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LYING ON THE STAND WON'T COST YOU A DIME: SHOULD COURTS RECOGNIZE A CIVIL ACTION IN TORT FOR PERJURY?

American courts generally do not permit a person to maintain a civil action for damages caused by another person's perjury.¹ Although perjury may have a substantial adverse effect upon civil and criminal litigants, public policies established at common law militate against a civil recovery for damages caused by false testimony.² Courts justify the rule against civil actions for perjury by recognizing that the rule encourages witnesses to speak freely in court by protecting witnesses from subsequent law suits alleging perjury.³ Courts also justify the rule by recognizing that the rule

1. See, e.g., *Liddell v. Smith*, 345 F. 2d 491, 494 (7th Cir. 1965) (no civil action lies in tort for perjury); *Morgan v. Graham*, 228 F.2d 625, 627 (10th Cir. 1956) (unsuccessful litigant, who had lost his case because of perjured testimony, could not maintain civil action for damages against person who committed perjury); *Rudow v. City of New York*, 642 F. Supp. 1456, 1472 (S.D.N.Y. 1986) (discussing common law doctrine that makes parties to judicial proceedings immune from subsequent civil liability for perjured testimony); *Stevens v. Brown*, 564 F. Supp. 368, 370 (C.D.N.C. 1983) (no liability for damages based on subornation for perjury in criminal case); *Alberta Gas Chemicals, Ltd. v. Celanese Corp.* 497 F. Supp. 637, 639 (S.D.N.Y. 1980) (same), *rev'd*, 650 F.2d 9 (2d Cir. 1980), *on remand*, 529 F. Supp. 226 (S.D.N.Y. 1981), *aff'd mem.*, 697 F.2d 287 (2d Cir. 1981) (unpublished decision), *cert. denied*, 103 S. Ct. 580 (1982). See generally, Eagle, *Civil Remedies for Perjury: A Proposal for a Tort Action*, 19 ARIZ. L. REV. 349, 349-52 (1977) (no civil action lies in tort for perjury or conspiracy to commit perjury in any phase of judicial proceeding).

2. See MODEL PENAL CODE § 241.1(1) (Proposed Official Draft, 1962) (defining elements of criminal offense of perjury). Perjury is the most serious offense against the integrity of information on which the government relies to convict a criminal. *Id.* at comment 1. False statements affecting the outcome of a proceeding may jeopardize the determination of guilt in a criminal trial or the adjudication of interest in a civil trial. *Id.* Despite the seriousness of the offense, the common law rule against civil actions for perjury protects a perjurer from civil liability. See *supra* note 1 (courts following common law rule against civil actions for perjury); *infra* note 20 and accompanying text (same); see also notes 71-109 and accompanying text (discussing underlying justifications for common law rule against civil actions for perjury).

3. See, e.g., *Shepherd v. Epps*, 179 Ga. App. 685, 686, 347 S.E.2d 289, 290 (1986) (rule against civil actions for perjury prevents parties from intimidating witnesses with threats of liability); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. App. 5th Dist. 1984) (providing parties, witnesses, and counsel with absolute immunity from civil liability regarding relevant testimony in course of lawsuit); *Stolte v. Blackstone*, 213 Neb. 113, —, 328 N.W.2d 462, 463 (1982) (courts need to protect witnesses against fear of subsequent actions for perjury); see generally Note, *The Rule Against Civil Actions For Perjury in Administrative Proceedings: A Hobgoblin of Little Minds*, 131 U. PA. L. REV. 1209, 1211 (1983). The rule against civil actions in tort for perjury encourages witnesses to speak freely in court by protecting the

encourages the finality of judgments by preventing repeated litigation between the same parties concerning the same subject of controversy.⁴ Courts suggest that the threats of frivolous perjury suits and attempts at intimidating witnesses outweigh the benefits of a private civil action for perjury.⁵ Courts, therefore, have limited a victim's remedies to either a vacation of the civil judgment under Rule 60(b) or a collateral attack of a criminal conviction.⁶ The recent decision of the Oklahoma Court of Appeals in *Copeland v. Anderson*⁷, however, recognized a civil action for damages caused by perjury.⁸ The *Copeland* case raises the novel question of whether courts denying a civil action for perjury provide adequate redress for the civil injuries that the commission of perjury inflicts and, if not, whether courts should recognize a civil action in tort for perjury.⁹

The rule that no civil action exists in tort for perjury or conspiracy to commit perjury originated in the English common law nearly 400 years ago.¹⁰ In the English case of *Damport v. Simpson*,¹¹ a plaintiff sought to recover damages against a witness who had testified in an earlier case that involved the misappropriation of a silver water fountain.¹² The plaintiff

witnesses from subsequent civil actions for perjury.; RESTATEMENT (SECOND) TORTS § 588 (1977) (discussing witness immunity rule in judicial proceeding). Section 588 of the Restatement (2d) of Torts provides an absolute privilege to witnesses testifying in a judicial proceeding. *Id.* Because the function of witnesses is of fundamental importance to the administration of justice, public policy necessitates that litigants should not undermine the full disclosure of the truth by threatening private suits against witnesses. *Id.*

4. See *John Allan Co. v. Brandow*, 207 N.E.2d 339, 342 (Ill. App. 1965) (rule against civil actions for perjury prevents retrying of every case in which prevailing party allegedly secured judgment by perjury); *Hokanson v. Lichtor*, 5 Kan.App.2d 802, ___, 626 P.2d 214, 222 (1981) (subsequent civil actions for perjury would relitigate same issue in original case); *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975) (permitting civil actions for perjury would produce endless litigation). See also *supra* note 3, at 1211-12 (suggesting that allowing civil actions for perjury would tempt every losing party to bring similar action).

5. See *infra* notes 80 & 94 and accompanying text (cases that support rule against civil action for perjury because courts fear that litigants will initiate frivolous suits and produce endless litigation); note 101 and accompanying text (courts citing public policy of encouraging witnesses to testify and need to prevent litigants from intimidating witnesses to support common law rule against civil actions for perjury).

6. See *Shepherd v. Epps*, 179 Ga. App. 685, 686, 347 S.E.2d 289, 290 (1986) (injured party's remedy against judgment obtained by perjury is instituting direct attack upon previous judgment, not civil action against alleged perjurer).

7. 707 P.2d. 560 (Okla. 1985).

8. *Copeland v. Anderson*, 707 P.2d 560, 563 (Okla. 1985); see *infra* notes 33-50 and accompanying text (discussing decision of Oklahoma Supreme Court in *Copeland* to recognize civil liability for tort of perjury).

9. *Copeland*, 707 P.2d at 566.

10. See Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts* 24 AM. J. LEGAL HIST. 156-58 (1980) (discussing *Damport v. Simpson* and origins of common law rule against civil actions for perjury); Eagle, *supra* note 1, at 365 (citing *Damport* and birth of common law preclusion of civil action for perjury); *infra* text accompanying notes 11-19 (discussing *Damport* and common law rule against perjury).

11. 78 Eng. Rep. 769 (K.B. 1596).

