STATE OF VERMONT
CALEDONIA COUNTY

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| **HAROLD COLLERAN** | ) | |
| **Petitioner** | ) | |
| | ) | **Caledonia Superior Court** |
| **v.** | ) | **Docket No. 134-4-08** |
| | ) | |
| **NANCY KNOWLES** | ) | |
| **(f/k/a COLLERAN)** | ) | |
| **Respondent** | ) | |

**Decision on Motions**

This case involves crossing, post-divorce tort claims. In the course of a short marriage, Petitioner[1] became seriously ill and granted Respondent a power of attorney. The marriage rapidly devolved. Petitioner revoked the power of attorney, recovered, and filed for divorce, alleging *inter alia* that he was exploited and financially manipulated by his wife while ill. The divorce is now over. Petitioner casts similar claims as torts still justiciable in this court; Respondent asserts that Petitioner has gone on a malicious campaign of post-divorce harassment, of which this action is part.

I.

On May 11, 2006, Harold Colleran filed for divorce in Orleans County Family Court; the case was docketed as 88-5-06 Osdm. On July 11, 2007, exactly one week before the parties were to commence a final hearing in the Orleans divorce, Harold Colleran brought an action against Nancy Knowles in this court, under 14 V.S.A. §§ 3510-11, alleging that she misused a power of attorney granted her at a point in the marriage when Mr. Colleran was seriously ill. Mr. Colleran demanded an accounting and related relief. The case was docketed as 158-7-07 Cacv.

The accounting statute, 14 V.S.A. §§ 3510-11, was enacted as part of a larger package of updates to the Vermont law relating to the aging. See 2001 (Adj. Sess.) No. 135. The purpose of § 3510 is to allow a principal to "compel the agent to submit an accounting or report his or her acts as agent to the principal." *Id.* § 3510(a). Such accounting or report may be sought for three purposes: "(1) to determine whether a power of attorney is in effect or has been terminated or revoked," or "(2) to determine the legality of acts, proposed acts, or omissions of an agent," or "(3) to enjoin the agent . . ." *Id.* § 3510(c)(1)-(3).

It never has been genuinely disputed that Mr. Colleran knew on July 11, 2007 that he had revoked the power of attorney and that his wife was not asserting any right to employ it which would require injunctive relief. Therefore, the only of the three purposes in the

[1] The parties are denominated Petitioner and Respondent because this action began as a petition for an accounting. Those labels are retained, though they no longer fit the posture of the case.

accounting statute he could have sought to satisfy was the second, which allowed him to require his wife to "report . . . her acts as agent to the principal" for the purpose of determining whether the acts were legal.

In dismissing the first accounting petition, this court reasoned that the acts of Ms. Knowles as principal, taken exclusively in the course of the marriage and alleged to relating exclusively to the personal and marital property of the parties, were likely to fall substantially within the scope of divorce discovery. See *Colleran v. Colleran*, No 158-7-07 Cacv (Eaton, J., Sept. 26, 2007). The timing of the petition made it tantamount to a request that the superior court overrule or circumvent the family court's ongoing supervision of discovery. This court held that the Orleans Family Court had exclusive jurisdiction over the subject matter during the pendency of the divorce. It warned unambiguously, "The Orleans Family Court, by the very nature of an action for divorce, necessarily has concurrent jurisdiction over *most or all of the issues* raised by the petition." *Id.*, p. 2 (emphasis added).

There was no risk that a delay in accounting would prejudice Mr. Colleran in the divorce action, as the Orleans Family Court could read the accounting statute for itself and could use the statute to guide its oversight of divorce discovery as it deemed appropriate. This court therefore ruled that Mr. Colleran had not forfeited his rights under 14 V.S.A. §§ 3510-11 by virtue of being divorced, but that divorce discovery would likely provide substantially the same information Mr. Colleran claimed to seek, and that any action relating to the power of attorney would have to wait "until a final judgment is rendered in the divorce, at which time the degree, if any, of issue preclusion by the divorce judgment will be ripe for evaluation." The first petition, 158-7-07 Cacv, was dismissed without prejudice, and Respondent's motion for V.R.C.P. 11 sanctions was denied for failure to establish an improper purpose.

