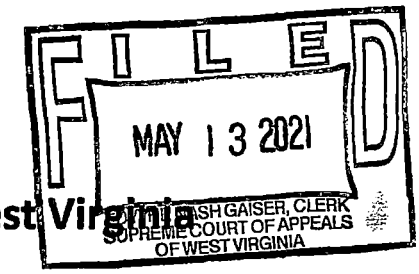

In the Supreme Court of Appeals of West Virginia

Docket No 21-0009

JAY M. POTTER,
Plaintiff Below, Petitioner

Appeal from a final order
of the Circuit Court of Kanawha
County (19-C-686)

Vs.)

BAILEY & SLOTNICK, PLLC, AND
CHARLES R. "CHUCK" BAILEY,
Defendants Below, Respondents

Petitioner's Brief

Petitioner, Jay M. Potter

Jay M. Potter (WV Bar # 2949)
600 Montei Drive
Earlysville, Virginia,
22936
304-941-2046
Jmp241968@gmail.com

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STATEMENT OF THE CASE

This is an appeal, by the Plaintiff below, requesting a de novo review of the granting of the Respondents' Motion to Dismiss all counts of a five-count Complaint in what is sometimes referred to as a truth-in-hiring case. See *Stewart v. Jackson & Nash, et al.*, 976 F.2d 86 (2nd Cir. 1992). That is basically the employment-law counterpart to a commercial-law bait-and-switch case. The plaintiff-employee claims that (1) he or she accepted employment based on promises by the employer; (2) when the employer made those promises, it intended not to keep them; (3) the employer subsequently did not keep them; and (4) the employee was damaged. The

gravamen of the claim is not the employer's failure to keep its promises (which failure might form the basis for a breach of contract action) but, rather, the employer's knowledge, when it made those promises, that it would not keep them. In this particular case, the reason that the Respondents did not intend to keep – and did not keep – their promises was the Petitioner's age. The Complaint's **fraud** count relates to the Respondents' lack of intention to keep the promises that they made to the Petitioner. The **breach-of-contract** count relates to the Respondents' subsequent failure to keep those promises. The three age-discrimination counts (**equal opportunity, prohibition against threats**, and **constructive discharge**) relate to the actions that the Respondents took in contravention of their promises and to the motivation underlying those actions.

Petitioner's First Period of Employment

The Petitioner is an attorney who practiced insurance defense law, with a concentration on toxic torts. The Respondents are the firm Bailey & Slotnick (which practices insurance defense law as Bailey & Wyant) and its managing member Charles R. "Chuck" Bailey. In 2012, the Petitioner and Mr. Bailey began discussing the possibility of the Petitioner joining Bailey & Slotnick (which will be referred to as "B&W"). (A.R. 6). The Petitioner's objective was to maintain his productivity as an attorney by obtaining new case referrals to augment the cases on which he was currently working. This was a necessary objective for him to have because the insurance carriers that had been retaining him to defend toxic tort cases for approximately 20 years had ceased writing environmental liability policies and were therefore uncertain sources of future case referrals. (A.R. 3). Mr. Bailey assured the Petitioner that joining B&W would enhance his career in general and, specifically, would enable him to obtain new cases. Mr. Bailey made those

assurances with such apparent sincerity that the Petitioner agreed to join B&W – and bring all his current toxic-tort cases with him – for a temporary four-month salary equal to the salary that he was already receiving at his current firm and without any agreement with Mr. Bailey as to what his compensation would be at the end of those four months. (A.R. 4).

The representations that Mr. Bailey made in order to induce the Petitioner to join B&W were false, in that the Respondents had no intention of doing anything to increase the Petitioner's case load. What they needed was an attorney to assist Mr. Bailey with his own case load. (A.R. 4).

Typically, when a job applicant desires something different than what a potential employer intends to provide, the latter simply does not hire the former. The Respondents here took the opposite approach. They misrepresented what they intended to provide to the Petitioner and then hired him. Specifically, they did not intend to increase the Petitioner's case load and intended, instead, that the only role that he would ever have at B&W was Mr. Bailey's assistant. They felt justified in doing this because – as they stated in the Motion to Dismiss that is the subject of this appeal – they viewed the Petitioner, who was age 65 at the time, as having had a legal career that was "undistinguished" (A.R. 47), "unsuccessful" (A.R. 51), and "unhappy". (A.R. 51). Furthermore, they considered the Petitioner to be "at the brink of retirement", in "the late stage of his professional life", and "writing the final chapter of his professional life." (A.R. 48). Their apparent reasoning was that, because the Petitioner's dismal legal career was essentially over, what little that was left of it might as well be expended in helping Mr. Bailey to further his career. Given that the Motion to Dismiss also described the Petitioner as having been

"uniquely subservient", Mr. Bailey apparently viewed the Petitioner as a servant with a law degree. (A.R. 47).

During the Petitioner's employment at B&W, he was characterized sometimes as an associate and other times as of counsel to the firm. As will be apparent from the discussion that follows, the Petitioner was actually nothing more than a contract attorney who was hired to work on two specific projects; and the expiration of his contract was the earlier of (1) the cessation of Mr. Bailey's need for his assistance on those two projects or (2) his retirement.

There were two factors – one professional and one financial – that made Mr. Bailey's need for the Petitioner's assistance so great that he was motivated to mislead the Petitioner in order to obtain that assistance. **Professionally:** Shortly before the Petitioner joined B&W, Mr. Bailey was retained to defend the West Virginia Department of Health and Human Resources in the case that evolved into *Taylor v. W.Va. Dep't of Health and Human Res.*, 788 S.E.2d 295 (W.Va. 2016). Mr. Bailey needed an experienced attorney to assist him with that case because his primary assistant had previously left the firm after an argument with Mr. Bailey (A.R. 4); and the Petitioner had recently defended the Department in an employment claim that had been handled by the same insurance claim representative who was handling Mr. Bailey's new case. **Financially:** Mr. Bailey's compensation arrangement at B&W included a provision under which the firm paid Mr. Bailey a portion of whatever income was generated by the work that attorneys other than Mr. Bailey performed on cases that were assigned to Mr. Bailey. (A.R. 9-10). Consequently it was financially advantageous for Mr. Bailey to have the Petitioner work as his assistant; and it would have been financially disadvantageous for Mr. Bailey to have kept his pre-hiring promise that

joining B&W would enable the Petitioner to obtain new cases of his own. This was because the Petitioner's work on his own cases would not have produced a financial subsidy for Mr. Bailey.

The magnitude of Mr. Bailey's desire to extract the maximum amount of personal financial benefit from the Petitioner during the "final chapter of his professional life" was revealed most clearly by the two situations discussed immediately below. The first was the firm's program to acquire more toxic tort cases; and the second was the Ormet case.

