STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

H. Dennis Long,
Plaintiff Below, Petitioner

vs) No. 11-0865 (Ohio County 06-C-345)

FILED
June 8, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Howard W. Long; Wendy F. Long; H.L. Real Estate, Inc., a West Virginia S corporation; LDL Investments, Inc., a California C corporation; KGM Harvesting Co., a California C corporation; Triadelphia, Inc., a West Virginia S corporation; Howard Long International, Inc., a Florida S corporation; Howard Long Co., Inc. a Florida S corporation; J.W. Long International Limited Partnership, a Nevada limited partnership; J.W. Long & Associates, Ltd., a Jersey Islands limited corporation; Oella Consulting, LLC, a Florida limited liability company; and Oella Capital, LLC, a Florida limited liability company, Defendants Below, Respondents

MEMORANDUM DECISION

Petitioner herein and plaintiff below, H. Dennis Long, appeals the Circuit Court of Ohio County's April 29, 2011, "Findings of Fact, Conclusions of Law, and Order" explaining the court's entry of judgment as a matter of law for defendants and dismissing plaintiff's lawsuit. Respondents herein, who were defendants below, are Howard W. Long; Wendy F. Long; H.L. Real Estate, Inc., a West Virginia S corporation; LDL Investments, Inc., a California C corporation; KGM Harvesting Co., a California C corporation; Triadelphia, Inc., a West Virginia S corporation; Howard Long International, Inc., a Florida S corporation; Howard Long Co., Inc. a Florida S corporation; J.W. Long International Limited Partnership, a Nevada limited partnership; J.W. Long & Associates, Ltd., a Jersey Islands limited corporation; Oella Consulting, LLC, a Florida limited liability company; and Oella Capital, LLC, a Florida limited liability company. Petitioner appears by counsel Robert L. Bays, Heather G. Harlan, and William G. Petroplus. Respondents appear by counsel Charles J. Kaiser Jr. and Richard N. Beaver.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner is the son of Respondent Howard W. Long. For approximately thirty years, petitioner was employed by successful businesses that Respondent Mr. Long owned. Petitioner filed his eleven-count Amended Complaint asserting, inter alia, that his father had breached promises to share one-half of the proceeds of the businesses and to establish a ten million dollar trust fund for petitioner's benefit. Petitioner alleges that he remained employed by the businesses, despite his receipt of a reduced salary and benefits, because he relied upon his father's promises.

At trial, before the case was submitted to the jury, the circuit court granted the respondents' motion for judgment as a matter of law. "This Court 'appl[ies] a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law.' *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001)." *Norfolk Southern Ry. Co. v. Higginbotham*, 228 W.Va. 522, __, 721 S.E.2d 541, 545 (2011).

This Court has reviewed the record, the parties' arguments, and the circuit court's thorough, well-reasoned order explaining its basis for granting judgment as a matter of law. We conclude that the circuit court was correct and we hereby adopt and incorporate the circuit court's order. The Clerk is directed to attach a copy of the circuit court's April 29, 2011, "Findings of Fact, Conclusions of Law, and Order" to this memorandum decision.[1] For the reasons set forth in the circuit court's order, we affirm.

Affirmed.

ISSUED: June 8, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

[1] This order was entered by the court on April 29, 2011, and was filed with the circuit clerk on May 2, 2011.

11-0865

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

H. DENNIS LONG,

Plaintiff,

v.

Civil Action No. 06-C-345
Judge Wilson

HOWARD W. LONG; WENDY F. LONG; H.L. REAL ESTATE, INC., a West Virginia S corporation; LDL INVESTMENTS, INC., a California C corporation; KGM HARVESTING CO., a California C corporation; TRIADELPHIA, INC., a West Virginia S corporation; HOWARD LONG INTERNATIONAL, INC., a Florida S corporation; HOWARD LONG CO., INC., a Florida S corporation; J.W. LONG INTERNATIONAL LIMITED PARTNERSHIP, a Nevada limited partnership; J.W. LONG & ASSOCIATES, LTD, a Jersey Islands limited corporation; OELLA CONSULTING, LLC, a Florida limited liability company; OELLA CAPITAL, LLC, a Florida limited liability company; and JOHN DOE,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

The Court has granted Defendants' motion for judgment as a matter of law. The Court has granted to the Plaintiff every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, and the court has assumed as true those facts which the jury may properly find under the evidence. Rules Civ. Proc., Rule 50. With that standard in mind and based upon the evidence presented at trial, the Court hereby makes the following Findings of Fact:

The Long family and the Howard Long Group

The Defendant, Howard W. Long ("Father"), now 76 years, was a successful entrepreneur whose life work included the creation of Coronet Foods, Inc. and other related companies referred to as the" Howard Long Group" which were built into profitable businesses that at one time employed over eight hundred (800) people. The Father's business success began with the establishment of Coronet Foods, Inc. in Wheeling, West Virginia. Later there were two companies known as Coronet Foods, Inc. The first Coronet Foods, Inc. is a West Virginia corporation located in Wheeling, West Virginia, that specialized in processing produce for various stores and restaurants ("Coronet East"). Coronet East was the primary business owned by Father and was H. Dennis Long's employer for most of his employment career. H. Dennis Long ("Son") was an officer and director of Coronet Foods, Inc. for nearly 30 years, most recently serving as the Vice Chairman. The second Coronet Foods, Inc., is a California corporation that also specialized in processing produce for various stores and restaurants on the West Coast of the United States ("Coronet West"). Father was the Chairman and sole beneficial stockholder; Son was not an employee or beneficial stockholder of Coronet West, but he was an officer and director of Coronet West.

Coronet Foods was only a part of Father's Horatio Alger success story. Coronet East began in Wheeling, West Virginia. After Howard W. Long developed a business relationship with McDonald's Corporation, Coronet East became a very successful business. McDonald's became Coronet's largest customer and was responsible for most of Coronet's revenue. Howard W. Long became a lettuce expert and spent many years traveling the United States and the world for McDonald's. He helped McDonald's improve the quality and quantity of the fresh lettuce and produce available for its restaurants in the United States, Europe and China. During all times relevant, Howard W. Long was the sole beneficial owner of the Defendant companies

(collectively referred to as "the Howard Long Companies")[1] as well as Coronet Foods, Inc.

The Howard Long Companies were created for various business purposes that were related to the processing of fresh produce or to minimize income tax costs and to avoid estate and inheritance taxes. Son was not a beneficial owner of any of the Howard Long Companies or Coronet Foods, Inc. but he did serve as an officer and director of some of the Howard Long Companies, and as an officer and director for Coronet Foods, Inc.