On November 15, 2007, the Orleans Family Court disposed the parties' divorce with a Final Order; an amended and corrected order followed January 8, 2008. *Colleran v. Colleran*, 88-5-06 Osdm (Davenport, J., Jan. 8, 2008). On April 14, 2008, Petitioner renewed what was still formally a petition for an accounting under 14 V.S.A. § 3510-11, together with a claim for breach of fiduciary duty and a new claim for "exploitation" under 33 V.S.A. § 6902. On May 5, 2008, Respondent counterclaimed for intentional infliction of emotional distress, intentional interference with business and employment relations, and defamation. A flurry of motions ensued, including crossing motions for prejudgment attachment, which were functionally indistinct from efforts to stay the Orleans property judgment.

On May 19 and 21, and then on July 16, 2008, the court heard argument and took evidence on the outstanding motions. On the record at the close of the motion hearing, the court denied Mr. Colleran's motion for a writ of attachment on the basis that he had not shown a reasonable likelihood of recovering judgment in an amount equal or greater than the amount he sought to attach. See V.R.C.P. 4.1(b)(2). The court expressly warned petitioner that his evidence suggested little or nothing that would not be precluded by the divorce and that his probability of success on the merits therefore appeared slim. The

court also denied Ms. Knowles' motion for trustee process against her own IRA, because the motion sought to attach property over which she, not any third party, had exclusive control, and the motion therefore would not serve the purposes of V.R.C.P. 4.2(a). All discovery was ordered stayed pending resolution of the outstanding motions, at least temporarily mooting quickly-expanding motion practice in that field.

Though the court ruled from the bench respecting attachment, several motions remain for consideration. These are: (1) Respondent's motion to dismiss Petitioner's exploitation claim, filed May 19, 2008; (2) Respondent's motion for summary judgment, filed June 6, 2008; (3) Petitioner's motion to amend, filed July 1, 2008; and (4) Petitioner's motion for partial summary judgment as to breach of fiduciary duty, also filed July 1, 2008, which presumes that the amendment sought will be granted; and (5) Petitioner's motion for V.R.C.P. 11 sanctions, filed June 30, 2008.

II.

When Petitioner refilled on this docket, he asserted that "[n]one of the Orleans[] [o]rders fully addressed the issues raised by Mr. Colleran in this Petition," because the family court "did not address . . . whether the Respondent was under an obligation to provide an accounting, and did not address whether Respondent had breached her fiduciary duty to [] Mr. Colleran." Petition, p. 3.

In his first count, Petitioner asserts that he repeatedly demanded an accounting and that, though a contentious divorce came and went, "Respondent has failed to this point to provide such an accounting." Pet. ¶ 12. Petitioner further alleges that Respondent breached her fiduciary duties by using the power of attorney after it had been revoked, cashing out his retirement fund and IRA, using credit cards in his name, and naming herself as irrevocable beneficiary of his State of Vermont pension. Pet. ¶¶ 15-22. Note that each and every of the acts alleged occurred before Orleans Family Court's November 15, 2007 final order, and that each and every of the acts alleged concerned the parties' personal or marital property.

In his second count, Petitioner asserts that he was, for some unspecified time in 2003, a "vulnerable adult" within the meaning of 33 V.S.A. § 6902(14), that the allegations in his first count therefore are cognizable not only as breaches of fiduciary duty incapable of remedy in the divorce, but also a separate tort of "exploitation." Petitioner constructs this tort from the definition of "exploitation" at 33 V.S.A. § 6902, which he agues creates liability for "willfully using, withholding, transferring or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another." Pet. ¶ 24.

On July 1, 2008, Petitioner moved to amend his petition to strike ¶¶ 11-14 and his request for an accounting, and to amend his second count for breach of fiduciary duty to add an allegation that Respondent had a legal obligation to keep a written statement itemizing her actions under the power of attorney, based on the definition of "accounting" found at

14 V.S.A. § 3501(1). Am. Pet. ¶ 25-26. Failure to keep such an itemized list, Petitioner alleges, is itself a breach of fiduciary duty. *Id.* ¶ 26.

