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Supreme Court Case No. 063269

IN THE SUPREME COURT OF WEST VIRGINIA

LANDIS V. LANDIS

A.E. LANDIS,

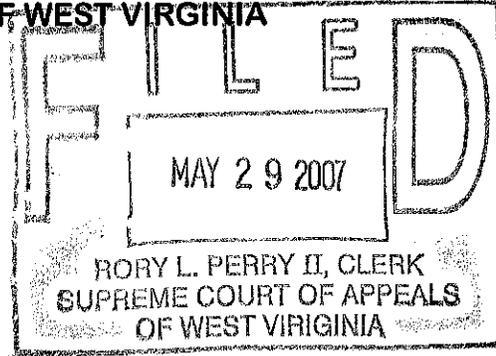
Petitioner below,

vs.

**CASE NUMBER: 99-D-531
JUDGE ROBERT A. BURNSIDE, JR.
CIRCUIT COURT OF RALEIGH COUNTY**

GEORGANNE BANNING LANDIS,

Respondent below.



FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

**REPLY TO THE MEMORANDUM OF LAW IN SUPPORT
OF PETITIONER'S RESPONSE TO RESPONDENT'S PETITION FOR APPEAL**

May 29, 2007

**Lyne Ranson
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

NATURE OF PROCEEDINGS AND RULINGS IN TRIBUNAL BELOW

In Dr. Landis' Response to Respondent's Petition For Appeal, he agreed that Ms. Landis' facts stated in her Nature of Proceedings and Rulings in Tribunal Below were substantially correct.

STATEMENT OF FACTS

Ms. Landis responds to the statement of facts filed by Dr. Landis in his Memorandum of Law In Support of Petitioner's Response to Respondent's Petition for Appeal as follows:

A. Dr. Landis states in his Statement of Facts, paragraph A that he has partially paid to Ms. Landis her equitable share of the parties' marital estate. This statement is completely false.

Ms. Landis has not received the first cent toward payment of the \$880,996.35 that was owed to her on December 17, 2005. Ms. Landis has received certain real estate and other assets pursuant to the final order previously entered on October 7, 2005, but has not received any of her share of the equitable distribution, nor the First Community Bank Share stock.

Furthermore, to address this false statement it is necessary to refer to a hearing held after the filing of this petition on the 27th day of March, 2007 wherein Dr. and Ms. Landis reached a subsequent agreement which stated Ms. Landis was to receive the marital home and lot located at Glade Springs in Daniels, West Virginia and the debt associated with such property. Also, Ms. Landis was to now only receive \$534,455.41 in cash to settle the equitable

distribution. As of the date of filing this reply, Dr. Landis has not signed the Agreement entered into by the parties, nor has even responded to the proposed order and agreement submitted to his counsel. Once again, this is a clear indication of Dr. Landis' intent in carrying out his agreements in this matter.

B. Dr. Landis states in his Statement of Facts, paragraph B that Ms. Landis has been subject to a contempt petition for her failure to cooperate in the division of the parties' marital assets. Once again, this statement is false.

Dr. Landis filed a petition for contempt on or about the 28th day of March, 2007 (after the filing of this Petition) which alleged that Ms. Landis had not signed the listing agreement to sell the marital home and lot located at Glade Springs, Daniels, West Virginia. As stated above, the parties reached an agreement at the hearing on the 27th day of March, 2007 wherein Ms. Landis was to receive the home and lot located at Glade Springs, Daniels, West Virginia. There has never been a finding of contempt against Ms. Landis in this regard. Certainly, Ms. Landis cannot be held in contempt for not signing a sales contract to sell property which she is now going to receive sole ownership and possession of. Dr. Landis' petition for contempt is clearly frivolous, meritless and a complete waste of the court's time.

C. Dr. Landis states in his Statement of Facts, paragraph C states that Ms. Landis did not terminate the services of Barry Bruce because he was unable to obtain certain requested financial information from Dr. Landis, but, she terminated Mr. Bruce because she was not willing to follow his advice and maintain her composure during the hearings in which she was involved with Mr.

Bruce.

It is not clear as to what Dr. Landis is referring to in this paragraph. However, with any divorce matter, the emotional distress a party goes through can be very overwhelming. Ms. Landis did not want a divorce from Dr. Landis. She wanted to keep her family together. Dr. Landis chose to leave Ms. Landis so that he could continue to pursue his relationship with a female, married X-Ray Technician in his office. This was a devastating blow to Ms. Landis who had invested many years in assisting Dr. Landis pursue his dream of building a successful practice as an orthopedic surgeon and assisting with their many real estate ventures and other business interests; as well as being a stay at home mother raising their two children. Ms. Landis deserves her fair share of what she worked so hard in helping Dr. Landis build. It is Dr. Landis that has blatantly refused to give her the share she is entitled to receive.