The Son, Plaintiff, H. Dennis Long, is the adult son of the Defendant, Howard W. Long and step-son of the Defendant, Wendy F. Long. Son began working part-time as a paid employee in Wheeling, West Virginia at Coronet Foods, Inc --not a Defendant in this matter--in 1965 as a laborer. In 1982, after he graduated from college, with his Fathers consent and encouragement, Son began working full-time as a paid executive employee at Coronet Foods, Inc. At that time the stock of Coronet Foods, Inc. was owned predominately by Father. Son's employment with Coronet Foods, Inc. continued until 2003 when Son became an employee of Defendant, Oella Consulting, LLC, the Fathers' company that had a contract to provide management services to Coronet Foods, Inc. and to some of the other Defendant companies. Son's employment with Oella Consulting, LLC continued even after Coronet Foods, Inc. filed for bankruptcy protection in the United States District Court for the Northern District of West Virginia and ceased operations.

Lorna Long Thorn was the adult daughter of Defendant, Howard W. Long, and the sister of Plaintiff, H. Dennis Long. Although she worked for Coronet Foods, Inc. in the past, she was

[1] The Defendant, H.L. Real Estate, Inc., is a West Virginia subchapter S corporation.
The Defendant, LDL Investments, Inc., is a California subchapter S corporation.
The Defendant, KGM Harvesting, Co., was a California subchapter S corporation.
The Defendant, Triadelphia, Inc., is a West Virginia subchapter S corporation.
The Defendant, Howard Long International, Inc., was a Florida subchapter S corporation.
The Defendant, Howard Long Co., Inc., was a Florida subchapter S corporation.
The Defendant, J.W. Long International Limited Partnership, was a Nevada limited partnership.
The Defendant, J.W. Long & Associates, LTD, is a Jersey Island (U.K.) limited corporation.
The Defendant, Oella Consulting, LLC, is a Florida limited liability company.
The Defendant, Oella Capital, Inc., is a Florida corporation

not a shareholder in either Coronet East or West or any of the other Howard Long Companies. She died shortly before the trial of this matter commenced. Her deposition testimony was presented to the jury.

Emma Gene Long was Howard W. Long's first wife and the mother of the Plaintiff, H. Dennis Long. Her marriage to Howard W. Long ended in ended in divorce 1990. Once a stockholder in Coronet East and two other Howard Long Companies, Emma Gene sold her shares in all Howard Long Companies as part of the 1990 divorce settlement. She died prior to the filing of the lawsuit.

At the time of the divorce Howard W. Long and Emma Gene Long were very wealthy and they settled their financial issues by entering into a written Property Settlement Agreement. The divorce settlement agreement stated that the agreement was a complete recitation of the agreement and that no other promises were made. At the time of the divorce, both of their children were emancipated adults. Thereafter, immediately following the divorce, Emma Gene Long made substantial gifts to her children H. Dennis Long and Lorna Long Thorn that included luxury automobiles, a house for Lorna, and more than $400,000 to Son to assist in purchasing his house.

As a part of the 1990 divorce, Howard W. Long purchased Emma Gene Long's stock in Coronet East and the Howard Long Companies for seven million dollars ($7,000,000.00). To protect his assets after the divorce process in 1990, Howard W. Long executed a Last Will and Testament that removed Emma Gene Long as the beneficiary of his estate in favor of Son who was named the eighty percent (80%) beneficiary of his estate and his daughter, Lorna was named the twenty percent (20%) beneficiary of his estate.

To obtain the funds to purchase Emma Gene Long's interest in the Howard Long Group businesses and also to obtain the financing necessary to expand its operations into Europe and

Asia to satisfy the desires of its largest customer, McDonald's Corporation, the Howard Long Company Defendants entered into a nineteen million seven hundred fifty dollar ($19,750,000.00) Revolving Loan Facility with Texas Commerce Bank ("the Bank"). Seven million dollars ($7,000,000.00) from the proceeds of the loan was used to repurchase stock owned by Emma Gene Long and nine million dollars ($9,000,000.00) was transferred to an affiliate and used to acquire and improve an English produce company as part of the ongoing McDonald's business relationship. The balance of the loan proceeds was used to repay the existing indebtedness of all of the Coronet companies and to pay the closing costs for the loan.

Virtually all of the assets of the Howard Long Group businesses were pledged to secure the loan including one hundred percent (100%) of the outstanding stock, all beneficially owned by Father. When the Bank closed in November of 1990, all of the stock in Coronet Foods East and West and in the Howard Long Group businesses was held in the name of the Howard W. Long Revocable Trust (the "Trust") with Howard W. Long as both Trustee and lifetime beneficiary, and all of this stock was pledged as part of the collateral for the loan.

The 1990 loan placed significant restrictions upon the Father and the Howard Long Companies including: (1) no other loans were permitted; (2) neither Father nor any of the Howard Long Companies was permitted to transfer any stock; (3) sales to McDonald's and its affiliates was required to always be greater than 50% of total sales of the Howard Long Companies; (4) salary and compensation to Father was restricted to $600,000 per annum; and (5) the entire loan could be called by the Bank within 90 days of the death of Father. Thus, after this loan was obtained in 1990, neither Father nor any of the Howard Long Companies could transfer any stock or ownership interests, obtain a loan from any other lender, or lose its McDonald's relationship without the Bank's prior approval. Moreover, if Howard W. Long died, the loan could be called by the Bank.

In 1991 Howard W. Long, before he married Wendy F. Long, signed a prenuptial agreement with Wendy that, in part, waived any claim to the ownership of any of the Howard Long Companies. The marriage has continued for the past twenty years and has produced three children, one of whom is still a minor.

In 1993, the Father, facing a serious heart condition, revised his estate and business succession plans to recognize his changed family status and to minimize estate taxes so that his death would not require the forced liquidation of the Howard Long Company businesses.[2] Because of Father's existing heart condition he could not obtain life insurance.

Under that estate plan, developed in 1993 by Howard W. Long's legal advisors, Father's revocable trust that held all of the stock of the businesses was to be in the Restated Howard W. Long 1993 Trust. Further, upon Father's death, all of the stock in the Howard Long Company businesses would be transferred to a marital trust for the benefit of his wife Wendy F. Long and to charitable remainder trusts for his minor children and charities.

Although his adult son and daughter were not named as a beneficiary of the Restated 1993 Trust, they were not forgotten by their dad. At the same time that the Trust was restated in 1993, as part of his estate planning, the Howard Long Companies entered into seven separate Employment Agreements with Son that were to be effective upon Father's death. The Employment Agreements would employ Son as chief executive officer of the Howard Long Companies with a salary set at Three Hundred and Fifty Thousand Dollars ($350,000.00) per year and pay him fifty percent (50%) of the net earnings of each company as calculated pursuant to the formula in each of the Employment Agreements.

[2] Father's death would be likely to cause the Texas Commerce bank loan to be called and the Coronet businesses to be liquidated in order to obtain the cash necessary to pay estate taxes. At the time of these changes, federal estate tax rates exceeded fifty percent (50%) of the value of an estate.

