitioner cannot sustain a claim for intentional infliction of emotional distress.

## IV. THE CIRCUIT COURT DID NOT ADD A THIRD PARTY TO THE CASE

The final ruling identifies both The Weston Democrat and The Record Delta as two separate trade names, or "d/b/a's of Defendant Clarksburg Publishing Company. It is true that Petitioner's Amended Complaint only identified The Weston Democrat as Clarksburg Publishing Company's d/b/a, however this is the same entity. *See Lawyer Disciplinary Bd. v. Losch*, 219 W. Va. 316, 319 (2006) ("It appears well settled that the use of a fictitious or assumed business name does not create a separate legal entity ... [and that] [t]he designation [d/b/a] "...is merely descriptive of the person or corporation who does business under some other name").

The Court has not "added a party" as Petitioner misleadingly asserts. It has simply added both assumed names for Clarksburg Publishing Company. The Court's addition is also accurate, as the advertisements were published in both papers.

Moreover, the Circuit Court did not "rely on characteristics of [The Record Delta] as a basis to dismiss the complaint." The Circuit Court took judicial notice of the fact that the advertisements were published in both papers, to determine the geographical reach of the advertisements. This was entirely proper, as discussed above.

Thus, to the extent the Circuit Court erred by adding The Record Delta as an additional assumed name for Defendant Clarksburg Publishing Company, which was not included in the original caption to Petitioner's Amended Complaint, this is harmless error. *See* W.Va. R. Civ. P.

61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"); *Talkington v. Barnhart*, 164 W. Va. 488, 490 (1980) (defect will be deemed harmless error unless other party can show actual prejudice affecting substantial rights).

## CONCLUSION

For the foregoing reasons, this Court should affirm the appealed order and deny Petitioner's appeal.

Respectfully submitted,

**GORDON REES SCULLY MANSUKHANI, LLP**

By: */s/ Brant T. Miller*

Brant Miller, Esquire
WV I.D. No. 13822
btmiller@grsm.com
Richard E. Griffith, Esquire
WV I.D. No. 14254
rgriffith@grsm.com
707 Grant Street, Suite 3800
Pittsburgh, PA 15219
T: (412) 588-7400
F: (412) 347-5461

Robert P. Fitzsimmons Esquire
W.V. I.D. No. 1212
bob@fitzsimmonsfirm.com
1609 Warwood Ave.
Wheeling, WV 26003

*Counsel for Respondent Warner Offices PLLC*

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**WARNER LAW OFFICES PLLC, and CLARKSBURGH PUBLISHING COMPANY, d/b/a the Weston Democrat, a West Virginia Corporation,**

**RESPONDENTS.**

## CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2024, a true copy of the foregoing **Respondent Warner Office PLLC's Response Brief** was served upon all counsel of record by the court's electronic notifications system as follows:

Patrick Crowe, Esquire
Crow Law, LLC
256 High Street
Morgantown, WV 26505
pcrowe@crowebarlaw.com
*Counsel for Plaintiff*

Trevor K. Taylor, Esq.
330 Scott Ave.
Morgantown, WV 26508
ttaylor@taylorlawofficewv.com
*Co-Counsel for Respondent The Weston Democrat*

Rachel A. Jarvis, Esq.
324 Hewes Ave.
Clarksburg, WV 26301
jarvislawgroup@gmail.com
*Co-Counsel for Respondent The Weston Democrat*

**GORDON REES SCULLY MANSUKHANI, LLP**

*/s/ Brant T. Miller, Esquire*
Brant T. Miller, Esquire
WV I.D. No. 13822
btmiller@grsm.com

Richard E. Griffith, Esquire
WV I.D. No. 14254
rgriffith@grsm.com
707 Grant Street, Suite 3800
Pittsburgh, PA 15219
T: (412) 588-7400
F: (412) 347-5461

Robert P. Fitzsimmons Esquire
W.V. I.D. No. 1212
bob@fitzsimmonsfirm.com
1609 Warwood Ave.
Wheeling, WV 26003

*Counsel for Respondent Warner Offices PLLC*