ASSIGNMENTS OF ERROR

In the Order affirming decision of the Family Court Judge entered on July 20, 2006 by the Circuit Court and the Final Order entered on April 24, 2006, the Court erred as follows:

1. That the Circuit Court erred by not remanding, nor reversing the family court judge's decision to not award a full or partial reimbursement to Ms. Landis for attorney fees, expert fees and costs incurred by her for the prosecution of this divorce matter, since this was a very complex case, Dr. Landis's misconduct led to the dissolution of the parties' marriage, there was a substantial disparity in income, he failed to provide documentation in

a timely manner, and Ms. Landis did not have the financial ability to pay such fees.

2. That the Circuit Court erred by not remanding, nor reversing the Family Court's finding that Ms. Landis received an award of substantial assets when, in fact Dr. Landis failed to pay almost \$900,000 that was due and owing in December 2005 and Ms. Landis' other marital assets did not produce much income.

3. That the Circuit Court erred by not remanding, nor reversing the Family Court's decision that Ms. Landis had the ability to pay her own attorney fees when she was not currently employed and has not been for the last 15 plus years, her spousal support will terminate in approximately 2 ½ years and she suffers from health problems which preclude her from earning an income.

4. That the Circuit Court erred by not remanding, nor reversing the Family Court's ruling that Dr. Landis was making payment on a \$15,000 mortgage loan for Ms. Landis' benefit for her prior attorney fees when that is not the evidence contained in the record.

5. That the Circuit Court erred by not remanding, nor reversing the decision of the family court in finding that Dr. Landis had paid \$1,500 to Barry Bruce for attorney services rendered to Ms. Landis, when in fact the evidence did not support that he had paid that.

DISCUSSION AND AUTHORITIES

In response to Dr. Landis' discussion regarding paragraph A, Ms. Landis does not have sufficient funds to pay her own attorney fees, expert fees and costs.

First, it is unknown as to what Dr. Landis' current income is. However, it is acknowledged by Dr. Landis that he had over \$600,000 gross income per year. The spousal support and child support Dr. Landis is currently paying will cease in less than 2 ½ years. This will leave Ms. Landis with no other income than her equitable distribution, which she still has not received. Ms. Landis will have to live off of her equitable distribution payment for the rest of her life since she has exhausted all funds in her retirement account to pay for her attorney fees, expert fees and costs.

Second, Ms. Landis has not received her share of the equitable due and owing to her. In the second paragraph under the Discussion title in Dr. Landis' response, it states, "Dr. Landis must pay to Ms. Landis, from some existing account, Eight Hundred Thousand Nine Hundred Sixty-Six Dollars (\$880,966), which certainly provides Ms. Landis sufficient income from which she can pay her attorney fees." **This money was due and owing to Ms. Landis on December 17, 2005 and has never been paid.** Ms. Landis continues to lose the interest each month that she would have received on this money. It is clear that Dr. Landis has no intention of paying this money to Ms. Landis. Several Petition for Contempt's have been filed as well as a writ of Capias for Dr. Landis to be

arrested for his non-payment. It is noted that the Family Court signed such Order, but Dr. Landis was not arrested as he appeared voluntarily. In fact, a hearing was scheduled for March 27, 2007 and another agreement was worked out between the parties. As of this date, Dr. Landis has not signed the agreement, complied with the terms of or responded to such.

Fourth, Dr. Landis did not comply with discovery deadlines after numerous requests. The record regarding this issue will speak for itself in that the number of Motions to Compel his responses which were filed. Dr. Landis states that he was deposed two times in this case; however, he failed to state that in his first deposition it was his accountant, John Stroud who was actually deposed and answered the questions. Also, Mr. Stroud had to be placed under oath along with Dr. Landis and answered most of Dr. Landis' questions. This was one of the contributing factors requiring Dr. Landis and John Stroud to be deposed a second time.

Fifth, Dr. Landis states in his response that he did not have an "adulterous affair." However, Dr. Landis admitted to Ms. Landis that he in fact had been having an affair with his married X-Ray Technician. Dr. Landis denies ever admitting such to Ms. Landis. Because the parties resolved this matter before trial each time with various agreements, it was never necessary to present testimony in court regarding all the facts that showed Dr. Landis' misconduct and relationship with his X-Ray technician. Please refer to Ms. Landis' Memorandum in Support of her Petition for Appeal regarding this issue.

