

**SURVEY OF WEST VIRGINIA PRIVACY
AND RELATED CLAIMS AGAINST THE MEDIA**

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(With Developments Reported Through **April 1, 2010**)

GENERAL COMMENTS

None.

SIGNIFICANT DEVELOPMENTS

In Dunn v. Rockwell, 689 S.E.2d 255 (W. Va. 2009), the West Virginia Supreme Court of Appeals held that the statute of limitations for a claim of civil conspiracy is determined by the underlying conduct on which the claim of conspiracy is based. In Dunn, the plaintiffs had alleged, in addition to civil conspiracy, misappropriation and conversion, fraud, professional negligence and breach of fiduciary duty against the defendants - all of which are governed by a two-year statute of limitations. 689 S.E.2d 255, 268. The Court held that the civil conspiracy claim, which was based upon those other torts alleged against the defendants, was subject to the same two-year statute of limitations. Id.

I. INVASION OF PRIVACY - GENERAL

In Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 (1983), the West Virginia Supreme Court of Appeals undertook a major survey of defamation and privacy laws of the various jurisdictions in the United States. Crump now serves as a treatise on the laws of defamation and privacy in West Virginia. The Restatement (Second) of Torts §§ 652A-652E (1977) has been accepted by West Virginia courts as the law regarding invasion of privacy. Crump, 320 S.E.2d at 85. The West Virginia Supreme Court of Appeals has held that when a plaintiff has established liability for invasion of privacy, the plaintiff is entitled to recover damages for (1) the harm to his/her interest in privacy resulting from the invasion; (2) his/her mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; (3) special damages of which the invasion is a legal cause; and (4) if none of the former damages is proven, nominal compensatory damages. Rohrbaugh v. Wal-Mart Stores, Inc., 212 W. Va. 358, 572 S.E.2d 881, 888 (2002).

II. FALSE LIGHT

A. Recognition of False Light Tort

1. **In General.** Crump specifically recognized the tort of false light publicity. Crump, 320 S.E.2d at 85. Reaffirming the four types of invasion of privacy, the West Virginia Supreme Court of Appeals recognized that “damages suffered as a result of tortious invasion of one’s right to privacy depend primarily on which particular element of privacy has been invaded.” Rohrbaugh, 572 S.E.2d at 888.

2. **As Applied to the Media.** The West Virginia Supreme Court of Appeals has specifically applied the recognition of false light invasion of privacy to a media defendant. In Crump, a West Virginia coal miner was photographed, with her knowledge and consent, for use in conjunction with a newspaper article concerning women coal miners published by the defendant in 1977. After the publication of the 1977 article, Crump had no further contact with the newspaper and the newspaper did not request permission to use her picture in any other article. Her picture re-appeared in the newspaper in 1979 in connection with another article concerning women coal miners. The 1979 article dealt specifically with problems faced by women miners, including physical attacks and abuse. Crump stated that this unauthorized publication caused unfavorable attention, humiliation, embarrassment and damage to her reputation because she had suffered no such physical attacks and abuse. Although the trial court did not consider invasion of privacy as a theory of recovery, the West Virginia Supreme Court of Appeals found that this theory needed exploration and exhaustively discussed both defamation and invasion of privacy (including the tort of false light) and defenses thereto. Crump, 320 S.E.2d at 85.

B. Substantive Elements — False Light

1. **Public Disclosure.** In order for a plaintiff to recover for the tort of false light invasion of privacy, the facts creating the false light must be made public. Crump, 320 S.E.2d at 87. An essential element for the recovery of damages is that the publication must be “widespread.” Id.

2. **Falsity.** Just as in a defamation claim, in order to sustain a claim of false light invasion of privacy, the matter that is publicized must be untrue. Crump, 320 S.E.2d at 87. The words or elements are to be viewed in the context of the whole article rather than in isolation. Id.

3. **Identification of Plaintiff.** False light claims may be based on the use of a photograph of another to illustrate an article or book with which the person has no reasonable connection when the appearance places the person in a false light. Crump, 320 S.E.2d at 90. The question thus becomes whether the publication sufficiently referred to the plaintiff such that her privacy was invaded. The question of whether a publication sufficiently refers to a particular plaintiff in a false light when the communication does not clearly favor a certain construction is a question that is left to the jury. Id.

4. **Offensiveness.** In order for a communication to support a claim of false light invasion of privacy, that communication must be highly offensive to a person of reasonable or ordinary sensibilities. Crump, 320 S.E.2d at 84. The protection of the law of privacy does not extend to the supersensitive. Id.

5. **Fault.**

a. **Issue of Public Concern.** Unless a communication enjoys a privilege, a claim of false light invasion of privacy by a private individual against a media defendant will be subjected to the test of “what a reasonably prudent person would have done under the same or similar circumstances.” Crump, 320 S.E.2d at 89. When a media defendant is involved, the “reasonably prudent person” standard becomes a “liberal professional newsperson” standard. Crump, 320 S.E.2d at 90. This allows a media defendant to raise additional considerations such as “chilling effect,” “the need for robusticity,” “standards within the profession,” and “the role of press in society.” Id. The court stated that a private individual need only show negligence in a false light invasion of privacy action against a media defendant. However, if a privileged communication is involved, actual malice or abuse of privilege must be shown for recovery. Crump, 320 S.E.2d at 89.

b. **Issue of Private Concern.** Although West Virginia courts have not specifically addressed the issue of a matter of private concern in relation to a false light invasion of privacy claim, the West Virginia Supreme Court of Appeals has stated that the “same absolute and qualified privilege defenses which are available in defamation actions are also available in right to privacy actions.” Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 10 Media L. Rep. 2225 n. 5 (1983). Thus, the Fourth Circuit's opinion in Mutafis v. Erie Ins. Exch., 775 F.2d 593, 12 Media L. Rep. 1279 (4th Cir. 1985), holding that there is no requirement to show “actual malice” where no public issue was involved and the matter is solely of a private concern, should be applied in action for false light invasion of privacy.

C. Privileges and Defenses — False Light

1. Constitutional.

a. **Opinion.** In West Virginia, “statements of opinion are absolutely protected under the First Amendment and cannot form the basis for a defamation action.” Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 788, 13 Media L. Rep. 1855 (1986). It follows that because defenses and privileges to defamation can also be applied to privacy actions, opinions would be absolutely protected from claims of false light invasion of privacy. Crump, 320 S.E.2d at 90. “A statement of opinion which does not contain a provably false assertion is entitled to full constitutional protection.” Maynard v. Daily Gazette Co., 191 W. Va. 601, 447 S.E.2d 293, 294, 22 Media L. Rep. 2337 (1994). This is true unless the opinion relies upon facts that are themselves false. Havalunch, Inc. v. Mazza, 170 W. Va. 268, 294 S.E.2d 70, 73 (1981).

2. **Common Law.** West Virginia’s recognition of retraction and apology as mitigating factors provides media defendants an additional means of avoiding or minimizing liability. Crump, 320 S.E.2d at 90. The Crump court held that professional newsmen owe complaining parties a duty to prepare a retraction or apology and to give the complaining party a chance to approve the same before it is published. Crump, 320 S.E.2d at 90 n.8. Also, West Virginia recognizes either express or implied consent to invasion of privacy as a defense to bar recovery. Crump, 320 S.E.2d at 84.

D. Relationship of False Light to Defamation

1. **Substantive Distinctions.** False light invasion of privacy is a separate and distinct cause of action although very similar to defamation. West Virginia makes a distinction between false light invasion of privacy and defamation on three different grounds. Crump, 320 S.E.2d 70, 87. First, privacy actions in general, including false light invasion of privacy, involve injuries to the inner person, emotions and mental suffering, whereas defamation involves injuries to reputation. Crump, 320 S.E.2d at 87. In false light, the communication need not necessarily be defamatory as long as it is offensive to a reasonable person. Id. False light invasions of privacy require widespread communication or publication which is not required for defamation. Crump, 320 S.E.2d at 87-88.

2. **Application of Constitutional and Common Law Privileges and Defenses.** The same absolute and qualified privilege defenses are available in privacy actions as are available in defamation actions. Crump, at 83 n.5. Also, newsworthiness, consent and truth are available defenses in false light invasion of privacy as well as defamation actions. Crump, at 77, 83 n.5.

3. **Viability of Separate Claim.** The West Virginia Supreme Court of Appeals has stated that there are obvious similarities between false light invasion of privacy and defamation. However, the two claims are separate and distinct. Crump, 320 S.E.2d at 87-88. The Crump court went to great lengths to determine that “false light invasion of privacy is a distinct theory of recovery entitled to separate consideration and analysis.” Crump, 320 S.E.2d at 88. In fact, the Crump court itself entertained separate and distinct claims of defamation and false light invasion of privacy.

E. Damages and Other Remedies — False Light

Generally, actions for invasion of the right of privacy protect against injuries to the emotions and mental suffering of the plaintiff. Crump, 320 S.E.2d at 87. The West Virginia Supreme Court of Appeals has held that when a plaintiff establishes liability for invasion of privacy, the plaintiff is entitled to recover damages for (1) the harm to plaintiff’s interest in privacy resulting from the invasion; (2) plaintiff’s mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; (3) special damages of which the invasion is a legal cause; and (4) if none of the former damages is proven, nominal compensatory damages are to be awarded. Rohrbaugh v. Wal-Mart Stores, Inc., 212 W. Va. 358, 365, 572 S.E.2d 881, 888 (2002). Punitive damages may also be recovered if the plaintiff shows that at least nominal damage was suffered. Id. at n. 19.

F. Procedural Matters – False Light

1. **Burden of Proof.** No West Virginia cases.

2. **Retraction Statutes.** West Virginia has a retraction statute that mitigates damages on a defamation claim. W. Va. Code § 57-2-4. This provides that if a defendant offers an apology before the commencement of an action for defamation or as soon after the commencement as possible, this may be used as evidence in mitigation of the plaintiff’s claimed damages. W. Va. Code § 57-2-4.

