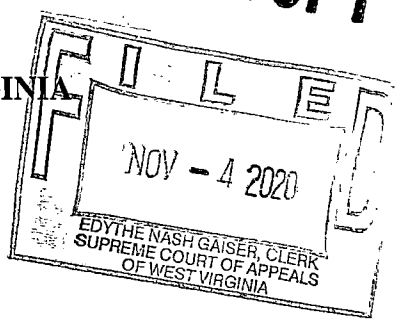


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**DOCKET NO. 20-0532**

**CLAY R. HUPP, Individually,**

**Petitioner,**

**v.** **(Civil Action No. 18-C-1265)**
**(Kanawha County Circuit Court)**



**RICHARD A. MONAHAN, and**
**THE MASTERS LAW FIRM LC,**

**Respondents.**

# RESPONDENTS' APPEAL BRIEF

Respectfully submitted:

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## III. STATEMENT OF CASE

### A. Statement of Facts Establishing Plaintiff's Claim Is Barred by Statute of Limitations

Plaintiff alleges in his Complaint that the Defendants were negligent per se and breached their standard of care by failing to introduce new medical evidence in support of his appeal of the termination of his hearing-loss disability as a result of a recertification exam. (Volume I, Appendix, Complaint, at ¶¶ 29-33, at pp. 4-5). Plaintiff alleges the adverse effect of such failure is demonstrated by statements in the recommended decision of the hearing examiner which was adopted by the West Virginia Consolidated Public Retirement Board, the final order of the Circuit Court of Tyler County, and the memorandum decision of the West Virginia Supreme Court of Appeals. (Vol. I, App., Complaint, at ¶¶ 13, 19, & 20, at pp. 2-3). Even assuming that these contentions of the Plaintiff are true[1] for purposes of the present motion to dismiss, the dates of these administrative and judicial decisions of which this Court may take judicial notice as well as the substance of documents integral to the allegations of the Plaintiff's claims, clearly establish that Plaintiffs' claim for legal malpractice is time-barred by the applicable statute of limitations. Plaintiff has neither objected to the consideration of these documents before the Circuit Court nor in its appeal brief and, accordingly, has waived any such objections.[2]

The hearing examiner's recommended decision was entered on April 27, 2011. (Vol. I, App., at pp. 31-39). The WVCPRB adopted such recommended decision by letter dated May 26,

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[1] For reasons which will be addressed below, Defendants both dispute that it was their fault that no so-called "new" medical evidence was introduced as well as whether such new medical evidence even should have been required based upon the insufficient and unsupported findings and conclusions reached by the doctor who conducted the recertification exam

[2] *See, e.g., State v. Asbury*, 187 W.Va. 87, 91, 415 S.E.2d 891, 895 (1992); *State v. Day*, 191 W.Va. 641, 647, 447 S.E.2d 576, 582 (1994) *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 114, 459 S.E.2d 374, 391 (1995); *State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996); *State v. Johnson*, 238 W.Va. 580, 595-96, 797 S.E.2d 557, 572-73 (2017).

2011 (Vol. I, App., at pp. 40-49), after the hearing examiner denied a motion for reconsideration in a conclusory fashion. The Final Order of the Tyler County Circuit Court denying Plaintiff's appeal and affirming the decision of the WVCPRB was entered on July 3, 2013. (Vol. I, App., at pp. 50-61). The Memorandum Decision of the West Virginia Supreme Court of Appeals wherein a majority of the Court (3-2) affirmed the Final Order of the Tyler County Circuit Court was entered on June 13, 2014. (Vol. I, App., at pp. 62-71). Plaintiff's Petition for Rehearing was denied on August 26, 2014 (Vol. I, App., at pp. 72-73), and the Court's Mandate ending the appeal was entered on September 2, 2014. (Vol. I, App., at pp. 74-75). The two-year statute of limitations applicable to a claim for legal malpractice sounding in tort based upon the handling of such appeal would have begun running on September 3, 2014, and would have ended on September 2, 2016. At no time during this two-year period did the Plaintiff ever inform the Defendants that he believed that they had negligently handled his appeal and/or was responsible for its lack of success. No threat or discussion of a possible legal malpractice claim ever occurred. Indeed, Plaintiff has admitted in his response brief that no contention or suggestion is being made that the Defendants acted in any deliberate manner to cause the statute of limitations to run. (Vol. III, App. at p. 203, Order Granting Defendants' Motion to Dismiss, at ¶ 12, p. 7 (citing Plaintiff's Response Brief, at p. 3, Vol. II, App., at p. 144)).

Plaintiff incorrectly asserts that the Defendants continued to represent him on this matter after the denial of his appeal by the Supreme Court of Appeals. (Vol. I, App., at p. 3, Complaint, at ¶ 21, at p. 3). However, documents integral to this claim clearly demonstrate that it is incorrect. Over a year after the Supreme Court's mandate ending his appeal, the Plaintiff sent the Defendants a letter dated September 28, 2015, wherein he stated "[a] year has passed since the denial of my claim, with the WV Consol. Ret. Bd., (partial duty disability). I am asking that you make

reapplication to the Board on my behalf for a partial or full disability award. The basic grounds I would suggest is a substantial, progressive loss, since my last attempt at this. . . ." (Vol. II, App., at p. 77). The Defendants responded by letter dated October 13, 2015, stating "[o]ur firm does not file applications or re-applications for partial or full disability awards for applicants. It would be your responsibility to file such application or re-application. If the Board denies your reapplication and the West Virginia Troopers Association approves our firm representing you in any appeal, then we can assist in that regard. . . ." (Vol. II, App., at p. 79). Clearly, as expressly found by the Circuit Court, this request for new representation did not involve the continuous representation of the Plaintiff for the matter underlying his claim of malpractice, i.e., the handling of his appeal of the termination of his prior partial-disability benefits. No further appeal or redress existed on such matter. Rather, the Plaintiff was hoping to file for a new award of disability benefits based upon his hearing loss having allegedly worsened since the Board had terminated his prior disability award based upon the recertification exam. At best the Plaintiff's request for new representation was only tangentially related to his prior representation. (Vol. III, App. at pp. 203-04, Order Granting Defendants' Motion to Dismiss, at ¶¶ 12-13, at pp. 7-8).

