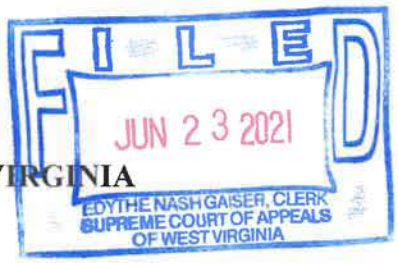

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0009

Jay M. Potter,
Plaintiff Below, Petitioner,

v.

Bailey & Slotnick, PLLC, and
Charles R. "Chuck" Bailey,
Defendants Below, Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Petitioner Jay M. Potter (**Petitioner**), a licensed attorney, instituted this litigation against his former employer, Bailey & Slotnick, P.L.L.C. (**B&S**), doing business as Bailey & Wyatt, P.L.L.C. (**B&W**), and its managing member, Charles R. "Chuck" Bailey (**Mr. Bailey**) (collectively, **Respondents**), in a misguided effort to vindicate a handful of perceived workplace slights that occurred over a period of some five (5) years before Petitioner's eventual resignation in December 2018. The forty-six (46) page Complaint—which is a reader's labyrinth due to Petitioner's penchant for internal cross-references—alleged five (5) claims against Respondents collectively. Each of those claims arose out of Petitioner's most recent term of employment—which began in September 2014 and continued until December 2018—with B&S. Count I alleged a common law claim for fraudulent inducement. (App. 30–34, ¶¶ 92–101.) Count II alleged a common law claim for breach of two (2) separate but related oral contracts of employment. (App. 34–37, ¶¶ 102–13.) Count III and Count IV alleged statutory age discrimination claims under the West Virginia Human Rights Act. (App. 37–44, ¶¶ 114–37.) Last but not least, Count V purportedly alleged a "claim" for constructive discharge. (App. 44–45, ¶¶ 138–45.)

Pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Respondents timely moved to dismiss each cause of action alleged against them for failing to state a claim upon which relief could be granted. (*See* App. 47–59; *see also* App. 91–112.) Upon careful consideration, and with the benefit of oral argument, the Circuit Court granted that motion in full. First, the Circuit Court held that the applicable statute of limitations, West Virginia Code § 55-2-12, barred Petitioner's claim for fraudulent inducement. (App. 185–86, ¶¶ 25–26.) Second, the Circuit Court determined that Petitioner's breach of contract claim failed to allege a cognizable claim against Mr. Bailey, as the Complaint included no allegation that Mr. Bailey was a party to the alleged oral contract(s). (App. 186–87, ¶ 28.) It also dismissed the same claim against B&S,

not only because the Complaint failed to allege a cognizable breach, but also because the clear allegations apparent from the face of the Complaint indicated that Petitioner had waived the breach had one occurred. (App. 187–88, ¶¶ 29–31.) Third, the Circuit Court dismissed Petitioner's "equal opportunity" age discrimination claim against Mr. Bailey, finding that the Complaint contained no allegations that Mr. Bailey was an "employer" within the meaning of the West Virginia Human Rights Act. (App. 188, ¶ 32.) It dismissed the same claim against B&S because each act alleged in the Complaint failed to rise to the level of an "adverse employment action" under West Virginia law. (App. 188–90, ¶¶ 33–34.) Fourth, the Circuit Court dismissed the "unlawful threat" age discrimination claim against Respondents for the same reason, *i.e.*, that the "threat" alleged was not actionable as a matter of law. (App. 190, ¶¶ 35–36.) Lastly, the Circuit Court dismissed Petitioner's purported "claim" for constructive discharge because the seventeen (17) month gap between the alleged discriminatory acts and his eventual resignation precluded resort to a constructive discharge theory as a matter of law. (App. 190–91, ¶ 37.)

Rather than engage with the substance of the Circuit Court's decision, Petitioner's Brief attempts to distract this Court with a series of *ad hominem* attacks and procedural detours that are irrelevant to the actual questions presented in this appeal. Wading through the morass of the factual recitations and procedural observations in Petitioner's Brief, the gist of each assignment of error is Petitioner's conclusory assertion that the Circuit Court failed to draw a sufficient number of factual "inferences" in his favor. (*See* Pet'r's Br. 20–23.) He complains at length about the Circuit Court's inclusion of "findings of fact" in its decision. (*See id.*) Yet, Petitioner fails to appreciate the fundamental proposition that this Court, like all appellate courts, "does not review lower courts' opinions, but [rather] their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (emphasis in original) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.

837, 842 (1984)). That proposition is significant to the disposition of this appeal, as Petitioner's conclusory allegations of error fail to explain ***why*** the inferences that he invited the Circuit Court to draw were reasonable in the first instance—much less why its ultimate judgment was incorrect. Nor does Petitioner's Brief direct this Court to any legal authority that might provide an explanation. Indeed, the handful of cases relied upon in Petitioner's Brief set forth nothing more than boilerplate propositions of law that are routinely relegated to a run-of-the-mill legal standard section. (*See, e.g.*, Pet'r's Br. 21.) When all is said and done, nothing in Petitioner's Brief casts doubt on the correctness of the Circuit Court's judgment, which this Court should affirm.

Factual Background

For purposes of the instant appeal, Respondents take the following facts to be true, as Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires. Petitioner, a licensed attorney, worked a succession of legal jobs before being hired by B&S, doing business as B&W, in August 2012. (App. 1–2, ¶¶ 4–6.) When Petitioner joined B&S in 2012, he agreed to bring to B&S "a number of cases that were assigned to him at his current firm." (App. 2, ¶ 7.) In exchange, Mr. Bailey, as the Managing Member of B&S, agreed that Petitioner's primary role would not be to assist other lawyers, (App. 2–3, ¶ 8), and promised that B&S "would use its base of existing clients and influence centers to provide [Petitioner] with opportunities to obtain new cases to replace his existing cases, as they were resolved," (App. 3, ¶ 9). However, once Petitioner began assisting Mr. Bailey on a "high-profile" case in November 2013, "that function became his primary role" as an employee of B&S. (App. 5, ¶¶ 14–15.) At the same time, B&S "did nothing to provide" Petitioner "with opportunities to obtain new cases," (App. 4, ¶ 11), and refused to allow Petitioner participate in a "toxic tort business development seminar" held sometime in early 2014, (App. 5–6, ¶¶ 16–17). At that point Petitioner began seeking other employment. (App. 5, ¶ 14.)

Convinced that "Mr. Bailey would never begin viewing [Petitioner] as anything more than a replacement for his former assistant," Petitioner voluntarily terminated his employment with B&S and accepted employment with a competing law firm on July 14, 2014. (App. 6, ¶ 18.) Within a matter of weeks, however, Petitioner encountered logistical problems that impaired his ability to work effectively at the competing law firm. (App. 6–7, ¶ 19.) In an effort to resolve those issues, Petitioner participated a "series of discussions with Mr. Bailey regarding the possibility of his returning" to B&S with the cases that Petitioner had originally brought to B&S in August 2012. (App. 7, ¶ 21.) Those discussions culminated in a verbal agreement in which Petitioner promised to return "to [B&S] with his cases." (App. 10, ¶ 29.) In exchange, Mr. Bailey, on behalf of B&S, promised: **(1)** to provide the professional development "opportunities that [Petitioner] expected to receive during his prior employment" with B&S and to "have cases assigned to [Petitioner] in order to replace the cases he would bring with him" to B&S as those cases were resolved; **(2)** not to require Petitioner "to work on any case on which he did not desire to work"; and **(3)** to pay Petitioner his salary "regardless of his level of financial productivity." (App. 8, 10, ¶¶ 23–24, 29–30.) In reliance on that agreement, Petitioner returned to B&S in September 2014. (App. 10, ¶ 30.)

After returning to B&S, Petitioner worked "exclusively on his own cases for less than a month" before Mr. Bailey requested that Petitioner resume assisting him with the same "high-profile" case discussed earlier. (App. 12, ¶ 34.) Once Petitioner "resumed assisting Mr. Bailey" on October 14, 2014, "it became increasingly apparent that the only role that [B&S] envisioned for [him] was – as it previously had been – Mr. Bailey's assistant." (App. 12, ¶ 36.) "No new cases were assigned" to Petitioner, and B&S "gave no indication that it intended to assign new cases to him" either. (App. 12, ¶ 36; *see also* App. 15–16, ¶ 46.) Instead of providing Petitioner

with new cases of his own, on March 15, 2015, Mr. Bailey assigned Petitioner to assist him with yet another matter. (App. 13, ¶ 39.) By the end of March 2015, "almost 75% of [Petitioner's] work consisted of assisting Mr. Bailey," while Petitioner's "work on his own cases was reduced by more than 50%." (App. 13, ¶ 39.)

Meanwhile, in early 2015, Petitioner learned that B&S had scheduled another toxic tort business development seminar for March 25, 2015. (App. 13, ¶¶ 38–39.) Petitioner requested "that he be included in preparing and presenting that seminar," reminding Mr. Bailey "of his promise" to include Petitioner after Petitioner had been excluded from the same seminar the prior year. (App. 13, ¶ 38.) However, B&S again excluded Petitioner from participating in the seminar without explanation. (App. 13–14, ¶¶ 39–40.) Subsequent to the seminar, B&S also published new marketing literature regarding its toxic tort litigation lawyers, yet failed to include Petitioner in the same "in spite of the fact that [he] was the most experienced toxic tort attorney" at B&S. (App. 14, ¶ 41.)

On March 30, 2015, Petitioner asked Mr. Bailey why B&S had excluded him from the seminar and why his role as Mr. Bailey's assistant continued to expand contrary to his agreement with B&S. (App. 14, ¶ 40.) Yet, Mr. Bailey "declined to explain why Mr. Potter had been excluded" and, ostensibly, did not comment on the second issue that Petitioner raised. (App. 14, ¶ 40.) Roughly two (2) weeks later, on April 14, 2015, Petitioner again "expressed to Mr. Bailey his increasing concerns about his role" at B&S, informing Mr. Bailey that "he had been 'routinely deferring' work on his own cases in order to assist Mr. Bailey with his cases." (App. 14–15, ¶ 42.) But once again, Mr. Bailey rebuffed him. (App. 15, ¶ 43.)

