KIND OF PROCEEDING AND RULINGS IN CIRCUIT COURT

On February 13, 2003, petitioner Julie K. McCammon, M.D., instituted the above-styled action by filing a complaint *pro se* against respondents the West Virginia Trial Lawyers Association and its then-President, William L. Frame. *See* Addendum at 1 (A1).

The Honorable Thomas A. Bedell, Judge of the Fifteenth Judicial Circuit, was initially assigned to preside over the action. Respondents sought his disqualification based on his wife having been a patient of petitioner nine years earlier in connection with a delivery. Judge Bedell opposed his disqualification, indicating that his impartiality was not affected, but the West Virginia Supreme Court disqualified him.

Subsequently, on May 7, 2003, the Honorable Booker T. Stephens, Judge of the Eighth Judicial Circuit, was assigned to the above-styled case in the Fifteenth Judicial Circuit.

Judge Stephens' wife, Gloria M. Stephens, is an attorney and a member of the defendant-respondent West Virginia Trial Lawyers Association. Due to the appearance of partiality and conflict of interest, petitioner moved for his recusal based on Canon 3(E)(1) of the West Virginia code of Judicial Conduct on September 16, 2003. (A6) Petitioner also sought recusal based on public records showing the receipt by Judge Stephens of campaign contributions from at least twelve (12) members of the respondent West Virginia Trial Lawyers Association.

By letter dated September 19, 2003, Judge Stephens sought advice on petitioner's motion from West Virginia Chief Justice Larry Starcher. (A9) Judge Stephens admitted that his attorney wife is a member of the defendant-respondent West Virginia Trial Lawyers Association. However, nearly all of his letter is devoted to whether he should recuse himself based on the campaign contributions.

By administrative order dated September 23, 2003, Chief Justice Starcher ordered against

disqualification and that Judge Stephens "be, and he hereby is, directed to continue to preside in the above-referenced case." (A11)

Meanwhile, on July 18, 2003, before plaintiff Julie McCammon obtained any meaningful discovery from defendants, they moved for summary judgment. (Docket Entry #87) They argued that, as a matter of law, they could not be liable to plaintiff because they did not owe a duty to her. Misreading plaintiff's complaint as based on negligence rather than intentional tort, defendants refused to comply with plaintiff's discovery requests and demanded dismissal of the action.

On November 25, 2003, Judge Stephens held his final hearing on defendants' summary judgment motion. Without defendants ever providing petitioner any meaningful discovery, the Judge ruled that "discovery in this case would unlikely produce facts necessary to defeat the motion for summary judgment" and that "the motion to stay discovery is granted." Nov. 25, 2003, Hearing Tr. at 7. Plaintiff's objection was reflected by the hearing transcript.

Judge Stephens granted their motion for summary judgment and issued his decision on December 4, 2003. (Attachment to Docketing Statement) He misconstrued the complaint as one in negligence, rather than intentional tort, as defendants urged. The decision addresses a negligence cause of action that was never filed, and fails to address the intentional tort that was alleged.

By amended order dated February 17, 2004, Judge Stephens extended plaintiff's deadline to appeal until May 4, 2004. (A19) Plaintiff hereby files this timely appeal.

STATEMENT OF FACTS

Defendant West Virginia Trial Lawyers Association ("Association") is a trade association, analogous to thousands of trade organizations in many other industries. Defendant Association, through agreement among its members, advances their interests and pursues a common agenda. Defendant Association provides information and even training to its members in how to file malpractice actions. Defendant Association formed a task force on malpractice to advance its goals. Like any trade association, the West Virginia Trial Lawyers Association is subject to legal process and accountable in court for any harm that it causes.

In West Virginia between the years of 1993-2003, there has been quite a bit of avoidable harm. In information obtained from the West Virginia medical board (not from the inadequate and curtailed discovery here), there were 941 dismissals and 291 physician verdicts, totaling over 1232 unjustified actions that required enormous expense to defend. (Docket Entry #95) The attorneys who brought these actions were nearly entirely members of the Defendant West Virginia Trial Lawyers Association. Many undoubtedly acted on information and training provided by the Association in the form of continuing legal education courses. Some were likely influenced by the task force organized by the Association with substantial publicity. The wasteful expense caused by this vast number of frivolous malpractice actions totals $50 million or more, assuming an average cost of defense of only $40,000. This cost, the harm, was borne by plaintiff-appellant Julie K. McCammon, M.D., and other good West Virginian physicians.

For 15 years plaintiff Julie McCammon has served the people of West Virginia by delivering their babies at all hours of the day and night. Practicing in the field of obstetrics and gynecology (OB/GYN), she has an excellent record of providing high quality medical care to the

patients in her community of Clarksburg and surrounding areas. She delivered the child of the first judge assigned to this case, Judge Bedell. She provides care in an underserved area that does not attract obstetricians easily. She is on call around the clock, available to travel to the hospital and deliver a baby at any time of day or night. However, her financial ability to continue practicing in West Virginia has been jeopardized by litigation tactics of the members of defendant West Virginia Trial Lawyers Association, who act in part on the advice and training of the Association.