In regard to such new matter, as found by the Circuit Court (Vol. III, App. at pp. 204-05, Order Granting Defendants' Motion to Dismiss, at pp. 8-9), in December, 2015, upon receiving a request from the West Virginia Troopers Association that Defendants discuss the Plaintiff's current issue with him (Vol. I, App., at p. 80-81), the Defendants stressed to Plaintiff that he might not be able to apply for new disability benefits since he had begun receiving his regular retirement pension based upon his age and years of service immediately upon termination of his partial-disability benefits, but that if he was to have any chance at all he needed to get one or more medical doctor's opinion that his hearing loss had substantially worsened from 2010 when Dr. Bailey

issued her report until the current time. The Plaintiff attempted to get Dr. Stephen Wetmore, who had examined him on behalf of the WVCPRB in 1999, to issue such a report. On behalf of the Plaintiff, as alluded to in his Complaint, the Defendants sent a letter to Dr. Wetmore on April 20, 2016 (Vol. I, App., at p. 82-85), explaining the situation and what evidence was needed. (*See* Vol. I, App., at p. 3, Complaint, at ¶ 23, at p. 3). As alleged by the Plaintiff, Dr. Wetmore did issue a report on August 30, 2016, wherein he found that the Plaintiff was still disabled from performing the essential duties of a State Trooper. (Vol. I, App., at p. at p. 3, Complaint, at ¶¶ 23-24, at p. 3). However, Dr. Wetmore didn't address any worsening during the relevant time period. (Vol. I, App., at pp. 86-88).

As also asserted in his Complaint, the Plaintiff got a report from an audiologist, Gary Harris, Ph.D., on May 21, 2016, essentially saying that he was still disabled and criticizing Dr. Bailey's conclusions but again not addressing the relevant period of time. (Vol. I, App., at pp. 89-92; Vol. I, App., at p. 4, Complaint, at ¶¶ 26-27, at p. 4). The Defendants again stressed to the Plaintiff that he needed to see one or more actual medical doctors in light of the prior ruling against consideration of his Hearing Instrument Specialist's opinions and that the relevant time period was critical for any reapplication.

Subsequently, Defendant Monahan had a telephone conversation with Dr. Wetmore on January 11, 2017, explaining again what evidence the Plaintiff needed and sent him relevant records on January 16, 2017, for comparison purposes. (Vol. I, App., at pp. at 93-111). On February 20, 2017, Dr. Wetmore issued another report which again failed to address any hearing loss differences during the relevant time period. (Vol. I, App., at pp. at 112-13). On September 29, 2017, the Defendants again sent Dr. Wetmore relevant records and explained to him what time period was relevant. (Vol. I, App., at pp. 114-38). Finally, on October 30, 2017, Dr. Wetmore

issued a letter/report that unfortunately stated "[t]o sum up the findings, there is not much difference in this man's hearing between 2009 and 2016. (Vol. I, App., at pp.139-40). At that time, upon receiving Dr. Wetmore's letter, Defendants told the Plaintiff that they were not aware of anything else that could be done by them to help him concerning his request to apply for new benefits. That was the last time Defendants heard from the Plaintiff until receiving the Complaint on October 9, 2018.

### B. Statement of Background Facts and Procedural History

Plaintiff Clay R. Hupp did not "retain" the Defendants to represent him. No contingency fee contract or hourly contract existed between the parties. Rather, at the request of The West Virginia Troopers Association, the Defendants agreed to provide pro bono legal services to the Plaintiff in order to assist him in handling his appeal of the termination of his duty-related, partial-disability retirement benefits based upon an improperly conducted and concluded recertification exam. (Vol. III, App., at pp. 197-98, Order Granting Motion to Dismiss, at ¶ 1, at pp. 1-2). Moreover, the Plaintiff was instructed by the Defendants to produce all of his past and current medical and related records concerning his hearing-loss disability and to get updated reports from his medical doctors supporting that he remained disabled from performing the essential duties of a West Virginia State Trooper with or without hearing aids. At no time did the Defendants as part of their pro bono services agree to pay to retain medical or other experts on behalf of the Plaintiff in order to render reports or testimony. The burden to produce all prior and current medical and related evidence as well as to obtain any new reports remained on the Plaintiff. All of the relevant medical and related documents produced by the Plaintiff was introduced as evidence at his hearing as well as his testimony concerning all relevant matters. (*See* Vol. III, App., at pp. 199-200 n. 2, Order Granting Motion to Dismiss, at pp. 3-5 n. 2).

As to the factual and procedural history of this matter, as found by the Circuit Court in its Order granting Defendant's motion to dismiss (Vol. III, App., at pp. 198-202, Order Granting Motion to Dismiss, at ¶¶ 2-11, at pp. 2-6):[3]

In 1999, Plaintiff Clay Hupp was awarded a permanent partial-disability retirement award by the West Virginia Consolidated Public Retirement Board ("WVCPRB") regarding his employment as a West Virginia State Trooper. He was found to be disabled from performing the essential functions of a State Trooper due to a moderate to severe high frequency hearing loss which according to the Board's own selected doctor, Dr. Stephen Wetmore, rendered him unable to ever again perform the essential duties of a West Virginia State Trooper. Such a hearing loss is not only irreversible but it is progressive, meaning it will only worsen over time. Mr. Hupp had also presented reports of his own treating physician, Robert W. Azar, M.D., as well as an audiologist, George F. Evans, M.A. Audiologist CCCA, in support of his disability. All concurred that he was permanently disabled from ever again performing the essential duties of a State Trooper.

On July 2, 2010, the WVCPRB sent notice to Mr. Hupp that he was being sent to a physician of their choosing to have a recertification exam to determine whether he was still disabled. He was examined by the WVCPRB's physician, Dr. Marsha Bailey, in August 2010, at which time she issued a report finding that he **was never disabled** from performing the duties of a law enforcement officer. In her report, Dr. Bailey noted that Mr. Hupp's disability is a progressive noise-induced hearing loss caused by his work as a Trooper and that his medical records reflect that his moderate-to-severe high-frequency hearing loss presently has not significantly worsened from that found by the WVCPRB's physician in 1999 at the time of his

[3] As noted herein, this Court may take judicial notice of all of the administrative and judicial decisions, pleadings, motions, legal memoranda, and evidence of record relevant to the claim at issue in this case.

disability determination. At no time did she ever find that his hearing loss had improved such that he was no longer disabled. Rather, she based her conclusion that he was never disabled on the fact that he served two terms as a Sheriff of Tyler County, WV, after his disability and was currently working part-time as a security officer (neither of which were forbidden by the disability statute at the time of his award). She also noted that she was aware of several other Troopers who had hearing losses as severe or worse than Clay Hupp and who were still working as State Troopers. Dr. Bailey performed no hearing test on her own (with or without Mr. Hupp wearing hearing aids). Rather, she performed a routine physical exam and a review of the records he produced to her concerning his hearing loss. Mr. Hupp was required to produce all of his past and current records related to his disability to Dr. Bailey by the letter informing him of his recertification exam.

