

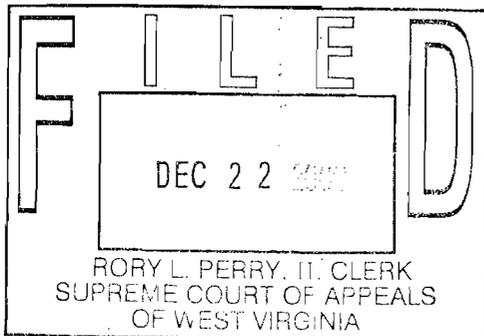
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

IN THE INTEREST OF:

JOHN T., MICHAEL T.,
NATALIE T., and CLARE T.

SUPREME COURT NO. 35281
Civil Action Nos. Below: 07-JA-54
07-JA-55
07-JA-56
07-JA-57

REPLY TO APPELLEE MICHAEL T 'S RESPONSE BRIEF



Submitted by,

Mary M. Downey (WV Bar No.1056)
1018 Kanawha Blvd., East
1200 Boulevard Tower
Charleston, West Virginia 25301
304-344-2481

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REPLY TO APPELLEE MICHAEL T 'S RESPONSE BRIEF

Other than relying on sarcasm and protestations of outrage Father argued in his Response Brief to this Court that Mother's Petition for Appeal on the issue of attorney fees should fail because: (1) A finding by clear and convincing evidence is *res judicata* with regard to findings requiring a different standard of proof; (2) Mother took the position that Father should "punt the matter to CPS and the circuit court and go home;" and (3) Notice *and* hearing are not required before an award of attorney fees.¹

1. A finding by clear and convincing evidence is not *res judicata* with regard to findings requiring a different standard of proof.

A court may order payment to a prevailing party for his or her reasonable attorney fees and costs incurred if the losing party's claims or defenses were vexatious, wanton, or oppressive assertion and could not be supported by any of the evidence.

Daily Gazette Co., Inc. v. Canady, 332 S.E.2d 262 (W.Va. 1985).

In the case at bar the circuit court made findings by clear and convincing evidence that Mother's beliefs and subsequent actions were false and baseless. In her Appeal Mother argued that her belief that Father sexually abused their daughter was not baseless, was supported by the evidence, and *not* without color. In his Response Father argued that Mother's claims had already been deemed false and baseless by clear and convincing evidence and were *res judicata* on the issue of attorney fees.

footnote 1 Father argued in his motion for attorney fees with the circuit court that: (1) Mother's conduct was the sole reason that the abuse and neglect proceeding was filed; (2) Mother's conduct was why the case took 2½ years to reach disposition; (3) the sexual abuse allegations against Father were baseless; and (4) the reports of sexual abuse by Father were only initiated by her. The circuit court granted said motion. Mother filed a Petition for Appeal with this Court and addressed each of the above reasons Father listed in his motion.

For *res judicata* to apply there must be a showing that the cause of action identified for resolution in a subsequent proceeding was either identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41 (W.Va. 1997).

To find that Mother's beliefs were false or baseless in abuse and neglect cases the showing must be by "clear and convincing" evidence. On the other hand, to find that Mother's beliefs were false or baseless in an action for attorney fees a court must find that they were "entirely without color," a much more difficult standard. Baker v. Health Management Systems, Inc., 264 F.3d 144 (2d Cir. 2001); Anlytica, Inc. v. NPD Research, Inc., 708 F.2d 1262 (7th Cir. 1983); Sauer v. Xerox Corporation, 95 F.Supp.2d 125 (W.D.N.Y. 2000); Re: Rubin Brothers Footwear, Inc., 119 BR 416 (SDNY 1999). A finding of subjective bad faith was required to award attorney fees. Sterling Energy, Ltd. v. Friendly National Bank, 744 F.2d 1433 (10th Cir. 1984).

Father referred to Mother as telling "her story" implying that any testimony offered by Mother or her witnesses was "entirely without color." The Court in Kincaid v. Morgan, 425 S.E.2d 128 (W.Va. 1992) in citing the rules of civil procedure stated, "The signature of any attorney or party constitutes a certificate by him that he has read the pleading ...; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law..." The Petition for Abuse and Neglect was signed by the prosecuting attorney representing DHHR naming Mother *and* Father. As such DHHR and the prosecuting attorney belief

that Father abused his daughter was “grounded in fact,” “warranted by existing law” and therefore *not* “entirely without color” of the law.