The civil rules permit amendment "as a matter of course at any time before a responsive pleading is served." V.R.C.P. 15(a). The renewed petition was filed on April 14, 2008. It followed a thoroughly litigated divorce wherein Petitioner, through a different attorney, repeatedly demanded an accounting of Respondent's actions under the power of attorney. It followed the dismissal without prejudice of a premature petition made collateral to divorce discovery and pleadings responsive to that petition. And of course, it followed Respondent's responsive Answer and Counterclaim, motion to dismiss the exploitation claim, responsive memorandum, twelve-page summary judgment motion, and several-hundred-page production of documentary evidence supporting that motion. The amendment is not guaranteed as a matter of course. *Id.*

It has been the longstanding policy of the courts of this state to permit amendment to pleadings with great liberality where no prejudice results. See *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 513 (1972); accord, *Desrochers v. Perrault*, 148 Vt. 491 (1987); *Lillicrap v. Martin*, 156 Vt. 165 (1991). Factors to be included in assessing a plaintiff's motion to amend include: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982).

Mr. Colleran's late amendment is based not upon any new discovery or development, nor any reasonable need to conform to the evidence, but rather upon the supposed inadequacy of his former wife's discovery responses *when she was asked for, and responded to, a request for an accounting as part of divorce discovery*. See Am. Pet. ¶¶ 23-24. Petitioner sees this as an attractive *per se* basis for his claim of breach of fiduciary duty, which is imagined to have the virtue of avoiding the estoppel arguments Respondent pled and briefed across three months, and so he bases a motion for partial summary judgment upon it.

The court finds this practice questionable. Neither Rule 15 nor the case law interpreting it intends that a party have a right, or even an opportunity, to wait out a summary judgment motion and only then to introduce by amendment a new, alternative legal theory that necessarily strikes facts previously pled.

Respondent has not objected and has implicitly consented to try the issue of fiduciary recordkeeping obligations by accommodating it in subsequent pleadings. See V.R.C.P. 15(b); Respondent's Response to Petitioner's Reply Memorandum, filed July 30, 2008, p.2. Notwithstanding the court's considerable concerns about the propriety of the proposed amendment, it is more fair and efficient at this stage to grant the amendment, the acceptability of which the parties seem to assume, than to dilate further on why its contents could not have been presented in the first refilled petition. It is particularly frustrating, however, that this strange delay in examining the divorce discovery would come after this court dismissed Petitioner's first 14 V.S.A. §§ 3510-11 effort for the

specific reason that he would need to know what occurred in the divorce in order to know whether there was any reason to return for an accounting.

Petitioner's motion to amend the petition is GRANTED; provided however that the timing and content of the amendment may bear consideration in any subsequent assessment of costs.

III.

As summarized in the procedural history *supra*, Petitioner has asserted in his second count that 33 V.S.A. § 6902(6) creates a tort for exploitation. Respondent has countered that no such statutory tort exists, and that jurisdiction over the cited statute belongs exclusively to the family court in any event. The court is compelled to agree, and so ultimately is Petitioner, who in subsequent pleadings has explained that his "claim sounds in tort and does not seek civil relief under Chapter 69 of Title 33," which everyone now agrees is an abuse-prevention statute that does not provide any civil relief. Non-emergency jurisdiction and venue are with the family court. 33 V.S.A. § 6932. Relief sought may "either or both of" an order "That the defendant refrain from abusing, neglecting, or exploiting the vulnerable adult," or an order "That the defendant immediately vacate the household." 33 V.S.A. § 6933.

Petitioner argues, however, that because his claim "sounds in tort," acceptance of Respondent's argument that there is no statutory tort of exploitation "would mean that a vulnerable adult who had been exploited would only have recourse to report the abuse and to seek a relief from abuse order." Pet'r Opp., pp. 1-2. Petitioner therefore expresses a concern that "a person who has been financially exploited would have no recourse to recover any funds that had been misappropriated." *Id.*

Petitioner fails to acknowledge countless familiar civil causes of action, including those for conversion, fraud, and indeed, breach of fiduciary duty, by which people, vulnerable and otherwise, every day seek to recover misappropriated property and funds. Petitioner could not be unfamiliar with the last of those three examples, because he pled it in this suit. To the extent petitioner is arguing for recognition of a new judicially-created tort, his argument is unpersuasive.