Dissatisfied with the situation, Petitioner requested a meeting with Jason Hammond and John Fuller, two equity members of B&S, "to discuss . . . his present and future role" at B&S,

including the concerns that Petitioner "had repeatedly expressed to Mr. Bailey and that Mr. Bailey had consistently disregarded." (App. 16, ¶ 47.) During that meeting, which took place on September 4, 2015, Petitioner complained about "being viewed as nothing more than Mr. Bailey's 'geriatric assistant.'" (App. 16–17, ¶ 49.) He further explained that his own cases "were in the process of settling" and that he would become "financially unproductive" once those "settlements were consummated" unless additional cases were assigned to him. (App. 16–17, ¶ 49.) Messrs. Hammond's and Fuller's only response to Petitioner's "expressions of concern was to imply, during the meeting, that [Petitioner] should be more receptive to the role of assisting Mr. Bailey." (App. 17, ¶ 50.)

Less than one (1) month later, on October 1, 2015, Mr. Bailey "further expanded" Petitioner's role as his assistant by assigning Petitioner "to assist him with another matter." (App. 17, ¶ 51.) As a result, Petitioner became "increasingly vocal" about B&S's failure "to assign to him, or otherwise provide opportunities for him to obtain, cases of his own." (App. 17, ¶ 52.) Mr. Bailey responded to Petitioner's complaints in December 2015 by proposing that Petitioner "agree to an arrangement in which [B&S] would 'finance' [his] attendance at educational seminars" instead of "expecting [B&S] to assign new cases to him." (App. 17, ¶ 53.) Yet, Petitioner declined that offer. (App. 18, ¶ 54.) Petitioner raised the issue again with Mr. Bailey on March 3, 2016, "and for the first time since September 2014, Mr. Bailey agreed to begin assigning cases" to Petitioner. (App. 19, ¶ 58.) But Mr. Bailey reneged on that promise the following day, instead reiterating his December 2015 proposal, which Petitioner again rejected. (App. 19, ¶ 59.)

On January 19, 2017, Mr. Bailey asked Petitioner to "begin assisting him with preparations" for an upcoming trial, further expanding Petitioner's role as Mr. Bailey's assistant. (App. 20, ¶ 61.) During that same conversation, Mr. Bailey also "brought up the issue of

[Petitioner's] financial productivity." (App. 20, ¶ 61.) While Mr. Bailey had no concerns about Petitioner's financial productivity, Mr. Bailey told Petitioner that other shareholders of B&S did. (App. 20, ¶ 61.) Mr. Bailey further explained if Petitioner "were to resume assisting Mr. Bailey with his case," that would alleviate the concerns expressed by B&S's other shareholders. (App. 20, ¶ 61.) In response, Petitioner acknowledged his diminishing financial productivity, but attributed the same to B&S's failure to assign him new cases as his own cases were settling, and once again complained about his exclusion from the 2014 and 2015 toxic tort business development seminars. (App. 20, ¶ 62.) Roughly two (2) weeks later, on February 1, 2017, Petitioner sent an e-mail to Mr. Bailey, agreeing "to resume assisting Mr. Bailey" with his high-profile case. (App. 20–21, ¶ 63.) Though Mr. Bailey never responded to Petitioner's e-mail, according to Petitioner, B&S allegedly "reaffirmed" its prior promise to pay Petitioner his salary "regardless of his level of financial productivity" in exchange. (*Compare* App. 21, ¶ 64, *with* App. 34–35, ¶ 102.)

A few months later, on May 11, 2017, Petitioner informed B&S's office administrator that he might have prostate cancer. (App. 21, ¶ 65.) Petitioner underwent his second stage of cancer screening on June 19, 2017, and was scheduled for a third stage of screening on July 17, 2017. (App. 22, ¶ 66.) Meanwhile, on June 23, 2017, Mr. Bailey's high-profile case settled. (App. 22, ¶ 67.) The following day, Petitioner also informed Mr. Bailey that his own cases "were in the final stages of closing" as well. (App. 22, ¶ 68.)

Subsequently, on July 13, 2017, Mr. Bailey notified Petitioner via e-mail that his "current compensation arrangement 'was no longer acceptable to the shareholders'" and offered him a new compensation package, effective from July 17, 2017 through December 31, 2017, comparable to a compensation plan that B&S had "negotiated with another attorney whose 'work generation

[was] very limited.'" (App. 23, ¶ 70.) "Under that arrangement, [Petitioner] would no longer receive a salary but would instead be paid a certain percentage of the revenue that was generated by his work on his own cases and a certain lesser percentage of the revenue that was generated by whatever work he did on other attorneys' cases." (App. 23, ¶ 70.) The following day, Petitioner inquired "what would occur if he declined Mr. Bailey's 'offer.'" (App. 24–25, ¶ 74.) Mr. Bailey responded that Petitioner's employment with B&S would be terminated effective July 31, 2017. (App. 25, ¶ 75.)

Petitioner at first rejected B&S's offer of a new compensation plan, which included healthcare benefits, and resigned his employment at B&S. But within a matter of days, Petitioner did an about-face after being diagnosed with prostate cancer. (App. 25, ¶¶ 76–77.) "Immediately after [Petitioner] received that diagnosis and in order to avoid losing [B&S] medical insurance coverage while being treated for the cancer, [Petitioner] notified Mr. Bailey that he would accept the terms of his July 13 e-mail." (App. 25, ¶ 77.) Subsequently, Petitioner underwent surgery for his prostate cancer. (App. 25, ¶ 79.) Some seventeen (17) months after accepting B&S's new compensation plan, Petitioner resigned from his position with B&S effective December 28, 2018. (App. 29, ¶ 91.)

Procedural Background

Seven (7) months after resigning from B&S, Petitioner instituted this litigation against Respondents. Petitioner's Complaint alleged five (5) causes of action against Respondents collectively. Count I alleged a common law claim for fraudulent inducement. (App. 30–34, ¶¶ 92–101.) Count II alleged a common law claim for breach of two (2) separate but related oral contracts of employment. (App. 34–37, ¶¶ 102–13.) Count III and Count IV alleged statutory age

discrimination claims under the West Virginia Human Rights Act. (App. 37–44, ¶¶ 114–37.) Lastly, Count V alleged a so-called "claim" for constructive discharge. (App. 44–45, ¶¶ 138–45.)

On August 12, 2019, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Respondents moved to dismiss the Complaint for failing to state a claim upon which relief could be granted.[1] (*See* App. 47–59.) Notwithstanding the fact that neither Respondent had noticed the Motion to Dismiss for hearing, Petitioner filed his Response to Defendants' Motion to Dismiss on August 27, 2019. (*See* App. 60–90.) Subsequently, on July 27, 2020, Respondents filed a Notice of Hearing, setting Defendants' Motion to Dismiss for argument on September 10, 2020. Eight (8) days before the Hearing, on September 2, 2020, Respondents filed and contemporaneously served a Memorandum of Law in Support of Defendants' Motion to Dismiss.[2] (*See* App. 91–112.)

On September 10, 2020, the Circuit Court heard oral argument on Defendants' Motion to Dismiss. (*See* App. 113–48.) At the conclusion of that Hearing, the Circuit Court directed the parties to submit proposed findings of fact and conclusions of law for its consideration. In compliance with the Circuit Court's directive, Respondents tendered their Proposed Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion to Dismiss,[3] (*see* App. 149–

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[1] Contrary to Petitioner's speculative and irrelevant assumption, (*see* Pet'r's Br. 14), the undersigned counsel—not Mr. Bailey—prepared the Motion to Dismiss on behalf of Respondents.

[2] Though unclear, Petitioner seems to take issue with Respondents having filed a Memorandum of Law in Support of Defendants' Motion to Dismiss in advance of the scheduled Hearing. (*See* Pet'r's Br. 18.) Of course, there was nothing objectionable about that submission. Rule 22.01 of the West Virginia Trial Court Rules expressly permits a party to file a "supporting memoranda" in connection with a motion to dismiss. W. VA. TR. CT. R. 22.01.

[3] While Petitioner appears to fault the Circuit Court for failing to entertain or otherwise discuss his Objection to Entry of Order, filed on October 14, 2020, (*see* App. 174–79), his criticism misses the mark. Petitioner's Objection was procedurally improper, as "such objections are not a second opportunity to argue the merits of the motion," which is precisely the tack that Petitioner's Objection took. *Johnson v. HCR Manorcare LLC*, No. 1:15CV189, 2015 WL 6511301, at *3 (N.D. W. Va. Oct. 28, 2015) (citing W. VA. TR. CT. R. 24.01(d)); *accord Blackrock Cap. Inv. Corp. v. Fish*, 239 W. Va. 89, 106, 799 S.E.2d 520, 537 (2017) (Loughry, C.J., joined by Walker, J., dissenting) ("As is obvious from the import of [Trial Court Rule 24.01(c)], such 'comments' or 'objections' are not designed to be substantive opposition to the granting or denial of the motion but, rather, objections to the wording of the order."); *cf. Walker v. Fazenbaker*, No. 18-1062, 2020 WL 598327, at *5 (W. Va. Feb. 7, 2020) (memorandum decision) (rejecting argument

60), while Petitioner filed his own competing Proposed Order, (*see* App. 161–73). Upon careful consideration, on December 10, 2020, the Circuit Court entered its Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion to Dismiss, which mirrored the Respondents' submission.[4] (*See* App. 180–91.) The instant appeal followed.