12. *Id.* at 769.

alleged that the witness gave false testimony regarding the fountain's value, resulting in a judgment of only L200 against the defendant instead of the fountain's actual value of L500.¹³ The plaintiff subsequently obtained a lower court judgment of L300 in damages for the witness' perjury.¹⁴ On appeal, however, the *Damport* court reversed the plaintiff's judgment for L300 against the witness and held that the plaintiff could not maintain a perjury action for damages against the witness.¹⁵ The *Damport* court reasoned that a court might punish a defendant twice, by a civil action for damages and a criminal action for perjury.¹⁶ To avoid punishing a defendant twice, the *Damport* court declared that courts should punish perjurers only by criminal actions.¹⁷ The *Damport* court also reasoned that a civil action would discourage witnesses from testifying in court, and that no precedent existed for a civil action for perjury.¹⁸ Accordingly, the *Damport* court dismissed the plaintiff's action.¹⁹

American courts uniformly have followed the English common law rule against civil actions for perjury.²⁰ For example, the Georgia Court of Appeals recently addressed the issue of whether Georgia recognized a civil action in tort for damages that a party sustains because of perjury.²¹ In *Shepherd v. Epps*²² the plaintiff brought a civil action in tort against a witness based on the witness' alleged commission of perjury in a previous divorce proceeding.²³ The plaintiff argued that the defendant witness' perjured testimony had

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See, e.g., *Shepherd v. Epps*, 179 Ga. App. 685, 686, 347 S.E.2d 289, 290 (1986) (following common law rule that losing party in civil action cannot maintain tort action against witness in civil action); *Lawson v. Hensley*, 712 S.W.2d 369, 370 (Ky. App. 1986) (discussing common law rule that denies plaintiff right to recover compensatory damages for tort of perjury); *Hawkins v. Webster*, 337 S.E.2d 682, 684 (N.C. App. 1985) (declaring that no civil action exists for perjury); see also *Eagle*, *supra* note 1, at 349. American courts remain true to the rule against civil actions for perjury with virtual unanimity and give undue weight to the existence of precedent. *Id.*

21. See *infra* notes 22-31 and accompanying text (discussing decision of Georgia court to follow common law rule against civil action for perjury).

22. 179 Ga. App. 685, 347 S.E.2d 289 (1986).

23. *Id.* at 686, 347 S.E.2d at 289; see *Shepherd v. Shepherd* 233 Ga. 228, 229, 210 S.E.2d 731, 732 (1974) (prior divorce proceeding in which defendant witness allegedly committed perjury). In *Shepherd v. Shepherd*, the plaintiff claimed that his wife's previous common law marriage to the defendant witness voided the couple's present marriage. *Shepherd v. Shepherd*, 233 Ga. 228, 229, 210 S.E.2d 731, 732. Because the previous common law marriage voided the present marriage, the plaintiff argued that he should not have to pay alimony to his wife. *Id.* The wife's alleged common law husband, Mr. Epps, testified under oath, however, that he and the plaintiff's wife had never consummated a common law marriage. *Id.* Based upon the testimony of Mr. Epps, the Georgia Supreme Court ordered that the plaintiff must pay his wife alimony. *Id.* at 232, 210 S.E. at 734.

caused the court to grant his wife alimony that she did not deserve.²⁴ The trial court, however, granted the defendant witness' motion for summary judgment finding that no cause of action existed in tort for perjury.²⁵ The plaintiff appealed the adverse summary judgment order.²⁶

On appeal, the Georgia Court of Appeals noted that Georgia courts never had determined whether a viable claim exists for the alleged commission of perjury in a previous civil action.²⁷ Following other jurisdictions that had addressed the issue, the *Shepherd* court determined that a civil action for perjury would not lie against either the adverse party or a witness in a previous suit.²⁸ The *Shepherd* court noted that a civil action for damages would intimidate witnesses and create endless litigation.²⁹ The *Shepherd* court declared that the proper remedy for judgments based upon perjured testimony is for the injured party to institute a direct attack on the judgment rather than a collateral attack against the alleged perjurer.³⁰ Accordingly, the *Shepherd* court held that the trial court correctly granted summary judgment in favor of the defendant.³¹

Unlike the Georgia Supreme Court in *Shepherd*, the Oklahoma Court of Appeals in *Copeland v. Anderson*³² determined that civil liability is available in Oklahoma for the tort of perjury.³³ In *Copeland* the plaintiff

24. *Shepherd*, 179 Ga.App. at 685, 347 S.E.2d at 289. In *Shepherd*, the plaintiff alleged that had the defendant witness testified truthfully about his previous common law marriage to the plaintiff's wife, the court would have declared void the plaintiff's present marriage. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 686, 347 S.E.2d at 290. The *Shepherd* court cited as precedent a North Carolina case in which the court stated that no civil action existed for perjury. *Id.*; see *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 261, 116 S.E.2d 725, 727-28 (1960) (holding that no civil liability exists for perjury in North Carolina).

29. *Shepherd*, 179 Ga. App. at 686, 347 S.E.2d at 290. The *Shepherd* court stated that a civil action in tort would permit parties to multiply and extend litigation by having courts re-examine the previous action. *Id.* The *Shepherd* court also stated that adverse parties could intimidate the witness by threatening to subject a witness to the expense and annoyance of a lawsuit based on the witness' testimony. *Id.* See *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 261, 116 S.E.2d 725, 727-28 (1960) (suggesting that civil action for perjury would give litigants great leverage to intimidate witnesses).

30. *Shepherd*, 179 Ga. App. at 686, 347 S.E.2d at 290. The *Shepherd* court stated that a plaintiff may attack collaterally a judgment that is void on its face. *Id.* Because the alleged perjury in the previous case would not render the judgment void on its face, the *Shepherd* court held that the plaintiff's remedy was a direct attack rather than a collateral attack on the judgment. *Id.*; see GA. CODE ANN. § 9-11-60 (1981) (statutory provision that describes available relief from an adverse judgment). A plaintiff directly attacks a judgment by a motion for a new trial, a motion to set aside the judgment, or by a complaint in equity. GA. CODE ANN. § 9-11-60 (1981).

31. *Shepherd*, 179 Ga.App. at 686, 347 S.E.2d at 290. The Georgia Supreme Court in *Shepherd* adopted as law in Georgia the common law rule against civil actions in tort for perjury. *Id.*

32. 707 P.2d 560 (Okla. Ct. App. 1985).

33. *Copeland v. Anderson*, 707 P.2d 560, 568; see *infra* notes 34-49 and accompanying text (Oklahoma Court of Appeals establishing tort of perjury in Oklahoma).

claimed that her former husband's perjured testimony during a divorce proceeding concealed his true earning capacity and, therefore, reduced the plaintiff's award for child support, alimony, and the plaintiff's share in the marital estate.³⁴ The plaintiff's complaint sought damages caused by the defendant's perjury and deceit, a vacation of the divorce decree, and also requested punitive damages.³⁵ The trial court determined that under Oklahoma law the plaintiff's complaint failed to state a claim upon which the court could grant relief.³⁶ Accordingly, the trial court dismissed the plaintiff's complaint.³⁷ Subsequently, the plaintiff appealed to the Oklahoma Court of Appeals.³⁸

In determining whether Oklahoma law permits a civil action for perjury, the Oklahoma Court of Appeals in *Copeland* held that perjury is a form of the tort of deceit.³⁹ The *Copeland* court determined that to create liability the plaintiff must prove that the perjurious statement constituted deceit under Oklahoma law.⁴⁰ According to the *Copeland* court to establish a tort of deceit under Oklahoma law, a plaintiff must demonstrate that a party intentionally deceived the plaintiff and that the plaintiff relied to his detriment on the deception.⁴¹ The *Copeland* court noted that because a perjuring witness makes a material misrepresentation that the witness knows is false, the essential elements for the tort of perjury should parallel the elements for the tort of deceit.⁴² The *Copeland* court declared that to establish the tort of perjury a plaintiff must show that the witness willfully deceived another, such as a litigant, juror, or investigator, with the intent

34. *Copeland*, 707 P.2d at 562. In *Copeland v. Anderson* the plaintiff alleged that her former husband had concealed negotiations with his employer, the McDonald's hamburger chain. *Id.* The plaintiff contended that testimony regarding the negotiations with McDonald's would have had a direct effect on the truthfulness of her former husband's earning capacity because the negotiations would have revealed the husband's plan to acquire an interest in a McDonald's franchise. *Id.*

35. *Id.* In *Copeland*, the plaintiff alleged that had the defendant accurately disclosed his earning capacity, the plaintiff's award would have been \$150,000 greater. *Id.* The plaintiff, therefore, sought the \$150,000 as compensatory damages. *Id.* Additionally, the plaintiff sought \$500,000 in punitive damages. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 562-63.

