IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-ICA-168

DONALD C. NICHOLS,
Plaintiff Below, Petitioner,

vs.

MARONEY WILLIAMS WEAVER & PANCAKE PLLC
and PATRICK K. MARONEY,
Defendants Below, Respondents.

PETITIONER'S REPLY BRIEF

Appeal from a Final Order of the
Circuit Court of Kanawha County, West Virginia
in Civil Action No. 20-C-518
(The Honorable Joanna I. Tabit, Judge)

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PETITIONER'S REPLY BRIEF

Petitioner Donald C. Nichols ("Petitioner"), by counsel, hereby submits his reply brief in further support of his appeal of the Circuit Court of Kanawha County's final order granting a partial motion to dismiss his negligence claim and a motion for summary judgment on his negligence and breach-of-contract claims in favor of Respondents Maroney Williams Weaver & Pancake PLLC ("Law Firm") and Patrick K. Maroney ("Mr. Maroney") (collectively referred to as "Respondents") in the underlying civil action. Without waiving any argument he has already made, the Petitioner hereby addresses arguments advanced by the Respondents in their brief.

In short, the Respondents' brief in support of the Circuit Court's rulings is built upon a foundation of untenable arguments – as are the Circuit Court's rulings, which are reflected in an order drafted by the Respondents' counsel in this case. The Petitioner respectfully renews his request that this Court fully reverse the Circuit Court's rulings and remand this case for further proceedings, including, but not limited to, the completion of discovery and a jury trial.

I. RENEWED REQUEST FOR ORAL ARGUMENT AND DECISION

The Petitioner respectfully renews his request that this case be set for a Rule 19 oral argument. The Petitioner also respectfully renews his request that a published opinion be issued, fully reversing the Circuit Court and remanding this case.

II. ARGUMENT

A. The Circuit Court's Ruling Regarding Rule 12(b)(6) Dismissal Constitutes Reversible Error, and the Respondents Have Provided No Viable Support for Concluding Otherwise.

Rather than separately addressing their position in support of the Circuit Court's Rule 12(b)(6) dismissal of the Petitioner's negligence claim, the Respondents lumped their position into a more general argument that the negligence claim is time-barred. (*See* Resp'ts' Br. at pp. 7-12.)

As a result, the Respondents confuse the differing standards applicable to analyzing a Rule 12(b)(6) motion to dismiss and a Rule 56(c) motion for summary judgment, essentially throwing their argument into a proverbial blender with the hope that the confusion will mask the flaws. The Petitioner, nevertheless, separately addresses what seems to be the Respondents' position on each.

The Respondents devote very little effort to supporting the Rule 12(b)(6) dismissal. They argue that "the Circuit Court appropriately disregarded Petitioner's unsupported conclusions that he did not know of Respondents' alleged negligence until January 30, 2020, and that Respondents fraudulently concealed facts that prevented Petitioner from discovering or pursuing his cause of action against Respondents." (Resp'ts' Br. at p. 12.) In making their argument, the Respondents ignore the facts alleged in the Complaint and ignore the requisite Rule 12(b)(6) analysis.

"The general rule is . . . that circuit courts considering motions under Rule 12(b)(6) should confine their review to the four corners of the complaint or other disputed pleading and may not consider extraneous documents." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 526, 854 S.E.2d 870, 888 (2020); *see also John W. Lodge Distrib. Co. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978) (recognizing that, for purposes of evaluating a motion to dismiss, a complaint should be "construed in the light most favorable to plaintiff, and its allegations are to be taken as true"). The Respondents seem reluctant to address the actual content of the Complaint, because such content simply does not support their position regarding Rule 12(b)(6) dismissal of the Petitioner's negligence claim.