In 2014, B&W initiated a program that was intended to increase the number of toxic tort case referrals to attorneys in the firm. After this program was announced, the Petitioner requested to be included in it because he was the firm's most experienced toxic tort attorney. Having initially promised to include the Petitioner in the program, Mr. Bailey later excluded him from it; and the program was conducted by attorneys who were both younger and less experienced than the Petitioner. (A.R. 6). In other words, B&W initiated a program that was intended to produce new case referrals in the area of the law in which the Petitioner's background made him particularly likely to receive referrals; and Mr. Bailey excluded him from that program in order to reduce the risk that the Petitioner would have opportunities to work on cases other than Mr. Bailey's.

The Ormet case was the most significant of the toxic tort cases that the Petitioner brought with him to B&W. It consisted of three mass-joinder cases, with a total of over 600 plaintiffs, in the Circuit Court of Marshall County. The Plaintiffs' lead counsel was Bob Fitzsimmons; and the defendants consisted of multiple industrial facilities in the Upper Ohio Valley. The Petitioner represented Ormet Corporation, which operated what was once the fourth largest aluminum reduction plant in the United States. The Petitioner's work on that case was producing revenue

in excess of $350,000 annually. (A.R. 62). Unbeknownst to the Petitioner, after he brought the Ormet case to B&W, Mr. Bailey transferred it on the firm's books from the Petitioner to himself so that, under his compensation arrangement, he would be entitled to a portion of whatever revenue was generated by the Petitioner's work. (A.R. 9). Consequently, while the Petitioner was working on what he thought was his own case, he was actually working on another of Mr. Bailey's cases.

In summary, the Petitioner was hired in 2012 for the purpose of working on two projects, the *Taylor* case and the Ormet case, in order to maximize Mr. Bailey's personal income. The best indication of that purpose is the fact, which is discussed on page 11 below, that the point in 2017 at which Mr. Bailey first criticized the Petitioner's productivity – and subsequently threatened to terminate his employment as a result -- was only 20 days after B&W closed its file on the *Taylor* case and only 19 days after the Petitioner informed Mr. Bailey that the Ormet case was about the be closed. (A.R. 22, 23).

Petitioner's Second Period of Employment

During 2014, it became apparent to the Petitioner that Mr. Bailey would not keep the promises that he had made in order to induce the Petitioner to join B&W two years earlier; and the Petitioner left B&W for another firm. (A.R. 6). Two months later, Mr. Bailey induced the Plaintiff to return to B&W by making a seemingly heartfelt plea that his prior treatment of the Petitioner had been a "mistake" that he had made only because he had not "listened" to the Petitioner's objections to his lack of new case assignments. (A.R. 8). He explained that B&W needed his support in the continuation of its toxic tort business development program (from which he had previously been excluded); and he promised that the Petitioner would be provided

with the same opportunities that Mr. Bailey had provided to two other attorneys who eventually became firm shareholders. However after the Petitioner returned to B&W on the basis of those assurances, Mr. Bailey placed him back into the exact same role that he had occupied the first time around. (A.R. 12). He was again assigned to assist Mr. Bailey with the *Taylor* case; he was again excluded from the toxic-tort business development program (A.R. 13, 14); he was again assigned no new cases of his own; and his only new assignments consisted of assisting Mr. Bailey. (A.R. 12). One difference between the Petitioner's two periods of employment was that, while Mr. Bailey was attempting to induce the Petitioner to return to B&W in 2014, he proposed – of his own volition, not in response to a request from the Petitioner – that if the Petitioner were to return, his salary would not depend on his financial productivity. (A.R. 8). In 2015, after the Petitioner had been back at B&W for approximately a year, he began warning the firm that, as the cases that he had brought to the firm were being resolved, the revenue that he was generating was decreasing and that, because his salary was not a function of his productivity, he would eventually become unproductive unless he was assigned new cases of his own – as opposed to assisting Mr. Bailey exclusively (A.R. 16,17). The firm ignored the Petitioner's warnings until a January 19, 2017 meeting between the Petitioner and Mr. Bailey. (A.R. 20, 21). The *Taylor* case had been set for an April trial; and Mr. Bailey asked the Petitioner for assurance that he would continue assisting with that case. The Petitioner (1) expressed frustration that – contrary to Mr. Bailey's repeated representations that the Petitioner would be assigned new cases – he had continued to be utilized as nothing more than an assistant to Mr. Bailey; and (2) reiterated his warnings that the revenue that he was generating would continue to decrease until cases were assigned to him. Mr. Bailey – who had not mentioned the issue of the Petitioner's

productivity since his 2014 representation that the Petitioner's salary would be unrelated to it – assured the Petitioner that he was not concerned about the Petitioner's productivity. He added that there were "other shareholders" who did have such concerns but that they had indicated to Mr. Bailey that those concerns would cease if the Petitioner agreed to continue assisting Mr. Bailey with the *Taylor* case. (A.R. 20). On February 1, 2017, the Petitioner sent an e-mail to Mr. Bailey and two other shareholders agreeing to continue assisting Mr. Bailey with the *Taylor* case and requesting that, if anyone had concerns about the Petitioner's productivity, he should communicate those concerns to the Petitioner. (A.R. 20, 21). The Petitioner never received any responses to that e-mail.

Mr. Bailey's September 2014 representation that the Petitioner's salary would not depend on his productivity and his January 2017 representation that he was unconcerned about the Petitioner's productivity were both false. On July 13, 2017 (which was only 20 days after B&W closed its file on the *Taylor* case and only 19 days after the Petitioner informed Mr. Bailey that the Ormet case was about to be closed) Mr. Bailey sent the Petitioner an after-working-hours e-mail informing him that "the shareholders" actually had been concerned about the Petitioner's productivity since at least 2016 and that, as a result of this concern, they had decided that the Petitioner's salary would cease at the end of the following week (i.e. only eight days later). (A.R. 23). B&W was aware, when it made that decision, that the Petitioner was in his second month of screening for cancer attributable to exposure to the herbicide Agent Orange while serving in the U.S. Navy on the inland waterways of the Republic of Vietnam. (A.R. 21).

Mr. Bailey's e-mail explained that the new arrangement that was being offered to the Petitioner would be for a five-month period ending December 31, 2017, would be governed by a

written agreement that Mr. Bailey would provide to the Petitioner for his review and that would reflect the same employment arrangement that Mr. Bailey had negotiated with another attorney whose "work generation is very limited". (A.R. 23). That attorney was Trigg Salsbery. On July 14, 2017, the Petitioner sent Mr. Bailey an e-mail response reminding him of the 2014 agreement that his salary would not be related to his productivity, observing that Mr. Salsbery was the only other attorney at the firm who was close to the Petitioner in age, objecting to being placed in the same organizational role that Mr. Salsbery occupied, and asking what would happen if the Petitioner did not accept the terms of his e-mail. (A.R. 24. 25). Shortly thereafter, Mr. Bailey came to the Petitioner's office. He did not comment on the salary-agreement issue or on the age issue and simply informed the Petitioner that his employment would be terminated at the end of the month if he did not agree to the terms of the e-mail. (A.R. 25).

