IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRINIA

**ROY FERNATT, individually and as ADMINISTRATOR OF THE ESTATE OF DENISE FERNATT,**

**Plaintiffs,**

**vs.**

**Civil Action No.: 19-C- 770**
**Judge Tabit**

**MARTY BLANKENSHIP, LESLEY TAYLOR, CRYSTAL FOSTER, AMANDA TUCKER, n/k/a AMANDA HOLMES, FIRE AND IRON MOTORCYCLE CLUB INC, LOCAL CHAPTER 40 OF FIRE AND IRON MOTORCYCLE CLUB, JOHN DOE, and JANE DOE,**

**Defendants.**

## PLAINTIFFS RESPONSE TO MOTIONS TO DISMISS

Comes now the Plaintiff, Roy Fernatt, by and through his counsel, Michael T. Clifford, and for his Response to Motions to Dismiss filed on behalf of the Defendants states as follows:

## FACTUAL BACKGOUND

For their Motions, Defendants accept as true the factual allegations set forth in the Complaint filed in this matter. The basic facts are that the Defendants engaged in a course of conduct designed to humiliate, harass, embarrass and bully the decedent, Denise Fernatt. They did this purposefully and with the expressed intent of causing her to "kill herself" as she had attempted in the past. In furtherance of their plan they printed and posted numerous boudoir photographs of the decedent throughout the community,

including road signs and at the church the decedent attended, the post office, etc.

The actions of the defendants had dire consequences including the termination of the employment of the decedent from a longtime position in the Probation Department of Fayette County. The purposefully induced anxiety had exactly the effect that the defendants sought-the suicide of the decedent. The defendants prior knowledge of the mental health and stability of the decedent is clearly known to the defendants and the defendants obtained the outcome which they had planned and hoped for.

The photographs of the decedent were clearly not meant for publication. The defendants invaded the private life of the decedent by publishing the intimate photos.

The Defendants would have you believe that they played a prank and did nothing wrong, that it was not their fault, that they are not to blame for the death of the decedent. If not for the actions of these defendants, the decedent would still be alive and employed today.

## MOTION TO DISMISS STANDARD OF REVIEW

In considering the pertinent facts, this Court's motion to dismiss standard of review is set forth in Syllabus Point 2 of Holbrook v. Holbrook, 196 W.Va. 720, 474 S.E.2d 900 (1996), is controlling:

> "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears

> beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99 [102], 2 L.Ed.2d 80 (1957)." Syllabus Point 3, Chapman v. Kane Transfer Company, 160 W.Va. 530, 236 S.E.2d 207 (1977).

In elaborating on this standard, the Supreme Court explained, 196 W.Va. at 726, 474 S.E.2d at 906:

> "As this Court acknowledged in John W. Lodge Distributing Co., supra, 161 W.Va. at 606, 245 S.E.2d at 159: "The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one.
>
> Generally, a motion to dismiss should be granted only where "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Murphy v. Smallridge, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.E.2d 59, 65 (1984)) (additional citation omitted). For this reason, motions to dismiss are viewed with disfavor, and this Court has counseled lower courts to rarely grant such motions. John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605–06, 245 S.E.2d 157, 159 (1978); Ewing v. Board of Educ. of Cnty. of Summers, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998). Furthermore, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).

## ARGUMENT

The question presented in this case is whether Defendants can be held liable for causing decedent to commit suicide. There are two exceptions to the general rule that suicide ordinarily is an intervening cause, recognized and discussed by this Court in *Moats*. Under one exception, there is no requirement for the plaintiff to prove the defendant had the person who committed suicide in its care and custody. Care and custody is a requirement for the second exception recognized in *Moats*.