SUMMARY OF ARGUMENT

The Circuit Court did not err in dismissing each of the five (5) causes of action asserted against Respondents for failing to state a claim upon which relief could be granted. W. VA. R. CIV. P. 12(b)(6). First, Count I failed to state a claim for fraudulent inducement since the allegations appearing on the face of the Complaint unmistakably revealed that the claim was barred under the applicable statute of limitations. Second, the breach of contract claim asserted in Count II failed as a matter of law not only because Mr. Bailey was not a party to the alleged oral contract(s), but also because the Complaint failed to allege a cognizable breach. Third, the "equal opportunity" age discrimination claim pled in Count III failed to state a claim against Mr. Bailey, as he was not an "employer" subject to the relevant provision of the West Virginia Human Rights Act. Similarly, Count III failed to state a claim against B&S because each "discriminatory" act alleged in the Complaint did not rise to the level of an "adverse employment action" under West Virginia law. Fourth, the "threat" alleged in Count IV failed to state a claim of age discrimination because the alleged threat was no threat at all. Last but not least, Count V failed to state a purported "claim" for constructive discharge insofar as Petitioner did not resign from his position within a

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that entry of an order in violation of the notice provisions of West Virginia Trial Court Rule 24.01 rose to the level of reversible error).

[4] To the extent that Petitioner suggests that the Circuit Court erred by "adopt[ing] verbatim the conclusions that Respondents had proposed," (Pet'r's Br. 20), he is mistaken. "Verbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice, but it does not constitute reversible error." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996) (citations omitted).

reasonable period of time, which is a necessary condition to proceed under a constructive discharge theory.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary given the lack of merit of Petitioner's assignments of error. This Court's decisional process would not be "significantly aided" by oral argument, as the "facts and legal arguments are adequately presented in the briefs and the record on appeal." W. VA. R. APP. P. 18(a)(4). In the alternative, abbreviated oral argument, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and resolution through a memorandum decision are appropriate because this case involves nothing more than the Circuit Court's correct "application of settled law." W. VA. R. APP. P. 19(a)(1). Contrary to Petitioner's position, full oral argument, pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, is unnecessary, as this case involves no "issues of first impression," no "issues of fundamental public importance," no "constitutional questions" of significance, and no "inconsistencies or conflicts among the decisions of lower tribunals." W. VA. R. APP. P. 20(a)(1)–(4). Therefore, Respondents request that the Court decide this case upon the briefs and record on appeal, which adequately present the facts and legal arguments at issue; in the alternative, Respondents request that the Court set this case, which may be resolved through a memorandum decision, for abbreviated Rule 19 argument.

ARGUMENT

I. The Circuit Court Did Not Err in Dismissing the Claim for Fraud Asserted Against Respondents in Count I of the Complaint Because That Claim Is Barred by the Applicable Statute of Limitations.

In Count I of the Complaint, Petitioner attempted to allege a claim for fraudulent inducement against Respondents. (App. 30–34, ¶¶ 92–101.) To state such a claim, the law of West Virginia required Petitioner to allege facts sufficient to establish: "**(1)** that the act claimed to be fraudulent was the act of the defendant or induced by him; **(2)** that it was material and false;

that plaintiff relied upon it and was justified under the circumstances in relying upon it; and **(3)** that he was damaged because he relied upon it." Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981) (emphasis added) (quoting *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737, 738 (1927)); *see also* Syl. Pt. 4, *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996) (fraudulent inducement). Here, the Complaint identified three (3) false representations that Mr. Bailey supposedly made to Petitioner ***in September 2014*** to induce him to return to B&S's employ: **(1)** that Petitioner would receive professional development opportunities and "would have cases assigned to him in order to replace the cases that he would bring with him to [B&S], as those cases were resolved," (App. 8, ¶ 23); **(2)** that Petitioner would not "be relegated to his former role as Mr. Bailey's assistant" and "would not be required to work on any case on which he did not desire to work," (App. 8, ¶ 24); and **(3)** that Petitioner "would be paid his salary regardless of his level of financial productivity," (App. 8, ¶ 24; *see also* App. 30, ¶ 93 (cross-referencing paragraphs 23 and 24)).

Respondents moved to dismiss Count I, arguing, *inter alia*, that the same was barred by two (2) year statute of limitations codified in West Virginia Code § 55-2-12. (*See* App. 92–96.) The Circuit Court appropriately began its analysis by looking to *Dunn v. Rockwell*, in which this Court set forth a five-part test to determine whether a cause of action is time barred:

> **First**, the court should identify the applicable statute of limitation for each cause of action. **Second**, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. **Third**, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). **Fourth**, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action,

> the statute of limitation is tolled. And **fifth**, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Syl. Pt. 5, 225 W. Va. 43, 689 S.E.2d 255 (2009) (emphasis added). Taking the allegations of the Complaint at face value, the Circuit Court concluded that Petitioner's fraudulent inducement claim fell outside of the two-year limitations period. (App. 185–86, ¶¶ 25–26.) Examining the allegations contained in the Complaint holistically, the Circuit Court reasoned that Petitioner knew, or ought to have known, that each of Mr. Bailey's three (3) representations was false no later than January 19, 2017. (App. 185–86, ¶ 26.) Yet, Petitioner did not institute this litigation until July 11, 2019—almost six (6) months beyond the limitations period. (App. 185, ¶ 25.) Accordingly, the Circuit Court held that Petitioner's claim for fraudulent inducement was time barred.[5] (App. 185–86, ¶ 26.)

Petitioner does not dispute that West Virginia Code § 55-2-12 sets forth the limitations period applicable to his fraudulent inducement claim—nor could he. *See Evans v. United Bank, Inc.*, 235 W. Va. 619, 627 n.8, 775 S.E.2d 500, 508 n.8 (2015) ("Pursuant to W. Va. Code § 55–2–12, a two-year statute of limitations applies to Petitioners' fraud in the inducement claim . . . ."). Likewise, Petitioner does not contest the fact that the "requisite elements" of fraud, as alleged, occurred in September 2014. (*See* App. 31, 33, ¶¶ 95, 98.) Rather, Petitioner claims that the Circuit Court failed to afford him the benefit of all reasonable inferences that could be drawn from the allegations contained in Count I. (*See* Pet'r's Br. 24–26.) As Petitioner views the landscape,

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[5] In addition, the Circuit Court dismissed Count I under the well-established rule that "[f]raud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or his property." Syl. Pt. 2, *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568 (2013) (per curiam) (emphasis in original) (quoting Syl. Pt. 3, *Croston v. Emax Oil Co.*, 195 W. Va. 86, 464 S.E.2d 728 (1995)).

the "earliest point at which [he] might possibly have realized" that Mr. Bailey did not intend to honor the aforementioned promises was on July 14, 2017, "when Mr. Bailey gave [him] the choice of either having his salary terminated or having his overall employment terminated." (*Id.* at 25.) Yet, the "inference" that Petitioner invites this Court to draw is squarely foreclosed by the unambiguous allegations in his Complaint.

Start with the first alleged misrepresentation, *i.e.*, that Petitioner would receive professional development opportunities and would be assigned new cases upon his return to B&S in September 2014. (*See* App. 8, ¶ 23.) Before this Court, Petitioner blithely claims that he did not discover, and through the exercise of reasonable diligence could not have discovered, the falsity of that representation before July 14, 2017. (Pet'r's Br. 25.) Yet, according to the allegations apparent from the face of Petitioner's Complaint, from the very moment that Petitioner returned to B&S in September 2014 until his resignation on December 28, 2018, B&S "***actively excluded*** [him] from its efforts to develop new business." (App. 15, ¶ 46.) After being excluded from participating in a toxic tort business development seminar in 2014, (*see* App. 5–6, ¶¶ 16–17), Petitioner was again excluded from the same seminar in 2015, despite B&S's promise to include him, (App. 13–14, ¶¶ 38–40). When Petitioner asked Mr. Bailey why B&S had excluded him from the seminar, Mr. Bailey "declined to" offer an explanation. (App. 14, ¶ 40.) In addition, Petitioner was excluded from the "business development literature" that B&S published thereafter. (App. 14, ¶ 41.)

Likewise, at no point in time were any "new cases . . . assigned to" Petitioner. (App. 12, ¶ 36; *see also* App. 15, ¶ 46.) Indeed, B&S "***gave no indication*** that it intended to assign new cases to him" at all. (App. 12, ¶ 36 (emphasis added).) As time went on, Petitioner became "increasingly vocal" about B&S's failure "to assign to him, or otherwise provide opportunities for him to obtain, cases of his own." (App. 17, ¶ 52.) Mr. Bailey responded to Petitioner's complaints in December

2015 by proposing that Petitioner "agree to an arrangement in which [B&S] would 'finance' [his] attendance at educational seminars" instead of "expecting [B&S] to assign new cases to him." (App. 17, ¶ 53.) Petitioner raised the issue ***again*** with Mr. Bailey on March 3, 2016, "and for the first time since September 2014, Mr. Bailey agreed to begin assigning cases" to Petitioner. (App. 19, ¶ 58.) Yet, Mr. Bailey reneged on that promise the following day, instead reiterating his December 2015 proposal, which Petitioner again rejected. (App. 19, ¶ 59.) By January 19, 2017, even Petitioner subjectively recognized that B&S had no intention of "honor[ing] Mr. Bailey's September 2014 promise." (App. 20, ¶ 62.) In light of those allegations, it is hardly surprising that the Circuit Court found that Petitioner knew, or should have known, of the falsity of this representation before July 11, 2017.

That conclusion is no different relative to the second alleged misrepresentation, *i.e.*, that Petitioner would not "be relegated to his former role as Mr. Bailey's assistant" and "would not be required to work on any case on which he did not desire to work." (App. 8, ¶ 24.) The alleged falsity of that representation was—or, as a matter of law, should have been—immediately apparent to Petitioner. According to the Complaint, "***less than a month***" after Petitioner returned to B&S, Mr. Bailey asked him to resume assisting with cases. (App. 12, ¶ 34 (emphasis added).) Once Petitioner "resumed assisting Mr. Bailey" on October 14, 2014, "it became ***increasingly apparent*** that the only role that [B&S] envisioned for [him] was – as it previously had been – Mr. Bailey's assistant." (App. 12, ¶ 36 (emphasis added).) By the end of March 2015, "almost 75% of [Petitioner's] work consisted of assisting Mr. Bailey," while Petitioner's "work on his own cases was reduced by more than 50%." (App. 13, ¶ 39.)