The Petitioner initially declined to accept the terms of Mr. Bailey's e-mail; however on July 19, 2017 he was diagnosed with the cancer for which he was being screened and accepted those terms in order to preserve his medical insurance during his cancer treatments. B&W never provided the Petitioner with the written employment agreement that Mr. Bailey had promised, which was significant because Mr. Bailey's e-mail had not addressed the issue of what business-development support the Petitioner could expect from the firm. (A.R. 25). The firm simply ended the Petitioner's salary at the end of the month and basically forgot about him. The petitioner underwent cancer surgery, obtained his own medical insurance because of the uncertainty of his employment situation, applied to the U.S. Department of Veterans Affairs for service-connected disability, and subsequently was awarded a 100% disability rating effective January 25, 2018. (A.R. 26).

On January 31, 2018, the Petitioner met, at his request, with Mr. Bailey and two other shareholders in order to ascertain what his role at B&W was – and in the future would be – considering that the arrangement discussed in Mr. Bailey's July 13, 2017 e-mail had expired a month earlier. (A.R. 27). Mr. Bailey showed no interest in discussing the subject of the Petitioner's role at the firm – other than to criticize him for having not "stepped up to the plate" to provide Mr. Bailey with enough assistance with the *Taylor* case – and seemed intensely irritated that the Petitioner was presumptuous enough even to request a discussion of his role at the firm. (A.R. 28). The Petitioner remained at B&W until the end of 2018. During that period, work assignments that he had previously received, or would have expected to receive, were given to younger attorneys; and the only new work assignment that he received was assisting one of the other shareholders with one of his cases. (A.R. 28). After the Petitioner had worked on that assignment for nine months without receiving any payment or information about the employment arrangement under which he was working, the Respondents offered to pay him retroactively at the rate of $35 per hour. (A.R. 29).

Respondents' Motion to Dismiss

The Petitioner filed this action on July 11, 2019; and on Monday August 12, 2019, the Respondents filed the Motion to Dismiss (A.R. 47-59) that is the subject of this appeal. All of the Thirteenth Circuit (i.e. Kanawha County) judges disqualified themselves because of the relationship that each of them had with Mr. Bailey. This Court specially assigned the case to Judge Chiles of the Sixth Circuit (i.e. Cabell County), who – as discussed more fully below – dismissed each of the Complaint's five counts via the December 10, 2020 entry of Findings of

Fact, Conclusions of Law, and Order Granting Defendants' Motion to Dismiss ("Dismissal Order") that had been proposed by the Respondents. (A.R. 180-191).

The Motion to Dismiss that the Respondents filed was unusual in four respects. **First**, it was not drafted by the Respondents' counsel Mike Farrell but, rather, by the defendant Mr. Bailey himself. **Second**, Mr. Bailey did not cite any judicial precedents in support of his arguments that the Complaint failed to state causes of action. **Third**, Mr. Bailey began his Motion with a "preface" that consisted of an elaborate factual scenario that he had constructed for the purpose of explaining why the Respondents' actions regarding the Petitioner had been completely justified and should never have been the subject of a lawsuit. (A.R. 47). One reason was that, when B&W hired the Petitioner, he was "at the brink of retirement", in "the late stage of his professional life", and "writing the final chapter of his professional life." (A.R. 48). That was an unorthodox position for Mr. Bailey to take, considering that three of the Complaint's five counts alleged age discrimination. **Fourth** – and most significantly – Mr. Bailey's explanatory scenario was an almost-total factual fabrication. It consisted of a mixture of psychological observations that Mr. Bailey made and descriptions of events that had never occurred and that Mr. Bailey knew had never occurred because he had been involved in the events that actually had occurred. This resulted in an inexplicable (at least in the Petitioner's view) situation in which (1) the Petitioner filed suit claiming that Mr. Bailey had made multiple false representations to him; and (2) Mr. Bailey's immediate reaction was to make multiple false representations to the court.

According to Mr. Bailey's "preface", this litigation did not result from any improper action by the Respondents. In his view, the Petitioner should have "properly thanked (Mr. Bailey and the firm) for their generosity and the opportunity to earn a living." (A.R. 51). The actual root cause

of this unfair litigation was the Petitioner's military service. The lawsuit was the result of the Petitioner's need to perform a "cathartic review" of his combat experiences in Viet Nam (A.R. 47); and the reason that the Petitioner had been dissatisfied with the role that Mr. Bailey had chosen for him at B&W was the education that he had received at the U.S. Naval Academy, which gave him an overinflated view of what his role at the firm should be. (A.R. 48). The Petitioner had the "fantasy" of "completing his legal career as a 'leader' when he had minimal experience as a legal leader." (A.R. 50).

Mr. Bailey's preface characterized the Petitioner's desire to be assigned new cases as a "mission impossible scenario" (A.R. 48) and explained that characterization at some length. The Petitioner's legal career was one in which "ninety-nine percent of his work life" had been spent assisting other attorneys. (A.R. 47). The only legal area in which he had significant experience was toxic torts; and B&W did not need him to do that kind of work because it was already being done by other attorneys. (A.R 51). The Respondents did their best to make the Petitioner professionally useful by attempting to broaden his legal expertise beyond the area of toxic torts; however because of his Academy-induced feeling of importance, the Petitioner "declined opportunities to work with other attorneys on non-toxic tort environmental law matters." (A.R. 49). The Respondents made "offers of new cases . . .in different disciplines" that would have enabled the Petitioner to "learn a new skill set or discipline" (A.R. 47, 48); however the Petitioner "refused those offers" because they were "outside the realm of environmental law and toxic torts." (A.R. 55). As a result, B&W's only realistic option was to assign the Petitioner to work "supporting Mr. Bailey" and providing "associate services to Mr. Bailey's clients." (A.R. 49).

The preceding representations that Mr. Bailey made to the circuit court were remarkable for two reasons. First, the disparaging representations that Mr. Bailey made in relation to the Petitioner's professional competence were totally irrelevant because, at the motion-to-dismiss stage, the only issue is the legal sufficiency of the complaint. Second, and as will be discussed immediately below, those representations were completely false.