The adult-abuse-prevention statutes, 33 V.S.A. § 6901 *et seq.*, do not create any civil cause of action and certainly not any exclusive civil cause of action. Looking strictly to the pleadings in this case, it is manifest that petitioner's exploitation count fails to state a claim upon which relief can be granted. V.R.C.P. 12(b)(6). No legal theory could save the count, which is redundant with the count for breach of fiduciary duty and otherwise so amorphous and lacking grounding in law as to fail even to put Respondent fairly on notice of the claim and the grounds upon which it rests. See V.R.C.P. 8; *Lane v. Town of Grafton*, 166 Vt. 148 (1997).

Petitioner's exploitation count is DISMISSED.

IV.

The court now turns to the crossing motions for summary judgment and accompanying statements of fact.

When addressing motions for summary judgment, "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material facts exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. *Boulton v. CLD Consulting Engineers, Inc.*, 175 Vt. 413, 427 (2003) (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

The undisputed facts are as follows:

The parties were married on November 3, 2000. In 2003, Petitioner was diagnosed with a rare and particularly difficult-to-treat cancer, known as a chordoma. He had extensive surgery in late March 2003, and he was released from Dartmouth Hitchcock Medical Center on March or around March 26, 2003, at which time he was heavily medicated. On April 1, 2003, Petitioner executed a power of attorney prepared and executed by Attorney Rachel Hexter, making his wife his agent. See. Resp's SUF ¶¶ 1-4; Pet's SUF ¶¶ 1-6.

As discussed in the procedural history, *supra*, Petitioner filed for divorce in Orleans Family Court on May 11, 2006. A two-day final hearing was held July 18, 2007 and September 25, 2007. In that action, Petitioner, as plaintiff in divorce, propounded more than one-hundred first-round interrogatories, most seeking financial information, and one directly demanding a full accounting of Respondent's actions under the power of attorney. See Resp's SUF ¶¶ 7-11. Among other disclosures, in response to Petitioner's twenty-first interrogatory Petitioner disclosed all "savings or commercial accounts in [her] name"; in response to Petitioner's twenty-fourth interrogatory, she denied having any other accounts into which she deposited or withdrew money or had an interest; in response to Petitioner's eighty-ninth interrogatory she provided extensive credit card information and averred that the parties credit cards were jointly held.

There is no genuine issue of material fact that the Petitioner's factual allegations of abuse, overbearing, exploitation, and abuse of the power of attorney figured very

prominently in his divorce strategy and were very extensively litigated. Petitioner's first interrogatories 93-99 relate directly to the same.

Petitioner's one-hundredth first divorce interrogatory asked, "Please provide a complete accounting of anything you did acting under the Power of Attorney given to you by your spouse and drafted by Attorney Rachel Hexter." To this, Respondent replied that she signed Petitioner's time sheets, his sick-leave requests, and medical permissions to treat Petitioner when he was intubated or medically sedated. Respondent also replied that she memorably signed Petitioner's name at an insurance agency, following Petitioner's instruction, only to have Petitioner deny his permission and threaten to sue the insurance company.

In a follow-up set of divorce interrogatory responses, the second, Respondent was asked, *inter alia*, if she rolled over Petitioner's IRA. She again responded to myriad very detailed financial questions relating to the actions she took respecting the parties' individual and joint accounts, including but not exclusive to actions she took as agent under the disputed power of attorney.

Petitioner filed to compel answers to his divorce interrogatories on August 24, 2007. The motion to compel demanded no further information concerning Respondent's use of the power of attorney nor any other information involving Petitioner's one-hundredth first divorce interrogatory, which interrogatory asked directly for a complete accounting of actions taken under the power of attorney. See Resp's SUF ¶ 10 and Exhibits 1A to 1C thereto. The information requested by the one-hundredth first interrogatory would have been at least as complete as the information required to be produced by 14 V.S.A. § 3510.