By letter dated November 5, 2010, the WVCPRB informed Mr. Hupp that it had considered his disability medical recertification information at its November 3, 2010, meeting and had voted to terminate his partial-duty disability retirement benefits effective December 1, 2010. Because Mr. Hupp had enough years of service and had reached an acceptable retirement age, a termination of his disability benefits, meant that he would be switched to a regular full retirement pension. However, Mr. Hupp wished to avoid this because he was receiving nearly double the monthly retirement award, because disability awards are not taxable and receive a cost of living adjustment.

Upon receiving this letter advising of the Board's decision, the West Virginia Troopers Association of which Mr. Hupp was a member approved him to be represented by The Masters Law Firm lc for an appeal of such decision. Our firm for approximately 30 years, has been representing Troopers who are approved by the Association on a pro bono basis.[4] These individuals are instructed by our firm in cases involving disability claims to bring all of their past

[4] Only in extreme cases, such as a class action or mass litigation has the firm ever charged the Association for attorney fees or costs and expenses.

and current relevant records to us as well as to see their doctors to obtain new reports showing that they are disabled or continue to be disabled from performing the essential duties of a State Trooper. Mr. Hupp was told this same information despite the fact that the recertification statute/regulation provided no right or requirement for retirants to produce new medical information in response to the recertification exam.

Mr. Hupp told the Defendants that he had already seen his doctor upon receiving his letter informing him of the recertification exam and that such doctor's report supported that he was still disabled and that his hearing aids do not adequately correct his severe hearing loss. Upon receiving and reviewing the relevant records of Mr. Hupp, prior to the appeal hearing, Defendants realized that the new report he had provided was from Richard L. Cunningham, Sr., H.I.S. of the Better Hearing Center of Wheeling. When it was pointed out to Mr. Hupp that it appeared that Richard Cunningham was a Hearing Instrument Specialist, rather than a medical doctor, he advised Defendants that Richard L. Cunningham, Sr., was the only "doctor" he was seeing for his hearing disability because all of his other doctors had retired or were no longer in business. He also advised that he did not have the financial assets to hire a medical doctor as an expert to provide a report or testimony at his administrative hearing. Mr. Cunningham's report did confirm that Mr. Hupp was still suffering from moderate-to-severe high frequency nerve deafness binaurally. Mr. Cunningham also concluded that the hearing loss was irreversible and will worsen with time and that it was not totally correctable with Mr. Hupp's hearing aids (which he had purchased after obtaining his disability).

Because (1) the recertification statute/regulation did not provide for, let alone require, that a retirant submit new medical testimony in response to the findings of the recertification doctor, (2) all of the existing medical records reflected that Mr. Hupp's disability was both irreversible

and progressive, (3) Dr. Bailey had improperly concluded that Mr. Hupp was never disabled as a law enforcement officer[5] and had not conducted any new hearing tests or other objective medical assessments demonstrating that Mr. Hupp's condition had improved so as to no longer render him disabled; (4) Dr. Bailey had improperly based her findings upon his statutorily permitted intervening work as a Sheriff and security officer and her alleged knowledge that other State Troopers continued to work with just as bad or worse hearing loss; and (5) Hearing Instrument Specialist Mr. Cunningham's new report of July 10, 2010, based upon his most recent hearing tests in 2009, demonstrated that Mr. Hupp still had irreversible and progressive moderate-to-severe high frequency hearing loss which was not totally correctable with hearing aids, it did not appear that the hearing examiner could rule against Mr. Hupp in any legally or constitutionally reasonable manner and the parties proceeded to the hearing on Mr. Hupp's appeal.

A hearing was held before Hearing Examiner Jack W. Debolt on February 1, 2011, during which all of the relevant medical and other related records produced by the Plaintiff were admitted. Additionally, Mr. Hupp testified concerning his continued disability, that a majority of his duties as Sheriff had been administrative, and gave numerous examples of how his hearing aids did not assist him in performing the essential duties of a State Trooper. Defendants filed a legal memorandum in support of his appeal and a reply brief following receipt of the Board's response brief. To our surprise and dismay, the Hearing Examiner in a decision entered on April 27, 2011, found in support of the termination of Mr. Hupp's disability based upon Dr. Bailey's conclusions. However, in order to do so, the hearing examiner essentially re-framed her conclusion to be that Mr. Hupp was no longer disabled because he now had hearing aids and that no medical evidence

[5] Defendants argued that the doctrines of *res judicata* and collateral estoppel prohibited her and the Board from making any such finding.

had been offered against her opinions because the Hearing Instrument Specialist was not a medical doctor. (*See* Vol. I, App. at pp. 31-39).

Defendants filed a motion for reconsideration which essentially objected to the hearing examiner rewriting Dr. Bailey's conclusions; basing his finding on Mr. Hupp's use of hearing aids; his disregard of Mr. Hupp's testimony that hearing aids did not assist his hearing in critical ways necessary for the performance of the full spectrum of essential duties of a State Trooper; and his refusal to consider the supporting opinions of Mr. Cunningham who was a hearing instrument specialist as well as the prior medical evidence demonstrating that Mr. Hupp's hearing disability was irreversible and progressive, thereby preventing him from ever returning to the duties of a State Trooper. Defendants also argued that no notice was provided by Dr. Bailey's report or otherwise that the use of hearing aids was the factor supposedly at issue for terminating Mr. Hupp's irreversible and progressive disability. For these reasons as well as the fact that the recertification statute/regulation failed to provide for, let alone require, the submission of new medical evidence by the retirant opposing the findings of the recertification doctor, Defendants asked to be permitted to obtain and present new medical evidence demonstrating the incorrectness of Dr. Bailey and the Hearing Examiner's conclusions.