Mr. Bailey's psychological foray into the Petitioner's military background exemplifies the meaningless result that can occur when people opine on subjects in which they have no experience. The factual scenario that Mr. Bailey constructed around the theme of the Petitioner having steadfastly refused to work on any case that did not involve toxic torts is a total fabrication. During the Petitioner's six years at B&W, he assisted Mr. Bailey with a number of his cases; and not one of those cases did involve toxic torts, all of which work was referred to the firm's younger attorneys. In other words, Mr. Bailey represented to the court that the Petitioner was never willing to do the exact type of work that he actually did do – for a full six years. Furthermore, the Petitioner had not spent ninety-nine percent of his work life assisting other attorneys; and he was experienced in litigation areas other than toxic torts. Mr. Bailey was fully aware of that because it had been reflected in the press release that B&W issued when the Petitioner joined the firm in 2012. According to that release – which Mr. Bailey personally approved – the Petitioner had "more than 20 years of experience defending environmental, product liability, commercial and medical negligence claims." During the Petitioner's six years at B&W, there were never any discussions of the Petitioner needing to be trained in any areas of the law in order to develop any "new skill set or discipline" or for any other reason; and no other attorneys ever offered to provide any sort of training to the Petitioner.

If, as Mr. Bailey represented, the Petitioner was a professional embarrassment to the firm, Mr. Bailey certainly would not have asked the Petitioner to return to the firm in 2014 after he had previously left the firm. And if, as Mr. Bailey also represented, the Petitioner was such an inexperienced and grossly incompetent attorney that assigning cases to him would have violated the "fiduciary capacity" that B&W had to its clients and would have not been "consistent with the Rules of Professional Conduct" (A.R. 48), B&W would certainly not – as they actually did – bill for the Petitioner's work at the same hourly rates as it billed for Mr. Bailey's own work.

Mr. Bailey's efforts to involve the Petitioner in his cases had nothing to do with benefiting the Petitioner professionally. Mr. Bailey assigned the Petitioner exclusively to assist him with his cases because Mr. Bailey's own income was increased by every hour that the Petitioner worked on cases that <u>were</u> assigned to Mr. Bailey, as opposed to cases that <u>were not</u> assigned to Mr. Bailey. There was not a single instance in which the Petitioner did not work on a case on which Mr. Bailey requested that he work; and none of those cases on which he did work involved toxic torts.

The point of the preceding five paragraphs is that Mr. Bailey took the same untruthful approach with the court in 2019 as he took with the Petitioner between 2014 and 2018. Having misrepresented to the Petitioner the kind of future that he would have at B&W, Mr. Bailey misrepresented to the court the kind of future that the Petitioner ended up having at B&W.

<u>Proceedings Regarding the Motion to Dismiss</u>

On August 27, 2019, the Petitioner filed Plaintiff's Response to Defendants' Motions to Dismiss, which invited the court's attention to, among other things, the extent of the false representations that were contained in the Motion. (A.R. 60-90). The Respondents subsequently

served the Petitioner with discovery requests that required him to substantiate the allegations contained in his Response. The Petitioner provided that substantiation in discovery responses served on February 21, 2020. After that, the Respondents' counsel adopted the strategy of distancing themselves and their clients from the very Motion that they desired to have granted. In other words, they wanted to obtain a dismissal of the Petitioner's claims; however they realized that the Motion to Dismiss that Mr. Bailey had drafted and that they – for reasons that remain unclear to the Petitioner – had filed was not the best vehicle for accomplishing this. Their avoidance strategy consisted of the following **four stages**.

First, the Respondents did nothing to advance their August 2019 Motion to Dismiss until August 2020, when the court set the case for an August 2021 trial; and the Petitioner pointed out that his July 2019 Complaint had never been answered. At that point, the court had the Respondents schedule their Motion for a September 2020 hearing; and the Petitioner continued waiting for a Reply to his August 2019 Response to the Motion.

Second, instead of ever filing a Reply to the Petitioner's Response to the Motion to Dismiss, nine days before the hearing on that Motion, the Respondents filed a document that was titled Memorandum of Law in Support of Defendants' Motion to Dismiss (A.R. 91-112) but that was, for all intents and purposes, an entirely new motion to dismiss that was designed to bury procedurally Mr. Bailey's Motion and the preface included in it.

Third, during the September 10, 2020 Motion hearing (A.R. 113-148), the Respondents totally ignored their original Motion and directed minimal attention to their Memorandum of Law that was ostensibly "in support" of that Motion. Instead, they took what the Petitioner would characterize as a collegial all-of-us-here-are-lawyers type of approach with the court. Mr.

Farrell's argument on behalf of the Respondents portrayed the litigation as having resulted from a problem with which all lawyers are familiar – the ubiquitous unproductive associate. He seemed genuinely troubled by the fact that the Petitioner, whom he viewed as a "friend" had, regrettably, ended up in that category. In the spirit of legal-community collegiality, Mr. Farrell reminded Judge Chiles that his brother Paul Farrell was also a Sixth Circuit judge. The essence of the Respondents' arguments was that the concept of associate-lawyer productivity is so sacrosanct within the legal profession that, in relation to employment-related claims, the judiciary should afford lesser weight to the claims from that particular subset of employee-plaintiffs than it would to the claims from other, more worthy, subsets of employee-plaintiffs.

The fundamental problem with the Respondents' "unproductive associate" argument – other than it being a summary-judgment argument, not a motion-to-dismiss argument – is that the Petitioner was never viewed as an associate who, if productive, would have a long-term future at the firm. As discussed above, the Petitioner was viewed as nothing more than a temporary contract attorney who was "at the brink of retirement", in "the late stage of his professional life", and "writing the final chapter of his professional life." He was hired to function as Mr. Bailey's own personal cash cow on two specific projects; and Mr. Bailey said and did whatever was necessary to ensure that the Petitioner's role never expanded beyond that.

Fourth, at the conclusion of the hearing, the court ordered the parties to submit proposed findings of fact and conclusions of law. The crux of this appeal is what happened next. Proposed findings and conclusions were submitted by both the Respondents (A.R. 149-160) and the Petitioner (A.R. 161-173). Subsequently the Petitioner filed Plaintiff's Objection to Entry of Order (A.R. 174-179). The Objection pointed out (1) extent to which, throughout the

proceedings, the Respondents had made what amounted to fact-based arguments that might be appropriate at the summary-judgment stage but were improper at the motion-to-dismiss stage and (2) the extent to which the Respondents' proposed findings and conclusions neither completely nor accurately reflected the factual allegations in the Complaint. The court disregarded the Petitioner's proposed findings and conclusions and his Objection and (1) adopted verbatim the facts that the Respondents had proposed, (2) also adopted verbatim the conclusions that the Respondents had proposed, and (3) based on those conclusions, dismissed every count in the Complaint. (A.R. 180-191).

In summary, the Respondents achieved a dismissal of the Petitioner's Complaint by (1) submitting to the circuit court a Motion to Dismiss that was so flawed that it had no proper place in any court file, (2) advocating for the granting of that Motion via arguments other than those that were contained in the Motion, and (3) submitting to the circuit court an order that proposed to dismiss the Complaint but that neither completely nor accurately addressed the allegations that were contained in the Complaint.