What existed at the time that the prosecuting attorney and DHHR filed against Father? The only medical and forensic evidence was that CMT was sexually abused by Father. Does Father take the position that Mother should have disbelieved the only medical and forensic evidence given to Mother? Do courts want the message sent to parents that if given medical and forensic information of sexual abuse from reliable professionals that it should be ignored for fear of having to pay the other parent’s attorney fees?

Father claimed as untrue Mother’s statement, “...the unchallenged and uncontraverted medical and forensic evidence was that the parties’ youngest daughter was sexually abused by Father” implying that it was entirely “without color.” Instead of naming one piece of medical or forensic evidence that even hinted that Father did not sexually abuse his daughter, he listed people or entities who allegedly “did not believe the story.” He listed the prosecutor as “not buying the story,” but omitted the fact that the prosecutor initially named Father in the abuse and neglect petition. He listed DHHR as “not buying the story,” but omitted that DHHR initially named Father as a party. He listed the State Police, but no one representing the State Police testified or provided evidence in this case. He listed the Kanawha County Sheriff’s Department as “not buying the story,” but no one from the Sheriff’s Department testified or provided evidence in this case except that CMT’s underwear had male DNA in it after the sexual abuse occurred.

Father further claimed that the statement made by Mother that CMT was in the custody of Father when she was sexually abused was untrue and, therefore, “without color.” All three medical doctors who saw CMT or reviewed her records testified that streptococcus pyogenes, the vaginal infection that CMT had, takes over 48 hours to show inflammation. CMT had been with her mother less than 24 hours when her vaginal area became inflamed putting CMT in her father’s custody when the infection was transmitted to her. The issue is not when the inflammation began to appear, but was who had custody of CMT when she was actually infected. The *only* testimony was that CMT was in her father’s custody when infected. Not only was mother’s claim not “without color, it was the only testimony given from three medical doctors- a very inconvenient truth for Mr. T , one would think.

Father further claimed that Mother’s “story” was without color when she stated, “No evidence or testimony was given that mother sexually abused her daughter.” Father cited no evidence from any witness who refuted this statement, but instead quoted billboards. Father claimed that Mother’s “story” was contrived and without color when on March 23, 2006, she filed a petition in magistrate court alleging sexual abuse by Father, but eight days earlier in family court she did not. Father failed to mention that Mother had just learned of the abuse on March 22, 2006. In retrospect when Mother was filling out her Petition for Domestic Violence with the magistrate she realized that CMT had been exhibiting signs and symptoms of sexual abuse prior to her disclosure to Mother. Additionally Mother testified that when filling out the petition for domestic violence protective order she misunderstood one or two of the questions and answered them incorrectly, a simple mistake, but not fraud. Father claimed that Mother’s “story”

was contrived because of the content of her dreams that she documented in her journal, but Father failed to acknowledge that a psychiatrist, the only person who testified to this issue, testified that dreams are not based in reality and are often disconnected with reality.

Furthermore, Father claimed that Mother's "story" was embellished and without color when she made an allegation of abuse in December, 2007. The lower court found that the alleged abuse could not have happened for lack of opportunity because CMT was living with Father's friends and Father's visitation was ordered to be supervised for a few hours on each Friday night. Later Father acknowledged that he visited his daughter every night and "would read her bedtime stories and tuck her in."

Clearly, no claim by Mother was "entirely without color." However, for only the sake of argument even if true, to enforce *res judicata* under these facts would defeat the ends of Justice. This Court stated:

Notwithstanding this scrupulous assessment of the applicability of *res judicata* to a particular case, we reiterate our prior admonishment that, even though the requirements of *res judicata* may be satisfied, we do "not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice. Gentry v. Farriggoa, 53 S.E.2d 741, 742 (W.Va. 1949). See also White v. SWCC, 262 S.E.2d (W.Va. 1949).