At oral argument in the Orleans Family Court, Ms. Colleran was questioned extensively about her use of the power of attorney. See Resp's SUF ¶ 17, 18. The divorce litigation involved a linchpin grievance of Petitioner in this action—that Respondent made herself irrevocable beneficiary of his pension plan. *Id.* ¶ 30. Respondent's status as irrevocable beneficiary was directly before the Orleans Family Court as part of the divorce.

Finally, the Orleans Family Court's final order and amended final order deal directly and completely with the parties' investments and marital property, including IRAs, investments, credit card debts, loans, and pensions. See *Colleran v. Colleran*, No. 88-5-06 Osdm (Davenport, J., June 6, 2008), pp. 2-3. The family court's orders directly and completely took up Petitioner's allegation that the power of attorney had been abused by Respondent and that she had restructured the parties' debts in anticipation of separation. *Id.* p. 4. The family court found that Respondent had, in fact, restructured the parties' debts in anticipation of separation, though this manipulation notably was not found specifically to involve the power of attorney. *Id.*, pp. 4-6. To remedy this improper restructuring, the family court awarded Petitioner half of Respondent's IRA. *Id.* pp. 6-7.

Simply put, the family court not only had an opportunity to adjudicate questions relating to Respondent's actions involving the power of attorney and the parties' finances, but also took that opportunity to correct what wrongdoing it found as part of the equitable

distribution of the parties' marital assets. *Id.* The contents of the Orleans Family Court's amended and corrected final order are not in dispute. The text indicates unambiguously that Petitioner received an equitable remedy for the same wrongs of which he now complains. It is undisputed that Petitioner has taken no appeal.

Petitioner asserts, based only on his own affidavit, that he "verbally" revoked the power of attorney sometime in April of May 2003. Pet's SUF ¶ 11.[2] Petitioner contends that Respondent's deposition testimony *in the divorce* revealed that she had taken actions under the power of attorney not explained in her divorce interrogatories. See Pet's SUF ¶ 11, Exhibit C. Petitioner further contends that Respondent cashed checks in his name and took out loans in his name after 2003. All of these questions were before the family court as a matter of undisputed fact.

It is not genuinely disputed as a matter of fact that Respondent's actions under the power of attorney came directly and completely before the Orleans Family Court, where they were litigated very extensively, and where Petitioner received an equitable remedy, in the form of half Respondent's pension, for those of Respondent's actions found by the family court to be wrongful. Petitioner's fact statements are bereft of record-supported facts. Instead, for example, the statement of disputed facts picks at such issues as whether Respondent was questioned by his Petitioner or Petitioner's counsel on his behalf. Petitioner's statement of disputed facts merely recites his pleadings.

Incredibly, notwithstanding his serious allegations of wrongdoing and repeated assertions that the issues here were not before the family court, Petitioner's statement of disputed facts points to absolutely nothing extrinsic to (1) his own affidavit and (2) the divorce record. To read Petitioner's statement of disputed facts is to read a request for an on-the-record appeal of the Orleans Family Court's divorce order. The statement quibbles about semantics, offers legal conclusions, and offers no material facts to controvert the material facts offered in Respondent's statement of undisputed facts.

V.

The doctrine of collateral estoppel, or issue preclusion, "bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the same parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action." *American Trucking Associations v. Conway*, 152 Vt. 363, 368 (1989).

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[2] By its terms, the power of attorney does not provide for verbal revocation. It provides that:

> *This general power of attorney may be voluntarily revoked by my written revocation sent to the attorney or attorneys-in-fact named herein by first class mail and by a notice sent to the office of the Probate Court for the County of my residency and/or the Town Clerk[']s office in any municipality in which I own real property.*

The drafting attorney appended below that passage a strong suggestion that "if you wish to revoke this instrument, you do all three of these, that the letters be sent certified mail, return receipt requested, and that you retain copies of the letters and the return receipts." 14 V.S.A. § 3507(b), which became law before execution of the power of attorney, does, however provide for revocation orally or "by any other act evidencing a specific intent to revoke."