SUMMARY OF ARGUMENT

The circuit court's December 10, 2020 dismissal of every single count in the Petitioner's five-count Complaint, via its entry of the Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion to Dismiss ("Dismissal Order") that had been proposed by the Respondents, was erroneous because it was not in accordance with the standards for granting motions to dismiss pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure.* The fundamental flaw in the process that the court used in its evaluation of the Complaint is discussed below.

RCP 12(b)(6) provides for the dismissal of complaints that fail to "state" a claim. Motions to dismiss for failure to state a claim are "viewed with disfavor." *Chapman v. Kane Transfer Company*, 236 S.E.2d 207, 212 (W.Va. 1977). Consequently a court "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Company*, 236 S.E.2d 207 (W.Va. 1977). In performing that analysis, the court should construe the complaint "in the light most favorable to plaintiff." 236 S.E.2d at 212. The "allegations in the complaint must be taken as true." Syl. Pt. 1, *Wiggins v. Eastern Associated Coal Corp.*, 357 S.E.2d 745 (W.Va. 1987). And "the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings." *Malone v, Potomac Highlands Airport Authority*, 786 S.E.2d 594, 600 (W.Va. 2015).

Based on the preceding criteria for evaluating a complaint at the motion-to-dismiss stage, the Petitioner suggests that the circuit court was required to evaluate his Complaint via the following four-stage process: (1) Examine, in the "light most favorable to" the Petitioner, the allegations in the Complaint, (2) give the Petitioner the "benefit" of all the inferences that could be drawn from those allegations, (3) decide whether, if the Petitioner were to prove the alleged and inferred facts, he might be legally entitled to damages, and (4) deny the Motion to Dismiss unless it appeared "beyond doubt" that the Petitioner would not be entitled to damages.

The fundamental procedural flaw in the circuit court's evaluation of the Complaint was its request, at the conclusion of the hearing on the Motion to Dismiss, that the parties submit proposed findings of fact. Because a motion to dismiss was before the court, the "facts" had already been "found". Those facts consisted of (1) the primary facts that were alleged in the

Complaint and which had to be construed "in the light most favorable to" the Petitioner and (2) secondary facts that could be inferred – but only for the "benefit" of the Petitioner – from the primary facts.

It was theoretically possible that the Respondents would propose findings of fact that were skewed in favor of the Petitioner – as facts are required to be at the motion-to-dismiss stage – however that was highly unlikely because litigants do not generally skew facts in favor of opposing parties. In this instance, the Respondents acted as litigants typically do. They (1) excluded from their proposed findings allegations in the Complaint that supported a denial of their Motion, (2) altered allegations that they did include in ways that were unfavorable to the Petitioner, and (3) drew only inferences that were favorable to them and unfavorable to the Petitioner.

The Petitioner has no way of knowing the analytical process via which the circuit court determined that the facts which the Respondents had proposed supported completely the conclusions of law that the Respondents had proposed. Perhaps the court did consider those proposed facts "in the light most favorable" to the Petitioner. However the Petitioner suggests that even a correct analytical process will never produce a correct result if the facts being analyzed are not the facts that should be analyzed. In other words, once the court adopted the pro-Defendants facts that the Respondents had proposed, it became procedurally impossible for the court to adopt conclusions of law that were <u>not</u> erroneous. This was a situation that the computer science community would refer to as GIGO. That acronym, which stands for "garbage in, garbage out", refers to the concept that if input to a computer system is erroneous, the output from the system will also be erroneous. In our judicial-system situation, the Respondents'

findings-of-fact input to the court was, under the standards applicable to motions to dismiss, erroneous; and the court's decision to process that input – while completely disregarding the Petitioner's counterpart input – resulted in an erroneous output in the form of the dismissal of the Petitioner's Complaint.

One particularly troubling aspect of the approach that the Respondents took in their proposed Dismissal Order is its similarity to a 2016 situation in which the Respondents were admonished by this Court for having tendered – on behalf of their clients – to a Kanawha County circuit judge an "overreaching" and "heavily partisan" proposed summary-judgment order that consisted "entirely of their version of the disputed facts" and contained conclusions of law that were "little more than one-sided rhetorical diatribes." *Taylor v. W.Va. Dep't of Health & Human Res.*, 788 S.E.2d 295, 304 (W.Va. 2016). Three years later in this case, the Respondents had their counsel take the same approach – except that this time it was augmented by the inclusion of actual factual fabrications.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that each of the seven arguments that follow fits within the Rule 19 oral argument criteria; however he believes that this appeal should be scheduled for a Rule 20 oral argument in order to address adequately the overriding issue discussed above in the Summary of Argument. That is the circuit court's utilization of proposed findings of fact to enable a non-movant to circumvent the pro-movant focus that courts are required to apply when considering a motion to dismiss. In other words, the court dealt with the Respondents' Motion to Dismiss as if it were a strange kind of motion for summary judgment that could be filed and ruled upon in advance of discovery. Because such an approach prematurely deprives plaintiffs

of meaningful access to the courts, the Petitioner considers it be an issue of "fundamental public importance."

ARGUMENTS

1. THE CIRCUIT COURT ERRED IN DISMISSING THE FRAUD CLAIM IN COUNT I OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count I ((A.R. 30-34) of the Complaint failed to state all of the essential elements of a fraud claim. Nor did the court conclude that the claim was not stated with sufficient specificity, which is a requirement for fraud claims. Instead, it based its dismissal on conclusions that the Petitioner would not be able to (1) prove that the claim was filed within the two-year statute of limitations and (2) prove that the claim was based on more than a promise that was not performed.

Statute of Limitations Issue

This is a prime example of the concept, which is discussed above in the Summary of Argument, of the court reaching a conclusion that is erroneous because it is based on factual findings that differ from the factual allegations of the Complaint.

Conclusion of Law 26 (A.R. 185) states that the Petitioner should have realized, on a succession of dates leading up to January 19, 2017, that Mr. Bailey had no intention of keeping the promises that he made to the Respondent. That Conclusion was based on Finding of Fact 14 (A.R. 183), which described the January 19, 2017 meeting between Mr. Bailey and the Petitioner only as one in which the Petitioner "acknowledged and confirmed" that the Respondents "should be concerned about the continuing diminution of his financial productivity." Omitted from that Finding were the allegations in Complaint paragraphs 61-63 (A.R. 20-21) that, during the meeting,

Mr. Bailey assured the Petitioner that he had no concerns about the Petitioner's productivity and that the Petitioner followed up that assurance with an e-mail confirming his reliance on it.