Additional provisions of the Employment Agreements that were important to the Court when it made its decision that there were no issues to be resolved by the jury include:

(a) paragraph 4(a), that states the Agreements automatically terminate in the event of a change of control event as defined in the Agreements;

(b) paragraph 4(b) that states that either the Board of Directors or Son may terminate the Agreements at any time; and

(c) paragraph 5(e) that provides:

> "(e)(emphasis added) **This Agreement expresses the entire Agreement of the parties, and all promises, representations, understandings, arrangements, and prior agreements are merged herein and superseded hereby.** No person, other than pursuant to a unanimous resolution of the disinterested members of the Board of Directors of the Company, shall have any authority on behalf of the Company to agree to modify or change the Agreement or anything in reference thereto."

It is undisputed that the 1993 Employment Agreements were never changed, they were not revoked until after this suit was threatened, and they never became effective because the condition precedent, that is the death of Howard W. Long, has not occurred. These Employment Agreements state that they encompass and supersede all of the promises, agreements, and understandings between the parties.

Even though he was no longer a beneficiary in his Father's Will, through the 1993 Employment Agreements, Son was given the authority to manage businesses owned by his Father after his Father's death and was provided a generous compensation package to do so. Son was also named the Adviser to his Father's Trust which permitted Son to vote the stock of the Howard Long Companies after Father's death.

THE END OF THE SUCCESS STORY

Coronet East and Coronet West, filed bankruptcy in the United States Bankruptcy Court for the Northern District of West Virginia in 2004. Both of these corporations were liquidated

pursuant to a Plan of Liquidation that was confirmed by the Bankruptcy Court during 2005. A settlement agreement was approved by the Bankruptcy Court that, among other things, released Father, Son, Coronet East, Coronet West, and the Defendant Howard Long Companies from all direct and derivative liability.

What went wrong with this wonderful success story that provided hundreds of good paying jobs to men and women in the Wheeling, West Virginia area, as well as other locations around the world? The businesses were a success because of the Father's insight, knowledge, work ethic and his willingness to take a risk to grow his businesses. He was to Coronet what Steve Jobs is to Apple. He was the man who made it work. But he started to realize in the 1970's that he would not live forever. Father had a long history of coronary disease suffering numerous heart attacks before undergoing quadruple bypass surgery in Texas in 1981. In June, 1998, Father suffered a heart attack. It was determined that the 1981 bypass grafts had failed or were failing, and Father was transferred to a Pittsburgh hospital where he underwent "redo" surgery to replace all four of the failed bypass grafts. During the surgery a portion of Father's heart muscle was removed because the tissue was dead and no longer functioning.

After the surgery his career as an active business executive was effectively over. He refused to retire. He would still communicate with management over the phone and review business documents--but he was unable to participate in the daily management of the Howard Long Companies, meet with customers, or assist McDonalds in its world-wide product improvement efforts. Over the next two years his heart condition steadily deteriorated, and in May, 2000, he was life-flighted to New York and placed on the heart transplant list where he remained for nearly four months before receiving a heart transplant on August 15, 2000. He suffered a relapse in September, 2000, that required additional hospitalization, Father endured months of drug and physical therapy so that his body could adjust to the side-effects from the

anti-rejection medication that he must now take for the rest of his life.

From June, 1998, through March, 2001, Father was unable to provide any effective supervision of the Howard Long Companies. During this time the existing managers, including Son who was Vice Chairman, operated the Howard Long businesses, and the businesses struggled. When earlier asked to step up and run the Howard Long Companies, the testimony at trial was that Son refused and told his Father that he was not going to suffer a heart attack over the businesses. The Court does not make a finding that the son actually said that.

Beginning in 1999, McDonald's began reducing its purchases from Coronet. During that period, several attempts were made to sell Coronet East and Coronet West with no success. Not only did the loss of McDonald's business endanger the efforts to sell the Howard Long Companies, but this also caused Texas Commerce Bank (which had become J.P. Morgan Chase) to exercise its rights under the Bank loan to terminate the lending relationship since sales to McDonald's no longer constituted more than 50% of the Howard Long Company businesses' sales. Father brought cash proceeds from his European operations, which had been sold, back to the United States to repay the Texas Commerce Bank loan and to advance loans to Coronet to revive the Coronet operations.

In January, 2000, it appeared that Ready Pac Produce would pay between thirty and thirty five million dollars ($30,000,000 -$35,000,000.00) to purchase Coronet East. That didn't happen, but on November 17, 2000, Ready Pac Produce and Coronet Foods did sign a binding letter of for nineteen million five hundred thousand dollars ($19,500,000.00). Although it was a binding letter of intent, Ready Pac reserved the right to withdrawal the offer under certain circumstances. It was during this time that Father told his Son and daughter Lorna that if Coronet Foods were sold it was his intention to establish a trust or annuity for each of his children. Unfortunately Ready Pac subsequently, pursuant to the conditions in the sales agreement, reduced the price of

its offers to purchase Cornet East by substantial amounts and then withdrew its offer to purchase Coronet entirely.

By the Spring of 2004, Coronet East and West were both experiencing significant financial difficulties. Father had continued to use his now rapidly depleting cash reserves to try to help Coronet and directed the managers to procure new business opportunities while continuing to market the remaining business operations for sale.

By the end of the second quarter of 2004, it appeared that Coronet East had reached a volume of sales that would allow it to break even. Moreover, several new potential buyers expressed an interest in purchasing the company as an ongoing-concern and were beginning due diligence investigations. Then came the final crushing blow.

On July 12, 2004, Coronet East was notified by Sheetz, Inc., its largest customer, of a possible salmonella incident from tomatoes purchased from Coronet. On July 13, 2004, Sheetz notified Coronet that it would no longer purchase products and refused to pay any amounts then owed to Coronet. Despite the fact that Coronet East was ultimately found to be "In-Compliance" with FDA regulations, the damage done to Coronet East's business as a result of the negative publicity was fatal.

All of the prospective purchasers of Coronet East withdrew and the company was unable to procure products liability insurance, Coronet East had no choice but to cease operations and to file Chapter 11 bankruptcy on October 29, 2004. Coronet West followed it into bankruptcy months later.

Because of Coronet East's and West's insolvency, Coronet was initially unable to promptly pay all produce vendors, which created statutory liability for all principal corporate officers including Father and Son, pursuant to the federal PACA statute. Even though the PACA vendors were eventually paid, Father, Son and other principal corporate officers listed on the

Coronet East and Coronet West PACA licenses were subsequently penalized by the U.S. Department of Agriculture by being prohibited from working in the produce industry for a period of time. Son did not challenge his responsibility under the PACA statute or attempt to mitigate the length of the penalty.

The Bankruptcy Court appointed Creditors' Committees for Coronet East and West who negotiated a Settlement and Plan Funding Agreement dated October 18, 2005, with Howard W. Long and the Howard Long Companies. A joint Plan of Liquidation for Coronet East and Coronet West was filed in the U.S. Bankruptcy Court for the Northern District of West Virginia on November 4, 2005, and subsequently confirmed by Order of the Bankruptcy Court on January 13, 2006.