Rather than improve over time, the situation only became worse. On April 14, 2015, Petitioner again "expressed to Mr. Bailey his increasing concerns about his role" at B&S,

informing Mr. Bailey that "he had been 'routinely deferring' work on his own cases in order to assist Mr. Bailey with his cases." (App. 14–15, ¶ 42.) But once again, Mr. Bailey rebuffed him. (App. 15, ¶ 43.) Five (5) months later, on September 4, 2015, Petitioner met with Messrs. Hammond and Fuller to complain about "being viewed as nothing more than Mr. Bailey's 'geriatric assistant.'" (App. 16–17, ¶ 49.) Messrs. Hammond's and Fuller's only response to Petitioner's "expressions of concern was to imply, during the meeting, that [Petitioner] should be more receptive to the role of assisting Mr. Bailey." (App. 17, ¶ 50.) Then, less than one (1) month after that meeting, Mr. Bailey "***further expanded***" Petitioner's role as his assistant by assigning Petitioner "to assist him with another matter." (App. 17, ¶ 51 (emphasis added).) That expansion continued unabated until Petitioner's resignation on December 28, 2018. Even viewing those allegations in the light most favorable to Petitioner, it is obvious that Petitioner knew, or should have known, of the falsity of this second representation long before July 11, 2017.

The same holds true with respect to the third and final alleged misrepresentation, *i.e.*, that Petitioner "would be paid his salary regardless of his level of financial productivity."[6] (App. 8, ¶ 24.) In his Complaint, Petitioner plainly alleged that "Mr. Bailey brought up the issue of [his] financial productivity" and informed him that B&S's shareholders were concerned about the same on January 19, 2017. (App. 20, ¶ 61.) Consequently, Petitioner knew, or ought to have known, of the falsity of this third representation no later than that date.

While Rule 12(b)(6) entitles Petitioner to the benefit of all "inferences that ***reasonably*** may be drawn from the allegations" in his Complaint, the "inferences" that Petitioner invites this Court to draw are manifestly ***unreasonable***. *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493,

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[6] Reliance on a promise of that ilk is also unreasonable as a matter of law. *Cf., e.g., Brewer v. EnerSys, Inc.*, No. CV 3:04-1335-MJP, 2006 WL 8446422, at *5 (D.S.C. June 29, 2006) ("[R]eliance on a promise of future at-will employment is unreasonable as a matter of law." (citing *Sakelaris v. Rice/Maddox P'ship*, 883 F. Supp. 64, 66 (D.S.C. 1995))).

473 S.E.2d 910, 914 (1996) (emphasis added) (citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995)). As demonstrated by the discussion above, the express allegations of the Complaint made clear that Petitioner knew—or ought to have known—of the basis for his potential fraud claim no later January 19, 2017. Indeed, Petitioner persistently complained about issues connected with the aforementioned representations throughout his tenure with B&S; yet, his complaints were consistently rebuffed or ignored. (*See, e.g.*, App. 14–17, ¶¶ 42–43, 48–50.) Because the fraudulent inducement claim alleged in Count I was time barred, the Circuit Court did not err in dismissing the same as a matter of law. *See Coffield v. Robinson*, __ W. Va. ___, ___, 857 S.E.2d 395, 401 (2021) ("[W]here causes of action are barred by the applicable statute of limitations, the complaint fails to set forth a claim upon which relief can be granted."); *see also Richards v. Walker*, 244 W. Va. 1, 813 S.E.2d 923 (2018) (affirming dismissal of complaint pursuant to Rule 12(b)(6) where the alleged claims for malicious prosecution, outrageous conduct, intentional infliction of emotional distress, and defamation were barred by applicable statutes of limitation).

II. The Circuit Court Did Not Err in Dismissing the Breach of Contract Claim Asserted Against Respondent Bailey & Slotnick, P.L.L.C. in Count II of the Complaint.

In Count II of the Complaint, Petitioner alleged that Respondents breached two (2) oral contracts of employment. (App. 34–37, ¶¶ 102–13.) The first oral contract arose in September 2014 out of an alleged conversation between Petitioner and Mr. Bailey. (App. 10, ¶ 29; *see also* App. 34–35, ¶ 102 (cross-referencing paragraph 29).) Under the terms of the first alleged agreement, Petitioner promised to return "to [B&S] with his cases." (App. 10, ¶ 29.) In exchange, B&S allegedly promised: **(1)** to provide the professional development "opportunities that [Petitioner] expected to receive during his prior employment" with B&S and to "have cases assigned to [Petitioner] in order to replace the cases he would bring with him" to B&S as those

cases were resolved; **(2)** not to require Petitioner "to work on any case on which he did not desire to work"; and **(3)** to pay Petitioner his salary "regardless of his level of financial productivity." (App. 8, ¶¶ 23–24; *see also* App. 34–35, ¶ 102 (cross-referencing paragraphs 23 and 24)).

The second alleged contract, which the Complaint described as "parallel" to the first, arose on February 1, 2017. (App. 34–35, ¶ 102.) Under the terms of this alleged oral contract, Petitioner "agreed to resume assisting Mr. Bailey with his case." (App. 20–21, ¶ 63; *see also* App. 34–35, ¶ 102 (cross-referencing paragraph 63).) In exchange, B&S allegedly "reaffirmed" its prior promise to pay Petitioner his salary "regardless of his level of financial productivity." (App. 8, ¶ 24; *see also* App. 34–35, ¶ 102 (cross-referencing paragraph 24).) Petitioner claimed that B&S breached both agreements on July 14, 2017, when Mr. Bailey supposedly informed Petitioner that if he would not agree to employment on different terms, then "his employment would be terminated." (App. 32, ¶ 96; *see also* App. 36, ¶ 108 (identifying "the eleventh aforementioned step" alleged in paragraph 96 as constituting the alleged breach).)

The Circuit Court dismissed the breach of contract claim alleged against B&S for two (2) independent reasons. The Circuit Court first determined that Petitioner's claim was foreclosed, as a matter of law, because B&S's offer to modify the terms of Petitioner's alleged oral contract(s) of employment did not constitute a breach. (App. 187, ¶ 29.) In the alternative, the Circuit Court concluded that the express allegations of the Complaint established, as a matter of law, that Petitioner had waived the alleged breach. (App. 187–88, ¶¶ 30–31.) Each conclusion was correct, Petitioner's objections notwithstanding.

A. The Factual Allegations in the Complaint Failed to Plead a Cognizable Breach of Either Alleged Oral Contract of Employment.

The Circuit Court did not err in dismissing Petitioner's breach of contract claim in light of Petitioner's failure to allege a cognizable breach of either alleged oral contract of employment. To

state a breach of contract claim, the law of West Virginia required Petitioner to "allege facts sufficient to support the following elements: **[1]** the existence of a valid, enforceable contract; **[2]** that the plaintiff has performed under the contract; **[3]** that the defendant has breached or violated its duties or obligations under the contract; **[4]** and that the plaintiff has been injured as a result." *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 714 (S.D. W. Va. 2009) (citing 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:1 (4th ed. 2009)). In this case, the Circuit Court correctly determined that B&S's offer to modify the terms of Petitioner's alleged oral contract(s) of employment did not constitute a breach. (App. 187, ¶ 29.) The Circuit Court first looked to the Complaint, yet found no allegation that either alleged oral contract "contained an 'ascertainable and definitive' term of duration." (App. 187, ¶ 29 (quoting Syl. Pt. 1, in part, *Sayres v. Bauman*, 188 W. Va. 550, 425 S.E.2d 226 (1992)).) The Circuit Court then relied upon the long-standing principle that "[w]hen a contract of employment is of indefinite duration it may be terminated at any time by either party to the contract." (App. 187, ¶ 29 (quoting Syl. Pt. 1, *Suter v. Harsco Corp.*, 184 W. Va. 734, 403 S.E.2d 751 (1991)).) Reasoning that B&S had the legal right to terminate its employment relationship with Petitioner whenever and for whatever reason it deemed appropriate, the Circuit Court concluded that Count II failed to allege an actionable breach of either oral contract as a matter of law. (App. 187, ¶ 29.)

Unsurprisingly, Petitioner takes issue with that conclusion. (*See* Pet'r's Br. 27–28.) Yet, Petitioner's assignment of error is not only conclusory, but also tilts at windmills. For example, Petitioner asserts that the Circuit Court's decision "is not supported by any legal authority," which is demonstrably false, (*see* App. 187, ¶ 29), and is also ironic considering that Petitioner himself did not cite a single shred of authority in support of his assignment of error, (*see* Pet'r's Br. 27–28). Indeed, Petitioner devoted less than two (2) pages of text toward explaining ***how*** the Circuit

Court erred in the first place. (*See* Pet'r's Br. 27–28.) What is more, the entirety of Petitioner's abbreviated criticism is built upon a contrived fiction. Contrary to Petitioner's flawed interpretation, the decision below did ***not*** hold 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." (*Id.* (emphasis in original).) Rather, the Circuit Court came to the unremarkable conclusion that the actual or threatened termination of an at-will employee does not result in a cognizable breach of contract. (App. 187, ¶ 29.)

That conclusion was not only sensible, but also enjoys substantial support from this Court's own jurisprudence. In this case, there is no dispute that Petitioner's Complaint, despite its substantial length, failed to include any factual allegations sufficient to allege an "ascertainable and definitive" term of duration with respect to either supposed oral contract of employment. "When a contract of employment is of indefinite duration," as was the case here, "it may be terminated at any time by either party to the contract." Syl. Pt. 1, *Suter*, 184 W. Va. 734, 403 S.E.2d 751 (quoting Syl. Pt. 2, *Wright v. Standard Ultramarine & Color Co.*, 141 W. Va. 368, 90 S.E.2d 459 (1955)). That is so because "[e]mployees relying upon a contract in 'which the expected duration of employment was never specified are considered "at will" employees.'" *Hatfield v. Health Mgmt. Assocs. of W. Va.*, 223 W. Va. 259, 265, 672 S.E.2d 395, 401 (2008) (per curiam) (quoting *Sayres*, 188 W. Va. at 552, 425 S.E.2d at 228). Indeed, it has long been established that such employment "is terminable at any time at the pleasure of either the employer or the employee." *Williamson v. Sharvest Mgmt. Co.*, 187 W. Va. 30, 32–33, 415 S.E.2d 271, 273–74 (1992) (citing *Cook v. Heck's Inc.*, 176 W. Va. 368, 342 S.E.2d 453 (1986); *Wright*, 141 W. Va. 368, 90 S.E.2d 459).