One of the most significant of the multiple promises that Mr. Bailey made to the Petitioner was that, if he returned to B&W in 2014, he would be paid his salary regardless of his level of productivity. It was not "beyond doubt" unreasonable for the Petitioner to believe that, when Mr. Bailey no longer needed the Petitioner to focus primarily on assisting him with the *Taylor* case, attention would finally be directed toward the expressions of concern that the Petitioner had begun making about his productivity in 2015. It was also not "beyond doubt" unreasonable for the Petitioner to believe that, when this point arrived, the firm would address the productively issue by beginning to assign cases to the Petitioner because, if the firm had done that in the first place, the productivity issue would never have arisen.

The basic premise underlying the Respondents' statute-of-limitations argument is that the Petitioner should have realized sooner than he did the extent to which one should not rely upon statements that Mr. Bailey makes. Making that inference is contrary to the *Malone* ruling that, at the motion-to-dismiss stage, "the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings." *Malone v, Potomac Highlands Airport Authority*, 786 S.E.2d 594, 600 (W.Va. 2015). Furthermore, when this situation is viewed "in the light most favorable" to the Petitioner – as *Chapman v. Kane Transfer Company*, 236 S.E.2d 207, 212 (W.Va. 1977) requires it to be at the motion-to-dismiss stage -- the earliest point at which the Petitioner might possibly have realized that the firm would never assign cases to him was on July 14, 2017, when Mr. Bailey gave the Petitioner the choice of either having his salary terminated or having his overall employment terminated. That was the point at which it appeared that the firm was

unlikely to address the productivity issue by keeping Mr. Bailey's promise that cases would be assigned to the Petitioner but, rather, by breaching Mr. Bailey's promise that the Petitioner's salary would not depend on his productivity. That was also the point at which the Petitioner was damaged; and without damage, there is no claim.

Promise-Not-Performed Issue

The circuit court also based its dismissal of Count I on the theory, stated in Conclusion of Law 27 (A.R. 186), that a fraud claim must include "a false assertion regarding some existing matter" and cannot be based solely on "a promise not performed." That is a correct statement of West Virginia law; however it does not support the dismissal of the Petitioner's fraud claim. The "existing matter" that is the sine qua non of a fraud claim is the promisor's intent, when he or she makes the promise, not to keep the promise. If a person intends to keep a promise that he or she makes but subsequently fails to keep the promise, that failure might support a breach-of-contract claim; however it will not support a fraud claim. The Complaint contains multiple specifically pled allegations that Mr. Bailey made promises that he did not intend to keep. Furthermore, not all of the false assurances that Mr. Bailey made to the Petitioner related to future events. His 2014 assurance that his previous failure to assign cases to the Petitioner had been a "mistake" (A.R. 9-10), his 2015 assurance that the Petitioner "should have been included" in that year's toxic tort business development program (A.R. 14), and his 2017 assurance that he had no concerns about the Petitioner's productivity (A.R. 20) all related to a present – not a future – matter, that being Mr. Bailey's state of mind.

2. THE CIRCUIT COURT ERRED IN DISMISSING THE CONTRACT CLAIM IN COUNT II OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count II (A.R. 34-37) of the Complaint failed to state all of the essential elements of a breach-of-contract claim. Instead, the court based its dismissal on the conclusions that the Petitioner failed to prove that (1) he was not an at-will employee; and (2) he had not waived whatever contractual claims that he might have had.

Employee-At-Will Issue

Conclusion of Law 29 (A.R. 187) states that the Petitioner's contract claim is "foreclosed as a matter of law because (he) was nothing more than an employee-at-will" and attributes the Petitioner's status to the fact that he had neither a contrary written agreement nor an oral agreement specifying that his employment would be of a specific duration.

The preceding theory would be applicable to a situation in which an employer that considers an employee to be an at-will employee terminates his or her employment; and the former employee contests the termination on the basis of an agreement that caused an "alteration" of that at-will status. In other words, it is an analysis that determines whether, at the time an employee's employment is terminated, the employee was, or was not, an at-will employee.

In Conclusion 29 (A.R. 187), the court erroneously expanded the applicability of the "ascertainable duration" theory and misapplied it to the situation here, in which neither termination of employment nor duration of employment is an issue. The essence of the Conclusion is that no agreement of any type between an employer and an employee can be

legally valid unless there is already an agreement regarding the duration of the employee's employment. That Conclusion is not supported by any legal authority. Phrased more simply, the fact that an employee is an at-will employee does not mean that there can be no enforceable agreement of any type between that employee and the employer.

Waiver Issue

The circuit court also based its dismissal of Count II on the theory, stated in Conclusion of Law 30 (A.R.187-188), that the Petitioner "waived his rights" under any agreement that he did have with the Respondents by continuing his employment, which continuation was "inconsistent" with his reliance on the agreements.

The court's "waiver" conclusion is erroneous because the doctrine of waiver is an affirmative defense that a defendant can assert in its answer to a complaint. There is no legal authority supportive of a defendant's use of that doctrine, at the motion-to-dismiss stage, to avoid answering a complaint. At the motion-to-dismiss stage, *Wiggins v. Eastern Associated Coal Corp.*, 357 S.E.2d 745 (W.Va. 1987) requires that all allegations in the Complaint must be "taken as true"; and the Petitioner's Complaint does allege that he relied on the Respondents' agreements with him. Furthermore, the court's inference, from the Petitioner's continued employment, that there was no reliance is diametrically opposed to the *Malone v, Potomac Highlands Airport Authority*, 786 S.E.2d 594, 600 (W.Va. 2015) requirement that the Petitioner "enjoys the benefit of all inferences" that can be drawn from the Complaint.

3. THE CIRCUIT COURT ERRED IN DISMISSING THE CONTRACT CLAIM, AS TO THE INDIVIDUAL RESPONDENT, IN COUNT II OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count II (A.R. 34-37) of the Complaint failed to state all of the essential elements of a breach-of-contract claim against Mr. Bailey. Instead, the court's Conclusion of Law 28 (A.R. 186-187) based its dismissal on the theory that the Petitioner had failed to prove the existence of any "agreement involving Mr. Bailey as an individual."

This is another example of the concept, which is discussed above in the Summary of Argument, of the court reaching a conclusion that is erroneous because it is based on factual findings that differ from the factual allegations of the Complaint. There are no agreements involving Mr. Bailey as an individual contained in the court's Findings of Fact; however there are multiple such agreements contained in the Complaint. The Respondents simply chose not to include those agreements in their proposed Findings.