Defendants additionally filed a supplemental memorandum in support of the motion for reconsideration wherein they submitted a decision of the same hearing examiner in the case of Stephen Burdette, entered in 2000, which was based upon studies and concluded that hearing aids were not sufficient to improve a law enforcement officer's ability to perform the required essential duties of their position. (At this time, the Defendants had begun representing Mr. Burdette who had also just lost his disability retirement based on a similar report of Dr. Bailey, and Defendants had just obtained his file and relevant records including such prior decision.) Without providing

any substantive explanation, the Hearing Examiner in a conclusory fashion denied Defendants' motion for reconsideration by letter and the WVCPRB adopted his decision by letter dated May 26, 2011. (*See* Vol. I, App. at pp. 40-49).

On June 24, 2011, Defendants submitted a petition of appeal of administrative ruling to the Circuit Court of Tyler County, WV, raising all of the above referenced grounds. On November 30, 2011, Defendants submitted an argument brief in support of the petition for appeal. On January 30, 2012, the WVCPRB filed its brief in opposition to the appeal to which Defendants filed a reply brief on March 15, 2012. On May 24, 2012, Defendants submitted to the Circuit Judge Mark A. Karl of Tyler County a copy of a decision of Kanawha County Circuit Judge Louis ("Duke") H. Bloom granting the appeal of Stephen Burdette. In his decision, consistent with Defendants' position on behalf of Mr. Hupp, Judge Bloom found that the termination of Mr. Burdette's disability was against the clear weight of the evidence inasmuch as Dr. Bailey did not perform any audiometric tests on Mr. Burdette to determine his present day hearing loss or have him fitted with hearing aids to determine whether such devices would in fact correct his disability to the extent that he could perform the essential duties of a State Trooper. Judge Bloom held that actual new medical evidence must support the conclusion that the former disability has improved and that Dr. Bailey's mere anecdotal conclusion would not suffice. A hearing was held before Judge Karl in Mr. Hupp's appeal on April 5, 2012. Unfortunately, to the dismay of Defendants and Plaintiff, on July 3, 2013, a final order was entered affirming the final order of the WVCPRB. (*See* Vol. I, App. at pp. 50-61).

This ruling was timely appealed to the West Virginia Supreme Court of Appeals. Defendants filed Petitioner's Brief on November 4, 2013, and a reply brief on January 22, 2014, after receiving a response brief. On June 13, 2014, the West Virginia Supreme Court of Appeals

entered a Memorandum Decision with the majority (3-2) affirming the Tyler County Circuit Court's Final Order. (*See* Vol. I, App. at pp. 62-71). On July 11, 2014, Defendants filed a Petition for Rehearing which was denied on August 26, 2014. (*See* Vol. I, App. at pp. 72-73). On September 2, 2014, the Court entered its Mandate that its Memorandum Decision was final. (*See* Vol. I, App. at pp. 74-75). At that time, Defendants explained to Mr. Hupp that his case was over and that nothing else could be done as to the termination of his disability benefits.

## IV. SUMMARY OF ARUGMENT

Plaintiff alleges in his Complaint that the Defendants were negligent per se and breached their standard of care by failing to introduce new medical evidence in support of his appeal of the termination of his hearing-loss disability as a result of a recertification exam. (Vol. I, App., at pp. 4-5, Complaint, at ¶¶ 29-33, at pp. 4-5). Plaintiff alleges the adverse effect of such failure is demonstrated by statements in the recommended decision of the hearing examiner which was adopted by the West Virginia Consolidated Public Retirement Board, the final order of the Circuit Court of Tyler County, and the memorandum decision of the West Virginia Supreme Court of Appeals. (Vol. I, App., at pp. 2-3, Complaint, at ¶¶ 13, 19, & 20, at pp. 2-3). Even assuming that these contentions of the Plaintiff are true, which Defendants strenuously dispute, the dates of these administrative and judicial decisions of which this Court may take judicial notice as well as the substance of documents integral to the allegations of the Plaintiff's claims clearly establish that Plaintiff's claim for legal malpractice is time-barred by the applicable statute of limitations.

Under the holdings of this Court in *VanSickle v. Kohout*, 215W.Va. 433, 437-38, 599 S.E.2d 856, 860-61 (2004), Plaintiff's cause of action would have begun running upon such holding of the Hearing Examiner had he terminated his relationship with the Defendants and retained someone else to handle his judicial appeals. However, because Defendants continued to

represent the Plaintiff through his judicial appeals, such efforts would have constituted the relevant efforts to mitigate the harm of Defendants' alleged negligence; thereby, temporarily tolling the running of his statute of limitations. Clearly, any such efforts at mitigation would have ended at the unsuccessful conclusion of such judicial appeals when the Supreme Court entered its mandate on September 2, 2014, after denying Plaintiff's motion for rehearing. At that time, the tolling by the continuous representation doctrine would have ended, and the Plaintiff's two-year statute of limitations would have begun running on September 3, 2014, and would have ended on September 2, 2016. *Kanode v. Czarnik*, No. 12-0282, 2013 WL 1707680, at **1-3 (W.Va. April 19, 2013) (affirming circuit court's dismissal of complaint filed on August 1, 2011, where circuit court concluded that any complaint regarding Plaintiff's criminal appeal would had to have been filed on or before April 22, 2011, two years within the refusal of Plaintiff's criminal appeal on April 22, 2009, the refusal of which was known by Plaintiff; holding "This Court concludes that this reason alone is sufficient to find that petitioner's action is time barred by the statute of limitations and the discovery rule is of no avail.").

The Plaintiff neither has nor could show a clear indicia of an ongoing, continuous relationship between the parties after the conclusion of such underlying matter. Absolutely nothing further could be done to remedy or cure the termination of Plaintiff's prior partial-disability benefits based upon the recertification exam after the conclusion of all judicial appeals available on such matter. Any further relationship between the parties was ***"only tangentially related to legal representation the [Defendants] provided in the matter in which [they were] allegedly negligent."*** Syl. Pt. 7, *Smith v. Stacy*, 198 W.Va. 498, 482 S.E.2d 115 (1996) (emphasis added).