The foregoing propositions doom Petitioner's breach of contract claim against B&S because the same conclusively demonstrate that B&S did not "breach" the oral contract(s) in the manner alleged. "A breach of contract is a non-performance of any contractual duty of immediate performance." RESTATEMENT (FIRST) OF CONTRACTS § 312 (AM. LAW INST. 1932); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. b (AM. LAW. INST. 1981). Here, Petitioner alleged that B&S breached the oral contract(s) of employment when Mr. Bailey supposedly informed Petitioner that if he would not agree to employment on different terms, then "his employment would be terminated." (App. 32, ¶ 96; *see also* App. 36, ¶ 108 (identifying "the eleventh aforementioned step" alleged in paragraph 96 as constituting the alleged breach).) What Petitioner fails to appreciate is that, as a result of his employee-at-will status, B&S had no contractual duty to keep Petitioner within its employ in perpetuity. In other words, B&S enjoyed the right to terminate its relationship with Petitioner whenever, and for whatever reason, it deemed appropriate, and *vice versa*.[7] As such, B&S's alleged "threat" to terminate Petitioner's employment—which is the only conduct alleged in the Complaint as evidencing B&S's breach—could not possibly amount to a breach of either alleged oral contract. Because the Complaint failed to allege a cognizable breach, which is a required element to state an actionable breach of contract claim, the Circuit Court correctly dismissed Count II as to B&S as a matter of law.

B. Even Assuming *Arguendo* That B&S Breached the Oral Contract(s), the Allegations Clearly Appearing on the Face of the Complaint Indicated That Petitioner Waived the Breach As a Matter of Law.

In the alternative, the Circuit Court concluded that the factual allegations appearing on the

[7] Indeed, Petitioner was notoriously fickle when it came to exercising his right to terminate his employment relationship with B&S. For example, Petitioner left B&S to join a competing law firm on July 14, 2014, (App. 6, ¶ 18), only to return to B&S around one (1) month later, (App. 10, ¶ 30). Petitioner again resigned from B&S around July 15, 2017, only to return days later "in order to avoid losing [B&S] medical insurance coverage" in light of his intervening cancer diagnosis. (App. 25, ¶ 77.)

face of the Complaint established, as a matter of law, that Petitioner waived the alleged breach. (App. 187–88, ¶¶ 30–31.) The Circuit Court recited the long-settled proposition "that '[w]here, with full knowledge of his rights, the conduct of a party to a contract is wholly inconsistent with reliance on the contract, he will be deemed to have waived his rights thereunder.'" (App. 187, ¶ 30 (quoting Syl. Pt. 1, *Beall v. Morgantown & Kingwood R. Co.*, 118 W. Va. 289, 190 S.E. 333 (1937)).) "Continuing one's employment subsequent to an employer's breach is a prime example of such inconsistent conduct." (App. 187–88, ¶ 30 (citing *Chem. Fireproofing Corp. v. Bronska*, 542 S.W.2d 74 (Mo. App. 1976)).) Turning to the Complaint, the Circuit Court found that the allegations therein clearly indicated a waiver. Assuming that B&S breached the oral contract(s) on July 14, 2017, the Circuit Court noted that Petitioner accepted B&S's offer of continued employment less than one (1) week later and remained with B&S for an additional ***seventeen (17) months*** thereafter before resigning. (App. 188, ¶ 31 (citing Compl., ¶¶ 77, 91, 96).) The Circuit Court then held that Petitioner's "conduct after knowing of the alleged breach effectively waived it." (App. 188, ¶ 31.)

In two (2) sparse paragraphs, Petitioner faults the Circuit Court for reaching that conclusion. (*See* Pet'r's Br. 28.) Notably, Petitioner does not dispute the correctness of the Circuit Court's actual holding relative to the merits, *i.e.*, that his conduct as alleged sufficiently waived the supposed breach as a matter of law. Instead, his sole argument turns on an issue of procedure. According to Petitioner, the Circuit Court erred "because the doctrine of waiver is an affirmative defense"; he goes so far as to assert that "no legal authority" permits "use of that doctrine, at the motion-to-dismiss stage, to avoid answering a complaint." (*Id.*) Yet, on that point too, he is incorrect.

Contrary to Petitioner's erroneous view, the clear majority rule is that affirmative defenses may be adjudicated upon a motion to dismiss when the factual allegations related to the defense appear on the face of the complaint. The overwhelming weight of federal authority, which remains highly "persuasive" when interpreting the West Virginia "counterpart," demonstrates the ubiquity of that rule. Syl. Pt. 3, in part, *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003). Simply put, "where facts sufficient to rule on an affirmative defense are alleged in the complaint," as was the case here, "the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc); *accord, e.g.*, *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) ("When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss." (citing *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128–29 (9th Cir. 1999))); *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 726 (5th Cir. 2013) ("[W]hen a successful affirmative defense appears on the face of the pleadings, dismissal under Rule 12(b)(6) may be appropriate." (alteration in original) (quoting *Kansa Reinsurance Co. v. Cong. Mortg. Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994))); *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) ("But when a plaintiff's complaint nonetheless sets out all of the elements of an affirmative defense, dismissal under Rule 12(b)(6) is appropriate." (citing *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009))); *LeFrere v. Quezada*, 582 F.3d 1260, 1263 (11th Cir. 2009) ("If the complaint contains a claim that is facially subject to an affirmative defense, that claim may be dismissed under Rule 12(b)(6).").

Because the allegations establishing Petitioner's waiver were obvious from the face of the Complaint, the Circuit Court did not err in dismissing Count II. In West Virginia, as in most jurisdictions, "[a] waiver may be express or may be inferred from actions or conduct, but all of the

attendant facts, taken together, must amount to an intentional relinquishment of a known right." Syl. Pt. 2, *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016). Though often "a question of fact, where only one reasonable inference can be drawn" from the allegations, "the existence of a waiver becomes a question of law." *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 460 n.21, 825 S.E.2d 779, 788 n.21 (2019) (quoting *Kossler v. Palm Springs Devs., Ltd.*, 161 Cal. Rptr. 423, 431 (Ct. App. 1980)).

That was precisely the case here. Assuming *arguendo* the allegations of the Complaint are true, B&S breached its oral contract(s) with Petitioner on July 14, 2017, when Mr. Bailey informed Petitioner that "his employment would be terminated" if he declined B&S's offer to continue his employment on different terms. (App. 31–32, ¶ 96; *see also* App. 36, ¶ 108 (alleging B&S breached the contracts by taking "the eleventh aforementioned step" discussed in paragraph 96).) In the weeks and months that followed the supposed breach, Petitioner took no steps to vindicate his contractual rights. Far from it, Petitioner instead accepted B&S's offer of continued employment less than one (1) week later. (App. 25, ¶ 77.) He then continued to remain in B&S's employ for some ***seventeen (17) months*** thereafter, eventually resigning for his own reasons on December 28, 2018. (App. 29, ¶ 91.) Petitioner's "own allegations and admissions establish[ed] that [he] waived any claim for breach of the [oral contract(s) of employment] as a matter of law." *Kumaran v. Northland Energy Trading, LLC*, No. 119CV8345MKVDCF, 2021 WL 797113, at *5–6 (S.D.N.Y. Feb. 26, 2021) (granting motion to dismiss breach of contract claim based upon the doctrine of waiver), *appeal filed*, No. 21-797 (2d Cir. Mar. 29, 2021); *cf. Chanze v. Air Evac EMS, Inc.*, No. 5:18CV89, 2018 WL 5723947, at *2 (N.D. W. Va. Nov. 1, 2018) (granting motion to dismiss claim for breach of implied contract on the basis of the affirmative defense of

preemption). Accordingly, the Circuit Court did not err in dismissing Count II against B&S pursuant to the doctrine of waiver.

III. The Circuit Court Did Not Err in Dismissing the Breach of Contract Claim Asserted Against Respondent Charles R. "Chuck" Bailey in Count II of the Complaint.

Count II of the Complaint also purported to assert a breach of contract claim against Mr. Bailey individually. (App. 34–37, ¶¶ 102–13.) The factual basis for this claim was and remains far from clear. That ambiguity should come as no surprise considering that Petitioner failed to allege the existence of ***any*** express contract between him and Mr. Bailey—as opposed to B&S. (*See* App. 34–35, ¶ 102.) Even affording Petitioner the benefit of all reasonable inferences, the Circuit Court agreed that Petitioner did not allege sufficient facts to demonstrate the existence of an "agreement involving Mr. Bailey as an individual." (App. 186–87, ¶ 28.) Reasoning that "no breach of contract claim will lie in the absence of a valid and enforceable contract," the Circuit Court unremarkably dismissed Count II given the absence of any allegation of an express contract between Mr. Bailey and Petitioner. (App. 186, ¶ 28 (citing *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 287, 737 S.E.2d 550, 556 (2012)).)

Though Petitioner faults the Circuit Court for reaching that conclusion, his argument on the point is difficult to follow. (*See* Pet'r's Br. 29–30.) The gist of Petitioner's argument appears to be that Mr. Bailey made "promises that he personally would take certain actions which he later failed to take." (*Id.* at 29 (emphasis in original).) Those "promises" supposedly included: **(1)** Mr. Bailey's alleged assurance to Petitioner in 2014 that the "failure to assign cases to the Petitioner had been a 'mistake' that [Mr. Bailey] had made only because he had not 'listened' to the Petitioner's objections to his lack of new case assignments"; **(2)** Mr. Bailey's "promises in 2015 regarding [Petitioner's participation in] the toxic tort business development program"; and **(3)** Mr. Bailey's "promise in 2016 to begin assigning cases to the Petitioner." (*Id.* at 29–30.)