3. **Statute of Limitations.** Invasion of privacy actions are personal and do not survive the death of the plaintiff. Slack v. Kanawha County Hous. and Redev. Auth., 188 W.Va. 144, 423 S.E.2d 547, 551 (1992). As a personal action, invasion of privacy is governed by a one-year statute of limitations. W. Va. Code § 55-2-12(c). The discovery rule has been applied to plaintiff’s claim for the tort of invasion of privacy. Slack, 423 S.E.2d at 552. The statute of limitations begins to run at the time the plaintiff knows, or with due diligence should have discovered, that she has been injured and the identity of the person responsible. Slack, 423 S.E.2d at 553.

4. **Other Procedural Matters.** No West Virginia cases.

III. PUBLICATION OF PRIVATE FACTS

A. Recognition of Private Facts Tort

1. **In General.** West Virginia recognizes the tort of invasion of privacy when a defendant makes a public disclosure of private facts. Davis v. Monsanto Co., 627 F. Supp. 418 (S.D. W. Va. 1986). In Davis, an employee brought an action against his employer alleging tortious invasion of privacy for the employer's disclosure of information that the employee had given to a mental health professional. The employer disclosed the information to managers and union representatives. Davis, 627 F. Supp. at 420. The court held that the plaintiff did not meet one of the requisite substantive elements, that of "publication," necessary to make a prima facie case for invasion of privacy by publication of private facts. Davis, 627 F. Supp. at 421-22.

2. **As Applied to the Media.** Although applicability was not specifically discussed, the public disclosure of private facts category of the invasion of privacy group of torts was recognized in Crump which involved a media defendant. Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 85 10 Media L. Rep. 2225 n. 5 (1983).

B. Substantive Elements — Private Facts

1. **Public Disclosure.** Unlike libel law, where mere communication to a third party creates liability, widespread publicity is required in order to create a prima facie claim of invasion of privacy. Davis, 627 F. Supp. at 421. For instance, in Davis, the plaintiff failed to make a prima facie case for public disclosure of private facts. The employer only told two individuals, outside of the management level personnel involved in making decisions regarding plaintiff's employment, of the plaintiff's private disclosures to a mental health professional. The court found that the employer had not "publicized" the plaintiff's private facts. Id.

2. **Private Facts.** In order to sustain an action for public disclosure of private facts, the facts disclosed are required to be private. Davis, 627 F. Supp. at 421 (quoting Restatement (Second) of Torts § 652D (1977)). It is clear that a disclosure of private matters of a business nature, versus a personal nature, is not subject to the protections of an action for invasion of privacy. Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93, 95 (S.D. W. Va. 1968). The law of invasion of privacy is designed to protect personal interests and, unless personal feelings and sensibilities are directly affected, disclosure of facts purely of a business interest will not suffice as a basis for invasion of privacy based on public disclosure of private facts.

3. **Identification of Plaintiff.** No West Virginia cases.

4. **Offensiveness.** The public disclosure of private facts must be "highly offensive and objectionable to a reasonable person of reasonable sensibilities." Davis, 627 F. Supp. at 421. Generally, invasion of privacy causes of action protect ordinary persons of reasonable sensibilities and not the supersensitive. Crump, 320 S.E.2d at 84.

5. **Absence of Legitimate Concern to the Public.** To establish a prima facie case for public disclosure of private facts, it must be proven that the public has no legitimate interest in the facts disclosed. Davis, 627 F. Supp. at 421. Public interest can include both "dissemination of current events and informational material of legitimate public interest." Crump, 320 S.E.2d at 84. What facts are, or are not, of legitimate concern to the public has not been analyzed in the invasion of privacy cases in West Virginia.

C. Privileges and Defenses — Private Facts

1. Constitutional.

a. ***Truthful Facts In Public Records.*** West Virginia has adopted a Freedom of Information Act, West Virginia Code § 29B-1-1 *et seq.* This statute provides for the release of all public records unless the records are under one of the categories exempted from disclosure under West Virginia Code § 29B-1-4. One of the exemptions is for information of a personal nature that would constitute an unreasonable invasion of privacy unless the public interest, by clear and convincing evidence, requires disclosure. W. Va. Code § 29B-1-4(2). Thus, unlike the Federal Freedom of Information Act, the West Virginia Code “favors nondisclosure of personal information unless public interest clearly requires disclosure.” Child Prot. Group v. Cline, 177 W. Va. 29, 350 S.E.2d 541, 545 (1986). In Cline, the mental health records of a bus driver were held to be public records for limited inspection solely by parents whose children were assigned to that driver’s bus. To decide whether public disclosure of private information is an unreasonable violation of privacy, a five factor test has been adopted. Cline, 350 S.E.2d at 543. The factors to consider are: 1) whether disclosure is an invasion of privacy and, if so, how serious; 2) the extent or value of the public interest and the purpose of the persons seeking disclosure; 3) whether the information is available from other sources; 4) whether the information was given with expectation of privacy; and 5) whether it is possible to mould relief so as to limit the invasion of an individual’s privacy. Id.; In re Gazette FOIA Request, 222 W. Va. 771, 671 S.E.2d 776 (2008).

b. ***Information of Public Concern.*** Communications of matters that are of legitimate public concern are protected from invasion of privacy causes of action. Crump, 320 S.E.2d at 84. Matters of public interest have a qualified privilege which “immunizes” a publisher from liability as long as the privilege is not abused and actual malice is not present. Crump, 320 S.E.2d at 84. Public interest includes dissemination of information of current events and matters of legitimate public interest. Id.

2. **Common Law.** Communication of private facts is absolutely privileged if required by law. Davis v. Monsanto Co., 627 F. Supp. 418, 421 (S.D. W. Va. 1986). For instance, in Davis, the plaintiff was an employee of the defendant who brought suit alleging tortious invasion of privacy when the employer disclosed to plaintiff’s union representative information the employee gave to a mental health professional. However, the employer was required by West Virginia law to provide its employees with a safe place to work. As such, its disclosures were absolutely privileged. A qualified privilege also attached to the communications because they were in furtherance of the employer’s legitimate interest (protection of its plant and employees) and the purpose of another’s legitimate interests (the union’s interest in protecting its membership). See, Davis, 627 F. Supp. at 421-22.

D. Relationship of Private Facts to Defamation and Other Privacy Torts

There are three major differences between defamation and invasion of privacy torts (which include publication of private facts). See Crump, 320 S.E.2d at 83 (quoting Emerson, The Right of Privacy and Freedom of the Press, 14 HARV.C.R.-C.L.L.REV. 329, 333 (1979)). First, in defamation cases, the facts that are published must be untrue in order to be actionable. This is not the case for publication of private facts because the truth of the facts, and their private nature, is a basic element of the tort. Second, defamation

actions protect the injury to reputation while privacy actions protect injury to the inner person. Lastly, in defamation actions, a public forum is the place to redress an injury through debate or retraction. However, in privacy actions, addressing issues in a public forum exacerbates the injury.

E. Damages and Other Remedies — Private Facts

Generally, the right of privacy protects an individual's feelings and personality. Crump, 320 S.E.2d at 85 n.6. The West Virginia Supreme Court of Appeals has held that when a plaintiff establishes liability for invasion of privacy, the plaintiff is entitled to recover damages for (1) the harm to plaintiff's interest in privacy resulting from the invasion; (2) plaintiff's mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; (3) special damages of which the invasion is a legal cause; and (4) if none of the former damages is proven, nominal compensatory damages are to be awarded. Rohrbaugh, 212 W.Va. at 365, 572 S.E.2d at 888. Punitive damages may also be recovered if the plaintiff shows that at least nominal damage was suffered. Id. at n. 19.

F. Procedural Matters — Private Facts

1. **Burden of Proof.** To establish a prima facie cause of action for public disclosure of private facts the plaintiff must show: 1) that there was a public disclosure of facts regarding the plaintiff; 2) that the facts disclosed were private in nature; 3) that this disclosure was highly offensive and objectionable to a reasonable person; and 4) that the public has no legitimate interest in the facts disclosed. Davis, 627 F. Supp. at 421. Additionally, the plaintiff must show that there was widespread publication of the private facts. Id. In order to establish that a public disclosure of private facts in public documents is necessary, the entity resisting disclosure must show that disclosure would unreasonably invade privacy and that there is no clear and convincing evidence requiring disclosure. Child Prot. Group v. Cline, 177 W. Va. 29, 350 S.E.2d 541, 545 (1986).

2. **Statute of Limitations.** Statutes of limitation for invasion of privacy torts (which include publication of private facts) like defamation causes of action, are personal to the plaintiff and do not survive death. Slack v. Kanawha County Hous. and Redev. Auth., 188 W. Va. 144, 423 S.E.2d 547, 551 (1992). Personal causes of action, such as invasion of privacy by publication of private facts, are governed by a one-year statute of limitations. Christman v. American Cyanamid Co., 578 F. Supp. 63, 66 (N.D. W. Va. 1983).

3. **Other Procedural Matters.** No West Virginia cases.

G. Private Facts Statutes

Although the West Virginia Code contains Freedom of Information provisions (Chapter 29B), the exemptions from that section include any information that is specifically exempted by statute. W. Va. Code § 29B-1-4(5). The West Virginia Code contains many provisions outlining confidential information that is not to be publicly disclosed. See also Ill.C.1.a, supra.