39. *Id.* at 563. The *Copeland* court noted that perjury is a crime in Oklahoma. *Id.* The Oklahoma state statute defined the crime of perjury as the willfull making of a false statement under oath. *Id.*; see OKLA. STAT. 21 § 491 (1981) (statutory provision defining criminal offense of perjury).

40. *Copeland*, 707 P.2d at 564. The *Copeland* court stated that when a witness has given deceptive trial testimony, the witness has intended to defraud the opposing party who subsequently received an adverse judgment due to the false testimony. *Id.*; see OKLA. STAT. 76 § 4 (1981) (defining deceit under Oklahoma law). The Oklahoma deceit statute provides that a person who has deceived another with the intent to defraud, also has intended to defraud every individual who the person actually misleads by the deceit. OKLA. STAT. 76 § 4 (1981).

41. *Copeland*, 707 P.2d at 564.

42. *Id.*

to make him alter his position.⁴³ The *Copeland* court held that the plaintiff also must demonstrate that he suffered detriment from the defendant witness' deception upon the trier of fact.⁴⁴ The *Copeland* court concluded that if a plaintiff could demonstrate detriment caused by the defendant witness in the prior action, the defendant should compensate the injured party.⁴⁵

Although recognizing a civil remedy for the tort of perjury, the Oklahoma Court of Appeals in *Copeland* declared that a plaintiff must prove that the perjured testimony was a material misrepresentation to establish the tort.⁴⁶ The *Copeland* court defined a material misrepresentation as one that is so substantial that the misrepresentation significantly affects or influences the party to whom it is made.⁴⁷ Measured against the definition of material misrepresentation, the *Copeland* court determined that the husband's unrealized business opportunity was speculative and, therefore, not material.⁴⁸ Accordingly, the *Copeland* court held that the plaintiff failed to state a cause of action under the new tort of perjury, and affirmed the lower court's dismissal of the plaintiff's claim.⁴⁹

Although Oklahoma is the first state to recognize a common law tort for perjury, one state statutorily allows a civil action for perjury.⁵⁰ A Maine statute provides that a party, injured by the perjury of an adverse party or a witness that the adverse party introduced at trial, may recover damages proximately caused by the perjury.⁵¹ The Maine statute also provides that the plaintiff may bring an action in tort and may recover damages only for

43. *Id.* at 563-64.

44. *Id.*

45. *Id.*

46. *Id.* at 568-69.

47. *Id.* at 569. Before establishing whether the defendant's statement constituted a material misrepresentation, the *Copeland* court stated that the court would have to determine that the plaintiff would have received a larger share of the marital estate had the court known the truth. *Id.*

48. *Id.* While recognizing that the defendant's unrealized business opportunity could have had a beneficial effect on the defendant's future income, the *Copeland* court determined that the business opportunity was relevant only to the issue of support, and not to the division of marital assets. *Id.*

49. *Id.* The *Copeland* court also found that the plaintiff's allegation of the facts did not support a vacation or modification of the divorce decree. *Id.* at 570.

50. See *infra* notes 51-52 and accompanying text (discussing Maine's statutory cause of action for perjury).

51. See ME. REV. STAT. ANN. 14 § 870 (1964 & Supp.) (statute providing civil action in tort for perjury). The Maine statute allows a plaintiff to bring an action for damages against the adverse party, or any alleged perjurious witness or confederate in the alleged perjury. *Id.*; see also *Cole v. Chellis*, 122 Me. 262, —, 119 A. 623, 623 (1923) (permitting injured party to bring civil action against witness who committed perjury). In *Cole v. Chellis*, the District Court for the District of Maine declared that to obtain a judgment for the plaintiff due to the perjured testimony of a witness, the plaintiff must prove that he suffered damages from the perjured testimony. *Cole*, 112 Me. at —, 119 A. at 623.

the perjury of an adverse party or a witness that the adverse party introduced at trial but not against a plaintiff's own witness.⁵²

A recent decision by the United States District Court of Maine applied Maine's statute that permits a plaintiff to bring a civil action to recover damages arising out of a judgment allegedly based on false testimony.⁵³ In *Spickler v. Dube*,⁵⁴ the plaintiff was unable to sell recently developed land because the defendant refused to release the mortgages on the property.⁵⁵ At a subsequent trial for breach of contract and default, the defendant introduced an allegedly false demand letter and testified that the plaintiff had executed the note.⁵⁶ The defendant claimed that the plaintiff had defaulted on the plaintiff's mortgage payments.⁵⁷ The plaintiff argued, however, that he had never seen the fabricated demand letter and, therefore, that he was not in default.⁵⁸ The jury found for the defendant on both claims.⁵⁹ The plaintiff subsequently filed an action in the District Court for the District of Maine against the defendant and his attorneys for damages proximately caused by the perjured testimony and the allegedly fabricated document.⁶⁰ Neither the plaintiff nor the district court, however, mentioned the Maine statute in the proceeding.⁶¹ The district court, therefore, held that an independent action does not lie to recover damages arising out of a judgment allegedly tainted by false testimony and dismissed the plaintiff's complaint.⁶² The plaintiff appealed the district court's dismissal.⁶³

On appeal, the United States Court of Appeals for the First Circuit remanded the case to the district court.⁶⁴ The First Circuit directed the district court to apply the Maine statute that provides a civil action for the tort of perjury.⁶⁵ On remand, the district court declared that if a plaintiff

52. ME. REV. STAT. ANN 14 § 870 (1964 & Supp. 1986) (permitting plaintiff to bring perjury action only against adverse party or witness introduced by adverse party).

53. See *infra* notes 54-67 and accompanying text (federal district court applying Maine statute).

54. 626 F. Supp. 1092 (D.Me. 1986).

55. *Spickler v. Dube*, 626 F.Supp. 1092, 1093 (D.Me. 1986); see *Spickler v. Dube*, 463 A.2d 739 (Me. 1983) (court discussing facts of case). In *Spickler v. Dube*, the plaintiff paid \$30,000 cash downpayment on undeveloped real estate and executed four notes to finance the remaining \$270,000 of the purchase price. *Spickler*, 463 A.2d at 740. The plaintiff secured each note by executing mortgages on different parcels of the land. *Id.* After the plaintiff had developed the land, several buyers became interested in purchasing the property. *Id.* When the defendant learned of the pending sale of the property, the defendant refused to release the mortgages on the land. *Id.*

56. *Spickler*, 463 A.2d at 739.

57. *Spickler*, 626 F. Supp. at 1093.

58. *Id.*

59. *Id.*

60. *Id.* at 1092.

61. *Id.* at 1095.

62. *Id.* at 1092.

63. *Id.*

64. See *Spickler v. Dube*, 774 F.2d 1149 (1st Cir. 1985) (unpublished opinion in which United States Court of Appeals for First Circuit remanded case to district court).