Plaintiff McCammon has personally bore the brunt of not one, but two frivolous malpractice actions. In *Shelley S. McDougal and David L. McDougal v. Julie K. McCammon, M.D.*, Civil Action No. 92-C-513-1, Circuit Court of Harrison County, West Virgina, defendant West Virginia Trial Lawyers Association members E. William Harvit, Bradley R. Oldaker, Sterl F. Shinaberry, and Frank Venezia prosecuted a baseless action against Dr. Julie McCammon. Dr. McCammon prevailed, but at a substantial expense. The other 1231 meritless malpractice actions caused similar harm to others. Likewise, a second lawsuit against Dr. McCammon was dismissed in *Brooke Danielle Lough v. Julie K. McCammon, M.D. and United Hospital Center*, Civil Action No. 00-C-287-2, Circuit Court of Harrison County, West Virginia.

Twice victimized by baseless lawsuits filed against her personally, plaintiff McCammon has suffered increases in malpractice coverage by virtue of the numerous frivolous actions against her colleagues. Her complaint alleged that defendants “have engaged in the institution of frivolous, non-meritorious, and malicious lawsuits” and have acted in a “civil conspiracy” that has directly and proximately caused harm to plaintiff.

By fomenting malpractice lawsuits, the defendant Association has driven up

McCammon's malpractice insurance rates to unconscionable levels. In 2003, her premiums increased to $115,000 a year, and cost of her tail coverage if she were forced to close her practice rose to $240,000. (A5) This is despite the fact that there has never been a successful malpractice claim ever filed against her. She is paying for the likelihood of expense for frivolous malpractice claims against her and other physicians. The defendant Association, in fostering, promoting, and training attorneys to bring these cases, proximately caused this financial injury to plaintiff McCammon.

In the proceeding below, plaintiff McCammon made a small number of reasonable discovery requests to enable her to prove the alleged civil conspiracy and malicious prosecution of frivolous actions. Specifically, she requested documents including the following:

(1) "All minutes of meetings and documents pertaining to the West Virginia Trial Lawyers Association task force (executive committee plus medical malpractice task force)."

(2) "All documents and pleadings pertaining to medical malpractice cases that have been filed by William L. Frame or in which Mr. Frame has participated (including medical malpractice claims filed by his firm) that have been dismissed or resulted in a defendant verdict at trial."

(3) "All continuing law education courses sponsored by the West Virginia Trial Lawyers Association since 1988 re: medical malpractice litigation (send all program syllabi and all printed information)."

(4) "Copies of all information on the West Virginia Trial Lawyers Association website including all information obtainable through restricted access."

(5) "All fliers/information sent to the legislature from the West Virginia Trial Lawyers Association with regard to medical malpractice/medical malpractice legislation since 1988."

(Docket Entries ##10, 62, 73) These initial requests were entirely reasonable and would have enabled plaintiff McCammon to build her case, assemble the requisite proof, and serve additional requests.

Defendants, however, refused to comply with several of these requests, provided incomplete information with respect to one, and implausibly claimed that they had no responsive document to others. (filed with Docket Entry #95; A4) Specifically, defendants refused to comply at all with requests numbered (2) and (4) above, such that plaintiff McCammon was even denied access to the defendant Association's own website. That denial rendered it impossible for plaintiff McCammon to prove the existence of a civil conspiracy, as she could not even obtain discovery of what the co-conspirators were saying to each other about malpractice litigation strategies. Defendants then moved for summary judgment as a way of avoiding discovery entirely.

On November 25, 2003, the court below held a hearing. Counsel for defendants made the first argument: "I think discovery ought to wait until the court rules on a summary judgment. That's all I have." Hearing Tr. at 2 (A14). In response plaintiff McCammon stated that

"I have received essentially no discovery in this case. I have been forced to file motions to compel times two. The first motion was filed in July, the second motion having been filed in October. I have received a mere three items from the Defendant. Other - they have not complied with any of the asked - for discovery, including written discovery. I

have been denied depositions. I feel at this time the motion to stay these discovery should be denied and that I have been denied my rights per rules of the rules of civil procedure to and discovery and motions to compel have yet to be addressed."

(A15) The court asked defendants' counsel if he wished to reply, and he simply said, "No, your Honor." *Id.* Plaintiff then requested extension of discovery to obtain compliance with her requests. (A15-16)

On December 3, 2003, while preserving the objections and exceptions of plaintiff McCammon, the circuit court entered an order granting defendants' motion to stay discovery. (A17) This precluded plaintiff McCammon from obtaining compliance with her discovery requests, including essential material relating to the task force on malpractice organized by the defendant Association and information on its website.