As previously noted, over a year after the Supreme Court's mandate ending his appeal, the Plaintiff sent the Defendants a letter dated September 28, 2015, wherein he stated "[a] year has

passed since the denial of my claim, with the WV Consol. Ret. Bd., (partial duty disability). I am asking that you make reapplication to the Board on my behalf for a partial or full disability award. The basic grounds I would suggest is a substantial, progressive loss, since my last attempt at this. . . ." (Vol. II, App., at p. 77). The Defendants responded by letter dated October 13, 2015, stating "[o]ur firm does not file applications or re-applications for partial or full disability awards for applicants. It would be your responsibility to file such application or re-application. If the Board denies your reapplication and the West Virginia Troopers Association approves our firm representing you in any appeal, then we can assist in that regard. . . ." (Vol. II, App., at pp. 79).

Clearly, this request for new representation did not involve the continuous representation of the Plaintiff for the matter underlying his claim of malpractice, i.e., the handling of his appeal of the termination of his prior partial-disability benefits. And had the Defendants been continually representing the Plaintiff, there would have been no need for the Plaintiff over a year later to send the letter requesting that Defendants apply for new benefits on his behalf due to a worsening of his hearing. Moreover, if Defendants were continually representing the Plaintiff for purposes of permitting the statute of limitations to run or to mitigate his damages for the purpose of avoiding a malpractice lawsuit, Defendants would not have denied his request in such regard. *See Smith v. Stacy,* 198 W.Va. at 503-05, 482 S.E.2d at 120-22. At best, the Plaintiff's request for new representation was only tangentially related to his prior representation.

As explained above, after receiving the request from the Troopers Association that Defendants discuss his then-current issue with him, Defendants did offer him the best legal advice and assistance that they could in his endeavor to apply for new partial or full disability benefits based upon a worsening of his hearing condition. However, because Dr. Wetmore ultimately concluded that his hearing had not worsened since the termination of his hearing benefits in 2010,

Defendants informed the Plaintiff that they did not believe that any grounds existed for him to even try to apply for new partial or full disability benefits.

Importantly, plaintiff has not alleged, and in light of documents referenced or integral to his claim could not truthfully allege, that such subsequent tangential relationship involved an agreement to continue to represent him for purposes of mitigating his damages so as to avoid the necessity of a malpractice lawsuit or for purposes of continuing their representation of him until the statute of limitations had run on his malpractice claim. Indeed, Plaintiff even admits in his response that he is not claiming any deliberate action on behalf of the Defendants in such regard. (Vol. III, App. at p. 203, Order Granting Defendants' Motion to Dismiss, at ¶ 12, p. 7 (citing Plaintiff's Response Brief, at p. 3, Vol. II, App., at p. 144)). And, as noted in Defendants' memorandum, and admitted by the Plaintiff in his response, the Plaintiff had never blamed the Defendants for losing his appeal or otherwise threatened a malpractice lawsuit. *Id.* Under these facts, the purposes for adopting the continuous representation doctrine to toll the statute of limitations are inapplicable to the claim in this lawsuit. Accordingly, any claim the Plaintiff might have had for the alleged malpractice would have had to been filed by September 2, 2016, and Plaintiff's complaint is time-barred.

## V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

These Respondents believe that the issues presented are neither novel, nor do they present unsettled areas of law. While Respondents always welcome oral argument under W.Va.R.App.P. 18(a), should the Court deem it appropriate in this case, these Respondents concede that this matter may be appropriate for memorandum decision under W.Va.R.App.P. 21. Should the Court grant oral argument, Respondents believe that this case would fall under W.Va.R.App.P. 19.

## VI. ARGUMENT

### A. Legal Standard for Rule 12(b)(6) Motions to Dismiss

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 770 (1995). *Accord Barber v. Camden Clark Mem. Hosp. Corp.*, 240 W.Va. 663, 815 S.E.2d 474 (2018). A Rule 12(b)(6) motion should only be granted where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Forshey v. Jackson*, 222 W.Va. 743, 749, 671 S.E.2d 748, 754 (2008). Concomitantly, dismissal is proper if the plaintiff fails "to set forth sufficient information to outline the elements of his/her claim." *Brown v. City of Montgomery*, 233 W.Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2], at 384–88 (4th ed. 2012)). And in assessing the Complaint, "a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Id.*

The West Virginia Supreme Court of Appeals has also explained when documents outside of the pleadings may be considered without converting the motion to dismiss to one for summary judgment.

> [I]t has been recognized that, in ruling upon a motion to dismiss under Rule 12(b)(6),
>
> "a court may consider, in addition to the pleadings, *documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice.*"
>
> [Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*,]. § 12(b)(6)[2], at 348 [(3d ed. 2008)] (footnote omitted). The United States District Court for the Western District of Virginia has explained this principle thusly:

"In general, material extrinsic to the complaint may not be considered on a Rule 12(b)(6) motion to dismiss without converting it to a Rule 56 motion for summary judgment, but there are certain exceptions to this rule. As the Second Circuit has explained:

*'The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.*

... [G]enerally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered. Accordingly, *where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated....* [O]n a motion to dismiss, *a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference, ... matters of which judicial notice may be taken, or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.* Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.'

*Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152–53 (2d Cir.2002) (citations, alterations in original, and internal quotation marks omitted); *see also New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.,* 18 F.3d 1161, 1164 (4th Cir.1994) (citing *Cortec Indus. v. Sum Holding, L.P.,* 949 F.2d 42, 47–48 (2d Cir.1991)); *Miller v. Pac. Shore Funding,* 224 F.Supp.2d 977, 984 n. 1 (D.Md.2002); 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure: Civil § 1327 & n. 7 (3d ed. 2004) (citing cases)."