Under the Plan of Liquidation all of the assets and claims of Coronet East and Coronet West were transferred to a liquidation trust for the creditors. Under the Settlement and Plan Funding Agreement all claims or causes of action of the Coronet Companies and their creditors, directly or derivatively, were settled and released. The "Released Parties" included all of the Long Entities defined as Howard W. Long, the Howard W. Long Revocable Living Trust, J.W. Long Limited Partnership, KGM Harvesting, Inc.; LDL Investments, Inc.; LDL Western LLC; H.L. Real Estate, Inc.; Oella Consulting LLC; Oella Capital, Inc.; the officers, directors, partners, members, agents, employees shareholders, accountants, agents and attorneys and the respective heirs, executors, successors or assigns of each of the foregoing. Son was included in the definition of a Released Party and, to the extent he may have had his own claims against the Released Parties, could have pursued such claims in the Bankruptcy Court, but he failed to file a claim with the Bankruptcy Court.

Although an officer and director of Coronet East and West, Son did not participate in the bankruptcy proceedings. Nevertheless, Father ensured that Son was released from all potential

liability, without Son having to contribute any money to the settlement.

After the bankruptcy proceedings were initiated, Son helped with winding down the Coronet East business for a short while; however, after Son found and read his Father's Last Will and Testament, he came to believe (incorrectly) that he had been completely eliminated as an heir.[3]

Son faxed a copy of a page from Father's Last Will and Testament to Father in Florida together with a hand written note demanding that his Father assure him of how he would continue to provide for Son.

Father became incensed at Son's behavior and refused to respond to Son's demands. Nevertheless, Father offered to help Son purchase his own business, suggesting that Son look into obtaining a McDonald's franchise, but Son did not respond to the offer of assistance. Attempts were subsequently made by daughter, Lorna Long Thorn, to reconcile Father and Son, but to no avail.

Son severed his relationship with his father and the Coronet bankruptcy proceedings and moved his family to Lake Norman, North Carolina to become a licensed real estate broker in North Carolina. Son testified that he no longer wanted to work in the fresh produce industry after Coronet Foods East closed in October, 2004, and instead sought to find employment in the real estate industry. Although Son ceased working for Coronet, the Howard Long Companies continued to pay Son his salary for a year and a half, ceasing only after Son instituted this civil

[3] In 2005, Father learned that he had colon cancer that required surgery and chemotherapy. Believing that he may die from the cancer and the treatment, Father gave stock in one of the Howard Long Companies to his wife Wendy F. Long and executed a new Last Will and Testament that named Son as a beneficiary of Father's estate for one million dollars ($1,000,000.00). After Son filed this lawsuit, Father changed his Last Will and Testament to exclude Son as a beneficiary of Father's estate.

action.

CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

The Amended Complaint in this case contains eleven claims:

Count I - partnership and/or joint venture;
Count II - breach of oral contract;
Count III – promissory estoppel;
Count IV - fraud and misrepresentation;
Count V - corporate malfeasance and misfeasance;
Count VI - intentional damage to business reputation;
Count VII - right to an accounting;
Count VIII - right to specific performance;
Count IX - intentional interference with H. Dennis Long's right to an inheritance;
Count X - intentional infliction of emotional distress; and
Count XI - punitive damages;

THE SITUATION IN WHICH THE RULE 50(a) MOTION WAS GRANTED

Prior to trial, Plaintiff voluntarily dismissed his Count I claim of *de facto* partnership, but maintained his Count I claim for joint venture. Also, prior to trial, the Court granted summary judgment in favor of Defendants on Count IX of Plaintiff's Amended Complaint, alleging intentional interference with H. Dennis Long's right to an inheritance.

After Plaintiff presented witnesses and exhibits and rested his case-in-chief, the Defendants made their Rule 50 Motion seeking dismissal of all of Plaintiff's remaining claims against them. The Court granted Defendants' Rule 50 Motion as to Plaintiff's claims for Count I alleging joint venture; Count IV alleging fraud and misrepresentation; and Count XI seeking punitive damages. The Court further ruled that Plaintiff's Count III claim for promissory

estoppel and Count IV claim for misfeasance and malfeasance were are not separate tort claims but would be included as part of Plaintiff's Count II claim alleging breach of oral contract.

The Court took under advisement Defendants' Rule 50 Motion on Plaintiff's Count X claim alleging intentional infliction of emotional distress, and, at that time, denied Defendants' Rule 50 Motion as to Plaintiff's remaining claims.

After having participated in the Jury Trial of this matter and having heard testimony and reviewed all exhibits presented by the Plaintiff in his case-in-chief and having heard the testimony and reviewed the exhibits presented by Defendants, the Court granted Defendants' Rule 50 Motion on all of Plaintiff's remaining claims.

Plaintiff, in his objections to defendants' proposed findings and conclusions, alleges that the Court retroactively granted the Motion during the middle of the defendants' case, and the Plaintiff was not afforded a right of rebuttal. It is not accurate to claim that the Rule 50(a) Motion was granted during the middle of the Defendants' case. The defendants had presented their testimony on the last day of trial before the Rule 50 Order of the court. At one point during that last trial day the court and counsel considered concluding the trial that day, without the defendants' last witness. The plaintiff was not seeking to offer any rebuttal evidence at the conclusion of the defendants' case. However, all present eventually agreed that to conclude the case that day would require going too late into the evening.

When the attorneys left the Judge's Chambers that afternoon counsel for the Defendant was unsure whether he wanted to call a last witness. The focus of the Court and **all attorneys** was on the submission of any supplemental jury instructions. For all practical purposes the Court had heard all of the relevant evidence and was preparing the jury charge for the next trial day. Plaintiff was not seeking to introduce anymore evidence

Additionally, Plaintiff objects to the Court's ruling with respect to the Motion because there were a multitude of factual issues which required jury resolution. In fact there were no factual issues requiring jury resolution of any viable legal claim.

Partnership and/or Joint Venture

Count I alleges claims against Father of a *de facto* partnership and/or a joint venture in the Howard Long Companies based on alleged promises by Father to pay Son one-half of the net profits from the Howard Long Companies. However, prior to trial Son voluntarily dismissed Count I of his Amended Complaint as it pertained to his claim of a *de facto* partnership. The Court dismissed the joint venture claim because Plaintiff failed to submit evidence to comply with the legal elements to establish a joint venture: "A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons *to carry out a single business enterprise for profit,* for which purpose they combine their property, money, effects, skill, and knowledge." Price v. Halstead, 177 W.Va. 592, 595, 355 S.E.2d 380, 384 (1987)(*emphasis in original*). "It is a single, isolated business pursuit which, as we said in *Nesbitt,* may be likened to a partnership, except "that a partnership relates to a general business ... while [a] joint adventure relates to a single business transaction." *Id.*

The Plaintiff does not dispute that Father was the sole shareholder of the Defendant Howard Long Companies and of the Coronet Companies since 1990. Son was only an employee of Coronet East. Thanks to his Father he was also a director and officer of most of the Defendant Companies and the Coronet Companies. Son received a salary and bonuses for his work, but, of critical importance, he was not a co-owner and he did not invest any of his property or money into the Howard Long Group businesses. Son provided no effects, skill, or knowledge that he acquired outside of his employment relationship with the Howard Long Companies. The

Defendant Howard Long Companies and the Coronet Companies were not a single, isolated business pursuit or transaction. They pre-existed Son's employment and were long-lasting corporations that conducted multiple businesses. Therefore, the Court, under well established West Virginia law, had no choice but to grant Defendants' Motion for a directed verdict on this count.