IV. INTRUSION

A. Recognition of Intrusion Tort

1. **In General.** The seminal case in West Virginia recognizing invasion of privacy by an intrusion into another's seclusion is Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958). Roach involved a landlord who placed a listening device in the apartment of one of his tenants. The court held that there is a right of privacy including the right of an individual to be let alone and to keep private his communications, conversations and affairs. Roach, 105 S.E.2d at 568. The tort was further expanded in 1959 to include illegal searches by a private individual. Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959). In Sutherland, when the plaintiff's bags were searched while in a grocery store checkout line, the court held that an illegal search by a private individual was a trespass in violation of the right to privacy. Sutherland, 110 S.E.2d at 723-24. West Virginia also has a statute that prevents unauthorized interception and/or disclosure of oral, wire or electronic communication. W. Va. Code § 62-1D-1 et seq. See IV.G.1.a, infra.

2. **As Applied to the Media.** Although no specific analysis has been done in West Virginia regarding the tort of intrusion as it relates to the media, in Crump this cause of action was recognized by the Court. Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 85, 10 Media L. Rep. 2225 (1983).

B. Substantive Elements — Intrusion

1. **Unauthorized Intentional Intrusion or Prying into Plaintiff's Seclusion.** The right of privacy in its most simplified form is the right of an individual to be let alone and to keep secret his private communications, conversations and affairs. Roach, 105 S.E.2d at 568. This has been found to be a right as to living quarters, bags and purses, private life as separate from job responsibilities, and freedom from certain drug and polygraph tests. See, e.g., Roach, 105 S.E.2d at 568.

2. **Offensiveness.** In Roach, the court did not require any degree of offensiveness. The court merely stated that privacy is "an individual right that should be held inviolate." Roach, 105 S.E.2d at 568.

3. **As to Private Matter.** This element has not undergone extensive analysis in West Virginia. Invasion of privacy has been found in cases of listening devices in homes or offices as well as physical searches of bags belonging to another. Roach, 105 S.E.2d at 569; Sutherland, 110 S.E.2d at 724; Slack, 423 S.E.2d at 551. A teacher's plea of no contest to a charge of shoplifting was considered to be a private matter unless it was shown to impact her teaching ability. Golden v. Board of Educ., 169 W. Va. 63, 285 S.E.2d 665, 669 (1981).

4. **Causing Anguish or Suffering.** A recovery for the invasion of the right to privacy "can be had regardless of whether or not the plaintiff has received personal injury." Sutherland, 110 S.E.2d at 724. The discussion in Sutherland stated that an invasion of privacy is a violation of a legal right in which the damages flow from the wrongful act causing injury to another's right even if no perceptible loss or harm accrues. Id.

C. Privileges and Defenses — Intrusion

1. **Constitutional.** Invasion of privacy by intrusion, like other aspects of the invasion of privacy tort, enjoys the same constitutional privileges and defenses as defamation. Crump, 320 S.E.2d at 83 n.5. However, constitutional defenses to intrusion claims have not been discussed in the case law of West Virginia.

2. **Common Law.** A good faith reliance by the provider of electronic or wire communication services on a court order or a legislative authorization will be a complete defense to civil or criminal actions under the West Virginia Wiretapping and Electronic Surveillance Act or any other law. W. Va. Code § 62-1D-12. See IV.G.1.a, infra.

a. **Consent.** Consent is a defense to a claim of invasion of privacy by intrusion. In order for a “good defense” of consent to be shown, it must appear that a person voluntarily permitted or expressly agreed to the intrusion. Sutherland, 110 S.E.2d at 726. The question of whether the consent was expressly given is a question for the jury. Id. However, consent does not have to be proven by the consenting individual’s testimony - it can be proven through other evidence. State v. Dillon, 191 W. Va. 648, 447 S.E.2d 583, 592 (1994). This defense, although applicable to all invasions of privacy under Crump, has only specifically been applied in West Virginia to invasion of privacy by intrusion when dealing with a search and seizure situation as in Sutherland.

b. **Other.** No West Virginia cases.

D. Relationship of Intrusion to Trespass and Other Privacy Torts

Invasion of privacy by intrusion has been labeled as a trespass against an individual in violation of a right to privacy. Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716, 723-24 (1959). It is an intentional invasion of, or interference with, property, property rights, personal rights or personal liberties. Sutherland, 110 S.E.2d at 724. Cases regarding invasion of privacy by intrusion have addressed physical invasions, such as use of listening devices, searches of bags and/or drug testing, rather than non-physical “invasions of privacy” like public disclosure of private facts, misappropriation, and false light.

E. Damages and Other Remedies — Intrusion

1. **General Damages.** The West Virginia Wiretapping and Electronic Surveillance Act provides that any evidence obtained in violation of West Virginia Code § 62-1D-3(a)(1) is inadmissible in any proceeding. See also West Virginia Dep’t. of Health and Human Res. ex rel. Wright v. David L., 192 W. Va. 663, 453 S.E.2d 646, 652 (1994). The West Virginia Code also provides for actual damages, but not less than one hundred dollars per day of violation, for persons whose oral, wire or electronic communications are

intercepted or disclosed without authorization. W. Va. Code § 62-1D-12. Common law damages for emotional distress may be recovered for claims of invasion of privacy by intrusion. Slack v. Kanawha County Hous. and Redev. Auth., 188 W. Va. 144, 423 S.E.2d 547, 555 (1992). A plaintiff’s emotional distress may be shown solely by the plaintiff’s own testimony; no corroborative evidence is required. Slack, 423 S.E.2d at 555.

2. **Special Damages.** Any person found to be civilly liable for intercepting or disclosing an oral, wire or electronic communication of another may be liable for the attorney’s fees and

reasonable litigation costs of the person whose communications were intercepted or disclosed. W. Va. Code § 62-1D-12.

3. **Punitive Damages.** The West Virginia Wiretapping and Electronic Surveillance Act specifically provides for punitive damages, where appropriate, in cases in which this statute is violated by interception or disclosure of oral, wire or electronic communications. W. Va. Code § 62-ID-12.

4. **Injunctive Relief.** No West Virginia cases.

F. Procedural Matters — Intrusion

1. **Burden of Proof.** No West Virginia cases.

2. **Statute of Limitations.** The statute of limitations for invasion of privacy by intrusion is one year. W. Va. Code § 55-2-12(c); Slack, 423 S.E.2d at 551. An invasion of privacy is a personal action that does not survive the death of the plaintiff. Id. The discovery rule applies to an invasion of privacy tort claim. Slack, 423 S.E.2d at 552. This means that the statute of limitations does not start running until the plaintiff knows, or by reasonable diligence should know, that she has been injured and the identity of the person responsible. Slack, 423 S.E.2d at 553.

3. **Other Procedural Matters.** No West Virginia cases.

G. Forms of Intrusion

1. **Electronic Eavesdropping or Recording.**

a. *Statutes.*

(1) **Citations and Brief Description.** The West Virginia Wiretapping and Electronic Surveillance Act can be found in West Virginia Code § 62-10-1, et seq. This Chapter of the West Virginia Code deals specifically with intentional interception of wire, oral or electronic communications and disclosure of those intercepted communications. W. Va. Code § 62-1D-3.

(2) **Consent Rule(s) and Exceptions.** It is lawful for a person to intercept a wire, oral or electronic communication if that person is a party to the communication or if one of

the parties to the communication has given prior consent, unless the communication is intercepted for the purpose of committing a crime or a tortious act. W. Va. Code § 62-1D-3(c)(2). A parent has no right to consent on behalf of their child to recording the child's conversations with the child's other parent while the child is in the other parent's home. ex rel. Wright, 453 S.E.2d at 654.

(3) **Criminal Sanctions Authorized.** Any person found guilty of intentionally intercepting or procuring the wire, oral or electronic communications of another, or disclosing such communications, is guilty of a felony and can face imprisonment for up to five years and/or a fine of up to ten thousand dollars. W. Va. Code § 62-1D-3.

(4) **Civil Action(s) Authorized.** Any person whose communication has been intercepted or disclosed or whose identity has been disclosed shall have a civil cause of action against the person who intercepts, discloses or uses the communications. W. Va. Code § 62-1D-12. The plaintiff has the right to recover actual damages, but not less than one hundred dollars for each day of violation; punitive damages, if appropriate; and reasonable attorneys fees and costs. W. Va. Code § 62-1D-12.

(5) **Statute(s) of Limitations.** No West Virginia cases.

b. **Case Law.** The first case in West Virginia specifically recognizing privacy rights was based on a listening device that was placed in a tenant's apartment by her landlord. Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958). The court found that the right to privacy is one that is inviolate and "to hold otherwise, under modern means of communication, hearing devices, photography, and other technological advancements, would effectively deny valuable rights and freedoms to the individual." Roach, 105 S.E.2d at 568.

2. **Hidden Cameras.** There are no statutes or case law in West Virginia with regard to actions for intrusion by a hidden camera.

3. **Other Surveillance.**

a. **Statutes.** West Virginia has a criminal statute dealing specifically with stalking. W. Va. Code § 61-2-9a. It is a misdemeanor to follow and harass, follow and make credible threats, or harass and make credible threats against another with whom a personal or social relationship is sought, is ongoing, or was previously had, or against a member of that person's family, if the intent of such acts is to place that person, or that person's family, in apprehension of death, bodily injury, sexual assault, battery or kidnapping. W. Va. Code § 61-2-9a. Harassment is defined as "willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress." W. Va. Code § 61-2-9a(g)(1).

b. **Case Law.** The West Virginia Supreme Court of Appeals has addressed invasion of the right to privacy by listening devices on two occasions. In Roach, a landlord placed a listening device in the apartment of his tenant. The court, for the first time in West Virginia, stated that a right to privacy did exist and that a cause of action for invasion of that right was proper. Roach, 105 S.E.2d at 568. The court in Slack again dealt with the issue of listening devices, however, this time in a business office. The plaintiff in Slack worked for a public corporation that distributed federal funds. When the plaintiff discovered that one of her coworkers owned a private interest in a business that was receiving such funds,

she reported it to her superiors and the co-worker was fired and indicted on criminal charges. During the pre-firing investigation, the plaintiff began to believe that the activities in her office were being monitored. This was later proven true when a listening device was found in her office. Plaintiff brought a successful claim for invasion of privacy. Slack v. Kanawha County Hous. and Redev. Auth., 188 W. Va. 144, 423 S.E.2d 547, 565 (1992).