*Bryant v. Washington Mut. Bank,* 524 F.Supp.2d 753, 757 n. 4 (W.D.Va.2007) (emphasis added). *See also Trans–Spec Truck Serv., Inc. v. Caterpillar Inc.,* 524 F.3d 315, 321 (1st Cir.2008) ("Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint; if matters outside the pleadings are considered, the motion must be decided under the more stringent standards applicable to a Rule 56 motion for summary judgment.... *Exhibits attached to the complaint are properly considered part of the pleading 'for all purposes,' including Rule 12(b)(6).* Fed.R.Civ.P. 10(c) .... Additionally, we have noted that *'[w]hen ... a complaint's factual allegations are expressly linked to-and admittedly dependent upon-a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).'* " (emphasis added) (internal citations omitted)); *Abhe & Svoboda, Inc. v. Chao,* 508 F.3d 1052, 1059 (D.C.Cir.2007) ("In determining whether a

> complaint states a claim, the court may consider the facts alleged in the complaint, *documents attached thereto* or incorporated therein, and matters of which it may take judicial notice." (emphasis added) (citation omitted)); *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir.2007) ("In general, our review [of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted] is limited to the facts as asserted within the four corners of the complaint, *the documents attached to the complaint as exhibits,* and any documents incorporated in the complaint by reference." (emphasis added)); *Buck v. Hampton Tp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir.2006) ("In evaluating a motion to dismiss, *we may consider documents that are attached to or submitted with the complaint ... and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'* 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004)." (emphasis added) (internal citation omitted)); *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 379 (5th Cir.2003) ("In deciding a motion to dismiss *the court may consider documents attached to or incorporated in the complaint* and matters of which judicial notice may be taken." (emphasis added)); *Technology Patents, LLC v. Deutsche Telekom AG,* 573 F.Supp.2d 903, 920 (D.Md.2008) ("Consideration of extrinsic evidence is inappropriate in a 12(b)(6) ruling, as the inquiry is limited to the complaint *and the documents attached thereto* or incorporated by reference." (emphasis added)).

*Forshey v. Jackson*, 222 W.Va. at 747-49, 671 S.E.2d at 752-54 (emphases added). *Accord, e.g., State ex rel. Veard v. Miller*, 238 W.Va. 333, 337, 795 S.E.2d 55, 59 (2016); *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W.Va. 77, 80 n. 4, 785 S.E.2d 627, 630 n. 4 (2016); *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W.Va. 421, 433 n. 14, 781 S.E.2d 198, 210 n. 14 (2015); *West Virginia Bd. of Educ. v. Marple*, 236 W.Va. 654, 659 n. 3, 783 S.E.2d 75, 80 n. 3 (2015); *Harrison v. Porsche Cars North America, Inc.* No. 15-0381, 2016 WL 1455864, at *3 n. 2 (W.Va. April 12, 2016); *Starcher v. Pappas*, No. 16-1160, 2017 WL 5157366, at **4-5 (W.Va. Nov. 7, 2017) (holding that in both motions to dismiss and motions for summary judgment, court may take judicial notice of pleadings and other documents filed in other court actions pursuant to W.Va.R.Evid. 201).

## B. A Motion to Dismiss May Be Granted on a Defense of Statute of Limitations

Because a defense based upon statute of limitations grounds generally require the resolution of issues that are fact-intensive, dismissal is normally not appropriate through a motion to dismiss under Rule 12(b)(6). However, the West Virginia Supreme Court of Appeals has acknowledged that dismissal based upon a statute of limitations is not always improper when based upon a Rule 12(b)(6) motion to dismiss, when such defects are apparent upon allegations contained within the complaint. *Sattler v. Bailey*, 184 W.Va. 212, 222 n.14, 400 S.E.2d 220, 230 n. 14 (1990) (quoting *Richards v. Mileski*, 662 F.2d 65, 73 (D.C.Cir. 1981)). *Accord Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, 110 (1996) (utilizing admissions made by counsel during hearing in addition to allegations in complaint); *E.K. v. West Virginia Department of Health*, No. 16-0773, 2017 WL 5153221, at **6-7 (W.Va. Nov. 7, 2017). *See also Stuyvesant v. Preston County Com'n*, 223 W.Va. 619, 621-23, 678 S.E.2d 872, 874-76 (2009) (affirming grant of motion to dismiss on statute of limitations grounds based upon allegations in complaint); *State ex rel. Monongahela Power Co. v. Fox*, 227 W.Va. 531, 711 S.E.2d 601 (2011) (granting writ of prohibition concerning circuit court's denial of motion to dismiss on grounds of statute of limitations); *Kanode v. Czarnik*, No. 12-0282, 2013 WL 1707680, at **1-3 (W.Va. April 19, 2013) (affirming circuit court's dismissal of complaint filed on August 1, 2011, where circuit court concluded that any complaint regarding Plaintiff's criminal appeal would had to have been filed on or before April 22, 2011, two years within the refusal of Plaintiff's criminal appeal on April 22, 2009, the refusal of which was known by Plaintiff; holding "This Court concludes that this reason alone is sufficient to find that petitioner's action is time barred by the statute of limitations and the discovery rule is of no avail."); *Starcher v. Pappas*, No. 16-1160, 2017 WL 5157366, at **4-5 (W.Va. Nov. 7, 2017) (affirming dismissal of amended complaint; holding that in both motions to dismiss and motions for summary

judgment, court may take judicial notice of pleadings and other documents filed in other court actions pursuant to W.Va.R.Evid. 201); *Davis v. Schooley*, No. 17-0435, 2018 WL 2192477, at *1-2 (W.Va. May 14, 2018) (affirming grant of motion to dismiss on statute of limitations grounds based upon allegations in complaint); *Magee v. Racing Corporation of West Virginia*, No. 17-0008, 2017 WL 4993455, at **1-4 (W.Va. Nov. 1, 2017) (same). As previously noted, in assessing the allegations of a complaint, a court may examine documents referenced therein, documents integral to the claims, or documents of which the court may take judicial notice. *Forshey v. Jackson*, 222 W.Va. at 747-49, 671 S.E.2d at 752-54.

### C. Statute of Limitations and the Continuous Representation Doctrine for Legal Malpractice Claims

The West Virginia Supreme Court of Appeals has explained:

> [S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions "are strictly construed and are not enlarged by the courts upon considerations of apparent hardship." Finding that the plaintiff had failed to satisfy the requirements of any established exceptions to the statute of limitations, we further stated that "[d]efendants have a right to rely on the certainty the statute [of limitations] provides, and adoption of the rule plaintiff urges would destroy that certainty." Lastly, we concluded that "[b]y strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions."

*Perdue v. Hess*, 199 W. Va. 299, 303, 484 S.E.2d 182, 186 (1997) (citations and internal quotations omitted) (emphasis added). *Accord Magee v. Racing Corporation of West Virginia*, 2017 WL 4993455, at *3.

Additionally, the Court has recognized that

> Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power.

Syl. Pt. 1, *Stevens v. Saunders*, 159 W.Va. 179, 220 S.E.2d 887 (1975). *Accord Magee v. Racing Corporation of West Virginia*, 2017 WL 4993455, at *3.