On December 4, 2003, the court below granted defendants' motion for summary judgment "as a matter of law." (Attachment to Docketing Statement) This was a final order, from which plaintiff appeals here. By amended order dated February 17, 2004, the court below extended plaintiff's deadline to appeal until May 4, 2004. (A19)

ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND HOW THEY WERE DECIDED BELOW

1. The presiding judge below should have been disqualified from deciding this case. It was error for Judge Stephens, upon instructions by Chief Justice Starcher, to remain on this case after the disclosure and admission that Judge Stephens' spouse was a member of the defendant West Virginia Trial Lawyers Association. The appearance of partiality when married to a spouse affiliated with defendant is simply too strong to comport with Canon 3(E)(1) of the West Virginia Code of Judicial Conduct and constitutional due process.

Plaintiff McCammon is entitled to adjudication free from any appearance of partiality.

2. The court below, at defendants' urging, misconstrued plaintiff's action as one in negligence when in fact it is an intentional tort. Plaintiff McCammon alleged malicious prosecution and civil conspiracy, neither of which require proof of any duty or breach of duty. Yet the court below dismissed plaintiff's complaint for want of a duty owed by defendants to her. This was reversible error.

3. The court below curtailed discovery prematurely, contravening numerous precedents of this Court. Plaintiff McCammon was prevented from obtaining compliance with basic discovery requests, such as a mere listing of the lawsuits filed by defendant William L. Frame "that have been dismissed or resulted in a defendant verdict at trial." She scheduled and rescheduled her deposition of him at his convenience, and then he moved for a stay of discovery and never complied. Though basic to plaintiff's action for civil conspiracy and malicious prosecution, defendant simply refused to produce this material and procured a premature grant of summary judgment instead. Plaintiff McCammon never received documents pertaining to her discovery request numbers 2 through 7 of her First Request for Production of Documents on defendants, discovery request numbers 2, 5 and 6 of her Second Request for Production of Documents on defendants, and discovery request numbers 1 and 2 of her Third Request for Production of Documents on defendants. It was reversible error for the court below to grant summary judgment prior to the completion of discovery.

POINTS AND AUTHORITIES

D. THE TRIAL JUDGE SHOULD HAVE BEEN DISQUALIFIED BECAUSE HIS WIFE WAS A MEMBER OF THE DEFENDANT ASSOCIATION.

Ethical standards require that: "a judge is disqualified whenever the judge's impartiality might reasonably be questioned ...." So states the official Comments to Canon 3(E)(1) of the West Virginia Code of Judicial Conduct. "The underlying rationale for requiring disqualification is based on principles of due process." *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 173, 444 S.E.2d 47, 51 (1994). This has been emphasized again and again by this Court and by the United States Supreme Court. "Due process requires that the appearance of justice be satisfied." *Louk v. Haynes*, 159 W. Va. 482, 499, 223 S.E.2d 780, 791 (1976). "'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and **no man is permitted to try cases where he has an interest in the outcome**. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a *possible temptation* to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *In Re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), emphasis added).

Where, as here, the judge's spouse is a member of the defendant, the impartiality of the judge might "reasonably be questioned" and recusal is warranted. Judge Stephens conceded that his attorney wife is a member of the defendant Association. (Compare A6, ¶ 2 & A9, ¶ 2) There is nothing improper about her activity, but it does compel disqualification of Judge

Stephens in a lawsuit brought against that same entity. Judge Stephens is undoubtedly a man of great integrity, but neither he nor the plaintiff-appellant should be burdened by this appearance of impartiality. The decision below should be vacated and the case remanded to an impartial replacement.

At a minimum, protracted litigation in this action could cause the defendant Association to request or require contributions by members to defray expenses or establish a reserve against a possible judgment. Most spouses share financial income and obligations, and Judge Stephens himself would be directly affected by any request or demands for payments by the Association. This would likely be only a small financial burden. But financial burdens, no matter how slight, require disqualification to avoid the appearance of impropriety. One federal appellate court has observed:

> Congress has, as noted, provided that **a known financial interest in a party, no matter how small, is a disqualifying conflict of interest and one that cannot even be waived by the parties**. This is a bright-line test that is, as to actual partiality, more than a little overbroad. One share of stock in a large corporation cannot induce a corrupt decision. However, a bright-line test as to equity interests in parties, particularly stock, avoids many difficult line-drawing decisions and is in that sense actually helpful to judges. As Congress has observed, in the absence of bright-line rules, judges are forced to decide the extent of their financial interest at their 'peril,' leaving them open 'to a criticism by others who necessarily had the benefit of hind sight ... [and] weakening public confidence in the judicial system.' H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352. A bright-line rule also avoids mistaken but sensationalist accusations of corruption

> that are wrong -- even dead wrong -- but may further shake public confidence in the judiciary. *Id.* We are fully confident of our observation that the judge had no real financial stake in the outcome. However, we are equally confident that Congress was right in apprehending that a headline (accurately) stating that the judge had entered a $92 million judgment to be shared by a corporation in which he owned $250,000 of stock would damage public confidence in the judiciary.

Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 128-29 (2d Cir. 2003). Though this and other federal precedents apply the federal statute 28 U.S.C. § 455, the underlying principles for disqualification are the same. West Virginia's ethical standards are no less stringent than the federal ones.