Also, Dr. Landis began using a pager service on or about March 9, 1999 at

the hospital. Dr. Landis had not been on call with the hospital since 1991 or 1992, so there was no reason for the pager service at this time. Dr. Landis used this system to communicate with his married X-Ray technician and purchased a separate company cell phone for her use. The cell phone bill was sent to his private Post Office box and paid by a separate company check.

Furthermore, while the parties were married, Dr. Landis was out of town and staying at a hotel in Charleston, West Virginia. Very late on June 4, 1999 at 1:06 a.m., Ms. Landis called Dr. Landis at the hotel and his female X-Ray technician answered the hotel room phone and handed the telephone over to a very sleepy and groggy Dr. Landis. Dr. Landis told Ms. Landis that he never wanted her to find out about the affair this way. Dr. Landis and Ms. Landis spoke two times on this evening, for eleven (11) minutes the first time at 1:06 a.m. and forty-five (45) minutes at 1:43 a.m.

B. APPLICATION OF THE BANKER FACTORS

1. **Ability to Pay:** In reply to Dr. Landis' response, he has not provide any evidence as to his medical condition and the only income levels for Dr. Landis in the record are showing his gross income to be over \$600,000 per year as admitted in his response.

Furthermore, Dr. Landis obtained an AIG Insurance Trust, naming his children as beneficiaries in the amount of \$1,000,000 in the event of his death. If Dr. Landis had serious medical problems or low income it is unlikely he would have been able to insure himself at this amount. Ms. Landis should not be responsible for full payment of her attorney fees out of the funds she is to receive as equitable

distribution of the parties' assets and debts; which she has yet to receive. She will have no other source of income for the duration of her life, except as may be derived from this money.

Certainly, given the volatility and uncertainty of the stock market and other speculative investments, it is not a guarantee that any additional money will be made from this sum. Furthermore, the remaining assets Ms. Landis received are mostly non-liquid, non-income producing assets. Ms. Landis receives \$10,000 per month in spousal support pursuant to the final order entered on October 7, 2005 until September 1, 2009 (less than 2 ½ more years) from which a significant portion will be spent paying taxes and covering her living expenses. Dr. Landis was ordered to pay all existing mortgages, utilities, taxes and insurance on all properties until August 30, 2004.

Due to the refinancing by Dr. Landis of the St. Michaels property into his name individually, before the parties division of marital assets, Dr. Landis's new bank did not include the taxes and insurance in the new payment of \$1,900 which was deducted from Ms. Landis's spousal support each month. When the bank realized that they were suppose to pay for the taxes and insurance for such home, the bank paid the amount of back taxes and insurance due and then charged Dr. Landis \$4,000 per month for one year for the back tax payments of the years 2003, 2004, 2005 and until July 2006, when Ms. Landis refinanced such property into her name solely. Dr. Landis should not have deducted the full amount of such

payments from Ms. Landis's spousal support payment during that period since he was responsible for the payment of all mortgages, homeowners insurance, and taxes from the time of the temporary hearing through August 31, 2004, the date when the parties' reached their agreement regarding the division of real estate. Furthermore, Ms. Landis was unaware that Dr. Landis refinanced such property and did not sign any documentation allowing the refinance to occur.

Due to Dr. Landis' non-payment of the equitable distribution owed to Ms. Landis, she was forced to refinance the home in St. Michaels, Maryland and the home in Nantucket, Massachusetts for a higher interest rate since she could not use the equitable distribution money as collateral or to pay off her credit card debt. Dr. Landis has continued to have the ability to increase his earnings on such amount by trading and selling stocks as well as receiving distributions from his E-Trade accounts. Ms. Landis has lost almost two (2) years of interest on such money as well as the use of such money.

2. **The Amount Involved and the Results Obtained:** Dr. Landis states in his response to such paragraph that the results contained in the Final Order in this case are basically those which were proposed as a settlement at the outset of this case. This is certainly not the case. Dr. Landis did not offer Ms. Landis \$15,000 per month in spousal support and child support. Dr. Landis did not offer Ms. Landis the properties she received as a result of the settlement agreement. Furthermore, it would not have been in Ms. Landis' best interest to enter into an agreement without a complete review of the parties' marital estate including all supporting documentation. Dr. Landis continuously removed, dissipated and transferred

marital monies that it had to be tracked and subpoenaed because Dr. Landis would not provide the appropriate documentation. Dr. Landis clearly violated the Order to Prohibit the Dissipation of Assets in this case as he has done with almost every order entered in this matter.