65. *Spickler*, 626 F.Supp at 1092.

alleged in his complaint that he incurred damages due to a judgment obtained by perjury, the plaintiff properly stated a cause of action under the Maine statute.⁶⁶ Accordingly, the district court reversed the lower court's dismissal of the plaintiff's claim and held that the plaintiff could maintain a civil action for perjury under the Maine statute.⁶⁷

Aside from the Oklahoma Supreme Court and courts construing the Maine statute, other courts consistently have refused to recognize a civil action for perjury.⁶⁸ In refusing to permit civil actions in tort for perjury, however, courts have honored the common law rule against civil actions for perjury without discussing the validity of the policies supporting the decision to reject a civil action.⁶⁹ The absence of explanations concerning whether courts should permit civil actions for perjury necessitates an examination of the common law rule in light of the justifications underlying the denial of a civil remedy for false testimony.⁷⁰

A repeated justification for the rule denying civil liability for perjury is that criminal statutes against perjury sufficiently deter witnesses from giving false testimony.⁷¹ Nevertheless, the number of perjury cases demonstrates that perjury still exists.⁷² To deter perjury, state legislatures have enacted statutes that generally consider perjury a felony punishable by imprison-

66. See *id.* at 1095 (acknowledging possibility of civil action for perjury under Maine statute). The *Spickler* court originally relied on a Maine case decided before the Maine legislature had enacted the statute that provides a civil action for perjury. *Id.* The district court in the earlier case had held that a plaintiff could not bring an independent action for damages allegedly caused by an adverse witness' false testimony. *Id.*; see *Dunlop v. Glidden*, 31 Me. 435, 437 (1850) (earlier Maine case stating that no civil action exists for tort of perjury in Maine).

67. *Spickler*, 626 F.Supp. at 1092.

68. See *supra* notes 1 & 20 and accompanying text (court decisions holding that no civil liability exists for perjury).

69. See, e.g., *Lawson v. Hensley*, 712 S.W.2d 369, 370 (Ky.App.1986) (citing general rule against civil action for perjury without discussing justifications for rule or applicability of rule to facts of case); *Stolte v. Blackstone*, 213 Neb. 113, —, 328 N.W.2d 462, 463 (Neb. 1982) (court following majority rule against civil actions for perjury without discussing justifications underlying rule); *Hawkins v. Webster*, 337 S.E.2d 682, 684 (N.C.App. 1985) (dismissing complaint without explaining policy behind rule against civil actions for perjury).

70. See *infra* notes 71-109 and accompanying text (discussing justifications for denying civil remedy for perjury).

71. See MODEL PENAL CODE § 241.1(1) (Proposed Official Draft 1962). Perjury is the willful giving of false testimony in a judicial proceeding on a material point by a witness who has taken an oath to tell the truth. *Id.* Perjury may occur whenever a witness makes a false statement under oath in a trial, deposition, declaration, or affidavit, when accompanied by an intent to publish the material as true. *Id.*; see *Eagle, supra* note 1, at 350-52 (discussing need for more effective deterrents to perjury that ensure integrity of judicial proceedings). Commentators have suggested that an urgent need exists to reform perjury laws and emphasize the need for increased prosecution. *Eagle, supra* note 1, at 351.; *infra* notes 72-74 and accompanying text (discussing criminal statutes against perjury).

72. Cf. *Eagle, supra* note 1, at 351 (declaring that criminal laws against perjury are small obstacle to individual contemplating perjury).

ment.⁷³ Courts have determined that subjecting a defendant to both criminal prosecution and civil liability for perjury punishes the witness for the same offense twice.⁷⁴ Courts, however, have never used the double punishment theory as a ground for denying civil redress for other intentional wrongs.⁷⁵ For example, assault, battery, libel, embezzlement, and other intentional wrongs are offenses that inflict personal injuries for which a plaintiff may recover both punitive and compensatory damages and are also offenses that subject a defendant to both civil and criminal penalties.⁷⁶ The deterrent effect that criminal statutes provide by punishing intentional wrongs, however, has never been a basis for courts to refuse civil relief.⁷⁷ Refusing to grant civil relief to plaintiffs injured by perjured testimony because the wrongful act also may subject defendants to criminal penalties, therefore, is not a persuasive justification for the refusal of a tort recovery.⁷⁸ Accordingly, courts should permit tort recovery from a person who commits perjury that causes an unjustified intentional injury.⁷⁹

A second justification underlying judicial refusals of a civil action for the tort of perjury is the public's interest in the finality of judgments.⁸⁰

73. See, e.g., KY. REV. STAT. § 523.020 (Repl.Vol. 1985) (perjury in first degree is class D felony); TENN. CODE ANN. § 39-5-605 (Repl.Vol. 1982) (perjury punishable as felony); VA. CODE ANN. § 18.2-434 (1950 Repl.Vol. 1982)(perjury punishable as class 5 felony); see also MODEL PENAL CODE § 241.1(1) Comment 1. States usually grade perjury as a felony and sometimes punish the offense with penalties that are more severe than the offense. MODEL PENAL CODE § 241.1(1) Comment 1.

74. See, e.g., *Hawkins v. Webster*, 337 S.E.2d 682, 684 n. 1 (N.C. 1985) (availability of criminal sanctions precludes civil action in tort for perjury); *Copeland v. Anderson*, 707 P.2d 560, 566 (Okla. 1985) (discussing double punishment as basis for denying civil redress for perjury); *Dampont v. Sympson*, 78 Eng. Rep 769, 769 (K.B. 1596) (early English case establishing rule that allowing civil action for perjury would punish defendant twice); see also *supra* text accompanying notes 10-19 (discussing *Dampont*).

75. See *Copeland v. Anderson*, 707 P.2d 560, 567 (Okla. App. 1985) (discussing *Dampont* court's concern that courts permitting civil redress might punish defendant twice). The *Copeland* court noted that no court has ever denied civil relief for an intentional tort other than perjury because the wrongful act also was a crime. *Id.*

76. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS*, 7-15 (5th ed. 1984). The same intentional act may be both a crime against the state and a tort against an individual. *Id.* at 8. A court may hear a civil tort action and a criminal prosecution for the same offense. *Id.*

77. See *Eagle*, *supra* note 1, at 365-66. A civil action for the tort of perjury would not interfere necessarily with the government's right to prosecute in a criminal action. *Id.* at 366. Instead, civil liability for perjury may provide an additional deterrent against the commission of perjury. *Id.* at 365, n. 111.

78. See *supra* notes 71-77 and accompanying text (discussing validity of double punishment theory as justification for denying civil liability for perjury).

79. See *id.* (notes discussing validity of double punishment theory).

80. See *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 497 F.Supp. 637, 639 (S.D.N.Y. 1980) (explaining that rule against civil actions for perjury is necessary to prevent parties from endlessly relitigating matters), *rev'd*, 650 F.2d 9 (2d Cir. 1980), *on remand*, 529 F. Supp. 226 (S.D.N.Y. 1981), *aff'd mem.*, 697 F.2d 287 (2d Cir. 1981) (unpublished decision), *cert. denied*, 103 S. Ct. 580 (1982); *Shepherd v. Epps*, 179 Ga. 685, 686, 347 S.E.2d 289, 290 (Ga.App. 1986)(stating that civil action for perjury would multiply and extend litigation if parties could

The ability to maintain an action for perjury potentially would allow every losing party the opportunity to bring a perjury action against the winning party in each subsequent lawsuit.⁸¹ The potentially endless litigation arguably would conflict with the doctrines of res judicata and collateral estoppel and their goal of finality of judgments.⁸² Res judicata bars a subsequent suit between the same parties if the same parties seek to relitigate the subject matter of a previous cause of action.⁸³ Alternatively, res judicata prohibits the splitting of a claim.⁸⁴ Essential to the application of res judicata, therefore, is an attempt to relitigate the same claim.⁸⁵ Courts, however, should not apply res judicata to bar litigation of a claim against a witness or a defendant to the original action who consciously introduces perjured testimony because the perjury claim against the witness or a defendant in the original action usually is unrelated to the original claim.⁸⁶ Because a claim alleging the commission of perjury is usually not part of the same transaction or occurrence that gave rise to the initial suit, a civil action for the tort of perjury rarely would violate the doctrine of res judicata.⁸⁷

Collateral estoppel, a doctrine similar to res judicata, prevents relitigation of any issue necessarily decided in a previous action.⁸⁸ For example, if the

re-examine subject matter of previous action with new action between victim and alleged perjuror); see also Eagle, *supra* note 1, at 368-71 (suggesting that liberalizing rule against civil actions for perjury could conflict with finality of judgments).