Canon 3(E)(1)(d)(i) expressly mandates disqualification of Judge Stephens from this particular case. Where, as here, "the judge or the judge's spouse ... (i) is a party to the proceeding, or an officer, director or trustee, of a party," disqualification is warranted. Judge Stephen's wife, by virtue of her membership in the defendant Association, is potentially a member of the very civil conspiracy alleged in the action. It is conceivable that she could even be called as a material witness, depending on what would be uncovered during a full discovery. That potentiality triggers triggering disqualification of Judge Stephens also. *See* Canon 3(E)(1)(d)(iv). The U.S. Supreme Court has reiterated: "The goal ... is to avoid even the appearance of partiality.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quotations omitted) (citing the federal statute that applies a standard similar to Canon 3(E)).

In addition, there is Judge Stephens' wife's own economic interest in this litigation, which militates in favor of disqualification. As a member of the defendant-respondent West Virginia

Trial Lawyers Association, a decision in favor of plaintiff-appellant could cause Judge Stephens' wife to incur a financial expense or perhaps even a limitation on her economic opportunities. That is more than enough to trigger disqualification of her husband under Canon 3(E)(1)(d)(iv). That provision requires disqualification if the spouse "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding." *See, e.g.*, *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 444 S.E.2d 47 (1994) (holding that where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the parties, recusal is warranted).

The conflicting interests by virtue of the Judge's marriage is what creates the compelling need for disqualification. "The circumstances here are such that an appearance of impropriety is created by the close nature of the marriage relationship. A husband and wife generally conduct their personal and financial affairs as a partnership. In addition to living together, a husband and wife are also perceived to share confidences regarding their personal lives and employment situations. Generally, the public views married people as 'a couple,' as 'a partnership,' and as participants in a relationship more intimate than any other kind of relationship between individuals. In our view the existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification, even though no other facts call into question the judge's impartiality." *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984). This need to prevent the appearance of impropriety applies with even greater force at bar. *See also Holloway v. Hopper*, 852 P.2d 711 (Okla. 1993) (requiring disqualification of a judge because a party sought and received legal advice

from spouse even though neither judge's wife or her law firm entered an appearance in case). The appearance of the potential for Judge Stephens' wife to give him advice during the pendency of the case is simply too great to allow the conflict.

Other jurisdictions are unanimous on this need to avoid even the appearance of partiality. In *Dietrick*, this Court surveyed the numerous precedents and emphasized their significance and force of law here. *See Dietrick*, 191 W.Va. 169, 169-75, 444 S.E.2d 47, 47-53 (1994). "Therefore, the possibility that the facts alleged may give rise to the appearance of impropriety must always receive the highest consideration in ruling on a motion for disqualification. It is of paramount importance that our judges meticulously avoid any appearance of partiality, not only to secure the confidence of litigants before their courts, but to retain public respect." 191 W.Va. at 175, 444 S.E.2d at 53 (citing *Smith v. Beckman*, 683 P.2d at 1216, and *People v. Botham*, 629 P.2d 589 (Colo. 1981), quotations omitted).

In *Dietrick*, this Court rejected a challenge to a search warrant based on a potential appearance of impartiality, but only because the elements present here were lacking there. The *Dietrick* Court took the opportunity to emphasize the need for the utmost impartiality. But there the spouse of the magistrate had no financial interest in whether the search warrant was executed by the magistrate. There is precisely such a financial interest by the judge's wife here. In *Dietrick*, the spouse of the magistrate was not a party, or member of the party, in contrast to the situation here. This Court made clear in *Dietrick* that it would not allow the appearance of partiality on facts presented here.

There is no "necessity" that would justify or excuse any taint of partiality in the proceedings below. "The application of the rule permitting a disqualified judge to act

where no other judge is available can be justified only by strict and imperious necessity, since the rule is an exception to the greater rule of disqualification resting on sound public policy. Under the doctrine, a disqualified judge may sit where no decision is possible if he does not sit, as in the case of an appellate court where there is no method provided by constitution or statute to have another person sit as judge of the court if a member is disqualified." 46 Am. Jur. 2d Judges § 90 (1969) (footnotes omitted). *See also City of Huntsville v. Biles*, 489 So. 2d 509, 514-15 (Ala. 1985).

In a recusal by Justice Robin Jean Davis in *John F. Rist, III v. Honorable Cecil H. Underwood, Governor of West Virginia, and Robert S. Kiss*, No. 992497 (Sept. 27, 1999), she recused herself for reasons less compelling that those presented by plaintiff-appellant for recusal below:

> "With due consideration for the West Virginia Code of Judicial Conduct and the integrity of the Supreme Court of Appeals of West Virginia, I feel obligated to recuse myself from the deliberation and/or decision of this matter. The reasons underlying my voluntary disqualification are two-fold. First, I believe it is important for me to abide by the rules governing my conduct as a member of the judiciary of this State. "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible

symbol of government under the rule of law. . . ." W. Va. Code of Judicial Conduct, Preamble. As a "highly visible symbol," it is imperative for a judge to "respect and comply with the law[. He/she] shall avoid impropriety and the appearance of impropriety in all of [his/her] activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." W. Va. Code of Judicial Conduct, Canon 2.A. Additionally, "[a] judge should participate in establishing, maintaining, and enforcing high standards of conduct, and *shall personally observe those standards* so that the integrity and independence of the judiciary will be preserved. . . ." W. Va. Code of Judicial Conduct, Canon 1.A (emphasis added).