4. **Unauthorized Reproduction of Private Documents.** No West Virginia cases.

5. **"Ride-Alongs."** No West Virginia cases.

H. Related Newsgathering Claims

1. **Trespass.** Trespass in violation of a right to privacy has been specifically used in West Virginia to describe an intrusion claim. Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716, 723-24 (1959). However, this particular claim for intrusion was based upon an illegal search by grocery store employee into the bag of a customer.

a. **Criminal Trespass.** The statutes governing criminal trespass actions can be found in W. Va. Code §§ 61-3B-1, et seq.

b. **Civil Trespass.** Since Sutherland, actions for trespass have been primarily limited to entrance onto the real property of another. See, e.g., Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 34 S.E.2d 348 (1945).

2. **False Pretenses/Misrepresentation/Fraud.** West Virginia recognizes claims of fraud, misrepresentation and false pretenses; however, none of these causes of action have been applied to media cases. See generally, Lengyel v. Lint, 167 W. Va. 272, 280 S.E.2d 66 (1981). Additionally, West Virginia has a statutory crime of obtaining “labor, services or any other such thing of value by false pretense, token or representation...” W. Va. Code § 61-3-24(d). Although this has not yet been applied in media cases, a plain reading of the statute may allow for that possibility.

3. **Harassment.** West Virginia has no cases dealing with harassment by news-gathering parties. However, West Virginia Code § 61-2-9a, dealing with criminal harassment, is discussed in IV.G.3.a, supra.

V. MISAPPROPRIATION/RIGHT OF PUBLICITY

A. Recognition of Tort — Misappropriation

1. Nature of Protection.

a. **Judicial.** The cause of action for appropriation of another’s name or likeness has been recognized in Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 320 S.E.2d 70, 85, 10 Media L. Rep. 2225 (1983).

b. **Statutory.** There is no statutorily created right to a cause of action for misappropriation of another’s name or likeness in West Virginia.

2. **Scope of Protection.** The cause of action for invasion of privacy by misappropriation protects the individual personality and feelings of one whose name or likeness is appropriated by another. Crump, 320 S.E.2d at 85 n.6. This cause of action acts to prevent the emotional harm of unauthorized use of the name or likeness of another. Crump, 320 S.E.2d at 85. This can be use of the name or likeness for promotion of a product or service as well as use for the noncommercial advantage of another. Id. It is distinguished from the cause of action for invasion of the right of publicity, which remedies the unjust enrichment caused by unauthorized exploitation of the name or reputation of a public figure. Crump, 320 S.E.2d at 85 n.6.

3. **Substantive Elements.** The cause of action for invasion of privacy by

misappropriation requires the use of another's name or likeness. Crump, 320 S.E.2d at 85. Mere publication of a name or likeness does not give rise to a cause of action for misappropriation. The "defendant must take for his own use or benefit the reputation, prestige or commercial standing, public interest or other value associated with the name or likeness published." Crump, 320 S.E.2d at 86. "It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded." Crump, 320 S.E.2d at 86 (quoting Restatement (Second) of Torts § 652C cmt. d (1977)).

4. **Descendibility.** Invasion of privacy claims are personal and do not survive the death of the plaintiff. Slack v. Kanawha County Hous. & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547, 551 (1992).

B. Recognition of Tort — Right of Publicity

1. Nature of Protection.

a. **Judicial.** The right of publicity "remedies the unjust enrichment caused by an unauthorized exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money and effort." Crump, 320 S.E.2d at 85 n.6. The right of publicity protects the commercial value of one's name or likeness. Id.

b. **Statutory.** See, IV.A.1.b, supra.

2. **Scope of Protection.** The right of privacy protects the personality and feelings of one whose name or likeness is misappropriated by another. Crump, 320 S.E.2d at 85 n.6. However, the right of publicity protects the commercial value of a name or likeness. Id.

3. **Substantive Elements.** The right of publicity cause of action "remedies the unjust enrichment caused by an unauthorized exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money and effort." Crump, 320 S.E.2d at 85 n.6.

4. **Descendibility.** No West Virginia cases.

C. Privileges and Defenses — Misappropriation/Right of Publicity

1. **Constitutional.** A plaintiff does not have the right to a cause of action for misappropriation or right of publicity merely because her name or likeness is published. Crump, 320 S.E.2d at 86. As long as the publication is not taking advantage of the reputation, prestige, or value associated with her, there is no cause of action. Id. A person's name and likeness is brought before the public regularly and neither is a private matter. Id. Only when the defendant takes the benefit of the commercial or other value of another's name or likeness does a cause of action arise. Id. The fact that newspapers are sold for a profit does not make the incidental publication of a person's name or likeness a basis for a cause of action.

2. **Common Law.** The law of misappropriation, and arguably the right of publicity, includes the defense of consent. Express and/or implied consent will bar recovery for claims

of invasion of privacy. Crump, 320 S.E.2d at 84. However, as with all qualified privileges, conduct in excess of the consent given is not protected. Id.

D. Damages and Other Remedies — Misappropriation/Right of Publicity

1. **General Damages.** The right of publicity is a cause of action that allows a remedy for the unjust enrichment caused by the exploitation of good will and reputation that a person has developed. Crump, 320 S.E.2d at 85 n.6. The right of publicity protects the commercial value of the name. Id. Collection of damages for invasion of privacy by misappropriation compensates for the emotional harm resulting from the unauthorized use of another's name or likeness. Crump, 320 S.E.2d at 85.

2. **Special Damages.** No West Virginia cases.

3. **Punitive Damages.** No case law but punitive damages are generally available in tort actions.

4. **Injunctive Relief.** No West Virginia cases.

E. Procedural Matters — Misappropriation/Right of Publicity

1. **Burden of Proof.** No West Virginia cases.

2. **Statute of Limitations.** Just as with any other cause of action for invasion of privacy, misappropriation is a personal action for which the statute of limitations is one year from the date that the plaintiff knew, or should have known, of the injury or of the person responsible. Slack, 423 S.E.2d 547, 551. The statute of limitations for violation of the right of publicity is presumably the same, although this has never been discussed in the case law of West Virginia.

3. **Other Procedural Matters.** No West Virginia cases.

VI. BREACH OF CONTRACT/PROMISSORY ESTOPPEL

West Virginia has no reported cases concerning breach of contract by media defendants with regard to confidential sources or exceeded consent.

VII. CONVERSION

There have been no reported West Virginia cases dealing with a media defendant's conversion of documents.

VIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Recognition of Tort — Intentional Infliction of Emotional Distress

1. **In General.** West Virginia recognizes the tort of outrageous conduct which is also known as the tort of intentional infliction of emotional distress. Harless v. First Nat'l Bank, 169 W. Va. 673, 289 S.E.2d 692, 703 (1982). This cause of action allows recovery of damages arising from intentional or reckless extreme and outrageous conduct by a defendant. Harless, 289 S.E.2d at 703. Generally, West Virginia law parallels the law in Restatement (Second) of Torts §§ 46, et seq. (1965). The tort of outrageous conduct may be claimed by one to whom the outrageous conduct is directed or by a third person who witnesses an immediate family member being subjected to outrageous conduct. Courtney v. Courtney, 190 W. Va. 126, 437 S.E.2d 436, 441 (1993).

2. **As Applied to the Media.** The United States District Court for the Northern District of West Virginia has specifically applied the tort of outrageous conduct in a case involving a media defendant. Garrett v. Viacom, Inc., No. 1:03CV22, 2003 U.S. Dist. LEXIS 21007, 31 Media L. Rep. 2433 (N.D. W. Va. Aug. 27, 2003). In Garrett, the defendant, a cable television network, aired a series of programs entitled "Music Behind Bars" that purported to examine prison music programs across the country. One episode of the series documented the music program at Mount Olive Correctional Facility near Beckley, West Virginia. The episode included an interview with, and musical performance by, an inmate by the name of Henthorne, who was serving a life sentence for the murder of plaintiff's son. Plaintiff alleged that the defendant inflicted severe emotional distress on her and her daughter by airing the episode and that the defendant's conduct in broadcasting the episode was "extreme and outrageous." Garrett, 2003 U.S. Dist. LEXIS 21007 at *2-4. Defendant contended that the television program at issue could not reasonably be construed as "extreme and outrageous" and further asserted that it was privileged as a truthful report on a matter of public interest under the First Amendment. The court held that the defendant's conduct was not so extreme and outrageous as to permit recovery. Consequently, it declined to reach the defendant's constitutional argument that the broadcast of the program was privileged under the First Amendment. Id. at *15-16.

B. Substantive Elements — Intentional Infliction of Emotional Distress

1. **Intentional or Reckless Conduct.** This element is met when the conduct complained of was undertaken with the purpose of inflicting emotional distress or when the actor acted recklessly when it was certain or substantially certain that emotional distress would result from such conduct. Travis v. Alcon Lab, Inc., 202 W. Va. 369, 504 S.E.2d 419, 425 (1998).

2. **Extreme and Outrageous Conduct.** The defendant's conduct must also be extreme and outrageous in order to make a successful claim for the tort of outrageous conduct. This determination is made on a case-by-case basis. Hines v. Hills Dep't. Stores, Inc., 193 W. Va. 91, 454 S.E.2d 385, 389-90 (1994). To meet this requirement the conduct by the defendant must be so outrageous in character and degree as to go beyond all bounds of decency and be atrocious and utterly intolerable in a civilized community. Harless, 289 S.E.2d at 705. Such conduct "must be more than unreasonable, unkind or unfair; it must truly offend community notions of acceptable conduct." Travis, 504 S.E.2d at 425 (internal citations omitted). Consequently, behavior evincing remorse and showing no threatening or harassing tendencies directed at the plaintiff could not, as a matter of law, be considered extreme and outrageous. See Garrett 2003 U.S. Dist. LEXIS 21007 at *9-10. Conduct may rise to the level of extreme and outrageous from the actor's knowledge that the plaintiff is particularly or peculiarly susceptible to emotional distress. Travis, 504 S.E.2d at 426 (citing Restatement (Second) of Torts § 46 cmt. f (1965)).