Breach of Oral Contract

Count II alleges claims against Father for breach of an oral contract to pay Son one-half of the net profits from the Howard Long Companies and to set up a ten million dollar ($10,000,000.00) trust for the benefit of Son. During the trial Son also alleged that Father promised to take care of Son for the rest of Son's life as part of Father's divorce settlement with Father's first wife, Emma Gene Long.

So arguing, the Plaintiff failed to address the fatal flaw in his claim: Plaintiff's breach of oral contract claim in regard to the promise to pay Son one-half of the net profits from the Howard Long Companies turns on the legal interpretation of the seven Employment Contracts that were executed by the parties in 1993. The Plaintiff agrees that these employment agreements were signed by him. The evidence is also uncontroverted that they were the only written documents that defined his business relationship with his father.

The 1993 Employment Agreements for Coronet East and West were terminated by their terms as a result of the bankruptcy of those companies and the sale of all of their assets in 2004. The 1993 Employment Agreements for the other Howard Long Companies were terminated by their boards of directors after this suit was filed against them.

Son's claim that his Father promised his mother that he would take care of him for the rest of his life as part of the divorce settlement, a promise that Father denies, is also dependent upon the interpretation of another written contract, the Property Settlement Agreement dated

August 28, 1990.

Both of the alleged oral promises did not present an issue for the jury. Both issues are superseded by the 1993 Employment Agreements and the divorce Property Settlement Agreement. After reviewing the employment agreements and divorce settlement agreement Court finds that their terms were not ambiguous and, therefore, the Court, consistent with West Virginia law, simply applied the terms of these agreements.

The interpretation of an unambiguous legal contract is for the court to decide, not for the jury. In re Joseph G., 214 W. Va. 365, 589 S.E.2d 507 (2003) *citing Syllabus Point 1, Stephen v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937). Moreover, West Virginia law is clear that it is not the right or province of the court to alter, pervert, or destroy the clear meaning and intent that the parties expressed in the unambiguous language of their written agreement. Hatfield v. Health Management Assoc. of W. Va., Inc., 223 W. Va. 259, 672 S.E.2d 395 (2008); *Syllabus Point 1, citing Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). The mere fact that parties do not agree to the construction of a contract does not render the contract ambiguous; whether a contract is ambiguous is a question of law to be determined by the court. Berkeley County Public Service District v. Vitro Corp. of America, 152 W. Va. 252, 162 S.E.2d 189 (1968).

The 1993 Employment Agreements between Son and seven of the Howard Long businesses provide for Son to succeed Father as chief executive officer of each of the seven companies. The 1993 Employment Agreements spell out the compensation that Son was to receive upon becoming chief executive officer. It includes both an exceptional salary of $350,000 per annum from Howard Long Co. ***and*** a percentage of the profits 50% of earnings after interest and before taxes and after certain other payments are taken into account.

Additionally, and of essential importance to the Son's claim, the 1993 Employment

Agreements include a provision incorporating and superseding any and all prior agreements. In particular paragraph 5(e) states:

> "(e) This Agreement expresses the **entire Agreement of the parties**, and **all promises, representations, understandings, arrangements, and prior agreements are merged herein and superseded hereby.** No person, other than pursuant to a unanimous resolution of the disinterested members of the Board of Directors of the Company, shall have any authority on behalf of the Company to agree to modify or change the Agreement or anything in reference thereto." (emphasis added).

Without a doubt, from 1993 until 2005, these Employment Agreements encompassed and superseded all of the promises, agreements, and understandings between the parties. Furthermore, they could not be changed orally but only could be changed by the unanimous resolution of the members of the Board of Directors of each of the companies. It is undisputed that the Agreements were never changed and they were not revoked until after this suit was threatened. In addition to all of those factors, the conditional commitment to Son never became effective because the condition precedent, the death of Howard W. Long, has not occurred.

Similarly, the divorce Property Settlement Agreement entered into between Father and Emma Gene Long encompassed and superseded all of the promises, agreements, and understandings between the father and his mother and could not be changed orally. In fact there was no provisions for the two children in the Agreement except for the statement that both were emancipated adults. Therefore, in applying the language of the written contracts, the Court had no choice under West Virginia law but to grant Defendants' Motion for a directed verdict.

Furthermore, Plaintiff's breach of oral contract claims in regard to the promise to take care of Son for the rest of his life and to pay Son one-half of the net profits from the Howard Long Companies fails because it violates the West Virginia Statute of Frauds. The West Virginia Statute of Frauds states that no action shall be brought in any case where the agreement cannot be performed within one year unless the contract or some memorandum or note thereof is in writing

signed by the person to be charged. W. VA. CODE §55-1-1 (2008 Replacement Volume). To be enforceable, such a promise must be reduced to writing and signed by the person against whom it is to be enforced, in this case the Father. MacQuoid v. West Virginia Newspaper Pub. Co., 105 W. Va. 20, 141 S.E. 398 (1928).

Plaintiff's breach of oral contract claim in regard to the allegation that Father promised to establish a ten million dollar trust for Son also fails because it is an unenforceable gratuitous promise and violates the Statute of Frauds. Under West Virginia law, a gratuitous promise that is to be performed in the future is simply not enforceable. Banner Window Glass Co. v. Barriat, 85 W. Va. 750, 102 S.E. 726 (1920). To sustain a parole gift, it must be shown by clear and convincing proof that the donor made delivery and relinquished all dominion and control over the property given. Tomkies v. Tomkies, 158 W. Va. 872, 215 S.E.2d 652 (1975). There has been no evidence presented that any such trust was ever established.

There is no written support for this alleged promise and, if the Father made that promise to Son, it is clearly a gratuitous promise that was not sufficiently certain. According to Son's testimony this was a promise made when the family was together at Christmas of 1998 or 1999 and this was during a time that Father entered into a binding letter of intent to sell Coronet East for between thirty million dollars and thirty five million dollars. According to Son's testimony he wasn't sure exactly how Father was going to set it up. Son even testified that different promises for different amounts were made and gave no timeline or other details for the alleged trust fund. Lorna Long Thorn testified that the trust was a non-specific gift dependent upon the sale of Coronet East. The sale of Coronet East did not occur, and so the trust fund was not set up.