As a Justice of the West Virginia Supreme Court, I am unequivocally bound by the Canons of Judicial Conduct and must conduct myself accordingly. In my current position as a member of this Court, and in light of my present campaign to retain this post, I am deeply concerned by the appearance of impropriety that my participation in the decision of the instant controversy would doubtless create. Because two seats for Justice of the Supreme Court of Appeals of West Virginia will be filled by the statewide elections in the year 2000, Mr. Kiss, or anyone else appointed by Governor Underwood to the remainder of retired Justice Workman's unexpired term, would quite likely be my direct opponent in the upcoming contest. **It goes without saying, then, that my participation in this matter would most certainly be viewed with suspicion and create the appearance of impropriety. Whenever such a doubt arises, the Code of Judicial**

> **Conduct explicitly requires that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned** . . . ." W. Va. Code of Judicial Conduct, Canon 3.E.1. Thus, it is with the utmost respect for the tenets governing the decorum of the judiciary that I tender this notice of my voluntary disqualification from this case. ..."

Id. (emphasis added). Likewise, "[i]t goes without saying" that the resolution of this matter by the spouse of a member of the defendant Association "would most certainly be viewed with suspicion." Disqualification of the presiding judge is warranted below.

Earlier in this proceeding, Chief Justice Starcher responded to an express letter request by Judge Stephens concerning plaintiff-appellant's request for disqualification. But in neither the request nor the response was the issue of the position of Justice Stephens' wife with the defendant Association addressed or resolved. Instead, Justice Stephens' request for guidance focused merely on his receipt of campaign contributions by members of the defendant Association. Chief Justice Starcher did not benefit from full briefing and argument on the appearance of partiality created by the marital relationship. Plaintiff-appellant Julie McCammon preserved her objection by seeking reconsideration by Chief Justice Starcher, but there was no response to it whatsoever. This issue of the appearance of impartiality based on a spousal relationship has remained unresolved in this action, and necessitates full review by this Court. Resolution by granting this Petition is warranted.

It matters not whether plaintiff-appellant will or should prevail on the underlying merits of her claims. Due Process and an unbroken line of precedents by the United

States Supreme Court, this Court and other jurisdictions entitle plaintiff-appellant to an adjudication free from any appearance of impartiality. She has a right to vacatur of the decision below and a remand to a different judge.

B. THE DECISION BELOW MUST BE REVERSED BECAUSE IT MISCONSTRUED THE COMPLAINT.

The decision below held, as a matter of law, that the defendant West Virginia Trial Lawyers' Association cannot commit a tort against plaintiff because it owes no duty to plaintiff. That is reversible error. Plaintiff-appellant alleged an intentional tort, not one in negligence. No duty is required for defendants to be liable to plaintiff for malicious actions or civil conspiracy. It was simply incorrect for the court below to dismiss the complaint because "no action for negligence can be maintained in the absence of a legal duty" (Order attached to Docketing Statement, p. 2, ¶ 1) and, again, "defendants have no legal duty to the plaintiff which would serve as a basis for the plaintiff's claim against them" (p. 4, ¶ 9). No legal duty is required to prove an intentional tort.

Specifically, plaintiff alleged that defendants "engaged in the institution of frivolous, non-meritorious, and malicious lawsuits against physicians in the State of West Virginia resulting in the unwarranted and stifling increase in the cost of professional liability insurance for the plaintiff, Julie McCammon, M.D." Complaint, ¶ VI (A2). Plaintiff also alleged that defendants engaged in a civil conspiracy that caused her harm. These are plainly intentional torts for which no pre-existing duty is required, as explained below.

The tort of filing malicious lawsuits, akin to "malicious prosecution," requires proof of the following elements: "(1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff."

McCammon v. Oldaker, 205 W. Va. 24, 29, 516 S.E.2d 38, 43 (1999). One need only review court dockets to confirm that numerous lawsuits are filed against physicians without reasonable or probable cause and are dismissed in favor of the physicians. Plaintiff McCammon herself has been personally and repeatedly victimized by this, as reflected in the *McCammon v. Oldaker* case itself. But she has also suffered harm from the frivolous malpractice actions filed against her colleagues, which have driven up the premiums of her malpractice insurance. (A5) The baseless malpractice actions cause physicians and their insurance carriers to incur substantial expenses defending against them, increasing premiums as a direct result. The extent to which these actions are malicious is for the jury to decide, not for resolution based on the pleadings. The court below erred in dismissing the complaint as a matter of law.