81. See Note, *supra* note 3, at 1212 (rule against civil actions for perjury reflects fear by courts that civil actions would tempt every losing party to bring perjury action).

82. See *id.* at 1210-14 (discussing doctrines of res judicata and collateral estoppel in context of civil actions for perjury); Eagle, *supra* note 1, at 369-71 (applying doctrines of res judicata and collateral estoppel to civil actions for perjury); see *infra* notes 83-92 and accompanying text (discussing res judicata and collateral estoppel).

83. See M. GREEN, BASIC CIVIL PROCEDURE, 227-34 (2d ed. 1979) (discussing doctrine of res judicata). A plaintiff who sues a defendant seeks to establish and enforce a cause of action. *Id.* at 228. Under the doctrine of res judicata, a final judgment is conclusive upon the parties in any subsequent litigation involving the same cause of action. *Id.* at 227. The judgment has the effect of extinguishing the cause of action. *Id.* at 228.; see Allen v. McCurry, 449 U.S. 90 (1980) (explaining doctrine of res judicata). In Allen v. McCurry, the United States Supreme Court declared that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that the parties could have or did raise in the original action. Allen v. McCurry, 49 U.S. 90, 94 (1980).

84. M. GREEN, *supra* note 83, at 228. The doctrine of res judicata precludes a plaintiff from splitting his cause of action. *Id.* A splitting of a cause of action occurs if a plaintiff divides a single or indivisible cause of action into several claims and brings several actions based on these different claims. *Id.*

85. See *id.* (discussing doctrine of res judicata). In res judicata the first judgment is conclusive, not only on all matters that the plaintiff actually litigated, but on all matters that the plaintiff could have litigated. *Id.*

86. See Eagle, *supra* note 1, at 370 (commentator discussing application of res judicata to civil action in tort for perjury). Courts should not apply res judicata to bar litigation of a claim that on a specific instance the defendant perjured his testimony. *Id.*

87. See *Id.*, at 369-70 (applying res judicata to civil actions for perjury). A fundamental goal of res judicata is to prevent the relitigation of a single cause of action. *Id.* at 369. Courts seldom consider a perjury claim as part of the same transaction that gave rise to the initial suit. *Id.*

88. See M. GREEN, *supra* note 83, at 234-41 (discussing doctrine of collateral estoppel).

parties in the original action litigated fully and fairly the truthfulness of a particular witness' testimony, then the doctrine of collateral estoppel would bar a plaintiff's subsequent tort claim for perjury against the witness.⁸⁹ Although the trier of fact in the original action may evaluate the truthfulness of all the testimony, the parties usually do not litigate in the original action the honesty of a particular witness or party.⁹⁰ The doctrine of collateral estoppel should bar an action in tort for perjury only when the trier of fact has determined that the witness has perjured himself in the prior action.⁹¹ Allowing a plaintiff a civil action for the tort of perjury, therefore, rarely conflicts with either the doctrine of res judicata or collateral estoppel and should not prevent courts from recognizing civil liability for perjury.⁹²

A third justification for the rule prohibiting civil actions for perjury is closely related to the goal of finality.⁹³ Opponents of a civil action for perjury argue that permitting civil actions for perjury would result in a flood of litigation.⁹⁴ Maine, the one state that has enacted a statute that allows a recovery of damages for perjury, however, has not experienced a significant increase in perjury litigation.⁹⁵ Arguably, the statute's high standard of proof has deterred frivolous lawsuits.⁹⁶ Similarly, the Oklahoma Supreme Court's requirement in *Copeland* that a plaintiff in a civil action

Collateral estoppel precludes a party in a second suit from litigating any issue that was necessary to the decision in a prior case. *Id.* at 235.; see *Allen v. McCurry*, 449 U.S. 90 (1980)(explaining doctrine of collateral estoppel). The Supreme Court in *Allen* stated that under the doctrine of collateral estoppel, if a court has decided an issue of fact or law necessary to the court's judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Allen*, 449 U.S. at 94.

89. See *Eagle*, *supra* note 1, at 370 (discussing application of collateral estoppel to civil actions for perjury). In most cases, the parties do not litigate the veracity of a particular witness or even an adverse party in the original action. *Id.*

90. See *id.* (parties may not relitigate fact necessarily decided in previous cause of action).

91. See *id.* at 371 (applying collateral estoppel to civil actions in tort for perjury). Collateral estoppel should bar an action in tort only in cases in which the factfinder distinctly adjudged the veracity of the witness that the plaintiff alleges perjured testimony. *Id.*

92. See *supra* notes 81-91 and accompanying text (noting that civil action for perjury rarely conflicts with either doctrine of res judicata or collateral estoppel).

93. See, e.g., *John Allan Co. v. Brandow*, 207 N.E.2d 339, 342 (Ill.App. 1965) (rule against civil action for perjury prevents retrying of every case in which plaintiff alleges that adverse party obtained judgment by false testimony or documents); *Stolte v. Blackstone*, 213 Neb. 113, —, 328 N.W.2d 462, 463 (Neb. 1980) (declaring that civil action for perjury would promote endless litigation); *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975) (suggesting that civil action for perjury would create endless litigation).

94. See *supra* note 93 (courts suggesting that civil actions for perjury would result in flood of litigation).

95. See *Eagle*, *supra* note 1, at 374 n. 165. During the one hundred years that the Maine statute that allows recovery for damages caused by perjury has existed, Maine's appellate courts have heard only four appeals that involved the tort of perjury. *Id.*

96. See ME. REV. STAT. ANN. 14 § 870 (1964 & Supp. 1986). The Maine statute requires a plaintiff to demonstrate that an adverse party has obtained a judgment against the plaintiff due to the perjury of a witness introduced at trial by the adverse party. *Id.* The plaintiff also must demonstrate that the defendant's perjury actually caused damage to the plaintiff. *Id.*

for perjury meet the same burden of proof as that demanded for the tort of deceit may deter frivolous lawsuits.⁹⁷ A plaintiff in Oklahoma must prove not only that the defendant perjured but also that he suffered detriment due to the deception that the witness practiced on the trier of fact.⁹⁸ One commentator has suggested that to recover for the tort of perjury the plaintiff must be able to prove by clear and convincing evidence that the defendant's perjury in the previous action resulted in monetary damages to the plaintiff and that the perjured testimony proximately caused the plaintiff's monetary damages.⁹⁹ Thus, by imposing a high standard of proof, courts and legislatures could prevent frivolous lawsuits brought under the guise of a perjury action.¹⁰⁰

A final justification for the common law rule against civil actions for perjury is that the rule encourages witnesses to testify in court.¹⁰¹ The common law rule of witness immunity provides a witness with an absolute privilege from subsequent suits for any relevant testimony that the witness offered in court.¹⁰² The witness immunity rule encourages witnesses to come forward and testify fully, freely, and honestly about the matters in issue without fear of later legal harassment.¹⁰³ Courts, however, do not serve the

97. See *Copeland*, 707 P.2d at 568-69 (establishing civil action for perjury in Oklahoma). In *Copeland*, the Oklahoma Supreme Court declared that a plaintiff must show that false testimony was a material misrepresentation parallel to the misrepresentation that the Oklahoma legislature had defined in the Oklahoma tort of deceit. *Id.* at 569; see also OKLA. STAT. 76, § 3 (Oklahoma statute defining tort of deceit). The *Copeland* court also required a plaintiff to establish that the witness intended to deceive the trier of fact, and that the defendant's perjured testimony actually harmed the plaintiff. *Copeland*, 707 P.2d. at 569; see *supra* notes 44-48 and accompanying text (discussing *Copeland* court's standard of proof for tort of perjury).