To require Mother to pay Father's attorney fees when Mother did *not* file the abuse and neglect petition would plainly defeat the ends of Justice. To require her to pay Father's attorney fees when the only medical and forensic evidence presented in this case was that Father, not Mother, sexually abused their daughter would plainly defeat the ends of Justice. To require Mother to pay Father's attorney fees when there

was absolutely no testimony that she sexually abused her daughter would plainly defeat the ends of Justice.

Finally, "A court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." Shields v. Romine, 13 S.E.2d 16 (W.Va. 1940); Virginia Electric & Power Co. v. Haden, 200 S.E.2d 848(W.VA.1973); Frazee Lumber Co. v. Haden, 197 S.E.2d 634 (W.Va. 1973); State ex rel. Crafton v. Buradide, 528 S.E.2d 768 (W.Va. 2000); Foster v. Sakhai, 559 S.E.2d 53 (W.Va. 2001); 14 Am. Juris., Courts, section 171. The administration of justice can be served by this Court by finding and stating the truth in this matter: there was no evidence that Mother sexually abused her child; the only evidence was that Father did, and justice is not served by requiring Mother to pay Father's attorney fees under these facts.

2. Mother did not state nor did she believe that Father should "punt the matter to CPS and the circuit court and go home."

Mother did not suggest that parents should not remain "attuned to the proceedings" or not have concerns or actively participate in protecting their children. On the contrary, for three years Mother has tried to do just that.

A Guardian *ad Litem* was appointed to represent the interests of the parties' children and the prosecuting attorney represented the State. The issue is whether Mother should be responsible for Father's attorney fees even though early in this process at the start of the adjudication hearing it was allegedly announced that the State was no longer prosecuting Father. After Father was dismissed from the case and was no longer a party, he continued to employ his attorney to prosecute Mother in

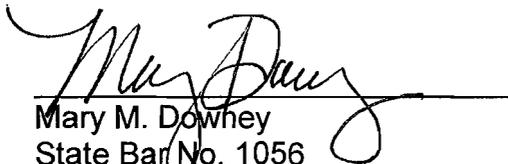
addition to the prosecuting attorney. In Father's response he questioned the ability of the prosecuting attorney to prosecute the case, but Mother should not be responsible for his choice to incur \$72,493.40 in attorney fees and costs when the State was already prosecuting Mother.

3. A notice and hearing are required to be held before an award of attorney fees.

Mother was not afforded a hearing to allow her to dispute the award of attorney fees in violation of her due process rights. Father in his response stated that, "The fee motion was addressed during the hearing held on the 22nd." Other than announcing that there was not going to be a hearing and signing the order on attorney fees already prepared by Father before the scheduled hearing, the court did not "address" the issue as claimed by Father in his response. Fair notice *and* an opportunity for a hearing on the record are required. Daily Gazette Co. v. Canady, 332 S.E.2d 262 (W.Va. 1985).

JEAN KENNEDY

By Counsel


Mary M. Dowhey
State Bar No. 1056
1018 Kanawha Blvd., East. Suite 1200
Charleston, West Virginia 25301
304-344-2481

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CERTIFICATE OF SERVICE

I, Mary Downey, counsel for the Petitioner Jean Kennedy, do hereby certify that service of the attached Reply upon the parties by mailing by U.S Mail postage paid on the 21st day of December, 2009, a true and exact copy thereof to:

The Honorable Paul Zakaib Jr.
Circuit Court Judge, Kanawha County Judicial Annex
111 Court Street
Charleston, West Virginia 25301

Mark Swartz, Esquire
P.O. Box 1808
St. Albans, West Virginia 25177

Barbara Utt, Esquire
300 Capitol Street Suite 1120
Charleston, West Virginia 25301
FAX: 304-342-7338

Amy Paxton, Esquire
Assistant Prosecuting Attorney
700 Washington Street, E. Ste 400
Charleston, West Virginia 25301
FAX: 304-357-4698



MARY M. DOWNEY
(W.Va. State Bar No. 4056)
1018 Kanawha Blvd. East, Suite 1200
Charleston, West Virginia 25301
304-344-2481