This tort is based on intent, not negligence. But the court below never addressed the alleged intentional tort. Instead, it applied the rules applicable to causes of action in negligence. "To be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected too [sic] produce an injury" (Order attached to Docketing Statement, p. 3, ¶ 3). Plaintiffs did not allege any negligence. This analysis is completely misplaced. The decision below must be reversed.

It matters not that defendants themselves have not sued plaintiff in their own name. She has alleged a civil conspiracy by defendants with those who have sued her and her colleagues. The West Virginia Trial Lawyers Association and its president, William L. Frame, have been devoted to promoting the interests of their members to bring malpractice actions, including lawsuits against plaintiff McCammon and her fellow physicians. Under civil conspiracy, the defendants are fully responsible for the actions of their co-conspirators. In this case the co-

conspirators are attorneys who have filed malicious actions against plaintiff McCammon and others. "[T]he civil conspiracy theory ... hold[s] that one civil conspirator is responsible for the acts of the other co-conspirator." *Politino v. Azzon, Inc.*, 212 W. Va. 200, 204, 569 S.E.2d 447, 451 (2002). The tactics that defendants have pursued, the information they disseminate, and the agreements they forge are all relevant to plaintiff McCammon's action in civil conspiracy against them. Her claim does not fail as a matter of law.

"In effect, where the purpose of the combination and competition is a malicious purpose, that is, to destroy another's trade or business, as opposed to simply competing with the other, then a civil conspiracy may legally be found." *Id.* This Court has emphasized that civil conspiracy is a valid cause of action in this state, and it was error for the court below to dismiss plaintiff's complaint as a matter of law. In a decision by this Court that affirmed a $7.85 million award, this Court reiterated that "[t]he law of this State recognizes a cause of action sounding in civil conspiracy. At its most fundamental level, a 'civil conspiracy' is 'a combination to commit a tort.'" *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (1998) (quoting *State ex rel. Myers v. Wood*, 154 W. Va. 431, 442, 175 S.E.2d 637, 645 (1970) (citing 15A C.J.S. *Conspiracy* § 1 (1967)). This Court has clarified that "where persons combine not for the purpose of protecting or advancing their own legitimate interests but for the purpose of injuring another in his trade or business, they are guilty of an unlawful conspiracy which, when executed and when damage results therefrom, is actionable ...." *Politino v. Azzon, Inc.*, 212 W. Va. at 204 (quoting 15A C.J.S. Conspiracy § 10(1)). Plaintiff alleged that defendants "have, in combination, acted maliciously and in civil conspiracy, injuring the plaintiff, Julie K. McCammon, M.D., in her profession." Comp. ¶ VII (A2). This is entirely

sufficient as a matter of law and should not have been dismissed prior to the completion of discovery.

Plaintiff need not allege that the agreements among members of the Association are themselves unlawful. "[A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff." *Dixon v. American Indus. Leasing Co.*, 162 W. Va. 832, 834, 253 S.E.2d 150, 152 (1979) (citing 15A C.J.S. *Conspiracy* § 1(1) and 16 *Am. Jur. 2d Conspiracy* § 44).

In *Kessel*, *supra*, this Court held that "individuals who have conspired with one another to orchestrate and/or carry out a *fraudulent* plan or scheme can be held liable for their conduct." 204 W. Va. at 129, 511 S.E.2d at 754 (citing 37 *Am. Jur. 2d Fraud and Deceit* § 301, at 397 (1968), emphasis in original). Put another way, "one who participates in a fraud is of course guilty of fraud, and one who, with knowledge of the facts, assists another in the perpetration of a fraud is equally guilty." 37 *Am. Jur. 2d Fraud and Deceit* § 305, at 403 & 405 (1968) (citing *Lincoln v. Claflin*, 74 U.S. 132, 7 Wall. 132, 19 L. Ed. 106 (1868)). *See also Frazer v. Brewer*, 52 W. Va. 306, 310, 43 S.E. 110, 111 (1902) ("He who adopts the results adopts also the means by which they are brought about."). The defendant West Virginia Trial Lawyers Association relies on lawsuits by its members as its *raison d'etre*, and would plainly benefit from overzealous litigation. The Association fits squarely within the properly alleged cause of action for civil conspiracy.

There is nothing unusual about suing trade associations for civil conspiracy. Indeed, this

has been a staple of attorneys' own repertoire for some time. *See, e.g.*, *In re North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. 1087, 1096-97 (D.N.D. 1990) (finding a civil conspiracy among members of a trade association to suppress information on asbestos risks). There the plaintiffs alleged that they were injured due to the suppression of information about the health risks of asbestos, and the court agreed that was a proper basis for a civil conspiracy count. *See id.* at 1095. Similarly, plaintiff-appellant here alleged that she was injured due to the fomentation of frivolous and malicious malpractice lawsuits. The Complaint here is conceptually similar to the civil conspiracy allegation sustained in the *North Dakota Personal Injury Asbestos Litig.* action, and should not have been dismissed below simply because the shoe was on the other foot.