When the allegations of a complaint against an attorney for legal malpractice sound only in tort, the applicable statute of limitations is the two-year limitation set forth in W.Va.Code § 55-2-12. *Harrison v. Casto*, 165 W.Va. 787, 789, 271 S.E.2d 774, 775 (1980). *Accord Hall v. Nichols*, 184 W.Va. 466, 469-70, 400 S.E.2d 901, 904-05 (1990). The present case is not one which requires fact-intensive discovery to determine whether the statute of limitations has run. *See, e.g., Stuyvesant v. Preston County Com'n*, 223 W.Va. at 621-23, 678 S.E.2d at 874-76 (2009); *State ex rel. Monongahela Power Co. v. Fox*, 227 W.Va. at 533, 711 S.E.2d at 603. Further, it is clear from a reading of the allegations of Plaintiff's Complaint that Plaintiff's claim sounds only in tort and that the applicable statute of limitations is the two-year period under W.Va.Code § 55-2-12. *Harrison v. Casto*, 165 W.Va. at 789, 271 S.E.2d at 775; *Hall v. Nichols*, 184 W.Va. at 469-70, 400 S.E.2d at 904-05.

As to claims of legal malpractice, in *Smith v. Stacy*, 198 W.Va. 498, 482 S.E.2d 115 (1996), the West Virginia Supreme Court of Appeals adopted the continuous representation doctrine and set forth the following relevant syllabus points:

> 6. West Virginia adopts the continuous representation doctrine through which the statute of limitations in an attorney malpractice *action is tolled until the professional relationship* ***terminates with respect to the matter underlying the malpractice action***.
>
> 7. *The limitations period for a legal malpractice claim is not tolled by the continuous representation rule* ***where an attorney's subsequent role is only tangentially related to legal representation the attorney provided in the matter in which he was allegedly negligent.***
>
> 8. The continuous representation doctrine applies only to malpractice actions in which there is clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney.

Syl. Pts. 6-8, *Smith v. Stacy*, *id.* (emphases added).

The purposes for adoption of the continuous representation doctrine are two-fold: (1) to prevent attorneys from continuing to represent a client for the purpose of permitting the statute of limitations to run on a malpractice lawsuit; and (2) enabling attorneys to mitigate or cure the damages caused by the malpractice in order to avoid the necessity of a malpractice lawsuit. *Smith v. Stacy*, 198 W.Va. at 503-05, 482 S.E.2d at 120-22. As explained by the Court:

> This doctrine tolls the running of the statute in an attorney malpractice action until the professional relationship terminates with respect to the matter underlying the malpractice action. It is an adaptation of the "continuous treatment" rule applied in the medical malpractice forum and is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice and providing uninterrupted service to the client. *See Cuccolo v. Lipsky, Goodkin & Co.*, 826 F.Supp. 763, 769–70 (S.D.N.Y.1993) (outlining policy considerations underlying the doctrine). In *Glamm v. Allen*, 57 N.Y.2d 87, 453 N.Y.S.2d 674, 439 N.E.2d 390 (1982), the court indicated that since it would be "impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed." *Id.* 453 N.Y.S.2d at 677, 439 N.E.2d at 393.
>
> In *Muller v. Sturman*, 79 A.D.2d 482, 437 N.Y.S.2d 205 (N.Y.App.Div.1981), the court explained that **the continuous representation doctrine applies only where there are "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney...."** *Id.* 437 N.Y.S.2d at 208. . . .
>
> Based upon these principles, **we hold that the limitations period for a legal malpractice claim is not tolled by the continuous representation rule where an attorney's subsequent role is only tangentially related to legal representation the attorney provided in the matter in which he was allegedly negligent. Therefore, *"[t]he inquiry is not whether an attorney-client relationship still exists on any matter or even generally, but when the representation of the specific matter concluded."*** Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 21.12, at 822 (4th ed.1996).

*Smith v. Stacy*, 198 W.Va. at 503-04, 482 S.E.2d at 120-21 (also acknowledging: "'We believe that the continuous representation rule appropriately protects the integrity of the attorney-client

relationship and affords the attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay.'" (quoting *Wall v. Lewis*, 393 N.W.2d 758, 763 (N.D. 1986)). The Court also "impose[d] the restriction that the burden of establishing the elements necessary for the application of the doctrine is upon the client." *Smith v. Stacy*, 198 W.Va. at 507, 482 S.E.2d at 124.

The continuous representation doctrine was also discussed by the Court in *VanSickle v. Kohout*, 215W.Va. 433, 599 S.E.2d 856 (2004), wherein the Court answered certified questions as follows:

> Does a cause of action for legal malpractice accrue prior to the final resolution of the party's efforts to reverse or mitigate the harm through administrative and/or judicial appeals?
>
> Our answer, Yes.
>
> Is the statute of limitations in a legal malpractice cause of action tolled during the pendency of the party's efforts to reverse or mitigate the harm through administrative and/or judicial appeals?
>
> Our answer, No.
>
> Therefore, we hold that a cause of action for legal malpractice accrues when the malpractice occurs, or when the client knows, or by reasonable diligence should know, of the malpractice. Furthermore, we hold that, when a victim of legal malpractice terminates his or her relationship with the malpracticing attorney, subsequent efforts by new counsel to reverse or mitigate the harm through administrative or judicial appeals do not toll the statute of limitations.

*VanSickle v. Kohout*, 215W.Va. at 437-38, 599 S.E.2d at 860-61.

### D. Application of Law to the Facts

The Plaintiff alleges in his Complaint that the Hearing Examiner held that the Plaintiff had failed to present medical evidence on his behalf. (Vol. I, App., at p. 2, Complaint, at ¶¶ 11-16, at p. 2). Assuming this finding was correct, and even further assuming that Defendants were

responsible for such failure rather than the Plaintiff, under the holdings of the Court in *VanSickle v. Kohout*, 215W.Va. at 437-38, 599 S.E.2d at 860-61, Plaintiff's cause of action would have begun running upon such holding of the Hearing Examiner had he terminated his relationship with the Defendants and retained someone else to handle his judicial appeals. However, because Defendants continued to represent the Plaintiff through his judicial appeals, such efforts would have constituted the relevant efforts to mitigate the harm of Defendants' alleged negligence; thereby, temporarily tolling the running of his statute of limitations. Clearly, any such efforts at mitigation would have ended at the unsuccessful conclusion of such judicial appeals when the Supreme Court entered its mandate on September 2, 2014, after denying Plaintiff's motion for rehearing. At that time, the tolling by the continuous representation doctrine would have ended, and the Plaintiff's two-year statute of limitations would have begun running on September 3, 2014, and would have ended on September 2, 2016.