The first exception applies in this case and it involves cases where a tortious act is found to have caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse to commit suicide, or prevented the decedent from realizing the nature of his act. Such cases typically involve the infliction of severe physical injury, or, in rare cases, the intentional infliction of severe mental or emotional injury through wrongful accusation, false arrest or torture. Such cases also can include situations where a defendant intentionally discriminated against a person because that person was in a legally protected class, and this wrongful, unlawful, and intentional discriminatory act caused the person to commit suicide.

The actions of the Defendants in this matter are outrageous and the tort of outrage may well be at hand. Without question there exists an intentional infliction of mental and emotional distress. It is precisely what was sought by the defendants with their actions. They had intended for her to commit suicide. They sought her suffering. They performed all of their actions knowing that decedent had attempted suicide in the past. These people knew the decedent well and they wanted her to pay the ultimate price for some perceived grudge unknown to the Plaintiff.

The Court first should review Moats v. Preston County Commission, 206 W. Va. 8, 521 S.E.2d 180 (1999). In Moats, 206 W.Va. at 16, 521 S.E.2d at 188:

> "Although negligence actions seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and, therefore, an intervening act that precludes a finding that the defendant is responsible, courts have allowed such actions where [1] the defendant is found to have actually caused the suicide or where [2] the defendant is found to have had a duty to prevent the suicide from occurring." McLaughlin v. Sullivan, 123 N.H. 335, 461 A.2d 123, 124B25 (1983). See also Comment, Civil Liability for Causing or Failing to Prevent Suicide, 12 Loy. L.A. L. Rev. 967, 968 (1979). (Emphasis added).

Because the person who committed suicide in Moats was in the custody of the defendants, Moats focused on the second exception, which often is applied to suicides that occur in jails, hospitals, reform schools and others having actual physical custody and control over the person who committed suicide. In Syllabus Point 6 of Moats, this Court summarized the rule rendering a caretaker liable for the suicide committed by a person under his or her care:

> "Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring. In order to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent giving rise to a duty to prevent the decedent from committing suicide. Generally, such relationship exists if one of the parties, knowing the other is suicidal, is placed in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter."

While the Defendants herein are not likely to be considered "caretakers" of the decedent, they did possess certain intimate knowledge of the mental state of the decedent and rather than protecting or preventing her from harming herself they actually sought to cause her death.

In Moats, the Court cited McLaughlin v. Sullivan, 123 N.H. 335, 461 A.2d 123 (1983), in support of this first exception. In McLaughlin, 123 N.H. at 337-38, 461 A.2d at 124, the New Hampshire Supreme Court discussed in some detail the circumstances where a defendant can be held liable for causing a person's death by suicide:

> "The first exception involves cases where a tortious act is found to have caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse to commit suicide, or prevented the decedent from realizing the nature of his act." See W. Prosser, Law of Torts ' 44, at 280B81; Comment, supra, 12 Loy. L.A. L. Rev. At 975B83; Schwartz, Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry, 24 Vand. L. Rev. 217 (1971), at 219B36; Annot., 11 A.L.R.2d 751, 756 (1950). Such cases typically involve the infliction of severe physical injury, or, in rare cases, the intentional infliction of severe mental or emotional injury through wrongful accusation, false arrest or torture. Comment, Civil Liability for Suicide: An Analysis of the Causation Issue, 1978 Ariz. St. L. J. 573, 576; Annot., 11 A.L.R. at 756B74. (Emphasis added).

There are a wide variety of decisions recognizing this exception. Most courts agree liability for causing a suicide should be recognized where the tortfeasor committed an intentional act. For example, in Mayer v. Town of Hampton, 127 N.H. 81, 87-88, 497 A.2d 1206, 1211 (1985), the New Hampshire once again examined liability for causing a person a person to commit suicide and stated the following requirements must be met:

> "Based on the foregoing discussion, we hold that in order for a cause of action for wrongful death by suicide to lie for intentional torts, the plaintiff must demonstrate that the tortfeasor, by extreme and outrageous conduct, intentionally wronged a victim and that this intentional conduct caused severe emotional distress in his victim which was a substantial factor in bringing about the suicide of the victim. Proof of the substantial causation will usually be based on expert testimony. Further, the fact that a decedent has a history of mental instability is no automatic bar to finding the defendant's conduct to be a substantial factor in causing the suicide.
>
> The defendant's actions in the wrongful death suicide will often times be the precipitating cause or the Astraw that broke the camel's back. So long as the defendant's wrongful act was a substantial cause of the suicide, there is no reason in such a case to undermine to the policy behind intentional torts which extends a defendant's liability almost without limit to any actual harm resulting. Civil Liability for Suicide, supra at 613. Cf. New Hampshire Supply Co. v. Steinberg, 119 N.H. 223, 400 A.2d 1163 (1979) (fact that decedent had previously weakened or diseased heart did not prevent his family from collecting

on worker's compensation claim so long as employment-related stress substantially contributed to heart attack)."

In Collins v. Village of Woodridge, 96 F.Supp.2d 744, 756 (N.D. Ill. 2000), where a newly hired female police officer had been subjected to a sexually hostile work environment and after complaining about this treatment, this officer killed herself, the District Court noted this claim was based upon an intentional tort and could go forward:

> "Even assuming that state tort law controls under Title VII and ' 1983-a point for which defendants cite no authority-in this case plaintiff's claims are for intentional wrongs, not negligence. Neither side has cited any cases addressing whether the same causation analysis applies in intentional tort cases. ***In fact, the rule appears to be different in such cases: the tort victim's suicide generally is not considered a supervening cause, at least where the plaintiff can demonstrate that the defendant's intentional conduct caused severe emotional distress that was a substantial factor in bringing about the suicide."*** See, e.g., Mayer v. Town of Hampton, 127 N.H. 81, 85-87, 497 A.2d 1206, 1209-11 (1985); Clift v. Narragansett Television L.P., 688 A.2d 805, 812 (R.I.1996); R.D. v. W.H., 875 P.2d 26, 30-31 (Wyo.1994); Tate v. Canonica, 180 Cal.App.2d 898, 912, 914-15, 5 Cal.Rptr. 28, 38, 39-40 (1960). But see Epelbaum v. Elf Atochem, North America, Inc., 40 F.Supp.2d 429 (E.D.Ky.1999) (Kentucky law; no indication that plaintiff argued that intentional tort cases should be treated differently)(emphasis added)

For a discussion of cases finding liability for suicide, even where the tortfeasor was negligent (as opposed to engaging in intentional acts), see *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 308-09 (Mo. 2011), where the Missouri Supreme Court held:

> "[T]he more recent trend [and better rule] is to place less emphasis on the mental state and more on the causal connection." *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135, 142 (S.D.N.Y.1987) (citing *Tate v. Canonica,* 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960); *Zygmaniak v. Kawasaki Motors Corp. U.S.A.,* 131 N.J.Super. 403, 330 A.2d 56 (1974); *Fuller v. Preis,* 35 N.Y.2d 425, 363 N.Y.S.2d 568, 322 N.E.2d 263 (1974)). In *Fuller,* the New York Court of Appeals noted in *dictum* that "recovery for negligence leading to the victim's death by suicide should perhaps, in some circumstances, be had even absent proof of a specific mental disease or even an irresistible impulse provided there is significant causal connection [between the injury and the suicide]." *Fuller,* 363 N.Y.S.2d 568, 322 N.E.2d at 266.

Modern psychiatry supports the idea that suicide sometimes is a foreseeable result of traumatic injuries. See Allen C. Schlinsog, Jr., *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased,* 24 J. MARSHALL L.REV. 463, 479, n. 76 (1991) (citing various studies). *See also* Gabriel Ryb E., M.D. et al., *Longitudinal Study of Suicide After Traumatic Injury,* 61 J. TRAUMA 799 (2006) (finding that suicide is more common for trauma patients than for the general population, particularly with increased age, for white male trauma patients, for trauma patients having a positive alcohol toxicology and for trauma patients suffering from disability resulting from the trauma).