The New York courts reached the same conclusion about trade associations as defendants in civil conspiracy cases. *See City of New York v. Lead Indus. Ass'n*, 190 A.D.2d 173 (N.Y. App. Div. 1st Dep't 1993). That court affirmed a denial of a cause of action in civil conspiracy against a trade association that was analogous to the defendant Association here. In *Lead Indus. Ass'n*, the court noted that "[t]he manufacturing defendants allegedly coordinated their efforts to conceal the [lead] hazard, to mislead the public and the government as to that hazard, and to market and promote the use of the product despite their knowledge of the hazard." *Id.* at 177. Similarly, the defendant West Virginia Trial Lawyers Association disseminates self-serving claims to the public about the malpractice crisis and arguably misleads the public about the causes of the problem. Furthermore, the defendant Association provides training courses to its members for how to file and prosecute malpractice claims. These are factual matters that plaintiff McCammon has a right to develop through full discovery and have decided by a trier of

fact. Dismissal of her action based on the pleadings was entirely inappropriate here.

The court below erred further in dismissing the complaint simply by asserting that "the alleged damage and injury asserted in the plaintiff's complaint was not proximately caused by any conduct of these defendants" (Order p. 4, ¶ 9). Determining proximate causation is plainly an issue for the jury, not to be resolved prior to the completion of discovery. "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103-04 (1928) (Andrews, J., dissenting). Determinations of proximate causation are within the province of the jury.

Finally, the court below erred in determining that defendant William L. Frame would somehow enjoy statutory immunity for his role as president of the Association that has been alleged to be a civil conspiracy. "The defendant, William L. Frame, was the President of the West Virginia Trial Lawyers Association. Mr. Frame served without compensation of the defendant, West Virginia Trial Lawyers Association, which is a non-profit organization. Accordingly, the defendant, William L. Frame, 'shall not be held personally liable for negligence, either through act or omission, or whether actual or imputed, in the performance of the managerial functions performed' on behalf of the defendant, West Virginia Trial Lawyers Association. West Virginia Code § 55-7C-2(4)(c)(i)." (Order pp. 3-4, ¶ 5) But that provision only provides limited immunity for liability for negligence. It does not provide any immunity for gross negligence or intentional torts. Conspiracy is an intentional tort, and thus Section 55-7C-1 *et seq.* offers no protection. William L. Frame avoided and never complied with plaintiff's

right to depose him, thereby concealing whatever information he has about intentional torts. It was error for the court to dismiss the complaint on this ground.

C. IT WAS PRECIPITOUS FOR THE COURT BELOW TO CUT OFF DISCOVERY AND THE CASE SHOULD BE REMANDED ACCORDINGLY.

In dismissing this case, the court below acted in precisely the "precipitous" manner that this Court criticized in an analogous situation:

> While it may be that none of the appellees is remotely responsible for the collapse of the area surrounding the school, this determination should be made after the discovery procedure has been completed. Even after discovery the court should exercise caution in reaching a conclusion based on discovery for, as Justice Miller recently observed, "there is no requirement that all facts must be developed through discovery, and certainly no grounds for the assumption that they have been developed by discovery." *Masinter v. Webco Company, et al.*, 262 S.E.2d 433 (1980). Thus, **a decision for summary judgment before discovery has been completed must be viewed as precipitous**.

Bd. of Education v. Van Buren and Firestone Architects, 165 W. Va. 140, 143-44, 267 S.E.2d 440, 443 (1980) (emphasis added).

Yet that is exactly what the court below did: it granted a motion for summary judgment before discovery had been completed. In fact, plaintiff-appellant Julie McCammon had received no meaningful discovery at the time of the summary judgment by the court below. As plaintiff McCammon explained at the hearing below, "I have received essentially no discovery in this case. I have been forced to file motions to compel times two. ... I have received a mere three items from the Defendant. Other - they have not complied with any of the asked-for discovery, including written discovery. I have been denied depositions." Nov. 25, 2003 Hearing Tr. at 3

(A15). Defendants had succeeded in their strategy of obtaining a dismissal as a matter of law, and delayed the production of documents long enough to avoid producing them at all.

On her own Plaintiff McCammon obtained a list of all dismissals and defendant verdicts in medical malpractice cases since 1993, but not through any discovery provided by defendant West Virginia Trial Lawyers Association. This information was only the tip of the iceberg. Between the years of 1993-2003 there were 941 dismissals and 291 physician verdicts, totaling over 1232 unjustified actions. (Filed with Docket Entry #95) At an average cost of defense of only $40,000, which is a gross underestimate in many cases, the total expense of these cases is nearly $50 million. The insurance carriers simply increase the premiums of plaintiff McCammon and others to bear this expense. She is directly injured by these frivolous actions. Deprived of real discovery, however, plaintiff McCammon was improperly thwarted in her right to prove her case.