98. See *Copeland*, 707 P.2d at 569 (requiring that defendant's perjured testimony proximately cause plaintiff's harm); *supra* note 97 (discussing *Copeland* court's definition of tort of perjury).

99. See *Eagle*, *supra* note 1, at 372-73 (requiring plaintiff to show by clear and convincing evidence that defendant's false testimony harmed plaintiff).

100. See *supra* notes 95-99 and accompanying text (suggesting that high standard of proof for tort of perjury would prevent flood of litigation)

101. See, e.g., *Rudow v. City of New York*, 642 F.Supp. 1456, 1472 (S.D.N.Y. 1986) (citing common law doctrine that provides immunity from subsequent civil liability for use of perjured testimony to parties testifying in judicial proceeding); *Hokanson v. Lichtor*, 626 P.2d 214, 219 (Kan.App.1981) (discussing public policy that supports privilege of witness' testimony during judicial proceeding); *Andrews v. Steinberg*, 122 Misc. 2d 468, 475, 471 N.Y.S.2d 764, 770 (N.Y.Sup.Ct. 1983) (declaring that absolute privilege attaches to testimony in judicial proceedings that encourages witness cooperation).

102. See *Eagle*, *supra* note 1, at 366-69. Courts grant to any witness an absolute privilege from subsequent law suits who gives any relevant testimony or other material to the court.. *Id.* at 367. The rule of witness immunity applies to all testimony, whether or not the witness had testified maliciously, and regardless of whether the information was truthful. *Id.*

103. See *id.* at 366-69. Courts have determined that subsequent law suits may hinder the administration of justice if courts did not grant civil immunity to a witness' pleading, depositions, and courtroom testimony. *Id.* at 367.; see, e.g., *Charles v. Wade*, 665 F.2d 661, 666 (5th Cir. 1982) (stating that insulating witness from threat of civil liability for his testimony

public policies that support the witness immunity rule by denying a victim an opportunity to seek redress from a dishonest and untruthful witness.¹⁰⁴ Courts define perjury as the giving of false testimony with knowledge that the statements were false.¹⁰⁵ The intent to commit perjury, without excuse or justification, should transform privileged conduct into a tortious act.¹⁰⁶ Courts that refuse to grant a civil remedy for perjury due to the witness immunity rule, therefore, unnecessarily deny compensation to an injured party.¹⁰⁷ A civil action in tort would not undermine a witness' privilege to give relevant truthful testimony because truthful testimony would not fall within the tort.¹⁰⁸ Courts that refuse to grant a civil remedy for perjury due to the witness immunity rule unnecessarily deny compensation to an injured party.¹⁰⁹

To avoid the common law rule against civil actions, plaintiffs occasionally have used alternative actions in tort to recover damages in which perjury was an element of the cause of action.¹¹⁰ For example, in *Morgan v. Graham*,¹¹¹ the United States Court of Appeals for the Tenth Circuit

would serve factfinding process), *cert. denied*, 103 S.Ct. 1426 (1983).; *Nichols v. Alker*, 231 F.2d 68, 80 (2d Cir. 1956) (Frank, J., concurring) (agreeing that civil action for perjury may tend to induce honest witnesses not to testify), *cert. denied*, 352 U.S. 829 (1956); *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 261-62, 116 S.E.2d 725, 727-28 (1960) (stating that civil action for perjury would give great leverage to litigants to intimidate witnesses).

104. See *infra* notes 105-108 and accompanying text (suggesting that civil action for perjury would not militate against witness immunity rule).

105. See MODEL PENAL CODE § 241.1(1) (Proposed Official Draft 1962) (defining perjury as knowingly making a false statement under oath).

106. See *Andrews v. Steinberg*, 471 N.Y.S.2d 764 (Sup. 1983). In *Andrews v. Steinberg*, the plaintiff, an attorney, alleged that a former client intentionally and maliciously gave false testimony about the plaintiff in a prior proceeding. *Andrew v. Steinberg*, 471 N.Y.S.2d at 766-67. The *Andrews* court determined that the witness made the statements in a judicial proceeding and, therefore, the statements were privileged under the witness immunity rule. *Id.* at 770. Reluctantly applying the witness immunity rule, the *Andrews* court noted that the defendant escaped liability only because the defendant made the statements in a judicial proceeding. *Id.* The *Andrews* court declared that the plaintiff unquestionably would have stated a cause of action for damages if the defendant had not made the statements during a judicial proceeding. *Id.*

107. See *Andrews*, 471 N.Y.S.2d at 770. The *Andrews* court noted that courts would undermine the public policy of encouraging witnesses to testify if courts interpreted the witness immunity rule to shield perjurious testimony and to deny a plaintiff an opportunity to seek redress. *Id.* at 761. The *Andrews* court, however, also noted that a criminal conviction demonstrates that the defendant witness had abused the privilege afforded by the witness immunity rule. *Id.* at 772. Rather than mechanically applying the witness immunity rule, the *Andrews* court suggested that a court should allow a civil action for perjury if a court had convicted the defendant of perjury in a previous proceeding. *Id.*

108. See *Eagle*, *supra* note 1, at 367. The rule of witness immunity has its primary application in preventing suits for libel and defamation. *Id.*

109. See *supra* notes 101-108 and accompanying text (suggesting that witness immunity rule should not prevent civil actions for tort of perjury).

110. See *infra* 111-137 and accompanying text (discussing alternative remedies in tort that involve perjury).

111. 228 F.2d 625 (10th Cir. 1956).

considered whether perjury may establish an element of a plaintiff's fraud claim.¹¹² In *Morgan*, the plaintiff brought an action against the defendant for damages caused by testimonial perjury.¹¹³ The defendant, president of an insurance company, falsely had denied that the negligent driver of an automobile who had injured the plaintiff in an accident did not have an insurance policy with the company.¹¹⁴ Relying on the defendant's perjured affidavit and testimony, the plaintiff accepted a nonsuit rather than fully pursuing his legal remedy against the insurance company.¹¹⁵ While declaring that no civil action existed for damages due to perjury, the Tenth Circuit held that the plaintiff's complaint stated a cause of action for fraud and allowed the recovery of damages.¹¹⁶

In addition to perjury as an element of fraud, courts have recognized other alternatives in tort that include the perpetration of perjury as an element.¹¹⁷ For instance, a plaintiff may use the commission of perjury as an element in seeking to establish a claim for malicious prosecution.¹¹⁸ In *Wright v. Yurko*,¹¹⁹ the District Court of Appeal of Florida (Fifth District) determined that although there existed no civil action for perjury in Florida, the plaintiff had established an action for malicious prosecution against the defendant.¹²⁰ In *Wright*, the defendant previously had filed a malpractice claim against the plaintiff.¹²¹ The plaintiff alleged that the defendant had

112. *Morgan v. Graham*, 228 F.2d at 627-28.

113. *Id.* at 626.