Also within the knowledge of these defendants was the fact that the decedent had suffered a major head injury as a result of a motorcycle accident in the recent past. The head injury had caused tremendous emotional problems for the Plaintiff and this was well known to the Defendants as well as her past suicidal ideations or attempts.

In North Shore Pharmacy Services, Inc. v. Breslin Associates Consulting, LLC, 2004 WL 6001505 at *4 (D. MA 2004), the District Court gave the following summary of cases addressing liability for causing a suicide:

> "Rowe v. Marder, 750 F.Supp. 718, 724 (W.D.Pa.1990) (federal court concludes that Pennsylvania would follow the trend of recent cases allowing recovery for suicide resulting from an intentional wrong provided that the intentional tort was a A substantial factor in causing the suicide), aff'd (without op.), 935 F.3d 1282 (3d Cir.1991); Kimberlin v. DeLong, 637 N.E.2d 121, 127B28 (Ind.1994) (DeLong committed suicide four years after being seriously injured by a bomb set by Kimberlin; while recognizing that suicide is deemed an intervening cause in the case of negligent conduct, court holds Athat an action may be maintained for death or injury from a suicide or suicide attempt where a defendant's willful tortious conduct was intended to cause a victim physical harm and where the intentional tort is a substantial factor in bringing about the suicide), cert. denied, 516 U.S.

829, 116 S.Ct. 98, 133 L.Ed.2d 53 (1995); R.D. v. W.H., 875 P.2d 26, 31 (Wyo.1994) (recognizing that a higher degree of responsibility exists for those who commit intentional acts than for those who merely act negligently, court holds that an actor will be liable when he intentionally commits a tort, in this case sexual assault, and the commission of that tort causes an emotional or psychiatric illness which is a substantial factor in bringing about the suicide of the victim even though the actor does not intend to cause the emotional or psychiatric illness@), and cases cited; Tate v. Canonica, 180 Cal.App.2d 898, 904, 912, 5 Cal.Rptr. 28, 33, 38 (1960) (court emphasizes differences between liability for another's suicide based on negligent conduct as opposed to intentional conduct and holds that defendants will Abe liable if (a) they intentionally caused severe physical or mental distress to decedent, and (b) that physical or mental distress was severe enough to be, in the judgment of the trier of the fact, a substantial factor in bringing about the suicide); Clift v. Narragansett Television L.P., 688 A.2d 805, 812 (R.I.1996) (analysis of defendant's liability for another's suicide allegedly caused by intentional conduct differs from the analysis of liability for negligent conduct because there is no superseding-cause concept applicable to intentional torts)."

As to the Defendants arguments relating to the Invasion of Privacy claim the Court need only look at the cases cited by the Defendants, which establish the standard as:

"...in West Virginia, an "invasion of privacy" includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. See Restatement (Second) of Torts §§ 652A-652E (1977). The Court's analysis in Roach also indicates that the types of defenses recognized elsewhere are available in privacy actions in West Virginia. Therefore, in West Virginia, the "right of privacy" does not extend to communications which are privileged under the law of defamation; which concern public figures or matters of legitimate public interest; or which have been consented to by the plaintiff. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 173 W.Va. 699 (W. Va., 1983)

Defendants invaded decedent's privacy by their willful conduct in the public posting of the photographs that were private. Defendants Motion seems to be based upon the idea that Plaintiff implied that Defendants somehow "stole" the images of decedent which the defendants then chose to display to the public. The invasion was not that of a physical location or a breach of peace in some manner but rather the

public nonconsensual publication of photographs which were not intended for public display. The photos were of a private nature and the publication of the photos was not with the consent of the decedent. How the Defendants acquired the photographs is not important. The use of the photos is what is important in this matter.