If the Father said such a thing to his adult children, it is not a promise that would be binding. If you cut away the verbiage and look at he thing itself, could it be plainer that this was simply a loving Father talking to his Son at Christmas, during a time when the dad's time on

earth seemed to be limited, and his business empire was crumbling underneath him. This is not the type of promise that can be enforced as a claim against your father! Therefore, the Court granted Defendants' Motion for a directed verdict because the alleged oral contract was merely an unenforceable gratuitous promise from a father to a son.

Promissory Estoppel

Count III of the Amended Complaint purports to plead an independent cause of action against Father for promissory estoppel based upon allegations that Father promised to pay Son one-half of profits from the Howard Long Companies and to set up a ten million dollar ($10,000,000.00) trust for Son. Our Supreme Court set out the principles governing the doctrine of promissory estoppel in Everett v. Brown, 174 W.Va. 35, 321 S.E.2d 685 (1984).

Upon examination of the promissory estoppel claim of the Plaintiff in this case, the Court determined that promissory estoppel claim was not a separate cause of action, but a part of Plaintiff's Count II breach of oral contract claim. Where, as here, the alleged "promise" is identical in substance to the terms of the alleged oral agreement and the performance requested is the performance of the terms of the oral agreement, a litigant cannot escape the application of the Statute of Frauds to that oral agreement through the mere expediency of asserting "promissory estoppel." *See* Paper Corp. of the U.S. v. Schoeller Technical Papers, Inc., 724 F. Supp. 110, 118 (S.D.N.Y. 1989). Rather, the doctrine of promissory estoppel is reserved for the "limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which plaintiff has relied." Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34, 36 (2nd Cir. 1977).

Son's claim of promissory estoppel must fail because he simply did not rely on any promises to his detriment. According to Son, the alleged promises occurred around 1998, after Son had already been working for Coronet Foods for nearly thirty years. Son did not testify that

he obtained and turned down other job offers after the promises were made. In fact, Son continued to work for Coronet Foods East receiving a substantial salary, generous bonuses, and a significant expense account. It appears from the testimony that Son would have continued to work for the Howard Long Companies regardless of whether any promises of a trust or one-half of company profits were made

Therefore, the Court granted Defendants' Motion for a directed verdict on his promissory estoppel claim for that reason and for all of the reasons stated in the Court's rejection of the Count II of the Amended Complaint.

Fraud and Misrepresentation

Plaintiff's Count IV claim alleges that Father committed fraud and misrepresentation based on alleged promises by Father to pay Son one-half of the net profits from the Howard Long Companies and to set up a ten million dollar ($10,000,000.00) trust for the Son. In regard to Plaintiff's fraud and misrepresentation claim. The Court granted Defendants' Motion for a directed verdict because fraud cannot be based upon a promise or contract and because Plaintiff failed to submit clear and convincing evidence to meet the legal elements to establish a claim for fraud and misrepresentation.

Plaintiff's fraud and misrepresentation claim is based on the same facts as Plaintiff's claim for breach of contract. "Fraud cannot be predicated on statements which are promissory in their nature, or constitute expressions of intention, and an actionable representation cannot consist of mere broken promises . . . ." White v. National Steel Corp., 938 F.2d 474, 490 (4th Cir. 1991), *cert denied* 502 U.S. 974 (1991) *quoting Janssen v. Carolina Lumber Co.*, 137 W. Va. 561 73 S.E.2d 12, 17 (1952). Nor can a claim for fraud be based upon an alleged breach of contract. *Id.* It is clear that Plaintiff's fraud and misrepresentation claim is based on an alleged

oral contract and allegations of failure to keep promises and, therefore, does not state a legal claim for fraud or misrepresentation.

Moreover, Plaintiff failed to prove a claim for fraud and misrepresentation. The essential elements of a claim of fraud must be proved by clear and convincing evidence and are: (1) that the act claimed to be fraudulent was the act of the defendants or induced by them; (2) that the act was material and false; (3) that the plaintiff relied upon the act; (4) that the plaintiff was justified under the circumstances in relying upon the act; and (5) that the plaintiff was damaged because he relied upon the act. Lengyel v. Lint, 167 W.Va. 272, 280 S.E.2d 66 (1981).

Plaintiff produced no facts to prove that 1993 Employment Agreements were fraudulent. Without a doubt they were not. Had Father died between 1993 and 2006, Son would have succeeded Father as chief executive officer of the Howard Long businesses for the salary and percentage of profits payments that were specified in the Employment Agreements. But, the Employment Agreements never came to fruition because Father did not die. Because of changes in business circumstances, Coronet East and West sold all of their assets in bankruptcy proceedings, and there were no businesses to manage. Thus, the Employment Agreements for Coronet East and Coronet West terminated according to their specific terms. The fact that the contracts were not implemented because the condition precedent, the death of Father, did not occur and because of the bankruptcy, does not make them fraudulent.

Additionally, there is no evidence that the alleged oral promise to provide Son with a trust was fraudulent or that Son relied on it to his detriment. Father's statement of intention was based upon the belief that Coronet East would be sold for an amount sufficient to fund a trust for his children, and the eventual bankruptcy of Coronet East and West made it impossible to fulfill that promise, if it were made. Furthermore, the alleged promises were said to have occurred

around 1998 or 1999, after Son had already been working for the Howard Long businesses for nearly thirty years.

Son did not testify that he obtained and turned down other job offers after the promises were made. In fact, Son continued to work for Coronet Foods East receiving a substantial salary, bonuses, and a generous expense account, until the bankruptcy. There was no evidence to suggest that Son would not have continued to work for the Howard Long businesses regardless of whether any promises of a trust or one-half of company profits were made.

Corporate Malfeasance and Misfeasance

5. Count V of the Amended Complaint alleges an independent cause of action against Father for corporate malfeasance and misfeasance. However, upon examination the Court determines that misfeasance and malfeasance are a part of Plaintiff's Count II Breach of Contract claim

The Court granted the Defendants' Motion for a directed verdict on his misfeasance and malfeasance claim because Plaintiff failed to prove that he has standing to assert such claims or that Father committed such violations. But even to the extent that there was any such evidence, the Court would still have to grant Defendants' Motion for a directed verdict as to all of Plaintiff's claims because they are barred pursuant to the Settlement and Plan Funding Agreement that was executed and confirmed as a part of the Plan of Liquidation for Coronet Foods East and West.

Son was not a shareholder or a member of any of the Defendant Howard Long Companies or the Coronet Companies. Thus, he has no standing to make a claim for or on behalf of the Howard Long Companies. Only a shareholder of a corporation [or a member of a limited liability company] has standing to derivatively sue a director or officer of a corporation for damages to the corporation as the result of malfeasance or misfeasance. *See e.g.* Gabhart v.

Gabhart, 267 Ind. 370, 370 N.E.2d 345 (1977); Hanna v. Lyon, 179 N.Y. 107, 71 N.E. 778 (1904); W. VA. CODE §31B-11-1101, 1102, and 1103 (2003 Replacement Volume).