Mr. Bailey was not named as a Defendant because he happened to be the managing member of B&W. He was named because he personally made statements that he knew were untrue, which statements included promises that he personally would take certain actions which he later failed to take. Those false statements began in 2014 when, as discussed above on page 9, he assured the Petitioner that his previous failure to assign cases to the Petitioner had been a "mistake" that he had made only because he had not "listened" to the Petitioner's objections to his lack of new case assignments. Subsequent false statement included promises in 2015 regarding the toxic tort business development program, as discussed below on page 32, and the

promise in 2016 to begin assigning cases to the Petitioner (A.R. 19). They continued into 2017 when, as discussed above on pages 10 and 11, Mr. Bailey, who had not assigned a single case to the Petitioner during the prior three years, stated that the Petitioner's resultant lack of productivity did not concern him.

The Respondents' continued advocation of this theory is troubling because they know that it is bogus. In the Motion to Dismiss that Mr. Bailey drafted, one of the reasons that he gave for having not assigned cases to the Petitioner was that the assignment of cases was not his role but, rather, the role of the insurer claim representatives. (A.R. 54). The Petitioner responded by producing, via discovery, e-mails in which Mr. Bailey promised that he himself would assign cases to the Petitioner. Undeterred, the Respondents proposed that the court dismiss this count, as to Mr. Bailey, for lack of proof of his personal involvement even though they had already been provided with that proof.

4. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION EQUAL OPPORTUNITY CLAIM IN COUNT III OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count III (A.R. 37-40) of the Complaint failed to state all of the essential elements of an age discrimination equal opportunity claim. Instead, it based its dismissal on the conclusion that the Petitioner would not be able to prove that any of the Respondents' actions regarding the Petitioner had been discriminatory.

According to Conclusions of Law 33 and 34 (A.R. 188-190), the Petitioner failed to "allege sufficient facts" to establish that B&W took "actionable adverse action" against him. The court

cited five "acts alleged in the Complaint" that supposedly did not fit within that category and opined that allowing the Petitioner to "maintain an age discrimination suit against his employer based on these facts would create a dangerous precedent."

The court's approach to the adverse-action issue is another example of it reaching conclusions that are erroneous because they are not based on the Complaint itself but, rather, only on the abbreviated version of the Complaint that was contained in the Findings of Fact that the Respondents proposed and that the court adopted verbatim. The "five acts" cited in Conclusions 33 and 34 are not the only discriminatory acts alleged in the Complaint. They are not even the most significant such acts. They are merely the only such acts that the Respondents chose to reference in their proposed Conclusions.

The primary basis for the Petitioner's age-discrimination claims is the "geriatric" career plan that Mr. Bailey had for him. That plan is summarized in Complaint Paragraphs 32 and 33 (A.R. 11), Paragraph 95 (A.R. 31) and Paragraph 117 (A.R. 38). The eleven steps that Mr. Bailey took to implement that plan are discussed in Complaint Paragraph 96 (A.R. 31-32). That plan is the reason why the Petitioner was not afforded "the same opportunities that (B&W) was affording to its younger attorneys." (A.R. 11). Basically, Mr. Bailey was pleased with Trigg Salsbery's role at the firm. He was an experienced attorney who was available to assist Mr. Bailey; and his presence cost the firm nothing. Because Mr. Bailey viewed Mr. Salsbery and the Petitioner primarily in terms of their ages, he decided that the appropriate long-term role for the Petitioner to have was the same role that Mr. Salsbery already had.

One of the primary examples of the Respondents' discriminatory acts involved the Petitioner's exclusion from B&W's toxic tort business development program. That is the fourth

of the eleven steps in the discriminatory career plan discussed in Complaint Paragraph 96 (A.R. 31-32). Mr. Bailey promised to include the Petitioner in the 2014 program but excluded him from it (A.R. 6). Later that year, Mr. Bailey induced the Petitioner to return to the firm by representing that he would have the opportunity to participate in the 2015 continuation of the program (A.R. 8) but, again, excluded him from it (A.R. 38-40) and later represented – as he had the previous year – that the Petitioner "should have been included" in the program. (A.R. 14). The court's abbreviated version of the preceding scenario, which is contained in its Finding of Fact 7 (A.R. 181-182), describes the scenario only as one in which the Petitioner because aware of the 2015 program after it had ended and "complained to Mr. Bailey" that he had been excluded from it. That summary contains no reference to any of the multiple promises that Mr. Bailey made to the Petitioner regarding his involvement in the program or to the fact that all of the attorneys who were included in it were substantially younger, and less experienced, than the Petitioner.

To reiterate the point that the Petitioner made above in the Summary of Argument, *Chapman v. Kane Transfer Company*, 236 S.E.2d 207, 212 (W.Va. 1977) states that a court considering a motion to dismiss "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This "beyond doubt" requirement means that a court should make an effort to identify, within a complaint, facts that support the claims in the complaint and only dismiss the complaint if no such facts are present or can be inferred from the facts that are present. The court here dismissed the Complaint because it concluded that no such facts were present. However the reason that no such facts were "present" at the conclusion-of-law stage is that the Respondents removed or altered those facts at the findings-of-fact stage.

5. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION EQUAL OPPORTUNITY CLAIM, AS TO THE INDIVIDUAL RESPONDENT, IN COUNT III OF THE COMPLAINT.

The circuit court's dismissal of the Count III (A.R. 37-40) age discrimination equal opportunity claim against Mr. Bailey is the only dismissal that was based on the theory that the Petitioner had failed to state a claim – as opposed to being unable to prove a correctly stated claim. The dismissal was based on the Conclusion of Law 32 (A.R. 188) reasoning that (1) the statutory basis, under the West Virginia Human Rights Act, for Count III is W.Va. Code § 5-11-9(1); (2) that statute prohibits discrimination by an "employer"; (3) Mr. Bailey was not the Petitioner's employer because, within the definition section of the WVHRA, W.Va. Code §§ 5-11-3(a) and (d) provide that an individual can be an "employer" only if he or she actually employs workers; and (4) the Petitioner was employed by B&W (i.e. B&S), not by Mr. Bailey.

The court concluded that the case of *Holstein v. Norandex, Inc., and Michael Counts*, 461 S.E. 2d 473 (W.Va. 1995) does not apply to this case because it involved a claim against a fellow employee under W.Va. Code § 5-11-9-(7)(A) (i.e. a "person' or "employer" conspiring with others to discriminate) whereas the Count III claim against Mr. Bailey is a claim under W.Va. Code § 5-11-9(1) (i.e. an "employer" discriminating). In other words, under Article 11, Section 9 an employer can be liable for discriminating or for conspiring to discriminate; however a non-employer can only be liable for conspiring to discriminate. As discussed below, the court's statutory analysis is technically correct; however its resultant conclusion, that *Holstein* is inapplicable, is incorrect.