The photographs were posted without decedent's permission and in ways calculated to open to public view private aspects of decedent's life that decedent has not so opened to view. The photos were for the private viewing of the decedent and her husband. It was not the right of the defendants to display these photos to the public.The public posting of the photographs intruded into decedent's solitude and seclusion of which decedent has a right of privacy in this information.

Concerning the idea of placing decedent in a false light, the Circuit Judge of Fayette County apparently felt that the light placed upon the decedent by the photos was sufficient to terminate her employment despite over a decade of faithful service.

The public posting of the photographs subjected the decedent to public and private ridicule, embarrassment, humiliation and caused decedent to lose her job.

WHEREFORE, Plaintiff requests that the Motions to Dismiss be DENIED and this matter be placed upon the Trial schedule of the Court and for any other relief which may seem just and proper.

**RESPECTFULLY SUBMITTED**

**ROY FERNATT, individually and as ADMINISTRATOR OF THE ESTATE OF DENISE FERNATT**
**By Counsel**

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Your day
Add something to your day

JUL 25 AT 8:14 PM

That's right u will be there!

I just want to hurt her

I know u do

I promised Lesley id be nice ... But idk if i can be if i see her

U can be.. u can kill her with kindness let her make the first move

Oh and when she does u better be there to get me off of her

I do not fight like a sissy bitch ill kill her

Your day
Add something to your day

Im on the verge of tears and not bcuz Im sad ....i am sooooo pissed

Don't let that whore get to I

U

Oh when i get to this point...look the fuck out

I really might kill her

And you are right mess with one get the whole nest

JUL 25 AT 1:17 PM

I understand that but she really isnt worth it

Your day
Add something to your day

I would say i will go with you but i go something up my sleeve....

Good

oh its a good one

JUL 25 AT 12:43 PM

Greatttttt

Lol

Fuckin bitch gets all she deserves

Yep!! Mess with one of us u mess with us all

Lesly Text

Start Time: 7/25/2017 7:12:30 AM(UTC-4)
Last Activity: 7/25/2017 7:12:30 AM(UTC-4)
Participants: +13043821421 Lesley
From: From: +13043821421 Lesley
Timestamp: 7/25/2017 7:12:30 AM(UTC-4)
Source App: iMessage: +13043821421
Body:
Told him i wanted those nasty pics of her, said i was gonna tack them up around the area. He says no because they'll know it was me. If he thinks more of them than he does of me, he can have them.
---

Amanda Tucker
Start Time: 7/25/2017 7:14:46 AM(UTC-4)
Last Activity: 7/25/2017 7:14:46 AM(UTC-4)
Participants: +13043821421 Lesley, +13045617722 Amanda Tucker
From: From: +13045617722 Amanda Tucker
Timestamp: 7/25/2017 7:14:46 AM(UTC-4)
Source App: iMessage: +13043821421
Body:
I don't think that's the case... how's they going to know it was him there is more people then him that have the pics... and I am sure they don't know he has them...
---

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**Defendants.**

## CERTIFICATE OF SERVICE

I, Michael T. Clifford, counsel for the Plaintiff, Roy Fernatt, do hereby certify that this 29th day of October, 2019, service of the forgoing **"Response to Motions to Dismiss"** in the above styled case has was made via facsimile transmission upon the following:

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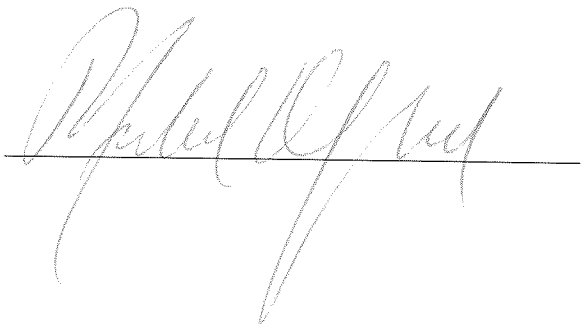

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