3. **Severe Emotional Distress.** The emotional distress suffered by the plaintiff making a claim for outrageous conduct must be "severe." Harless, 289 S.E.2d at 704. The emotional distress must be 'so severe that no reasonable man could be expected to endure it.' Harless, 289 S.E.2d at 695 (quoting

Restatement (Second) of Torts § 46 cmt. j (1965)). “Severe emotional distress includes (but is not limited to) such reactions as mental suffering and anguish, shock, fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” Travis, 504 S.E.2d at 430. No physical injury need be shown in order to recover damages for emotional distress. Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157, 165-67 (1992).

4. **Causation.** Causation is an element of recovery for the tort of outrageous conduct. Harless, 289 S.E.2d at 704. Although it has not been analyzed in depth, West Virginia courts have stated that if a plaintiff shows a “logical sequence of cause and effect” between the defendant’s conduct and the plaintiff’s injury, the causation requirement will be satisfied. Travis, 504 S.E.2d at 429.

C. Privileges and Defenses — Intentional infliction of Emotional Distress

1. **Constitutional.** To date, West Virginia case law has not specifically addressed the application of constitutional privileges or defenses to the tort of outrageous conduct. Although the media defendant in Garrett asserted a privilege based on truth under the First Amendment, the court declined to reach the argument because it concluded that defendant’s conduct could not reasonably be regarded as “extreme and outrageous.” Garrett, 2003 U.S. Dist. LEXIS 21007 at *15.

2. **Common Law.** A plaintiff will not be able to recover for the tort of outrageous conduct or intentional infliction of emotional distress if the claim is duplicative of another claim. For instance, a claim of the tort of outrageous conduct may be duplicative of a claim for assault and battery, Criss v. Criss, 177 W. Va. 749, 356 S.E.2d 620, 622 (1987); the claim may be duplicative of a claim of retaliatory discharge, Dzinglski v. Weirton Steel Corp., 191 W. Va. 278, 445 S.E.2d 219, 225 (1994), overruled in part by Sheetz, Inc. v. Bowles Rice McDavid Graff & Love PLLC, 209 W. Va. 318, 547 S.E.2d 256 (2001); and it may also be preempted by claims made under federal and state civil rights laws, Knox v. Wheeling-Pittsburgh Steel Corp., 899 F. Supp. 1529, 1535 (N.D. W. Va. 1995). A defendant also enjoys a qualified privilege from claims of intentional infliction of emotional distress when “he acts to protect or advance his own legitimate interests, the legitimate interests of others or the legitimate interests of the public.” Dzinglski, 445 S.E.2d at 227. Recently, the Supreme Court of Appeals of West Virginia refined the application of the

“litigation privilege” to include “litigation conduct” in Clark v. Druckman, 218 W. Va. 427, 624 S.E.2d 864 (2005). Historically, this privilege was applied to attorney’s communications made during the course of litigation, thereby barring claims of defamation based on those communications. See Collins v. Red Roof Inns, Inc., 211 W. Va. 458, 566 S.E.2d 595 (2002). In Clark, the litigation privilege was also found to apply to conduct because the public policy behind the privilege created “no reason to distinguish between *communications* made during the litigation process and *conduct* occurring during the litigation process.” Clark, 624 S.E.2d at 870 (emphasis in original). As a result, the litigation privilege will now “generally operate[] to preclude actions for civil damages...” brought in the form of a claim for negligence or intentional infliction of emotional distress. Clark, 624 S.E.2d at 872.

D. Relationship of Intentional Infliction of Emotional Distress to Defamation

The West Virginia Supreme Court of Appeals, while engaging in a discussion of the independence of a claim for intentional infliction of emotional distress, stated that “even though a cause of action for defamation may contain a damage component of mental or emotional distress, it is ancillary to the recognized substantive tort of defamation which did not survive at common law and is not within the categories set out in W. Va. Code, 55-7-8a(a).” Courtney v. Courtney, 190 W. Va. 126, 437 S.E.2d 436, 441

n. 11 (1993). West Virginia Code § 55-7-8a(a) excludes cases of defamation from statutory survivability and, therefore, subjects them to a one-year statute of limitations under West Virginia Code § 55-2-12(c).

E. Damages and Other Remedies — Intentional Infliction of Emotional Distress

1. **General Damages.** Following the Restatement (Second) of Torts § 46 recovery for intentional infliction of emotional distress can include damages for the emotional distress caused and from any bodily harm that arises from the emotional distress. Harless v. First Nat'l Bank, 169 W. Va. 673, 289 S.E.2d 692, 703 (1982).

2. **Special Damages.** No West Virginia cases.

3. **Punitive Damages.** An award of damage for the tort of outrageous conduct when no physical trauma has resulted is essentially an award of punitive damages. Dzingski, 445 S.E.2d at 229. If a jury is allowed to award punitive damages as well as damages for emotional distress without an accompanying physical injury, double punitive damages would be improperly imposed. Id. However, where there is substantial and concrete evidence of serious physical, emotional, or psychiatric injury arising out of intentional infliction of emotional distress, a compensatory or special damages award would be compensation for actual injury, rather than serving to punish the defendant. Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 506 S.E.2d 554, 575 (1997). In such cases, a punitive damage award would not constitute an impermissible double recovery. Id.

4. **Injunctive Relief.** No West Virginia cases.

F. Procedural Matters — Intentional Infliction of Emotional Distress

1. **Burden of Proof.** Plaintiff has the burden of proving that the elements of the tort of outrageous conduct have been met. Harless, 289 S.E.2d at 704.

2. **Statute of Limitations.** Intentional infliction of emotional distress, otherwise known as the tort of outrage, is governed by a two-year statute of limitations found in West Virginia Code § 55-2-12(b). Courtney, 437 S.E.2d 436, 442. Emotional distress is considered to be a personal injury which survives the death of the plaintiff. Courtney, 437 S.E.2d at 442.

3. **Other Procedural Matters.** Whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress is a legal question while it is for the trier of fact to determine whether such conduct is, in fact, outrageous. Travis v. Alcon Lab., Inc., 202 W. Va. 369, 504 S.E.2d 419, 428 (1998).

IX. PRIMA FACIE TORT

No West Virginia cases.

X. NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS

A. Recognition of Tort — Negligent infliction of Emotional Distress

1. **In General.** The tort of negligent infliction of emotional distress was first recognized in West Virginia in the case of Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157, 160 (1992). This cause of action will lie when a person witnesses a physical injury or death of a close family member and suffers serious mental anguish as a result. Heldreth, 425 S.E.2d at 160. The West Virginia Supreme Court of Appeals has also indicated that it will allow a recovery for the negligent infliction of emotional distress “upon a showing of facts sufficient to guarantee that the emotional damage claim is not spurious.” Ricottilli v. Summersville Mem’l Hosp., 188 W. Va. 674, 425 S.E.2d 629, 635 (1992). The West Virginia Supreme Court of Appeals has likewise indicated that it will allow recovery for negligent infliction of emotional distress arising from the fear of contracting a disease. Marlin v. Bill Rich Constr., Inc., 198 W. Va. 635, 482 S.E.2d 620 (1996).

2. **As Applied to the Media.** The tort of negligent infliction of emotional distress has been applied in the limited circumstances described above and has not been applied in cases of media defendants in West Virginia.

B. Substantive Elements — Negligent Infliction of Emotional Distress

1. **Negligent Conduct.** The cause of action for negligent infliction of emotional distress is grounded in a traditional negligence cause of action. Heldreth, 425 S.E.2d at 169. The plaintiff is required to prove that the emotional distress was foreseeable, that the defendant’s negligence proximately caused the injury or death of the victim, and that the plaintiff’s injury proximately resulted from this. Heldreth, 425 S.E.2d at 169. The requirements of duty and foreseeability, rather than the zone of danger requirement used by some jurisdictions, are used to limit a defendant’s liability. Heldreth, 425 S.E.2d at 169.

2. **Extreme and Outrageous Conduct.** The conduct for which a defendant may be liable for a claim of negligent infliction of emotional distress must simply be negligent and is not required to be extreme and outrageous. Heldreth, 425 S.E.2d at 169.

3. **Severe Emotional Distress.** The emotional distress suffered by a witness who makes a successful claim for negligent infliction of emotional distress must be severe. This means emotional distress beyond which a disinterested bystander would suffer. Heldreth, 425 S.E.2d at 165. This seriousness is measured by a standard of a “reasonable person, normally constituted.” Heldreth, 425 S.E.2d at 166. The reasonableness of the reaction will normally be judged by a jury. Heldreth, 425 S.E.2d at 167. The plaintiff is required to prove the emotional distress through the use of medical and psychiatric evidence. Id.

4. **Causation.** A cause and effect relationship between the negligent conduct and the emotional distress must be proven by the plaintiff. Heldreth, 425 S.E.2d at 167. The emotional trauma must be the direct result of the critical injury or death to the family member. Heldreth, 425 S.E.2d at 165.