Yet, none of these "promises" allegedly made and supposedly broken by Mr. Bailey was sufficient to state a cognizable breach of contract claim against him. The reason is simple. While Mr. Bailey might have been the mouthpiece that communicated the three (3) "promises" to Petitioner, according to Petitioner's own Complaint Mr. Bailey did so while "acting within the scope" of his employment with B&S. (App. 1–2, ¶ 4.) The allegation that Mr. Bailey negotiated the terms of Petitioner's alleged oral contracts of employment does not somehow make Mr. Bailey a party to them. It is axiomatic that "[t]he agent of a disclosed principal is not liable in damages for the breach of a contract made by him on behalf of his principal, unless it be shown that he acted beyond the scope of his authority." Syl. Pt. 1, *Hoon v. Hyman*, 87 W. Va. 659, 105 S.E. 925 (1921). As mentioned above, the Complaint included no allegation that Mr. Bailey acted outside the scope of his authority; in fact, the opposite was true. (*See* App. 1–2, ¶ 4.) To the extent any of the three "promises" were sufficiently definite and otherwise capable of giving rise to an enforceable contract, the parties to the contract were Petitioner and B&S—not Mr. Bailey.

That much is obvious from the very nature of the promises themselves. Each promise related to alleged terms or conditions of Petitioner's employment with B&S. Although Petitioner blithely claims that "Mr. Bailey was not named as a Defendant because he happened to be the managing member of" B&S, (Pet'r's Br. 29), the "promises" upon which Petitioner relies only make sense if one assumes that Mr. Bailey was communicating with Petitioner on behalf of B&S as its managing member.

The key allegations in Count II of the Complaint confirm that conclusion. Petitioner went to great lengths to allege the existence of "an agreement ***between B&W and Mr. Potter*** that established an employment arrangement" circa 2014, as well as "a parallel agreement ***between B&W and Mr. Potter***" circa 2017. (App. 34–35, ¶ 102 (emphasis added).) Yet, nowhere does

Petitioner similarly allege the existence of an agreement between himself and Mr. Bailey. (*See generally* App. 1–46.) Such an omission is obviously fatal to a breach of contract claim. Because Petitioner failed to adequately state the elements required to make out a cognizable claim for breach of contract against Mr. Bailey, the Circuit Court did not err in dismissing Count II.

IV. The Circuit Court Did Not Err in Dismissing the "Equal Opportunity" Age Discrimination Claim Asserted Against Respondent Bailey & Slotnick, P.L.L.C. in Count III of the Complaint Since Petitioner Failed to Allege Any "Actionable Adverse Action" Taken Against Him.

In Count III of the Complaint, Petitioner claimed that Respondents discriminated against him on the basis of his age, specifically in violation of West Virginia Code § 5-11-9(1), one of the provisions of the West Virginia Human Rights Act (**WVHRA**). (App. 37–40, ¶¶ 114–27.) That provision declares it unlawful for "any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required." W. VA. CODE § 5-11-9(1). The WVHRA defines the term "discriminate," in turn, as meaning "to exclude from, or fail or refuse to extend to, a person equal opportunities because of," *inter alia*, the person's "age." *Id.* § 5-11-3(h). Petitioner claimed that Respondents discriminated against him: **(1)** by renegotiating the terms of his continued employment in July 2017, (App. 39, ¶ 121); **(2)** by failing to provide a formal written agreement memorializing the renegotiated terms of his continued employment after July 19, 2017, (App. 39, ¶ 122); **(3)** by assigning work to "substantially younger attorneys" instead of to him after August 1, 2017, (App. 40, ¶ 123); **(4)** by failing to take action on his January 31, 2018 request "for information regarding his current and future employment status," (App. 40, ¶ 124); and **(5)** by

requesting "that he perform work assignments" after February 5, 2018 without clarifying his "employment arrangement," (App. 40, ¶ 125).

To determine whether Petitioner had stated a viable age discrimination claim against Respondents, the Circuit Court appropriately focused its analysis on whether sufficient facts were alleged "to establish, *inter alia*, that his 'employer made an adverse decision concerning' him." (App. 188–89, ¶ 33 (quoting Syl. Pt. 1, in part, *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 786 S.E.2d 188 (2016)).) The Circuit Court looked to federal decisions defining "actionable adverse action" as "a 'tangible change in the duties or working conditions constituting a material employment disadvantage.'" (App. 189, ¶ 33 (quoting *Walden v. Patient-Centered Outcomes Research Inst.*, 304 F. Supp. 3d 123, 133–34 (D.D.C. 2018)).) The Circuit Court then examined each of the five (5) supposedly discriminatory acts alleged in the Complaint. (App. 189–90, ¶ 34.) Relying on analogous federal decisions, the Circuit Court concluded that each discrete act did not constitute adverse employment action as a matter of law. (App. 189–90, ¶ 34.)

Petitioner resists that conclusion. (*See* Pet'r's Br. 30–32.) Tellingly, Petitioner does not dispute that the five (5) supposedly discriminatory acts alleged in the Complaint failed to rise to the level of "actionable adverse action." (*See id.*) Instead, Petitioner suggests that those five (5) acts were "not the only discriminatory acts alleged in the Complaint." (*Id.* at 31.) He then argues that the "primary basis" for his "age-discrimination claims [was] the 'geriatric' career plan that Mr. Bailey had for him," and identifies his "exclusion from [B&S's] toxic tort business development program" in 2015 as one of "the primary examples" of how B&S allegedly discriminated against him. (*Id.*)

To the extent that the Circuit Court did not examine other possible "discriminatory acts," as Petitioner suggests, it had a good reason for doing so. "Because age discrimination cases

brought under the [federal Age Discrimination in Employment Act] and the WVHRA are governed by the same analytical framework," this Court often looks to federal decisions interpreting the ADEA for guidance on how to apply the WVHRA. *Knotts*, 237 W. Va. at 178, 786 S.E.2d at 197. "To be actionable" under the ADEA and, by implication, the WVHRA, "a discrete act—an event that 'takes place at a particular point in time'—must occur within the filing period," *i.e.*, before the pertinent statute of limitations has expired. *Dickens v. Dep't of Consumer & Regul. Affs.*, 298 F. App'x 2, 3 (D.C. Cir. 2008) (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007), *superseded in part by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5). The applicable limitations period for claims brought under the WVHRA, in turn, is two years. W. VA. CODE § 55-2-12; *see also McCourt v. Oneida Coal Co.*, 188 W. Va. 647, 651, 425 S.E.2d 602, 606 (1992). Petitioner instituted this action on July 11, 2019, and so the scope of his age discrimination claim is limited to adverse employment actions occurring on or after July 11, 2017.

The problem for Petitioner is that each event upon which he now relies to support his age discrimination claim occurred well after the pertinent statute of limitations had lapsed. For instance, Petitioner describes his alleged "exclusion from [B&S's] toxic tort business development program" as one of "the primary examples" of how B&S allegedly discriminated against him. (Pet'r's Br. 31.) Yet, that event happened in March 2015—***two (2) years*** outside of the relevant limitations period. (*See* App. 13–14, ¶¶ 38–39.) Likewise, each "step" that Mr. Bailey allegedly took "to implement . . . the 'geriatric' career plan" transpired well after the limitations period had expired as well.[8] (Pet'r's Br. 31.) The unambiguous allegations of the Complaint demonstrate as

[8] Only a handful of the alleged "steps" occurred during the limitations period. (*See* App. 23, ¶ 70 (discussing the **ninth and tenth steps**, which occurred on July 13, 2017); App. 25, ¶ 75 (discussing the **eleventh step**, which occurred on July 14, 2017).) As indicated *supra*, however, the Circuit Court examined the discrete acts alleged in

much, with the most recent event occurring some six (6) months outside of the limitations period. (*See* App. 12, ¶ 34 (discussing the **first step**, which occurred on October 14, 2014); App. 13, ¶ 37 (discussing the **second step**, which occurred "in early 2015"); App. 15–16, ¶ 46 (discussing the **third step**, which occurred "[t]hroughout the first year after [Petitioner's] September 2014 return"); App. 13–14, ¶¶ 38–41 (discussing the **fourth step**, which occurred during "early 2015"); App. 14, ¶ 40 (discussing the **fifth step**, which occurred on March 30, 2015); App. 17, 19, ¶¶ 53–54, 59 (discussing the **sixth step**, which occurred in December 2015 and on March 4, 2016); App. 16–17, 20–21, ¶¶ 47–50, 61, 63 (discussing the **seventh step**, which occurred on September 4, 2015; January 19, 2017; and February 1, 2017); App. 20, ¶ 61 (discussing the **eighth step**, which occurred on January 19, 2017).) Because the Complaint failed to allege even a single "actionable adverse action" that occurred during the relevant limitations period, the Circuit Court did not err in dismissing Count III as to B&S (or, for that matter, Mr. Bailey too) as a matter of law. *See Boone v. Activate Healthcare, LLC*, No. 19-1007, __ W. Va. __, __ S.E.2d __, 2021 WL 2390208 (2021) (affirming dismissal of WVHRA claim because plaintiff failed to allege sufficient facts to establish such a claim).

V. The Circuit Court Did Not Err in Dismissing the "Equal Opportunity" Age Discrimination Claim Asserted Against Charles R. "Chuck" Bailey in Count III of the Complaint Since Mr. Bailey Is Not an "Employer."

In Count III of the Complaint, Petitioner also alleged that Mr. Bailey discriminated against him on the basis of his age, again in violation of West Virginia Code § 5-11-9(1). (App. 37–40, ¶¶ 114–27.) Even accepting all of the well-pleaded allegations of the Complaint as true, the Circuit Court concluded—correctly—that Count III failed to state a claim against Mr. Bailey as a matter of law. (App. 188, ¶ 32.) The Circuit Court appropriately looked to the language of section 9(1),

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those paragraphs, but concluded that each act did not constitute adverse employment action as a matter of law—a conclusion that Petitioner does not challenge here.

which "declares it unlawful for 'any ***employer*** to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment' on account of age." (App. 188, ¶ 32 (emphasis in original) (quoting W. VA. CODE § 5-11-9(1)).) The Circuit Court then applied the plain language of the statute to determine that "Mr. Bailey, as an individual," did not come within the WVHRA's definition of the term "employer." (App. 188, ¶ 32 (citing W. VA. CODE § 5-11-3(d)).) That conclusion was not only correct, but also sensible, as the Complaint contained no allegation that Mr. Bailey personally employed "twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year." W. VA. CODE § 5-11-3(d).