114. *Id.* In *Morgan v. Graham*, the plaintiff suffered injuries due to an automobile accident with Godfrey W. Cochran who was the negligent driver of the automobile that caused the accident. *Morgan*, 228 F.2d at 626. The plaintiff obtained a default against Cochran in the United States District Court for the District of Kansas. *Id.* The plaintiff suspected that Cochran had an outstanding insurance policy with Moral Insurance Company at the time of the accident and subsequently initiated a suit against the insurance company. *Id.* The president of the insurance company, however, filed an affidavit stating that Cochran never had a policy with the company. *Id.*

115. *Id.* In *Morgan*, the plaintiff did not have access to the negligent driver's insurance policy and could not prove that the defendant's insurance policy ever existed. *Id.* The plaintiff, therefore, voluntarily took a nonsuit. *Id.* Seven months later, however, the plaintiff learned that the negligent driver's insurance policy existed after the insurance company became insolvent. *Id.* The plaintiff then sued the president of the insurance company individually for fraud. *Id.*

116. *Id.* at 627. The United States Court of Appeals for the Tenth Circuit in *Morgan* determined that the sworn affidavit of the president of Moral Insurance Company was false and that the president gave the perjured affidavit with the intent to deceive and defraud the plaintiff. *Id.* The Tenth Circuit also determined that the plaintiff had relied to his detriment upon the affidavit. *Id.* at 628. Stating that the action sounded in tort, the Tenth Circuit permitted the recovery of punitive damages as well as compensatory damages. *Id.*

117. See *infra* notes 118-36 and accompanying text (discussing other alternative tort remedies that may include perjury as element of tort).

118. See *infra* notes 119-24 and accompanying text (discussing perjury as element of malicious prosecution claim).

119. 446 So. 2d 1162 (Fla. Dist. Ct. App. 1984).

120. *Wright v. Yurko*, 446 So. 2d at 1165.

121. *Id.* at 1164. In *Wright v. Yurko*, a jury had found for the plaintiff in the defendant's

given false testimony with the intent to injure the plaintiff and subsequently instituted a suit for malicious prosecution.¹²² To establish an action for malicious prosecution, the *Wright* court stated that the plaintiff must demonstrate that the defendant had initiated a civil proceeding against the plaintiff with malice and without probable cause, and that the court had terminated the previous proceeding in favor of the plaintiff.¹²³ After finding that the plaintiff's complaint sufficiently stated a claim for malicious prosecution, the *Wright* court permitted the plaintiff to seek monetary damages due to the defendant's interference with the plaintiff's medical practice.¹²⁴

Another court has held that a plaintiff has established an action in tort if the adverse party fraudulently obtains a judgment by procuring witnesses to give perjured testimony.¹²⁵ In *Stevens v. Brown*¹²⁶ the United States District Court for the Western District of North Carolina permitted a plaintiff to maintain a civil action arising from an alleged conspiracy to convict the plaintiff using false testimony.¹²⁷ In *Stevens*, the plaintiff claimed that several police officers conspired to give false testimony to procure the plaintiff's murder conviction.¹²⁸ The trial court awarded the plaintiff damages for the defendants' perjury and the defendants appealed.¹²⁹ On appeal, the district court in *Stevens* declared that under North Carolina law civil liability does not exist for damages resulting from perjury in a criminal trial.¹³⁰ The *Stevens* court, however, noted that a conspiracy to convict using false testimony was actionable in North Carolina.¹³¹ Although recognizing a civil

previous malpractice claim. *Id.* The plaintiff subsequently brought suit alleging that the defendant initiated the previous malpractice action with malice and intent to injure the plaintiff. *Id.* The plaintiff also alleged that the defendant conspired to give, and subsequently gave, perjured testimony at the trial with the intent to injure the plaintiff. *Id.*

122. *Id.*

123. *Id.* at 1165. The *Wright* court, however, noted that if the plaintiff had failed to plead properly any one of the elements of the malicious prosecution action, then the court would have dismissed the suit. *Id.*

124. *Id.* at 1167.

125. See *infra* notes 126-133 (discussing case in which perjury was element of conspiracy).

126. 546 F.Supp 368 (C.D.N.C. 1983).

127. *Stevens v. Brown*, 546 F.Supp. at 369-70.

128. *Id.* at 369. In *Stevens v. Brown* a jury had found the plaintiff guilty of first degree murder in a previous criminal proceeding. *Id.* The plaintiff, however, alleged that the police officers had met with the district attorney before the trial and had conspired to convict the plaintiff using perjured statements. *Id.*

129. *Id.* The trial court in *Stevens v. Brown* declared that the defendants had violated the plaintiff's civil rights by conspiring to have the plaintiff arrested, prosecuted, and convicted for murder using false testimony. *Id.* The trial court assessed damages at \$9,000.00 against three of the defendants. *Id.*

130. *Id.* at 370. In addition to declaring that civil liability did not exist for perjury, the *Stevens* court declared that no liability existed for the inducement of perjury. *Id.* The *Stevens* court, however, found that the evidence, taken in the light most favorable to the plaintiff, stated a claim against the defendants for conspiring to convict the plaintiff with perjured testimony. *Id.*

131. *Id.* at 370. The *Stevens* court noted that courts should encourage free testimony in criminal cases. *Id.* Because police officers testify frequently in criminal cases, the *Stevens* court

action for conspiracy, the district court found that the plaintiff failed to prove the conspiracy or demonstrate that the officers' testimony was inconsistent with the evidence.¹³² Accordingly, the *Stevens* court set aside the plaintiff's judgment against the defendants.¹³³

The decision of the *Stevens* court departs from the decisions of courts in the majority of American jurisdictions which maintain that a conspiracy to commit perjury is not actionable because perjury itself is not tortious.¹³⁴ Although tort theories other than a civil action for perjury may offer relief to injured parties, the remedies are available only in certain factual circumstances.¹³⁵ Each of the tort remedies has separate elements in addition to perjury that a plaintiff must establish before recovering damages.¹³⁶ Because courts aim the other tort remedies at redressing other types of tortious conduct, the alternative tort remedies often do not redress the injuries caused solely by perjury.¹³⁷

Although the alternative tort remedies often are inadequate or unavailable to a victim of perjured testimony, a plaintiff could seek relief under the Federal Rule of Civil Procedure 60(b).¹³⁸ Section 60(b)(3) authorizes a motion for relief upon the grounds of perjury or fraud if the injured party discovers the false testimony within one year from the judgment.¹³⁹ To

emphasized the need for police officers to testify freely in a judicial proceeding without the fear of subsequent actions against them. *Id.* The *Stevens* court, however, stressed that courts would serve no public policy by protecting witnesses from liability for damages caused by a successful conspiracy to procure a conviction using false testimony rather than from the false testimony itself. *Id.*

132. *Id.*

133. *Id.* at 371.

134. See, e.g., *Hokanson v. Lichtor*, 626 P.2d 214, 218 (Kan.App. 1981) (stating that no civil action for damages exists for either perjury or conspiracy to commit perjury); *Stolte v. Blackstone*, 213 Neb. 113, —, 328 N.W.2d 462, 464 (Neb. 1982) (declaring that perjury itself is not actionable and, therefore, plaintiff cannot make perjury subject of actionable conspiracy); *W. G. Platts v. Platts*, 73 Wash.2d 434, 440, 438 P.2d 867, 871 (1968) (stating that plaintiff's claim of conspiracy to commit perjury was not actionable).

135. See *supra* notes 111-116 and accompanying text (discussing facts of fraud claim involving perjury); notes 118-124 (malicious prosecution that includes perjury as element); notes 125-133 (perjury as element of conspiracy action).

136. See *supra* note 135 (noting requisite factual circumstances for fraud claims based on perjury).

137. See *supra* notes 110-33 and accompanying text (examples of courts applying other tort remedies that include perjury as element).

138. See FED. R. CIV. P. 60(b) (providing relief from judgment that defendant obtained by fraud, misrepresentation, or other misconduct of adverse party); *infra* notes 139-144 and accompanying text (discussing remedies available under federal rule 60(b)(3)).