5. Limitations on Availability.

a. **Requirement of Physical Impact.** No limitation to injuries involving physical impact exists in this state. Stump v. Ashland, Inc., 201 W. Va. 541, 499 S.E.2d 41, 46 (1997).

b. **Requirement of Physical Injury.** There is no physical injury requirement in a claim for negligent infliction of emotional distress. Heldreth, 425 S.E.2d at 166.

c. **Requirement That Emotional Distress Be Foreseeable.** Recovery for negligent infliction of emotional distress is premised on a traditional negligence theory in which the plaintiff is required to prove that the distress suffered was reasonably foreseeable to the defendant. Heldreth, 425 S.E.2d at Syl. Pt. 2. In order to evaluate this foreseeability, four factors are considered: 1) the relationship between the plaintiff and the victim; 2) the location of the plaintiff at time of accident; 3) whether the victim is critically injured or killed; and 4) the seriousness of plaintiff's emotional distress. Id. However, in Marlin, the West Virginia Supreme Court of Appeals held that the Heldreth foreseeability factors were not applicable to claims for emotional distress arising from the fear of contracting a disease. Rather, there are two factors which are essential to proving that serious emotional distress due to the fear of contracting a disease was reasonably foreseeable: 1) that the exposure upon which the claim is based raises a medically established possibility of contracting a disease; and 2) that the disease will produce death or substantial disability requiring prolonged treatment to mitigate and manage or promising imminent death. Marlin, 482 S.E.2d at 638.

d. **Requirement of Duty of Care.** No West Virginia cases.

C. Privileges and Defenses — Negligent Infliction of Emotional Distress

1. **Constitutional.** No West Virginia cases.
2. **Common Law.** No West Virginia cases.

D. Relationship of Negligent Infliction of Emotional Distress to Defamation

The relationship between negligent infliction of emotional distress and defamation has not been discussed in reported cases. However, the relationship between a claim for emotional distress, in general, and a claim for defamation was briefly touched upon in footnote 11 of Courtney v. Courtney, 190 W. Va.

126, 437 S.E.2d 436, 441 (1993) (noting that while a cause of action for defamation may contain a damage component of emotional distress, the damage component is ancillary to the defamation). See also VIII.D, supra.

E. Damages and Other Remedies — Negligent Infliction of Emotional Distress

1. **General Damages.** Beyond noting that damages for negligent infliction of emotional distress are recoverable, West Virginia cases have not discussed the availability of damages.
2. **Special Damages.** No West Virginia cases.
3. **Punitive Damages.** If the plaintiff not only proves that the defendant was negligent, but also proves that the defendant's conduct was wanton, willful, or reckless, then the jury may assess both compensatory and punitive damages. Stump, 499 S.E.2d at 53.
4. **Injunctive Relief.** No West Virginia cases.

F. Procedural Matters — Negligent Infliction of Emotional Distress

1. **Burden of Proof.** Plaintiff has the burden of proving the basic elements in a claim for negligent infliction of emotional distress. Heldreth v. Marrs, 188 W. Va. 481, 425 S.E.2d 157, 168 (1992). The seriousness of plaintiff's injury in a claim for negligent infliction of emotional distress must be proven by the use of medical and psychiatric evidence. Heldreth, 425 S.E.2d at 167. The plaintiff will be required to demonstrate that the harm would reasonably have been expected to befall an ordinary person. Id.

2. **Statute of Limitations.** Actions for emotional distress are personal injury claims and are governed by a two-year statute of limitations. W. Va. Code § 55-2-12(b).

3. **Other Procedural Matters.** No West Virginia cases.

XI. CONSPIRACY

A. Recognition of Tort — Conspiracy

1. **In General.** West Virginia recognizes the tort of civil conspiracy. Dixon v. American Indus. Leasing Co., 162 W. Va. 832, 253 S.E.2d 150 (1979). Civil conspiracy requires two or more persons acting in concert to accomplish an illegal purpose or to accomplish a lawful purpose by unlawful means. Dixon, 253 S.E.2d at 152. The cause of action is created by the wrongful acts and not the conspiracy itself. Id. Therefore, the exercise of an absolute right cannot form the basis of a conspiracy because the act is not wrongful. Dixon, 253 S.E.2d at 153.

2. **As Applied to the Media.** No West Virginia cases.

B. Substantive Elements — Conspiracy

1. **Entry into Agreement.** The tort of civil conspiracy is an intentional tort. Mallamo v. Town of Rivesville, 197 W. Va. 616, 477 S.E.2d 525 (1996). Civil conspiracy requires that two or more persons act in concert. Dixon, 253 S.E.2d at 152.

2. **To Commit a Criminal or Unlawful Act or a Lawful Act By Criminal or Unlawful Means.** The West Virginia Supreme Court of Appeals has stated that the persons must join to "accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." Dixon, 253 S.E.2d at 152.

3. **An Act in Furtherance.** Although not analyzed in detail, West Virginia common law requires that an act be undertaken in furtherance of the conspiracy. Dixon, 253 S.E.2d at 152. "The cause of action is not created by the conspiracy but by the wrongful acts done...." Id.

4. **Damage to Plaintiff.** Although not discussed, injury to the plaintiff is a stated element of civil conspiracy in West Virginia. Dixon, 253 S.E.2d at 152.

5. **Other.** No West Virginia cases.

C. Privileges and Defenses — Conspiracy

1. **Constitutional.** No West Virginia cases.

2. **Common Law.** The absence of a wrongful act by the defendants in a civil conspiracy case will defeat the cause of action. Dixon, 253 S.E.2d at 152. In Dixon, the West Virginia Supreme Court of Appeals stated that the termination of a lease pursuant to an absolute contractual right would not support a claim for civil conspiracy. Dixon, 253 S.E.2d at 152-53.

D. Relationship of Conspiracy to Defamation

The relationship of the tort of conspiracy to defamation was briefly addressed in Porter v. Mack, 50 W. Va. 581, 40 S.E. 459, 461 (1901), an action for interference with business relationships. The Porter court stated that a claim of conspiracy in an action for defamation against more than one defendant must be specifically alleged and pleaded as to each defendant alone. Porter, 40 S.E. at 461. This allows the court, and the defendants, to distinguish whether the plaintiff is stating that each of the defendants was uttering the same defamatory comments separately, in furtherance of one conspiracy, or whether each of the defendants, or only one of the defendants is liable for defamation, without regard to the conspiracy claim. Id.

E. Damages and Other Remedies — Conspiracy

Generally damage awards for conspiracy have not been addressed by the West Virginia courts. However, in cases involving conspiracy to interfere with employment contracts, injunctions have been awarded. See XIII.E.4, infra.

F. Procedural Matters — Conspiracy

1. **Burden of Proof.** Plaintiffs have the burden of proving the prima facie elements of civil conspiracy and the damages that flow therefrom. Dixon, 253 S.E.2d at 152.

2. **Statute of Limitations.** In Dunn v. Rockwell, 689 S.E.2d 255 (W.Va. 2009), the West Virginia Supreme Court of Appeals held that the statute of limitations for a claim of civil conspiracy is determined by the underlying conduct on which the claim of conspiracy is based. In Dunn, the plaintiffs had alleged, in addition to civil conspiracy, misappropriation and conversion, fraud, professional negligence and breach of fiduciary duty against the defendants - all of which are governed by a two-year statute of limitations. 689 S.E.2d 255, 268. The Court held that the civil conspiracy claim, which was based upon those other torts alleged against the defendants, was subject to the same two-year statute of limitations. Id.

3. **Other Procedural Matters.** If the prima facie elements of conspiracy are not proven, i.e. concerted action of two or more persons and an unlawful purpose or means, defendants are entitled to a directed verdict on the cause of action. Dixon, 253 S.E.2d at 152.

XII. INJURIOUS FALSEHOOD

A. Recognition of Tort — Injurious Falsehood

1. **Slander of Title.** West Virginia has specifically recognized the tort of slander of title. TXO Prod. Corp. v. Alliance Res. Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992), cert. granted in part, 113 S. Ct. 594, 121 L. Ed.2d 532 (1992), aff'd, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). This tort is actionable if the slander is on the title of a third person or if one is “claiming title in oneself without any reasonable basis.” TXO Prod. Corp., 419 S.E.2d at 879.

2. **Trade Libel/Product Disparagement/Disparagement of Quality.** Although causes of action for trade libel, product disparagement and disparagement of quality have not been specifically adopted, the West Virginia Supreme Court of Appeals has cited with approval the Restatement (Second) of Torts § 624 (1977), which provides guidance on liability for publication of an injurious falsehood. TXO Prod. Corp., 419 S.E.2d at 879.

3. **Other.** No West Virginia cases.

B. Substantive Law — Injurious Falsehood

Although the West Virginia Supreme Court of Appeals has cited the Restatement (Second) of Torts § 624 (1977) with approval, a cause of action for injurious falsehood has not been specifically adopted in this state.

1. Elements of Injurious Falsehood.

a. **Falsity.** The West Virginia Supreme Court of Appeals has decided that in actions for slander of title, “recording a quitclaim deed that one knows to be frivolous” is no different than falsely telling a potential buyer that there is a cloud on a title. TXO Prod. Corp., 419 S.E.2d at 879-80. Wrongfully recording a baseless quitclaim on another’s property is actionable as slander of title. TXO Prod. Corp., 419 S.E.2d at 880.

b. **Injury.** No cases have analyzed the requirement of an injury in a slander of title case.

c. **Publication.** In an action for slander of title, recording a frivolous quitclaim deed has the same results as wrongfully publicizing to a potential buyer that there is a cloud on a title. TXO Prod. Corp., 419 S.E.2d at 879-80. This can have the same effect of discouraging another from dealing with the owner of the property, as would actually telling the third party that there is a problem with the title. TXO Prod. Corp., 419 S.E.2d at 878-79.

d. **Of and Concerning.** No West Virginia cases.

e. **Special Damages (Injury to Pecuniary interests).** The West Virginia Supreme Court of Appeals has made an exception to the ordinary rules of special damages in actions for

slander of title. TXO Prod. Corp., 419 S.E.2d at 881. Ordinarily, attorney fees are not special damages, but in cases where the fees are incurred to remove spurious clouds from a title, attorney fees will qualify as special damages. TXO Prod. Corp., 419 S.E.2d at 881.

f. **Malice.**

(1) **Intent to Cause Harm.** No West Virginia cases.