Much to his credit, Petitioner concedes that the Circuit Court's "statutory analysis," as laid out above, was "technically correct." (Pet'r's Br. 33.) Yet, Petitioner argues—as he did before the Circuit Court—that this Court's decision in *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995), obliterated, *sub silentio*, that statutory scheme. (Pet'r's Br. 33–34.) In Petitioner's view, *Holstein*'s holding—that "a cause of action may be maintained by a plaintiff employee as against another employee under the West Virginia Human Rights Act"—must be applied to each and every provision of the WVHRA, regardless of what the specific statutory provisions actually say. (*Id.* at 34 (quoting Syl. Pt. 4, in part, *Holstein*, 194 W. Va. 727, 461 S.E.2d 473).) He is wrong.

Pack v. S&S Firestone, Inc., No. 5:14-CV-17286, 2014 WL 12625463 (S.D. W. Va. Aug. 27, 2014)—which expressly rejected Petitioner's flawed interpretation of *Holstein*—illustrates why. In *Pack*, an employee who had been laid off sued his former employer and supervisor, alleging, *inter alia*, a claim for age discrimination premised upon West Virginia Code § 5-11-9(1). *Id.* at *1. The employer and supervisor removed the suit to federal court on the basis that complete

diversity existed once the citizenship of the supervisor—whom the employer claimed had been fraudulently joined—was disregarded. *Id.* at *3. In support of its fraudulent joinder argument, the employer contended that the supervisor was not an "employer" within the meaning of West Virginia Code § 5-11-3(d) and, as such, that the age discrimination claim against him individually failed as a matter of law. *Id.* The employee disagreed and moved to remand, relying on *Holstein* for the same proposition that Petitioner does here—that "employees can be held liable under the Human Rights Act." *Id.* at *4.

The district court disagreed with the employee and found that the supervisor had been fraudulently joined. To demonstrate that the supervisor had been fraudulently joined, the employer had to establish "that there [was] *no possibility* that the plaintiff [*i.e.*, the employee] would be able to establish a cause of action against the in-state defendant [*i.e.*, the supervisor] in state court." *Id.* at *2 (emphasis in original) (quoting *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999)). The district court concluded that the employer had carried that burden based upon the plain language of the WVHRA. *Id.* at *6–7. Just like the Petitioner in this case, the employee grounded his age discrimination claim on West Virginia Code § 5-11-9(1), which prohibits "any employer" from discriminating "against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment" on account of age. *Id.* at *6 (quoting W. VA. CODE § 5-11-9(1)). Because the supervisor did not fall within the statutory definition of the term "employer," the district court determined that the employee "could not possibly establish a cause of action against [him] for violating . . . W. Va. Code § 5-11-9(1)." *Id.* at *7.

Of significance here, the district court expressly rejected the employee's argument that *Holstein* recognized such a cause of action, the plain language of West Virginia Code § 5-11-9(1) notwithstanding. *Id.* at *6–7. Rather, as the district court correctly explained, *Holstein*'s holding

was limited to claims asserted against fellow employees under West Virginia Code § 5-11-9(7). *Id.* at *7. The reason was simple enough. While West Virginia Code § 5-11-9(7) expressly imposed liability upon "any person" in addition to any "employer," West Virginia Code § 5-11-9(1) spoke only in terms of an "employer." *Id.* Because the complaint did not include a claim against the supervisor for violating West Virginia Code § 5-11-9(7), the district court concluded that *Holstein* was inapplicable. *Id.*; *accord, e.g.*, *Pajak v. Under Armour, Inc.*, No. 1:19CV160, 2021 WL 850549, at *6 (N.D. W. Va. Mar. 5, 2021) ("*Holstein*, accordingly, stands for the limited proposition that an employer meets the definition of a 'person' under the WVHRA insofar as it can be aided or abetted by another in its discriminatory practices." (citing Syl. Pt. 4, *Holstein*, 194 W. Va. 727, 461 S.E.2d 473)).

The reasoning and holding of *Pack* accord with this Court's characterization of *Holstein*'s holding as well. Take, for example, *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996), which was decided just one (1) year after *Holstein*. In *Conrad*, this Court affirmed the dismissal of a sexual harassment claim brought against an individual defendant under West Virginia Code § 5-11-9(1). *Id.* at 378, 480 S.E.2d at 817. Just like the district court in *Pack*, this Court explained that the individual defendant "was certainly not the plaintiff's employer, nor was he 'the state, or any political subdivision thereof, [or] any person employing twelve or more persons.'" *Id.* at 376, 480 S.E.2d at 815 (alteration in original). As such, the plaintiff had no cognizable claim against the individual defendant under West Virginia Code § 5-11-9(1). *Id.* at 376–78, 480 S.E.2d at 815–17. In reaching that decision, this Court described *Holstein* as holding that West Virginia Code § 5-11-9(7)—***not*** West Virginia Code § 5-11-9(1)—"permitted a cause of action against an employee for aiding or abetting an employer engaging in an unlawful discriminatory practice," nothing more, nothing less. *Id.* at 378, 480 S.E.2d at 817. That statement is not only consistent

with *Pack*, but is also consistent with this Court's other decisions on the same issue. *See, e.g.*, *Brown v. City of Montgomery*, 233 W. Va. 119, 126, 755 S.E.2d 653, 660 (2014) (expressly characterizing *Holstein*'s holding in syllabus point 4 as being "based on" West Virginia Code § 5-11-9(7)).

Turning to the instant dispute, the Circuit Court got it right. Under the plain language of the statute, West Virginia Code § 5-11-9(1) does not apply to Mr. Bailey's conduct. The pertinent portion of the WVHRA prohibits discriminatory acts undertaken by an "***employer***." W. VA. CODE § 5-11-9(1) (emphasis added). The WVHRA defines an "employer," in turn, as "any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year." W. VA. CODE § 5-11-3(d). Yet, the Complaint neither alleged that Mr. Bailey personally employed Petitioner, nor that Mr. Bailey had personally employed an additional eleven persons either. As such, Mr. Bailey was not an "employer" and, likewise, he was not subject to the prohibitions contained in West Virginia Code § 5-11-9(1). Therefore, this Court must affirm the Circuit Court's dismissal of Count III as to Mr. Bailey for failing to state a claim upon which relief could be granted. W. VA. R. CIV. P. 12(b)(6).

VI. The Circuit Court Did Not Err in Dismissing the "Threat-of-Economic-Loss" Age Discrimination Claim Asserted Against Respondents in Count IV of the Complaint.

Count IV of the Complaint asserted an additional age discrimination claim against Respondents premised upon Mr. Bailey's communication of an alleged "threat" to Petitioner in violation of West Virginia Code § 5-11-9(7)(A), another provision of the WVHRA. (App. 41–44, ¶¶ 128–37.) The substance of the alleged "threat" consisted of B&S's offer in July 2017 to continue Petitioner's employment on different terms and its subsequent explanation—provided at

Petitioner's request—of B&S's position if he were to reject that offer.[9] (App. 43, ¶ 134.) "Even accepting the allegations of the Complaint as true," the Circuit Court concluded that Count IV failed to state a claim against Respondents "as a matter of law." (App. 190, ¶ 36.) To reach that conclusion, the Circuit Court first examined the language of West Virginia Code § 5-11-9(7)(A), which "declares it unlawful for 'any person' or 'employer' to, in pertinent part, engage 'in any form of threats . . . the purpose of which is to . . . cause . . . economic loss.'" (App. 190, ¶ 35 (omissions in original) (quoting W. VA. CODE § 5-11-9(7)(A)).) The Circuit Court then determined that the conduct alleged in the Complaint failed to "rise to the level of an actionable 'threat,'" especially as compared to the threatening conduct found to be actionable in the analogous case of *McDowell v. Town of Sophia*, No. 5:12-CV-01340, 2012 WL 3778837 (S.D. W. Va. Aug. 30, 2012). (App. 190, ¶ 36.)

Petitioner disagrees, erroneously asserting that *McDowell* "actually supports the Petitioner's assertion that this claim should not have been dismissed." (Pet'r's Br. 36.) In support of that flawed argument, Petitioner myopically focuses on the end result of *McDowell* as opposed to its reasoning and substance. (*Id.* at 35–36.) Yet, Petitioner's misguided effort to recast *McDowell* as authority favorable to his position misapprehends the limited and specific purpose for which the Circuit Court relied upon it in the first instance. The issue of what conduct constitutes an actionable "threat" under West Virginia Code § 5-11-9(7)(A) appears to be one of near first impression in West Virginia. As such, it is hardly surprising that the Circuit Court looked

[9] It was not enough that the Complaint alleged that the foregoing exchange constituted an unlawful "threat," as the Circuit Court was "free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations" in assessing the sufficiency of Petitioner's Complaint. *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting FRANKLIN D. CLECKLEY ET AL., LITIGATION HANDBOOK OF WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(6)[2], at 384–88 (4th ed. 2012)).

to *McDowell*—one of the only cases analyzing West Virginia Code § 5-11-9(7)(A)—as supplying an analogous guidepost.

In *McDowell*, two officers from the Beckley Police Department learned that two individuals—Damon McDowell, an African-American police officer from the Sophia Police Department; and Nathan McGraw, the Caucasian boyfriend of Officer McDowell's daughter—had supposedly dined-and-dashed at the Applebee's located in the City of Beckley. 2012 WL 3778837, at *1–2. The officers decided to investigate the accusation and obtained statements that implicated not only Officer McDowell, but also Mr. McGraw as well. *Id.* at *2. Despite the fact that the statements implicated both gentlemen, the officers only pursued and secured a warrant for Officer McDowell's arrest. *Id.* at *3. When the officers brought the matter to the attention of Officer McDowell's supervisor, the supervisor hauled Officer McDowell in and presented him with a "Sophie's choice": either resign, in which case no arrest would be made, or be arrested and terminated. *Id.* at *2. Officer McDowell chose the latter course and, unsurprisingly, was immediately terminated and arrested shortly thereafter. *Id.* at *2–3.