3. **The Skill Required to Perform Legal Services Properly:** Ms. Landis detailed in her Memorandum in Support of her Petition for Appeal the reasons as to why she no longer could use the legal services of James Cagle and Barry Bruce. Ms. Landis had a good relationship with both James Cagle and Barry Bruce.

4. **The effect that payment of attorney fees would have on each parties' standard of living:** Dr. Landis states in his response to such paragraph that Ms. Landis will have twice as much spendable income in cash alone apart from her independent wealth and other investment holdings. First of all, as stated above, Ms. Landis has not received one cent toward payment of the equitable distribution due and owing to her. Secondly, Ms. Landis exhausted her investment holdings which was her pre-marital property to pay toward her legal fees, expert fees and costs.

5. **The "Degree of Fault" by either party in making the divorce action necessary.**

In reply to Dr. Landis' response to such paragraph, Dr. Landis did in fact admit to Ms. Landis that he committed adultery. Furthermore, Ms. Landis had every intent on placing her evidence before the court regarding his adulterous relations. However, the parties settled this matter before it was necessary.

6. The Attorney Fees, Expert Fees and Costs in this case are Reasonable.

In reply to Dr. Landis' response to such paragraph, as stated above, the record will reflect Dr. Landis did not produce in a timely manner the documents necessary to value the parties' marital asset. In some instances, he did not produce requested documents for years. Furthermore, Ms. Landis was acting on the advice of her financial experts and attorneys. The documents that were requested were specific to the value of the parties' marital estate, his income for purposes of calculating child support and determining spousal support as well as other issues to finalize this matter.

THE 12 AETNA FACTORS

1. The Time and Labor Required: Dr. Landis states in his response that this case was no more complex, protracted or contentious than many other cases before the court. He further states that what made this case complex, protracted and contentious was the personality of the Respondent who was hell-bent on attempting to destroy the reputation of Dr. Landis which she fell short of doing so. This is certainly an inaccurate statement. Ms. Landis at no time wanted to destroy the reputation of Dr. Landis. In doing so, she would have jeopardized his income necessary to pay her child support and spousal support award as well as hurt her children. If Dr. Landis' reputation was damaged at all, it was because of his actions and misconduct during the marriage.

Furthermore, this case was complex due to the fact that every aspect of this case was contested by Dr. Landis and there were numerous separate property issues all of which had to be researched and evaluated to determine if a marital

interest existed as well as numerous businesses which had to be valued.

2. **The Novelty and Difficulty of the Questions:** Dr. Landis states that Ms. Landis' irrational and unreasonable behavior caused this case to appear complex. It appears that Dr. Landis is on a smear campaign to discredit Ms. Landis when she has done nothing wrong and certainly was not the cause for the dissolution of the marriage.

This case was more difficult than the average divorce case due to the extent and nature of the disputed marital assets, as well as the advanced complex of theories put forth. Once again the allegations made by Dr. Landis are false. Ms. Landis' only concern was to protect herself and her children. Dr. Landis had numerous business interests in which Ms. Landis had, at least an arguable interest due to theories as determined by Ms. Landis' financial expert. Every family law matter imaginable was at issue and hotly disputed in this case including: equitable distribution, what constituted separate property, whether appreciation or separate property was active or passive, the value of marital business interests, spousal support and the nature and length of such, child custody, parenting time with the children, proper amount of child support, payment of extra curricular activities and schooling for the children, adultery by Dr. Landis, misconduct by Dr. Landis, medical coverage for Ms. Landis repairs to the numerous homes and vehicles, many costly commercial and residential appraisals, and the list could continue on and on.

3. **The Skill Required to Perform Legal Services Properly:** It doesn't

matter whether Ms. Landis had one or three attorneys during the course of this litigation. It appears that Dr. Landis does not contest any of the three attorney's skill level.

4. **The Preclusion of Other Employment by the Attorney Due to the Acceptance of this Case:** This factor is not relevant in this matter; with the exception this case was very time consuming.

5. **The Customary Fee:** Ms. Landis attempted to obtain counsel in the Beckley, West Virginia area. However, every attorney she consulted with had a conflict due to Dr. Landis' occupation and standing in the community. Ms. Landis had no other choice but to retain counsel out of the Raleigh County area. Her first attorney was in Charleston, and was involved in a number of high profile criminal cases. Her next attorney was from Lewisburg and current attorney from Charleston; both attorneys regularly practice in the Raleigh County area with such hourly rates.