(2) **Recklessness, Knowledge of Falsity or Similar Fault in Relation to Truth of the Publication.** Malice has been found in an action for slander of title when the joint venturer in an oil and gas development project intentionally recorded a quitclaim deed that “it knew to be without any basis in fact.” TXO Prod. Corp., 419 S.E.2d at 881. A pattern or practice of defrauding and coercing those in unequal bargaining positions can be used to establish the malice element in a slander of title cause of action. Id. In TXO, a joint venturer involved in a gas and development project brought a declaratory judgment action to clear a purported cloud on a title. The defendant counterclaimed for slander of title. The evidence showed that the real intent of the declaratory judgment action was to reduce the royalty payments that were due under the lease. The court found that the recording of a quitclaim deed without any basis established the malice requirement necessary to the cause of action. TXO Prod. Corp. v. Alliance Res. Corp., 187 W. Va. 457, 419 S.E.2d 870, 880-81 (1992), cert. granted in part, 113 S. Ct. 594, 121 L. Ed.2d 532 (1992), aff’d, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

(3) **Spite or Ill Will.** No West Virginia cases.

2. **Distinctions (if any) in Elements of Subsidiary Torts.**

a. **Slander of Title.** The elements of slander of title are: 1) publication; 2) a false statement; 3) derogatory to plaintiff’s title; 4) with malice; 5) causing special damages; and 6) as a result of diminished value in the eyes of third parties. TXO Prod. Corp., 419 S.E.2d at 879. These elements are discussed in XII.B.1, supra.

b. **Trade Libel.** No West Virginia cases.

c. **Product Disparagement.** No West Virginia cases.

3. **Opinion.** No West Virginia cases.

4. **Privileges.** No West Virginia cases.

5. **Damages and Other Remedies/Injunctive Relief.** Ordinarily, West Virginia courts do not recognize attorney’s fees as special damages. However, in cases of slander of title, attorney’s fees incurred in clearing up a purported cloud are considered to be special damages. TXO Prod. Corp., 419 S.E.2d 870, 881 (1992). It is also clear in West Virginia that if the requisite state of mind exists, awards of punitive damages for slander of title will be upheld. TXO Prod. Corp., 419 S.E.2d at 886-90.

C. **Procedural Issues — Injurious Falsehood**

No West Virginia cases.

D. Disparagement and Defamation Statutes

West Virginia has an insulting words statute that reads as follows: “[a]ll words which, from their usual construction and common acceptance, are construed as insults and tend to violence and breach of the peace shall be actionable. No demurrer shall preclude a jury from passing thereon.” W. Va. Code § 55-7-2. However, the last sentence of the statute has been declared a nullity and will not be applied under the reasoning of New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. 1527 (1964). See also Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216, 220 (1981). This statute provides a cause of action that supplements traditional defamation and slander torts. Mauck, 280 S.E.2d at 219. The insulting words statute creates a cause of action for two situations not actionable under traditional defamation grounds: 1) “for those insults of an unprivileged nature written or stated to the victim of the insult alone”; and 2) “for insulting words which tend to violence and to a breach of the peace, which would include epithets and racial slurs.” Mauck, 280 S.E.2d at 219. The first situation would fail under common law defamation grounds because it lacks the publication requirement. The second situation would also fail under a common law defamation analysis unless it was coupled with the additional proof of special damages. Id. In order to be actionable under the insulting words statute, unpublished insults “must be both insulting and tend to violence and a breach of the peace.” Mauck, 280 S.E.2d at 219 (citing Poling v. Pickens, 70 W. Va. 117, 73 S.E. 251 (1911)). However, proof of special damages is not necessary for a cause of action under the insulting words statute found in West Virginia Code § 55-7-2. Covey v. Fields, 177 W. Va. 481, 354 S.E.2d 413, 414 (1987).

It is for the jury to determine whether the spoken words are actionable under West Virginia Code § 55-7-2. Ordinarily, “malice may be presumed from words made actionable by this statute.” Cunningham v. Martin, 170 W. Va. 411, 294 S.E.2d 264 (1982) (citing Michaelson v. Turk, 79 W. Va. 31, 90 S.E. 395, Syl. Pt. 3 (1916)). “But only actionable words permit a presumption of malice.” Cunningham, 294 S.E.2d at 266. In Cunningham, an insulting words case was reversed and remanded after a finding that erroneous jury instructions given by the court removed the jury’s discretion to decide whether particular circumstances and phrases made words actionable for statutory slander. Id. It is clear that, following the Cunningham decision, “[i]t is the province of the jury to determine what words are actionable, taking into consideration all facts, circumstances and mitigating factors.” Cunningham, 294 S.E.2d at 267.

Statutory defenses as are allowed by common law are available in addition to all allowable First Amendment defenses. “[C]ommon law defenses of privilege and truth along with any First Amendment defenses are available in all actions brought under the insulting words statute....” Mauck, 280 S.E.2d at 219. This includes all First Amendment defenses applicable to a common law defamation cause of action. Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778, 781 n.2, 13 Media L. Rep. 1855 (1986). Under New York Times v. Sullivan, whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law; consequently, the provision in West Virginia Code §55-7-2, the insulting words statute, which states “[n]o demurrer shall preclude a jury from passing thereon’ fails on constitutional grounds and will not be applied to future actions brought under that statute.” Mauck, 280 S.E.2d at 217. This inclusion of constitutional defenses insures that a plaintiff’s civil rights are not violated by the statute.

E. Relationship of “Injurious Falsehood” Torts to Traditional Libel Claims

The relationship of injurious falsehood torts to traditional libel claims has not been explored in West Virginia.

F. Lanham Act — § 43(a)

West Virginia has no state statute which parallels the Lanham Act. The United States District Court for the Southern District of West Virginia has interpreted the Lanham Act to apply only in very specific situations. Cromer v. Lounsbury Chiropractic Offices, Inc., 866 F. Supp. 960 (S.D. W. Va. 1994). The court reiterated its holding in Mylan Lab., Inc. v. Makari, 7 F.3d 1130, cert. denied, 510 U.S. 1197, 114 S. Ct. 1307, 127 L. Ed. 2d 658 (1994), and stated, “[t]he Lanham Act is primarily intended to protect commercial interests.... [I]t provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor’s false advertising.” Mylan Lab., Inc., 7 F.3d at 1139 (quoting Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 230 (3d Cir. 1990)). Thus, the plaintiffs’ case in Cromer was dismissed because their damages were “purely personal - no commercial interests whatsoever [were] involved.” Cromer, 866 F. Supp. at 964.

G. State Unfair Competition Law

West Virginia laws of unfair competition have not been applied in cases of commercial disparagement.

XIII. INTERFERENCE WITH CONTRACT/PROSPECTIVE ECONOMIC ADVANTAGE

A. Recognition of Tort — Interference with Contract/Prospective Advantage

1. **In General.** West Virginia has recognized causes of action for tortious interference with business interests, Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S.E. 591, 56 L.R.A. 804 (1902); interference with contractual relations, Consolidation Coal Co. v. Disabled Miners of S. West Virginia, 328 F. Supp. 1248 (1971), modified, 442 F.2d 1261 (1971), cert. denied, 404 U.S. 911, 92 S. Ct. 228, 30 L. Ed. 2d 184 (1971); and interference with testamentary bequest, Barone v. Barone, 170 W. Va. 407, 294 S.E.2d 260 (1982). The West Virginia Supreme Court of Appeals, relying on the Restatement (Second) of Torts, has outlined the elements of a prima facie case of tortious interference which can apply to claims of either interference with contract or business relationships or to expectancy interests. Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W. Va. 210, 314 S.E.2d 166, Syl. Pt. 2 (1983). Although the basic elements for a tort of interference seem settled in this state, the highest court has cited with approval Am. Jur. 2d Interference which states: “in connection with the tort of interference, precedents are only suggestive, not conclusive, and the fact that a situation is one in which a remedy for interference has never previously been granted does not deter the courts from granting a remedy.” 45 Am. Jur. 2d Interference, § 1, p. 280.

2. **As Applied to the Media.** The United States District Court for the Southern District of West Virginia specifically applied the elements of tortious interference to the actions of a media defendant in Collard v. Smith Newspapers, Inc., 915 F. Supp. 805, 24 Media L. Rep. 1940 (S.D. W. Va. 1996). The plaintiff was the managing editor of the Lincoln Journal, which was under a management contract with the defendants, Smith Newspaper, Inc. and Newspaper Management Co. Collard, 915 F. Supp. at 809. Plaintiff alleged that he was terminated by the Lincoln Journal due to a series of articles and editorials that he wrote concerning a politically charged issue surrounding consolidation of the public

schools in the area. Plaintiff claimed that the management companies tortiously interfered with his employment relationship. Collard, 915 F. Supp. at 816. The defendant newspapers moved for summary judgment on the ground that they had the responsibility for the welfare of the *Lincoln Journal* due to the management contract and, therefore, could not be held liable for tortious interference. Id.

The court reiterated the elements necessary to establish a prima facie cause of action for tortious interference as outlined in Torbett. See XIII.B.1.a-d, infra. The court then stated that the defendant newspapers were entitled to summary judgment by the use of the defense of responsibility for another's welfare as stated in the Restatement (Second) of Torts § 770 (1977). Collard, 915 F. Supp. at 816. Thus, one who is responsible for the welfare of another person cannot interfere improperly with a contract of the other person as long as he does not employ wrongful means and acts to protect the other's welfare. Collard, 915 F. Supp. at 817.