The Plaintiff neither has nor could show a clear indicia of an ongoing, continuous relationship between the parties after the conclusion of such underlying matter. Absolutely nothing further could be done to remedy or cure the termination of Plaintiff's prior partial-disability benefits based upon the recertification exam after the conclusion of all judicial appeals available on such matter. Any further relationship between the parties was ***"only tangentially related to legal representation the [Defendants] provided in the matter in which [they were] allegedly negligent."*** Syl. Pt. 7, *Smith v. Stacy, supra* (emphasis added).

As previously noted, over a year after the Supreme Court's mandate ending his appeal, the Plaintiff sent the Defendants a letter dated September 28, 2015, wherein he stated "[a] year has passed since the denial of my claim, with the WV Consol. Ret. Bd., (partial duty disability). I am asking that you make reapplication to the Board on my behalf for a partial or full disability award.

The basic grounds I would suggest is a substantial, progressive loss, since my last attempt at this. . . ." (Vol. II, App., at p. 77). The Defendants responded by letter dated October 13, 2015, stating "[o]ur firm does not file applications or re-applications for partial or full disability awards for applicants. It would be your responsibility to file such application or re-application. If the Board denies your reapplication and the West Virginia Troopers Association approves our firm representing you in any appeal, then we can assist in that regard. . . ." (Vol. II, App., at p. 79).

Clearly, this request for new representation did not involve the continuous representation of the Plaintiff for the matter underlying his claim of malpractice, i.e., the handling of his appeal of the termination of his prior partial-disability benefits. And had the Defendants been continually representing the Plaintiff, there would have been no need for the Plaintiff over a year later to send the letter requesting that Defendants apply for new benefits on his behalf due to a worsening of his hearing. Moreover, if Defendants were continually representing the Plaintiff for purposes of permitting the statute of limitations to run or to mitigate his damages for the purpose of avoiding a malpractice lawsuit, Defendants would not have denied his request in such regard. At best, the Plaintiff's request for new representation was only tangentially related to his prior representation.

As explained above, after receiving the request from the Troopers Association that Defendants discuss his then-current issue with him, Defendants did offer him the best legal advice and assistance that they could in his endeavor to apply for new partial or full disability benefits based upon a worsening of his hearing condition. However, because Dr. Wetmore ultimately concluded that his hearing had not worsened since the termination of his hearing benefits in 2010, Defendants informed the Plaintiff that they did not believe that any grounds existed for him to even try to apply for new partial or full disability benefits.

Importantly, plaintiff has not alleged, and in light of documents referenced or integral to his claim could not truthfully allege, that such subsequent tangential relationship involved an agreement to continue to represent him for purposes of mitigating his damages so as to avoid the necessity of a malpractice lawsuit[6] or for purposes of continuing their representation of him until the statute of limitations had run on his malpractice claim. Indeed, Plaintiff even admits in his response that he is not claiming any deliberate action on behalf of the Defendants in such regard. (Vol. III, App. at p. 203, Order Granting Defendants' Motion to Dismiss, at ¶ 12, p. 7 (citing Plaintiff's Response Brief, at p. 3, Vol. II, App., at p. 144)). And, as noted in Defendants' memorandum, and admitted by the Plaintiff in his response, the Plaintiff had never blamed the Defendants for losing his appeal or otherwise threatened a malpractice lawsuit. *Id.* Under these facts, the purposes for adopting the continuous representation doctrine to toll the statute of limitations are inapplicable to the claim in this lawsuit. Accordingly, any claim the Plaintiff might have had for the alleged malpractice would have had to been filed by September 2, 2016, and Plaintiff's complaint is time-barred. As held by the Circuit Court, "a ruling in Plaintiff's favor would enable a dilatory plaintiff to delay the running of the statute of limitations by contacting the attorney and requesting his assistance on a collateral matter merely tangentially related to the underlying representation at issue in the untimely malpractice action; thereby, thwarting both the public policy and legislative intent behind statutes of limitations and the purposes of the continuous representation doctrine." (Vol. III, App. at p. 214, Order Granting Defendants' Motion to Dismiss, at p. 18.

## VII. CONCLUSION

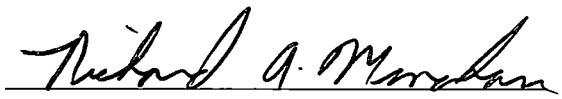
[6] As previously noted, under the applicable holdings of the Supreme Court, the Defendants continued representation of the Plaintiff through his judicial appeals would have constituted their relevant attempts to mitigate or cure his damages. *VanSickle v. Kohout*, 215 W.Va. at 437-38, 599 S.E.2d at 860-61; Syl. Pts. 6-8, *Smith v. Stacy*, *supra*.

For all of the foregoing reasons, Defendants/Respondents respectfully pray that Your Honorable Court deny the Plaintiff/Petitioner's appeal and affirm the Order of the Kanawha County Circuit Court dismissing Plaintiff's Complaint for being untimely and in violation of the applicable statute of limitations.

RESPECTFULLY SUBMITTED,

Richard A. Monahan, and
The Masters Law Firm lc,

By counsel



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

**CASE NO. 20-0532**

**CLAY R. HUPP, Individually,**

**Plaintiff,**

**v.** **(Civil Action No. 18-C-1265)**
**(Kanawha County Circuit Court)**

**RICHARD A. MONAHAN, and**
**THE MASTERS LAW FIRM LC,**

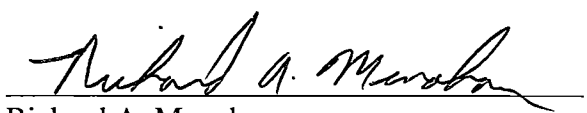
**Defendants.**

## CERTIFICATE OF SERVICE

I, Richard A. Monahan, counsel for Defendants, do hereby certify that a true and exact copy of the foregoing proposed "Respondents' Appeal Brief" was served upon the following:

Richard A. Robb, Esquire
Post Office Box 8747
South Charleston, West Virginia 25303
*Counsel for Plaintiff*

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail this 4th day of November, 2020.



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