139. See FED. R. CIV. P. 60(b)(3) (1985). Rule 60(b)(3) provides that a court may relieve a party from a final judgment obtained by fraud, misrepresentation, or other misconduct by an adverse party. *Id.* Rule 60(b)(3) also provides that the fraud may be either intrinsic or extrinsic. *Id.*; see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.14 (3d 1985). "Intrinsic fraud" includes the use of perjured testimony or forged evidentiary documents. *Id.* "Extrinsic fraud" includes bribery of the judge or jury, and fraudulently inducing a party not to appear in court. *Id.*

maintain a motion for equitable relief under the rule for perjured testimony, the plaintiff must demonstrate that the perjury prevented a full and fair consideration of all relevant facts.¹⁴⁰

While permitting courts to rescind a judgment obtained by fraud or perjury, the rule limits relief to situations in which the plaintiff can attribute the alleged perjury to the adverse party.¹⁴¹ If the perjurer is not a party to the original action relief is unavailable to the injured party.¹⁴² Another limitation of relief under the rule is a one-year limitation period for plaintiffs alleging fraud or perjury.¹⁴³ If a plaintiff does prevail on a motion under the rule, however, a court may vacate an erroneous judgment and impose the duty of restitution upon the party charged with fraud.¹⁴⁴

Neither the alternative common law remedies nor the enactment of rule 60(b)(3) adequately redress plaintiffs injured solely by the commission of perjury.¹⁴⁵ A tort action similar to that in *Copeland*, however, permits a court to compensate a victim for all injuries proximately caused by perjured testimony.¹⁴⁶ Because the commission of perjury is an intentional act committed with malice, courts also could award punitive damages to an injured plaintiff.¹⁴⁷ Moreover, if a court will not vacate a judgment, a tort remedy for perjury will be the only means to compensate the plaintiff for his injuries.

140. See J. MOORE, W. TAGGART, *MOORE'S FEDERAL PRACTICE* § 60.24[5] (2d ed. 1985). A court should not presume fraud, misrepresentation, or other misconduct. *Id.* The moving party must prove by clear and convincing evidence each allegation against the adverse party. *Id.*

141. See *id.* Federal rule 60(b)(3) clearly states that a court may relieve a party from a final judgment because of fraud, misrepresentation, or other misconduct of an adverse party only. *Id.* Federal rule 60(b)(3) does not provide relief, however, if a witness has given perjured testimony and the party who obtained the judgment was completely innocent and the independent fraud was material. *Id.* Although a judgment procured by the perjury of an independent third person is unjust, courts cannot grant relief pursuant to rule 60(b)(3). *Id.*

142. See *id.* (rule 60(b)(3) limiting plaintiff's relief only to adverse party).

143. See FED. R. CIV. P. 60(b)(6) (providing that plaintiffs must make motion for relief within one year); F. JAMES & G. HAZZARD, *supra* note 139, at §12.14. Rule 60(b)(3) allows a court to set aside a judgment within one year on the basis of fraud whether the fraud is intrinsic or extrinsic. *Id.*

144. See Eagle, *supra* note 1, at 361-62 (discussing disadvantages of obtaining relief under rule 60(b)(3) for perjury). A disadvantage of federal rule 60(b)(3) is the inadequacy of restitution as a remedy for perjury or fraud. *Id.* at 361. Restitution under rule 60(b)(3) entitles a person suffering loss due to perjury to recover the defendant's unjust enrichment. *Id.* Although restitution may provide a recovery, it may not compensate adequately the victim for all of his damages. *Id.* at 362. Because courts measure a plaintiff's restitution proceeds based on one party's unjust enrichment at the other party's expense, the injured party may recover only the amount that the court gave the adverse party pursuant to the decree. *Id.*

145. See *supra* notes 110-44 and accompanying text (analysis of other tort remedies as adequate redress for perjury).

146. See *supra* notes 39-47 and accompanying text (*Copeland* court recognizing civil action in tort for perjury).

147. See *supra* MODEL PENAL CODE § 241.1(1) (Proposed Official Draft 1962) (defining perjury as knowingly making false statement under oath).

Perjury is a voluntary and intentional wrong.¹⁴⁸ When an adverse party willfully and maliciously has committed an act that harms another, courts should award the victim damages for all injuries proximately caused by the adverse party's act.¹⁴⁹ Courts, however, traditionally have denied compensation to plaintiffs injured by perjury.¹⁵⁰ In *Copeland v. Anderson*, however, the Oklahoma Court of Appeals recognized a civil action for damages caused by perjury.¹⁵¹ By recognizing a civil action in tort for perjury, the *Copeland* court has provided a remedy that will compensate completely and consistently a victim of perjury.¹⁵² Like the *Copeland* court, other courts should realize that the common law justifications underlying the rule against a civil action do not support the mechanical denial of a civil action to victims injured by an adverse party's perjury.¹⁵³ Courts also should realize that the alternative tort remedies and rule 60(b)(3) often provide inadequate redress to a victim of perjury.¹⁵⁴

In addition to courts, legislatures should consider a statutory cause of action for the tort of perjury.¹⁵⁵ Legislatures should impose a high standard of proof similar to the standard in the Maine perjury statute and the *Copeland* case.¹⁵⁶ A prospective perjury statute should permit civil actions for perjury only against an adverse party or a witness that the adverse party introduced at trial.¹⁵⁷ The statute should require that the plaintiff demonstrate that he suffered actual monetary damage proximately caused by the defendant's perjured testimony.¹⁵⁸ Like the Maine perjury statute, legislatures should also require that the plaintiff commence his perjury action within

148. *See id.*

149. *See* RESTATEMENT OF TORTS § 870 (1977) (person who commits intentional act to cause harm to another should be liable to victim for damages caused by act).

150. *See supra* notes 1 & 20 and accompanying text (citing courts that follow common law rule and deny civil action in tort for perjury).

151. *See supra* notes 32-49 and accompanying text (discussing Oklahoma Supreme Court decision's in *Copeland* to recognize civil action in tort for perjury).

152. *Id.*

153. *See supra* notes 71-109 (discussing reasonableness of justifications for common law rule against civil actions for perjury).

154. *See supra* notes 110-37 and accompanying text (suggesting that courts aim alternative tort remedies at other types of tortious conduct, not at injuries caused solely by perjury); 137-44 and accompanying text (discussing limitations and inadequacies of rule 60(b)(3) as remedy for perjury).

155. *See infra* notes 156-158 and accompanying text (discussing prospective perjury statute).

156. *See supra* notes 95-98 and accompanying text (discussing standard of proof in *Copeland* and Maine perjury statute).

157. ME. REV. STAT. 14 § 870 (1964 & Supp. 1986) (providing perjury cause of action only against adverse party or witness introduced by adverse party); *see supra* notes 51-52 and accompanying text (examining Maine perjury statute).

158. *See supra* notes 95-99 and accompanying text (suggesting that high standard of proof would deter frivolous law suits); *see also* Eagle, *supra* note 1, at 373 (declaring that high standard of proof would prevent fraud). Because the tort of perjury has high potential for abuse and results in reopening of prior litigation, courts should disallow suits that do not allege pecuniary or tangible damage. *Id.* at 373 n.152.

three years after the adverse judgment.¹⁵⁹ A concern for providing adequate relief to victims of intentional harm should encourage both courts and state legislatures to re-examine the common law rule against a civil action for perjury and consider a civil action in tort for perjury.

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159. ME. REV. STAT. ANN. 14 § 870 (1964 & Supp. 1986) (requiring that plaintiff bring action within three years of adverse judgment); *see supra* note 143 and accompanying text (suggesting that rule 60(b)'s one-year limitations period is another obstacle to plaintiffs alleging perjury).