Additionally, Son failed to submit any evidence to support allegations that Father was guilty of misfeasance or malfeasance rather than simply making business decisions as a corporate officer and director. The Father was under no obligation to make perfect business decisions one hundred percent of the time. There is no evidence that any of Father's actions were made in bad faith or that Father did not reasonably believe that his actions were in the best interests of the Howard Long Companies at the time they were made. W. VA. CODE §31D-8-831 (2003 Replacement Volume). But even if there was such evidence, all liability for those claims regarding Coronet Foods East and Coronet Foods West has been settled and released pursuant to the Settlement and Plan Funding Agreement that was executed and confirmed as a part of the Plan of Liquidation for Coronet Foods East and West.

Under this Settlement and Plan Funding Agreement all claims or causes of action of the Coronet Companies, directly or derivatively, and all claims and causes of action of the Coronet Companies' creditors against the "Released Parties" were finally settled and released. The "Released Parties" included all of the Long Entities defined as Howard W. Long, the Howard W. Long Revocable Living Trust, J.W. Long Limited Partnership, KGM Harvesting, Inc.; LDL Investments, Inc.; LDL Western LLC; H.L. Real Estate, Inc.; Oella Consulting LLC; Oella Capital, Inc.; the officers, directors, partners, members, agents, employees shareholders, accountants, agents and attorneys and the respective heirs, executors, successors or assigns of each of the foregoing.

Accordingly, any claims that Son may have had that pertain to Coronet East or West or the Defendant Howard Long Companies have been settled and released. There is nothing in the

allegations of the Amended Complaint or in the facts developed during trial to override the release of liability under federal law as it relates to the bankruptcy settlement.

Intentional Damage to Business Reputation

Plaintiff's Count VI claim against Father alleges intentional damage to business reputation based upon the violation of the federal PACA statutes. In regard to Count VI, the Court granted Defendants' Motion for a directed verdict because Plaintiff failed to satisfy the legal elements necessary to establish a claim for intentional damage to business reputation.

Plaintiff, to recover damages for intentional interference with business reputation, had to demonstrate that Howard Long was outside of Denny Long's business relationships and that he intentionally interfered with a reasonable expectation of economic advantage and benefit on the part of Denny Long by proving: (1) the existence of a reasonable expectation of economic advantage or benefit belonging to the plaintiff, Denny Long; (2) that the defendant, Howard Long, had knowledge of that expectation of economic advantage; (3) that the defendant, Howard Long, wrongfully and without justification interfered with Denny Long's reasonable expectation of economic advantage or benefit; (4) in the absence of the wrongful act of the defendant, Howard Long, it is reasonably probable that the plaintiff, Denny Long, would have realized his economic advantage or benefit; and (5) the plaintiff, Denny Long, sustained damages as a result of this activity by the defendant. Bryan v. Massachusetts Mut. Life Ins. Co., 178 W.Va. 773, 780, 364 S.E.2d 786, 793 (1987); Zippertubung Co. v. Teleflex, Inc., 757 F.2d 1401, 1408 (3d Cir. 1985).

Plaintiff submitted no evidence that Father acted wrongfully or with intent to damage Son's business reputation. Rather, the evidence was that Father hired a new company president and injected large sums of cash to help the Coronet Companies to again become viable businesses. The false allegations that salmonella poising emanated from Coronet East caused the

loss of customers, which resulted in lost revenue and made it impossible to pay PACA vendors. Son, as Vice Chairman, presided over the Coronet East business during this time period. These unfortunate circumstances resulted in the bankruptcy of the Coronet businesses, and as part of the bankruptcy plan, the PACA vendors were paid.

Although Son, together with Father and other officers and directors, incurred the consequences of PACA liability and were prohibited from working in the industry for a period of time, Son suffered no damages inasmuch as he testified that he had no desire to work in the produce industry after he left his employment with Coronet. Instead, Son began a new career as a real estate broker in North Carolina.

Finally, Son's intentional interference with business reputation claim must fail because Father was not outside of the expected business relationship. Rather, Father was the Chairman and director of Coronet East and West which were Son's employer, and both Father and Son were subject to the same PACA statute as well as the same consequences for its violation. It was Father, not Son, that settled the PACA claims during the bankruptcy proceedings, thereby permitting Son to work in the agricultural commodity industry again, if he so desired. To date, Son has not attempted to reinstate his PACA license or work in the produce industry.

Right to Accounting and Request for Specific Performance

Count VII requests an accounting of Son's alleged partnership interest in the Howard Long Companies and requests that a receiver be appointed for the purpose of rendering a partnership accounting.

Count VIII alleges claims against Father for the right to specific performance of the alleged breach of Father's oral promise to set up a ten million dollar ($10,000,000.00) trust for the benefit of Son.

In regard to Plaintiff's Counts VII and VIII claims against Father for an accounting and specific performance, the Court granted Defendants' Motion for a directed verdict because Plaintiff failed to submit evidence to prove that he has standing to seek such relief.

Under the Revised Uniform Partnership Act, as adopted in West Virginia, only a partner is entitled to access to the books and records of the partnership. W. VA. CODE § 47B-4-3 (2006 Replacement Volume). Likewise, the prerequisite to the right to an accounting under West Virginia law is the demonstration that the Son is indeed a partner. W. VA. CODE § 47B-4-5 (2006 Replacement Volume). Similarly, the prerequisite to the right to specific performance is the proof that there is indeed a contract to be enforced. Brand v. Lowther, 168 W. Va. 726, 285 S.E.2d 474 (1981).

Prior to trial, Son dismissed his clam that a *de facto* partnership existed between Father and Son. Additionally, for reasons stated in detail above, there was no oral contract or joint venture between Father and Son. And, Son has admitted that he owned no stock in the Defendant Long Companies or the Coronet Companies. Thus, Son has no standing to seek an accounting or specific performance of an oral contract that the Court has found to be unenforceable

Intentional Interference with Right of an Expectancy of Inheritance

Count IX alleges claims against Wendy Long for intentional interference with Son's right of an expectancy of inheritance based on allegations that Wendy Long committed unspecified acts causing Father to remove Son as a beneficiary from Father's Last Will and Testament. Prior to trial, the Court granted summary judgment in favor of Wendy Long on this count because no such claim exists pursuant to West Virginia law.

West Virginia law holds simply that no person can be the heir of a living person. King v. Riffee, 172 W. Va. 586, 309 S.E.2d 85 (1983). Florida law, where Father is a resident and where

Father executed his Last Will and Testament, is the same. Lewis v. Green, 389 So.2d 235 (Fla. App. 1980). Moreover, both Florida and West Virginia permit a person to make a will disposing of his property in any way that the person may see fit so long as he provides for his spouse. King at 88. Hooper v. Stokes, 107 Fla. 607, 145 So. 855 (1933).