6. **Whether the Fee is Hourly or Contingent:** The fee here was hourly, so this factor is not relevant.

7. **The Limitations Imposed by the Client or the Circumstances:** The circumstances that should be considered are the dilatory actions of Dr. Landis, his failure to abide by any agreement that he has made and the circumstances involving significant property in three states, many businesses and a medical practice to value.

8. **The Amount Involved and the Results Obtained:** This has been addressed above herein that the results reached were much more beneficial to Ms. Landis than ever offered to her previously.

9. **The Experience, Reputation and Ability of the Attorneys:** Ms. Landis' first attorney, Jim Cagle is a well known criminal lawyer who was involved with a number of high profile cases consuming his time during his representation of Ms. Landis. Mr. Bruce has been an attorney for over 24 years and practices family law on a regular basis as well. Mr. Bruce admitted in Court to the Judge that this divorce case was one of the most complex divorce cases he had tried since practicing law.

10. **The Undesirability of the Case:** This case was undesirable because of the prominence of overcoming Dr. Landis and his well known reputation in the Raleigh County area. The high skill level and expertise of litigating with Dr. Landis' attorney, particularly knowing his success in the Raleigh County area and defending against the knowledge and capability of Dr. Landis' financial expert made this a hard case to try.

11. **The Nature and Length of the Professional Relationship With the Client:** This factor was not relevant.

12. **Attorney Awards in Similar Cases:** As for total fee awards, the most published and widely cited case on the issue is Chafin v. Chafin 202 W.Va. 616 505 S.E.2d 679 (1998) in which the total fees were over \$127,000 and this case was litigated 8 years ago.

CONCLUSION

WHEREFORE, it is respectfully submitted that considering all of the above, the Circuit Court and the Family Court abused its discretion in awarding Ms. Landis attorney fees, expert fees and costs in this matter. Therefore, Ms. Landis' Petition for Appeal should be granted and be awarded attorney fees, expert fees and costs in this matter.


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Georganne Banning Landis
By Counsel

CERTIFICATE OF ATTORNEY

The undersigned counsel for Georganne Banning Landis hereby certifies that the facts alleged in the Reply to the Memorandum of Law in Support of Petitioner's Response to Respondent's Petition for Appeal are faithfully represented and accurately presented to the best of my ability.

A handwritten signature in black ink, appearing to read "Lyne Ranson", written over a horizontal line.

**Lyne Ranson
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Charleston, WV 25311
(304) 344-2121**

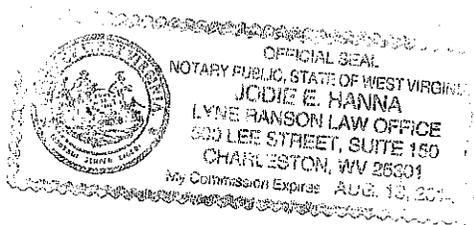
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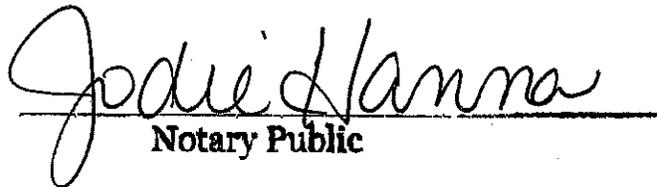
I, **Georganne Banning Landis**, Respondent being duly sworn, says that the facts and allegations contained in the Reply to the Memorandum of Law In Support of Petitioner's Response to the Respondent's Petition for Appeal are true, except insofar as they are therein stated to be on information, and that insofar as they are therein stated, they are believed to be true.


Georganne Banning Landis

Taken, subscribed and sworn to before me this 29th day of May, 2007.

My commission expires: Aug. 18, 2014




Notary Public

CERTIFICATE OF SERVICE

I, Lyne Ranson, Counsel for Respondent, **Georganne Banning Landis**, do hereby certify that I have served a true and exact copy of the foregoing **Reply to the Memorandum of Law In Support of Petitioner's Response to Respondent's Petition for Appeal** following counsel of record by mail this **29th day of May, 2007** to the following:

C. Elton Byron, Jr., Esquire
108 Main Street
Beckley, WV 25801


LYNE RANSON, ESQ. (SBN. 3018)
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