Officer McDowell sued the two investigating officers for, *inter alia*, conspiring with his supervisor to make an unlawful threat on account of his race in violation of West Virginia Code § 5-11-9(7)(A). *Id.* at *10. The two officers moved to dismiss that claim, arguing that it was factually and legally insufficient to state a cause of action as a matter of law. *Id.* In response, Officer McDowell asserted that his complaint "adequately alleged" that the two officers had conspired with his supervisor "to threaten to arrest him if he did not resign from his position with the Sophia Police Department." *Id.* The district court agreed with Officer McDowell. *Id.* It held that Officer McDowell had stated a cognizable claim against the two officers because the two officers had acted "in concert" with the supervisor who, in turn, had made an unlawful threat. *Id.*

Turning to the instant dispute, the Circuit Court did not rely upon *McDowell* for its ultimate conclusion. Rather, the Circuit Court relied upon *McDowell* to illustrate the stark contrast between the substance of the alleged "threat" made to Petitioner and that of the cognizable threat examined in *McDowell*. As the Circuit Court correctly concluded, it is not "an unlawful 'threat' for an employer to offer an employee continued employment on different terms." (App. 190, ¶ 36.) Nor is it "an illegal 'threat' for an employer to explain—in response to a question from the employee no less—its position should the two be unable to reach a mutually-acceptable agreement." (App. 190, ¶ 36.) In dismissing Count IV, the Circuit Court merely recognized that the WVHRA, like Title VII, "does not set forth 'a general civility code for the American workplace.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). Because that conclusion could hardly be described as erroneous, this Court must affirm the dismissal of Count IV for failing to state a claim upon which relief could be granted. W. VA. R. CIV. P. 12(b)(6).

VII. The Circuit Court Did Not Err in Dismissing the Constructive Discharge Claim Asserted Against Respondents in Count V of the Complaint.

Last but not least, in Count V of the Complaint, Petitioner alleged that Respondents made his working conditions "so intolerable" that he was forced to resign, thereby constructively discharging him on the basis of his age in violation of West Virginia Code § 5-11-9(1).[10] (App. 44–45, ¶¶ 138–45.) In the words of the Complaint, those "intolerable" working conditions resulted

[10] Under West Virginia law, "constructive discharge is not a cause of action in its own right." *Conrad v. Council of Senior Citizens of Gilmer Cty., Inc.*, No. 14-1262, 2016 WL 6778918, at *3 n.4 (W. Va. Nov. 16, 2016) (memorandum decision) (quoting *Dickens*, 298 F. App'x at 3); *accord Shaffer v. City of S. Charleston*, No. 14-0954, 2015 WL 6955158, at *1 n.1 (W. Va. Nov. 6, 2015) (memorandum decision) (same); *Blessing v. Sup. Ct. of Appeals of W. Va.*, No. 13-0953, 2014 WL 2208925, at *3 (W. Va. May 27, 2014) (memorandum decision) (same). Instead, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." *Conrad*, 2016 WL 6778918, at *3 n.4 (quoting *Simpson v. Fed. Mine Safety & Health Review Comm'n*, 842 F.2d 453, 461 (D.C. Cir. 1988)). Put another way, an employee who resigns—as opposed to being fired—must prove he was constructively discharged as an additional element to establish his underlying wrongful termination claim. *Id.*

from **(1)** the alleged termination of Petitioner's salary on July 31, 2017, and failure to provide him "with any substantive information about what, if any, professional future he had" with B&S thereafter, (App. 44–45, ¶ 140); and **(2)** the alleged assignment of some work to "attorneys who were substantially younger" than Petitioner after July 31, 2017, (App. 45, ¶ 141). Claiming that no "reasonable employee" could endure working under such conditions, Petitioner resigned from B&S effective December 28, 2018—some ***seventeen (17) months*** later. (App. 29, ¶ 91.)

Even accepting all of the factual allegations of the Complaint as true, the Circuit Court concluded—correctly—that Count V failed to state a claim against Respondents as a matter of law.[11] (App. 190–91, ¶ 37.) In reaching that conclusion, the Circuit Court relied upon a well-developed line of federal cases supporting the proposition that "an employee's failure to 'resign within a reasonable time period after the alleged' discriminatory acts occur precludes—as a matter of law—resort to a constructive discharge theory." (App. 190, ¶ 37 (quoting *Gerald v. Univ. of P.R.*, 707 F.3d 7, 26 (1st Cir. 2013)).) In light of the "seventeen (17) month gap between the alleged discriminatory acts and [Petitioner's] eventual resignation," the Circuit Court held that Petitioner could not prevail under a constructive discharge theory "as a matter of law." (App. 191, ¶ 37 (citing *Poland v. Chertoff*, 494 F.3d 1174, 1185 (9th Cir. 2007)).)

Before this Court, Petitioner makes no attempt to discredit the cases upon which the Circuit Court relied in support of its sensible conclusion. (*See* Pet'r's Br. 36–37.) Nor does Petitioner dispute that he somehow endured his "intolerable" working conditions for ***more than seventeen***

[11] Count V must also be dismissed as to Mr. Bailey for the same reasons discussed in Part V, *supra*, insofar as no cause of action premised upon West Virginia Code § 5-11-9(1) will lie against Mr. Bailey as a matter of law. It is true that the Circuit Court did not rely upon this proposition in support of its dismissal of Count V. Yet, that presents no obstacle here, as "it is permissible for [this Court] to affirm the granting of [dismissal] on bases different or grounds other than those relied upon by the circuit court." *Hoover v. Moran*, 222 W. Va. 112, 119, 662 S.E.2d 711, 718 (2008) (per curiam) (second alteration in original) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995)) (collecting cases).

(17) months before resigning from B&S. (*See generally id.*) Instead, Petitioner repeats the same flawed argument made throughout his Petitioner's Brief, *i.e.*, that the Circuit Court was "not in a position to determine, under the motion-to-dismiss 'beyond doubt' standard, that Petitioner remained at [B&S] for as long as he did because his situation there was tolerable." (*Id.* at 37.) According to Petitioner, that conclusion is especially true since the Complaint included no "information whatsoever regarding the Petitioner's reasons for staying at [B&S] for as long as he did or his reasons for leaving when he did." (*Id.*)

Of course, Petitioner's argument turns the pleading standard embodied in Rule 8 of the West Virginia Rules of Civil Procedure on its head. What Petitioner fails to grasp is that the law required ***him*** to plead, "at a minimum[,] . . . sufficient information to outline the elements of his [or her] claim." *W. Va. Reg'l Jail & Corr. Facility Auth. v. Estate of Grove*, 244 W. Va. 273, ___, 852 S.E.2d 773, 780 (2020) (alterations in original) (quoting *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015)). If Petitioner failed to include an explanation for why he stayed "at [B&S] for as long as he did" or a discussion of "his reasons for leaving when he did," that is not the fault of the Circuit Court. (Pet'r's Br. 37.) Rather, only Petitioner is to blame for that dispositive omission.

Relative to Petitioner's constructive discharge theory, the law required ***him*** to plead sufficient facts to "establish that working conditions created by or known to the employer [*i.e.*, B&S] were so intolerable that a ***reasonable*** person would be compelled to quit." Syl. Pt. 6, in part, *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992) (emphasis added). Accepting all of the factual allegations of the Complaint as true, the Circuit Court merely and reasonably concluded that the inexplicable seventeen (17) month gap between Respondents' alleged discriminatory acts and Petitioner's eventual resignation foreclosed his

constructive discharge theory as a matter of law. (App. 190–91, ¶ 37.) Its holding on that point enjoys substantial and uncontradicted support from federal decisions adjudicating analogous claims. *See, e.g.*, *Poland*, 494 F.3d at 1185 (eight-month delay); *Landrau-Romero v. Banco Popular De Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (seven-month delay); *Smith v. Bath Iron Works Corp.*, 943 F.2d 164, 167 (1st Cir. 1991) (six-month delay); *Serrano-Nova v. Banco Popular de Puerto Rico, Inc.*, 254 F. Supp. 2d 251, 265 (D.P.R. 2003) (six-month delay); *Gonzalez Garcia v. P.R. Elec. Power Auth.*, 214 F. Supp. 2d 194, 205 (D.P.R. 2002) (nine-month delay). By Petitioner's own admission, his Complaint included no "information whatsoever regarding the [his] reasons for staying at [B&S] for as long as he did or his reasons for leaving when he did." (Pet'r's Br. 37.) Given the absence of such an explanation, the Circuit Court did not err in dismissing Count V. *Cf. Conrad v. Council of Senior Citizens of Gilmer Cty., Inc.*, No. 14-1262, 2016 WL 6778918, at *3–4 (W. Va. Nov. 16, 2016) (memorandum decision) (affirming dismissal of wrongful termination claim premised upon constructive retaliatory discharge theory due to "the absence of alleged facts" sufficient to support such a claim).

CONCLUSION

The Circuit Court correctly dismissed each claim alleged against Respondents for failing to state a claim upon which relief could be granted, as Rule 12(b)(6) of the West Virginia Rules of Civil Procedure required. Petitioner's assignments of error are without merit. Therefore, this Court should affirm the decision of the Circuit Court in full.

Signed: 

Michael J. Farrell (WVSB # 1168)
Respondents

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 21-0009

Jay M. Potter,
Plaintiff Below, Petitioner,

v.

Bailey & Slotnick, PLLC, and
Charles R. "Chuck" Bailey,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Respondent Bailey & Slotnick, PLLC, and Respondent Charles R. "Chuck" Bailey, do hereby certify that the foregoing **Respondents' Brief** was served on June 23, 2021 via electronic mail and U.S. Mail, postage prepaid, upon the following:

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