Holstein stands for the proposition that "a cause of action may be maintained by a plaintiff employee as against another employee under the West Virginia Human Rights Act." Syl. Pt. 4, *Holstein v. Norandex, Inc., and Michael Counts*, 461 S.E. 2d 473 (W.Va. 1995). The *Holstein* court noted that this ruling is consistent with the non-WVHRA "existing law" that "both an agent and his principal are liable for the agent's wrongful acts committed in furtherance of the principal's business." 461 S.E. 2d at 477. It also noted that if the "term 'person,' as defined and utilized within the contest of the" WVHRA, did not include "both employees and employers", that might have the effect of "barring suits by employees against their supervisors"; and such a bar would be "contrary to the very spirit and purpose" of the WVHRA. Syl. Pt. 4, *Holstein v. Norandex, Inc., and Michael Counts*, 461 S.E. 2d 473 (W.Va. 1995).

In summary, the Count III Article 11, Section 9 claim against Mr. Bailey is viable under *Holstein* because, although that case did involve Article 11, Section 9 claims, its ruling was not limited to any specific claims within that section. It applied, at the Article 11, Section 3 definitional level, to the entire WVHRA.

6. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION THREAT-OF-ECONOMIC-LOSS CLAIM IN COUNT IV OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count IV (A.R. 41-44) of the Complaint failed to state all of the statutorily required elements of an age discrimination threat-of-economic-loss claim. Instead, it based its Conclusions of Law 35 and 36 (A.R. 190) dismissal on the reasoning that the Petitioner would not be able to prove that Mr. Bailey's July 14, 2017 statement (i.e., that the Petitioner's employment would be terminated if

he did not agree the terms of Mr. Bailey's July 13, 2017 e-mail) constituted a statutorily prohibited "threat". The court based its dismissal on *McDowell v. Town of Sophia, et al.* No. 5:12-CV-01340, 212 WL 3778837 (S.D. W.Va. 2012).

According to Conclusion of Law 36, *McDowell* stands for the proposition that Mr. Bailey's July 14, 2017 statement, which the Complaint characterized as a "threat", did not "rise to the level of an actionable 'threat'" under W.Va Code § 5-11-9(7). The Petitioner contends just the opposite – that *McDowell* stands for the proposition that Mr. Bailey's statement did constitute an actionable threat.

McDowell is a racial discrimination case in which multiple defendants were alleged to have taken various adverse actions against the plaintiff; and some of the defendants filed motions to dismiss. In one of the multiple allegedly discriminatory actions, three of the defendants were involved in an incident in which the plaintiff was allegedly told that his employment would be terminated unless he resigned as a police officer for the Town of Sophia. The plaintiff claimed that this was violative of W.Va Code § 5-11-9(7). The person who allegedly communicated that threat was not among the multiple defendants who filed motions to dismiss. The two defendants who were allegedly otherwise involved in the threat did file motions to dismiss; however the court denied both of their motions under the reasoning that the "complaint presents adequate facts, when assumed to be true and when drawing all reasonable inferences in favor of Plaintiff, to support a claim that (those two defendants' actions were done in concert with (the) allegedly racially motived termination in violation of the WVHRA." The multiple defendants whose motions to dismiss were granted in *McDowell* were not alleged to have had

any involvement with the termination threat. They had been involved in other allegedly discriminatory incidents.

Given that none of the three *McDowell* defendants who were involved in the alleged threat to terminate the plaintiff's employment had the claims against them dismissed, the reliance of the circuit court here on that case in support its dismissal of the Petitioner's threat claim is not only erroneous, but actually supports the Petitioner's assertion that this claim should not have been dismissed.

The Petitioner is not contending that W.Va Code § 5-11-9(7) generally prohibits employers from threatening to terminate the employments of their workers. The prohibition applies only to threats that are made for discriminatory purposes, which was the case here. After Mr. Bailey notified the Petitioner that he would be placed under the same employment arrangement that Mr. Bailey had negotiated with another attorney, the Petitioner objected because that attorney was the only other attorney in the firm who was close to the Petitioner's age. Mr. Bailey's response was to threaten to terminate the Petitioner's employment. In other words, Mr. Bailey gave the Petitioner the choice of either agreeing to be discriminated against because of his age or having his employment terminated. That is what made Mr. Bailey's threat actionable.

7. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION CONSTRUCTIVE DISCHARGE CLAIM IN COUNT V OF THE COMPLAINT.

This dismissal was erroneous because the circuit court did not conclude that Count V (A.R. 44-45) of the Complaint failed to state all of the essential elements of an age discrimination

constructive discharge claim. Instead, it based its dismissal on the Conclusion of Law 37 (A.R. 190-191) reasoning that the Petitioner would not be able to prove that the working conditions prior to his departure from the firm had been "intolerable." This was because "common sense" dictates that, if those conditions had been intolerable, the Petitioner would have departed sooner than he did.

As previously stated, the standard that the court should have applied at the motion-to-dismiss stage is that a claim should not be dismissed "unless it appears beyond doubt that the (Petitioner) can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Company*, 236 S.E.2d 207 (W.Va. 1977). The court's substitution of its "common sense" standard for the "beyond doubt" standard was erroneous. Furthermore, the court applied the erroneous "common sense" standard without having any information whatsoever regarding the Petitioner's reasons for staying at B&W for as long as he did or his reasons for leaving when he did.

The legal definition of intolerable – as correctly stated in the Complaint – is a condition in which a reasonable employee would resign rather than endure. The duration of that endurance is a function not only of the tolerability of the situation, but also of the persistence of the employee. President Calvin Coolidge is known for having opined: "Nothing in the world can take the place of persistence." The circuit court here was not in a position to determine, under the motion-to-dismiss "beyond doubt" standard, that the Petitioner remained at B&W for as long as he did because his situation there was tolerable or because he was persistent in the face of intolerability.

CONCLUSION

The circuit court's order granting the Respondents' Motion to Dismiss should be reversed, as to all five counts of the Petitioner's Complaint; and this matter should be remanded for further proceedings.

Signed: Jay M. Potter

Jay M. Potter (WV Bar # 2949)
Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0009

JAY M. POTTER,
Plaintiff Below, Petitioner

Vs.)

Appeal from a final order of the Circuit Court of Kanawha County (No. 19-C-686)

BAILEY & SLOTNICK, P.L.L.C.
and CHARLES R. "CHUCK" BAILEY,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true copy of the **APPENDIX RECORD** and **PETITIONER'S BRIEF** this 12th Day of May 2021, *via* electronic mail and U. S. Mail, postage prepaid, upon the following counsel:

Michael J. Farrell, Esquire
J. Ben Shephard, Esquire
Farrell, White & Legg, PLLC
914 Fifth Avenue
P.O. Box 6457
Huntington, West Virginia,
25772-6457.

JAY M. POTTER

Jay M. Potter

Jay M. Potter, (WV Bar # 2949)
600 Montei Drive
Earlysville, Virginia,
22936
304-941-2046
jmp241968@gmail.com