B. Substantive Elements — Interference with Contract/Prospective Advantage

1. Interference with Contract.

a. ***Existence of a Valid Contract Between Plaintiff and Third Party.*** In order to establish a claim for interference with a contractual relationship, a plaintiff must establish that a valid contract was in existence. Torbett, 314 S.E.2d at 173. Generally, the cases in West Virginia address this issue in terms of interference with an employment contract. See, e.g., Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S.E. 161 (1906); Voorhees v. Guyan Mach. Co., 191 W. Va. 450, 446 S.E.2d 672 (1994).

b. ***Knowledge By Defendant of Contract.*** The element of defendant's knowledge of the contract has not been analyzed in West Virginia cases. However, the interference, in order to be actionable, must be intentional and not merely negligent. Torbett, 314 S.E.2d at 171. See XIII.B.1.c, infra.

c. ***Intentional and Improper and Unjustified Interference to Induce Nonperformance.*** As part of plaintiff's prima facie case for interference with a contract, the plaintiff must prove that the interference was intentional. Torbett, 314 S.E.2d at 171. However, a claim of intentional and improper interference may be negated by an affirmative defense of lawful justification or privilege. Torbett, 314 S.E.2d at 173. The defendant has the burden of proof on affirmative defenses. Voorhees, 446 S.E.2d at 672. The available privileges and justifications are discussed in XIII.C.2, infra.

d. ***Nonperformance of Contract Damaging to Plaintiff.*** It is clear that the plaintiff's prima facie case for interference with contract includes the element of damages caused by the interference. Torbett, 314 S.E.2d at 173.

2. Interference with Prospective Advantage.

a. ***Reasonable Expectation of Entering Into Valid Business Relationship.*** The tort of interference adopted in West Virginia includes a cause of action for interference with expectations of business relationships, Torbett, 314 S.E.2d at 173, and of expectations from testamentary bequest, Barone v. Barone, 170 W. Va. 407, 294 S.E.2d 260 (1982). Plaintiff's prima facie case for this cause of action must include the existence of an expectancy. Torbett, 314 S.E.2d at 173.

b. ***Knowledge By Defendant of Expectation.*** A defendant's knowledge of the expectation has not been specifically addressed in the cases. However, the interference with an expectancy must be intentional. See XIII.B.2.c, infra.

c. ***Intentional and Improper and Unjustified Interference.*** Plaintiff must establish an intentional interference with the expectancy as part of a prima facie case. Torbett, 314 S.E.2d at 173. An intentional act or interference may include a defamatory statement or writing. Garrison v. Herbert J. Thomas Mem’I Hosp., 190 W. Va. 214, 438 S.E.2d 6 (1993).

d. ***Loss of Prospective Advantage.*** In order to establish a claim for tortious interference with prospective advantage or expectation, the plaintiff must show that the Interference caused her damages. Torbett, 314 S.E.2d at 173.

C. Privileges and Defenses — Interference with Contract/Prospective Advantage

1. **Constitutional.** Constitutional privileges and defenses have not been raised in cases of interference with contract or prospective advantage.

2. **Common Law.** If a plaintiff establishes a prima facie case of tortious interference, a defendant may assert the affirmative defenses of justification or privilege. Bryan v. Massachusetts Mut Life Ins. Co., 178 W. Va. 773, 364 S.E.2d 786 (1987). “Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party’s business, their responsibility for another’s welfare, their intention to influence another’s business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.” Torbett, 314 S.E.2d at 173. Truthful information is an absolute bar to tortious interference claims whether or not the information is requested. Tiernan v. Charleston Area Med. Ctr., 203 W. Va. 135, 506 S.E.2d 578, 593 (1998) (adopting Restatement (Second) of Torts § 722 (1979)). One who, charged with the welfare of another, intentionally causes that person to not perform a contract does not improperly interfere as long as he does not act improperly and acts to protect the welfare of the other. Collard v. Smith Newspapers, Inc., 915 F. Supp. 805, 24 Media L. Rep. 1940 (S.D. W. Va. 1996).

D. Relationship of Interference with Contract/Prospective Advantage to Defamation

1. **Application of Constitutional and Common Law Privileges and Defenses.** No West Virginia cases.

2. **Viability of Separate Claim.** In Garrison, a doctor sued a former employing hospital for tortious interference with his new job opportunity. He claimed interference resulted when a letter regarding a peer review that had taken place at the former employing hospital was sent to the prospective employer, who subsequently failed to employ plaintiff. The plaintiff sued the former employing hospital for tortious interference, which has a two-year statute of limitations, rather than defamation, which has a one-year statute of limitations. Garrison, 438 S.E.2d at 14-15. The West Virginia Supreme Court of Appeals specifically stated that tortious interference and defamation are separate claims with distinct elements. Garrison, 438 S.E.2d at 14. The court reasoned that a defamatory statement or writing could form the basis of the “intentional act of interference” element in a tortious interference cause of action. However, the mere existence of the defamatory statement does not change the cause of action to one for defamation. Id.

E. Damages and Other Remedies — Interference with Contract/Prospective Advantage

1. **General Damages.** In a suit for tortious interference, it has long been held that the person who interferes is liable for all damages caused by that interference. Carter v. United States Coal & Coke Co., 84 W. Va. 624, 100 S.E. 405 (1919).
2. **Special Damages.** No West Virginia cases.
3. **Punitive Damages.** In an action for intentional interference with an employment relationship, punitive damages may be properly considered by a jury. C.W. Dev. Inc. v. Structures, Inc., 185 W. Va. 462, 408 S.E.2d 41, 46 (1991).
4. **Injunctive Relief.** Preliminary injunctions have been held to be a proper remedy in cases where a defendant or a group of defendants tortiously interfere with an employment contract. Consolidation Coal Co. v. Disabled Miners of S. West Virginia, 328 F. Supp. 1248 (1971), modified, 442 F.2d 1261 (1971), cert. denied, 404 U.S. 911, 92 S. Ct. 228, 30 L. Ed. 2d 184 (1971).

F. Procedural Matters — Interference with Contract/Prospective Advantage

1. **Burden of Proof.** A plaintiff, in making claims of tortious interference, has the burden of demonstrating all of the elements of the cause of action. Syl. Pt. 2, Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W. Va. 210, 314 S.E.2d 166 (1983). Once a prima facie case is shown, the burden shifts to the defendant to show that it has an affirmative defense of lawful justification or privilege for its actions. Torbett, 314 S.E.2d at 173.

2. **Statute of Limitations.** The statute of limitations for a claim for tortious interference with a business contract or relationship is two years pursuant to West Virginia Code § 55-2-12(b). Garrison, 438 S.E.2d at 14. The West Virginia Supreme Court of Appeals has determined that an individual's right to conduct business or pursue employment opportunities is a property right, and, therefore, is governed by a two-year statute of limitations. Id. The court has held that an intended beneficiary has the right to sue for tortious interference with a testamentary bequest and this right also has a two-year statute of limitations. Barone v. Barone, 170 W. Va. 407, 294 S.E.2d 260, 264 (1982).

3. **Other Procedural Matters.** No West Virginia cases.

XIV. NEGLIGENCE MEDIA PUBLICATION

No West Virginia cases.

XV. PRODUCT LIABILITY/STRICT LIABILITY

No West Virginia cases.

XVI. OTHER THEORIES OF EDITORIAL CONTENT LIABILITY

No West Virginia cases.

XVII. OTHER RELEVANT STATUTES

A. Cameras In the Courtroom

1. **Statutes or Court Rule.** West Virginia has adopted trial court rules which govern camera coverage of courtroom proceedings. West Virginia Trial Court Rules 8.01, et seq. The rules became effective July 1, 1999. The circuit judge or magistrate has the ultimate say on whether camera coverage will be permitted. Rule 8.01, West Virginia Trial Court Rules (1999). Further, camera coverage will only be allowed in proceedings that are open to the public. Rule 8.04, West Virginia Trial Court Rules (1999). The rules provide the procedural requirements for camera coverage. Rule 8.02, West Virginia Trial Court Rules (1999). Additionally, the rules specify the type of and the maximum amount of video and audio equipment which shall be permitted in a courtroom at any one time. Rule 8.06, West Virginia Trial Court Rules (1999).

2. **Case Law.** The West Virginia Supreme Court of Appeals has addressed cameras in the courtroom in the context of criminal trials. The presence or use of cameras, sound recording equipment, and broadcasting equipment in the courtroom during a criminal trial is not inherently inconsistent with a defendant's right to a fair trial. State v. Hanna, 180 W. Va. 598, 378 S.E.2d 640, 644, 17 Media L. Rep. 1627 (1989). However, the media does not have an absolute constitutional right to photograph, record, or broadcast judicial proceedings if such activity would impose a serious threat to the defendant's constitutional right to a fair trial. Id.

B. Confidential Sources

West Virginia has no statutes regarding confidential sources. However, the West Virginia Supreme Court of Appeals has held that a reporter is entitled to a qualified privilege when engaged in the news-gathering function. State ex rel. Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188, 17 Media L. Rep. 1627 (1989).

C. SLAPP Suits

West Virginia does not have an anti-SLAPP statute and there are no West Virginia cases on this issue.

D. “Son of Sam” Laws

West Virginia Code § 14-2B-2 to § 14-26-4 provides for the distribution of crime profits including any assets obtained through the use of unique knowledge obtained during the commission or preparation of a crime. According to the legislative findings section, “it is a violation of the public policy of this state to permit a person who commits a crime to thereafter gain a monetary profit from the commission of that crime. Consequently, the Legislature finds that when a person convicted of a crime later profits as a result of the commission of that crime, such profits should be used to compensate those crime victims who were damaged as a result of the commission of the crime, as well as the taxpayers who paid for the prosecution or incarceration of the defendant, or both.” W. Va. Code §14-2B-2. No case law exists in West Virginia with regard to the “Son of Sam” law.

E. Other

No other relevant statutes or case law exist in West Virginia with regard to media defendants.