The role played by defendants in these actions remains undisclosed, because they simply stonewalled plaintiff McCammon's requests and moved for summary judgment instead. (A4) Despite her repeated and entirely proper discovery demands, the defendant West Virginia Trial Lawyers Association denied access by her even to the information posted on its website. The defendant Association had a medical malpractice task force, but completely withheld all the relevant material about that task force from plaintiff McCammon. The defendant Association further withheld its relevant emails and even the information and documents sent within the organization concerning medical malpractice. Its communications with legislators relating to the issues in this lawsuit were further withheld. Plaintiff requested this relevant and discoverable information repeatedly, but defendant Association repeatedly stonewalled her. See First, Second

and Third Responses of the Defendants to Requests for Production of Documents. (Filed with Docket Entry #95)

Defendant Frame, though in charge of defendant Association as its President, produced nothing whatsoever. During discovery, plaintiff made a formal request for "All documents and pleadings pertaining to medical malpractice cases that have been filed by William L. Frame or in which Mr. Frame has participated (including medical malpractice claims filed by his firm) that have been dismissed or resulted in a defendant verdict at trial." This request would only be burdensome if defendant Frame had filed a large number of frivolous claims. Yet defendant Frame flatly refused to produce any such documents, though not for the reason of alleged burden. Instead, defendant Frame refused to produce a single document in response to this case by objecting that "[t]he information sought by this request is not relevant nor reasonably calculated to lead to relevant information. As acknowledged by plaintiff in her deposition the defendant, William L. Frame, has never instituted or been involved in any litigation with respect to the plaintiff." Response of the Defendants' to Third Request for Production of Documents 2, at 2 (June 13, 2003, filed with Docket Entry #95). Moreover, Mr. Frame refused to attend plaintiff's deposition of him, after she agreed to a day that he wanted for his convenience. Instead, he moved for a stay of discovery to avoid his deposition altogether.

But in the action for civil conspiracy filed by plaintiff, it is no defense to an allegation of conspiracy for a defendant to say he did not personally injure plaintiff. The actionable wrong is the agreement to injure others, which can be inferred by conduct. The number and nature of frivolous malpractice actions filed by William L. Frame, and the tactics he used in pursuing those frivolous actions, may well shed light on the alleged conspiracy at issue in this action.

Were certain insurance carriers targeted as victims of frivolous actions, in the hope of easy settlements to avoid the nuisance of litigation? Were certain doctors, such as OB/GYN doctors, sued in baseless actions in the hope of a quick settlement? Though defendant Frame did not sue plaintiff McCammon, did he use the same strategy and approach in his frivolous actions as the actions that victimized McCammon? Such information is essential to plaintiff McCammon's proving her case, and she was denied her basic right to discover this material.

In *Elliott v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002), this Court reversed an order for summary judgment on analogous facts. Citing precedents by the U.S. Supreme Court and this Court, the *Elliott* decision noted that "[a]s a general rule, summary judgment is appropriate only after adequate time for discovery. ... A party opposing a motion for summary judgment must have a reasonable 'opportunity to discover information that is essential to [its] opposition' to the motion." 213 W. Va. at 73, 576 S.E.2d at 800. The Court noted that:

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2)

demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Id. *See also State ex rel. Pritt v. Vickers*, 588 S.E.2d 210, 2003 W. Va. LEXIS 106, *19 (Oct. 10, 2003) (holding that the circuit court "substantially abused its discretion" by denying further discovery, after earlier reversing the premature grant of summary judgment prior to the completion of discovery).

Plaintiff McCammon satisfied these requirements for full discovery. She did "articulate" the need to obtain documents from the defendant Association's task force on malpractice lawsuits to prove her claim of a civil conspiracy. *See* Response of the Plaintiff to the Motion for Summary Judgment of the Defendants (filed as Docket Entry #95; *see also* A4). Second, everything that she requested was readily accessible to defendants at little burden. For example, her request for access to material on the defendant Association's website could be satisfied in a matter of minutes at no cost, simply by granting her a password or printing out the relevant pages. These materials plainly could create genuine and material issues of fact, because they could illustrate conspiratorial activities to target certain physicians, cultivate particular experts, or engineer voir dire to maximize verdicts. Finally, plaintiff McCammon made her discovery requests in a timely manner, so there is no objection that she did not conduct her discovery earlier. Defendants were the ones who refused to comply with their discovery obligations in a timely manner.

"The proper course of action for the trial court to have taken would have been to

defer action on the summary judgment motion until the completion of discovery ...."

Van Buren and Firestone Architects, 165 W. Va. at 144, 267 S.E.2d at 443. This case should be remanded for that same result here.

CONCLUSION

This petition should be granted so that the decision below may be reconsidered and reversed with a remand to a new judge who is free from any possible appearance of partiality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2004, I served the foregoing PETITION FOR APPEAL, DESIGNATION OF APPELLATE RECORD BY PETITIONER and DOCKETING STATEMENT upon Gregory H. Schillace, Huntington Bank Building, P.O. Box 1526, Clarksburg, WV 26302-1526 and James A. Varner, Sr., McNeer, Highland, McMunn and Varner, L.C., Post Drawer 2040, Clarksburg, WV 26302-2040 by sending these documents by overnight delivery in an envelope addressed to each of said attorneys at his respective address.

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