The doctrine of *res judicata*, or claim preclusion, bars parties "from litigating claims or causes of action which were or should have been raised in previous litigation . . . where the parties, subject matter and causes of action are identical or substantially similar." *Id.* 370. The doctrines are not the same, but neither are they mutually exclusive.

This analysis focuses only on collateral estoppel, because application of the doctrine is dispositive of the summary judgment motions.

Collateral attacks on divorce judgments are improper and consistently have been disallowed by Vermont courts. See e.g., *Tudhope v. Riehle*, 167 Vt. 174, 179-80 (1987); *Trahan v. Trahan*, 176 Vt. 539, 541 (2003). Legitimate, non-collateral tort claims among divorced spouses may occur in very limited instances where (1) the same issues were neither raised nor necessary to the divorce. *Slansky v. Slansky*, 150 Vt. 438 (1988); or (2) the family court expressly did not adjudicate the same issue during the parties' divorce. *Farrell v. Mountain Folk, Inc.*, 169 Vt. 568, 569 (1999); accord *Trahan*, 176 Vt. at 541-42 (distinguishing *Slansky and Farrell, supra.*).

Neither the *Slansky* caveat nor the *Farrell* caveat applies here. The issues relating to Respondent's use of the power of attorney were both raised and necessary in the divorce. That they were raised is beyond doubt, as the above-described facts drawn form the trial record make clear. That they were necessary—formally a moot question since they were in fact raised—is evident from the nature of a divorce proceeding.

> *When the family court was created, the Legislature amended the statute delimiting the superior court's jurisdiction so as to deny it jurisdiction over actions cognizable in the family court. 4 V.S.A. § 113 (superior court has original and exclusive jurisdiction over all original civil actions except "those made cognizable by ... the family court" ). The family court has exclusive jurisdiction over divorce proceedings, which includes the distribution of marital property. 4 V.S.A. § 454(4); 15 V.S.A. § 751(a).*

*Tudhope v. Riehle*, 167 Vt. 174,177 (1997).

The family court hearing a divorce has extremely broad equitable authority to make a property distribution. 15 V.S.A. § 751 (authorizing consideration of "all relevant factors"). In making such a settlement, the factors considered necessarily include, but are not limited to, "the contribution of each spouse in the acquisition, preservation, and depreciation or appreciation in value of the respective estates," and "the respective merits of the parties." *Id.* § 751(b)(11) and (12). Discovery is available with regard to "any matter, not privileged, which is relevant to the subject matter involved in [a] pending action," so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." V.R.C.P. 26(b)(1); V.R.F.P. 4(g)(2).

These facts are unlike *Slansky* because the issues here—what Respondent did with the parties' personal and marital property and finances, with and without a power of attorney,

during the course of the marriage—were not only raised but also necessary to the distribution of marital property. Accord § 15 V.S.A. 751(b)(11). These facts are unlike *Farrell* because the family court in this case expressly addressed, and in fact remedied, the misconduct about which Petitioner now complains to the superior court.

Issue preclusion is appropriate when:

> *(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.*

*Trahan*, 176 Vt. at 541 (citing *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990)).

"Issue preclusion applies to issues of fact as well as law." *Id.* (quoting *Mellin v. Flood Brook Union Sch. Dist*, 173 Vt. 202, 209 (2001)).

In this case, the parties are unchanged from the divorce action. The divorce was resolved and the marital property completely distributed by a final judgment on the merits. The issues raised by Petitioner in this action were not only raised but clearly formed the absolute centerpiece of the divorce action. The divorce provided a full and fair opportunity to litigate the propriety of Respondent's actions respecting the marital property and funds, as well as a full and fair opportunity to obtain through discovery the accounting Petitioner claimed to seek from this court. Finally, fairness not only permits but also demands that preclusion be applied to this action, which represents an impermissible collateral attack on the divorce judgment.