It is clear that both West Virginia and Florida law do not recognize a cause of action for intentional interference with the right to an inheritance while the testator is alive and competent because a person has a right to change his will at any time prior to death so long as he is legally competent to do so. During trial, it was evident that Howard W. Long is legally competent to change his Last Will and Testament. Therefore, the Court granted summary judgment in favor of Wendy F. Long on Son's claim for intentional interference with Son's right of an expectancy of inheritance because no such claim exists pursuant to West Virginia law or Florida law, the only two state laws that matter in this case. The Court also notes that there was no evidence that Wendy F. Long did anything improper to interfere with Son's expectancy of inheritance.

Intentional Infliction of Emotional Distress

Count X alleges claims against Father and Wendy Long for the tort of intentional infliction of emotional distress based on claims that Howard and Wendy Long caused Plaintiff severe emotional distress by cutting him off from his inheritance at the end of 2006 at the age of 48 years where his future employment is doubtful and his ability to provide monetarily and medical benefits for his family is uncertain. In regard to Count X, the Court granted Defendants' Motion for a directed verdict because Plaintiff failed to submit evidence to meet the legal elements to establish a claim for tort of intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress is defined as "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results

from it, for such bodily harm." Hines v. Hills Dept. Stores, Inc., 193 W.Va. 91, 95, 454 S.E.2d 385, 389 (1994) (*citing Harless v. First National Bank in Fairmont,* 169 W.Va. 673, 289 S.E.2d 692 (1982)).

Such conduct must be, "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' Stump v. Ashland, Inc., 201 W. Va. 541, 552, 499 S.E.2d 41, 52 (1997) (*citing Tanner v. Rite Aid of West Virginia, Inc.,* 194 W. Va. 643, 651, 461 S.E.2d 149, 157 (1995) (*quoting* RESTATEMENT (SECOND) OF TORTS § 46(1) Comment (d) (1965)).

In order to prevail on a cause of action for intentional infliction of emotional distress, the following four elements must be established:

> (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency;
> (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct;
> (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and
> (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Philyaw v. Eastern Associated Coal Corp., 219 W. Va. 252, 633 S.E.2d 8, 13 (2006) (*citing Travis v. Alcon Laboratories, Inc.,* 202 W. Va. 369, 504 S.E.2d 419, Syllabus Pt. 3 (1998)). "The plaintiff must show that the defendant's extreme and outrageous conduct caused the plaintiff to suffer severe emotional distress. The requirement of causation is satisfied by showing a "logical sequence of cause and effect" between the actions of the defendant and the plaintiff's injury." Travis, 202 W. Va. at 379 (*citing Long v. City of Weirton,* 158 W. Va. 741, 761, 214 S.E.2d 832, 848 (1975)). The "distress" suffered by the plaintiff must be "more than the

'transient' and 'trivial' distress that necessarily accompanies life among other people. 'The law intervenes only where the distress is so severe that no reasonable man could be expected to endure it.'" Kanawha Valley Power Co. v. Justice, 181 W.Va. 509, 513, 383 S.E.2d 313, 317 (1989).

Son provided no evidence to prove that any conduct of Defendants rises to the level of "extreme" and "outrageous" required to support the tort of outrage. The facts fail to show that Howard or Wendy Long acted with the intent to cause Son severe emotional distress. The facts merely show that Son is no longer an employee of the Howard Long Companies and had to endure hardships related to the bankruptcy process, as did Defendants and hundreds of others who lost their jobs because of the closure of Coronet Foods after being unfairly tarred as the source of a salmonella outbreak. Loss of employment is unfortunate for anyone, but it is hardly the extreme and outrageous conduct that is necessary to assert a claim for intentional infliction of emotional distress. Likewise, Son's reading of his Father's Last Will and Testament and concluding (incorrectly) that he had been cut out of the Howard Long Companies and his father's estate, though unfortunate, is not outrageous conduct.

Finally, Son failed to provide any evidence to support the allegation that he suffered from severe emotional distress. Although evidence was submitted that he was embarrassed and upset by the failure of the Howard Long Companies, and his belief that he was cut out of his father's estate, such emotions are endured by all people in similar situations. Son did not provide any evidence that he sought medical care or was required to take prescription medication to cope with the situation.

Punitive Damages

In regard to Plaintiff's Count XI claim against Father and Wendy Long for punitive damages, the Court granted Defendants' Motion for a directed verdict because Plaintiff failed to

submit evidence that Defendants acted willfully, wantonly or with reckless disregard for the rights of Plaintiff. There was no evidence that Father or Wendy Long acted maliciously toward the Son or otherwise intended to cause him harm; the facts indicate quite the opposite. Son's salary continued for more than a year following the date that he quit doing work for the Howard Long Companies, stopped speaking to his father, and moved to North Carolina. Son was made a significant beneficiary of his Father's Last Will and Testament that was executed in 2005 prior to undergoing surgery for colon cancer, and Wendy F. Long designated Son as contingent Executor in her Will and the legal guardian for her children. Moreover, as noted above, Son has no cause of action in any of Counts I through X, which prohibits the award of punitive damages.

Concluding thoughts

In over 29 years as a Circuit Court judge the Court has never granted a Rule 50 (a) motion granting judgment as a matter of law during a jury trial. It is rare for a judge to ever to take a case from a jury.

In this case, to witness an aging father and a struggling son from a well known and very successful Wheeling family testifying against each other in front of their children, grandchildren and mutual friends, was heart wrenching for all. Every effort was made by the Court to settle the matter without a jury trial. The Son never accepted the fact that the Father's cash wealth was nearly exhausted-at least to the extent that he no longer could give out million dollar payments to all his children and his wife.

As previously stated, it appeared that all of the evidence had been submitted (although just prior to granting the Rule 50 motion the Defendant informed the Court that one more witness would be called). The Court had received all of counsels proposed instructions and tried to write a jury charge. It was at that time that the Court finally had to conclude after giving the Plaintiff every reasonable and legitimate inference fairly arising from the testimony, and when considered

in its entirety, that it was the Court's duty, unwelcome as though it may be, to rule that no claim remained that could be submitted to the jury.

Only one reasonable conclusion as to the verdict could be reached. After trying to prepare instructions on the law for the jury the Court knew that Plaintiff's evidence was not sufficient to create a question of fact for the jury as to whether Son had any cause of action against Father. Realizing what it had to do, the Court made one final effort to settle the case. The Plaintiff, knowing that the Court was going to grant the Rule 50(a) motion refused the Defendant's improved final offer of settlement.

The Court remains convinced that it had no choice but to dismiss all of Plaintiff's claims against the Defendant.

ORDER

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby **ORDERS** that Plaintiff H. Dennis Long's Amended Complaint be dismissed, with prejudice, from the docket of this Court; and it is further **ORDERED** that the Clerk transmit attested copies of this Order to all counsel of record.

ENTERED this 29 day of APRIL 2011.

Honorable Ronald E. Wilson, Judge