In the course of their recent and contentious divorce, the parties have litigated nearly every aspect of their lives together. Petitioner has fixated on titular causes of action and semantics to avoid the inevitable conclusion that the subject matter about which he complains in this court could have been, must have been, and was in fact, already adjudicated. One may not relitigate divorce issues as torts if the subject matter was or could have been adjudicated in the divorce. *St. Hilaire v. DeBlois*, 168 Vt. 445, 448-49 (1998) ("fraud action represented a collateral attack on the underlying validity of [a] child support order" which "was barred as a matter of law and public policy"; this court notes differing public policy rationale for finality of non-child-support judgments).

Petitioner may feel that his amended complaint for breach of fiduciary duty by virtue of failure to keep records has received short shrift. That is all the claim is due, because issue preclusion forecloses action. Shifting titular causes of action does not change the fact that Petitioner is grieving the same acts and omissions of Respondent that were directly taken up in the divorce and factored into the equitable property distribution. Breach, if any, goes ultimately to losses caused thereby. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 475 (1998) (citing Restatement (Second) of Agency § 399(a), (b)); accord 14

V.S.A. § 3512 (providing remedies to a principal "who sustains damages or injury as a result" of a breach of fiduciary duty). Petitioner has not plead any. He asks the court to "[o]rder the Respondent to repay all funds of Hal Colleran that were appropriated for her own use," without saying by way of *ad damnum* whatever those might be or how they possibly could be extrinsic to the divorce. Am. Pet., p.5, ¶e.

In the divorce, Petitioner asked directly for an accounting, received in response a list of actions taken under the power of attorney, and did not even bother to move to compel a better answer when he had the chance and took it as to other subject matter. In the divorce, Petitioner directly grieved the status of his retirement accounts and put on related testimony by a certified public accountant. This subject matter was, as a matter of undisputed fact, so squarely before the Orleans Family Court that any damages caused by improper or sloppy use of the power of attorney are now inseparably a part of the equitable property distribution, which distribution not only could have, but must have, and on the record obviously did, take into account factors including those at 15 V.S.A. §§ 751(b)(11) and (12).

Finally, a simple factual inconsistency bears note. The accounting statute, 14 V.S.A. §§ 3510-11, clearly was intended by the Legislature to provide ready access to information in circumstances where a principal, having granted a power of attorney, remains substantially disabled or otherwise impaired in investigating his own affairs. The principal in this case, by contrast, recovered from his serious illness, regained individual autonomy and authority over his accounts and affairs, and in fact stands in a position of complete and total access to his own records. At no point has Petitioner explained what Respondent might ever have told him about her actions as agent that he himself could not or cannot discover, without any cooperation on her part, from information freely available to him.

If a divorce judgment has been obtained by fraud or deceit, "the proper avenue of relief is through a motion to set aside the judgment under V.R.C.P. 60(b), which balances the needs for both fairness and finality, and serves as a safety valve to the doctrine of res judicata." *Tudhope*, 174 Vt. at 178; accord *Jones v. Murphy*, 172 Vt. 86 (2001). If a divorce judgment is errant, the proper avenue of relief is through an appeal to the Vermont Supreme Court. 4 V.S.A. § 455. In no event can a litigant who is merely displeased with the disposition of an issue in divorce take an ersatz appeal to the superior court of a neighboring county.
Petitioner's claims are barred by collateral estoppel. Respondent's motion for summary judgment as to the claims against her must be GRANTED and Petitioner's motion for partial summary judgment must be DENIED.

VI.

The court has before it no motions relating to Respondent's counterclaims.

Respondent's V.R.C.P. 11 motion is premature pending further development of the facts, so the motion is DENIED.

## Order

For the foregoing reasons,

Petitioner's motion to amend is GRANTED;
Respondent's motion to dismiss the "exploitation" claim is GRANTED;
Respondent's motion for summary judgment is GRANTED as to all claims and causes of action articulated against her by Petitioner;
Petitioner's motion for summary judgment DENIED;
Respondent's motion for V.R.C.P. 11 sanctions is DENIED.

Dated at St. Johnsbury, Vermont this 20 day of August, 2008.

Harold E. Eaton, Jr.
Superior Court Judge