As addressed in his initial appeal brief, the Petitioner has alleged an ample basis for tolling the statute of limitations based on the discovery rule. In his Complaint, the Petitioner alleges:

> 32. Represented by separate counsel at a separate law firm, the Plaintiff filed a civil action (Civil Action No. 16-C-888 in the Circuit Court of Kanawha County, WV) against FMC

> Corporation and other defendants (not the defendants in this case) relative to his benzene exposure.
>
> 33. On or about January 13, 2020, in the course of the above-referenced civil action (*i.e.*, Civil Action No. 16-C-888 in the Circuit Court of Kanawha County, WV), FMC Corporation took the position that the Plaintiff's deliberate-intent claim against it is barred by the doctrine of res judicata, given that the Plaintiff's application for workers' compensation benefits was denied.
>
> 34. The Defendants' failure to adequately and properly represent the Plaintiff in the workers' compensation matter has also adversely impacted the Plaintiff's above-referenced civil action (*i.e.*, Civil Action No. 16-C-888 in the Circuit Court of Kanawha County, WV).

(Compl. at ¶¶ 32-34 (AR 006).) These are factual allegations. Treating such allegations as true for purposes of Rule 12(b)(6) analysis, the Petitioner did not know of the Respondents' negligence until on or about January 13, 2020.[1] Thus, the two-year statute of limitations on the negligence claim would not have started to run until on or about January 13, 2020, which brings the June 25, 2020, filing of the negligence claim well within the applicable two-year filing period. The issue of whether the Petitioner should have known of the negligence claim sooner is not appropriate for a motion to dismiss or even a motion for summary judgment; it is a jury issue – as is the issue of whether the Respondents fraudulently concealed their negligence (as asserted by the Petitioner), thus providing an additional basis for tolling the statute of limitations on the negligence claim.

[1] As alleged in the Complaint, on or about January 13, 2020, FMC Corporation took the position that the Plaintiff's deliberate-intent claim against it is barred by the doctrine of res judicata. (Compl. at ¶ 33 (AR 006).) The Petitioner's initial appeal brief cites to the January 13, 2020, date referenced in the Complaint; however, the Petitioner's initial brief then contains a typo by inadvertently referring to that date as January 30, 2020. For purposes of the overarching point, which is that the negligence claim is not time-barred, the typo is insignificant; nevertheless, please allow this footnote to clarify that the January 30, 2020, reference in the initial appeal brief was a mere typo. The correct date is January 13, 2020, as alleged in the Petitioner's Complaint.

In *Evans v. United Bank, Inc.*, 235 W. Va. 619, 627, 775 S.E.2d 500, 508 (2015), the Supreme Court of Appeals of West Virginia reversed the trial court's dismissal of the plaintiffs' negligence claim based upon the trial court's erroneous application of a date by which the plaintiffs purportedly should have known of their claims. Like the trial court in *Evans*, the Circuit Court in the present case erroneously found that, "no later than July 15, 2017, Plaintiff knew or should have known" of his negligence claim.[2] (*See* AR 256.) The Respondents rely heavily on this finding for purposes of trying to justify the Circuit Court's dispositive rulings relative to the negligence claim. But again, respectfully, such a finding was reversible error pursuant to *Evans*.

Although *Evans* is one of two cases cited by the Respondents in their argument regarding the Petitioner's negligence claim,[3] the Respondents gloss over one of the more fundamental holdings in *Evans* in terms of evaluating whether a negligence claim is time-barred. As the Supreme Court of Appeals held in *Evans*, the resolution of issues regarding application of the discovery rule and the doctrine of fraudulent concealment (both of which have been raised by the Petitioner in the present case) "will generally involve questions of material fact that will need to be resolved by the trier of fact." Syl. pt. 4, *Evans*, *supra* (in part) (quoting Syl. pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009) (in part). The Respondents offer no viable argument why the present case should be the exception to the rule.

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[2] July 15, 2017, was the deadline for appealing the Administrative Law Judge's ("ALJ") decision on the workers' compensation claim in which the Respondents represented the Petitioner.

[3] The Respondents' argument that the Petitioner's negligence claim is time-barred is set forth in Section V.C. on pages seven through twelve of the Respondents' Brief. That section contains only two case citations: (1) *Evans*, including language from *Evans* that quotes *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009); and (2) *Brown v. City of Montgomery*, 233 W. Va. 119, 755 S.E.2d 653 (2014), which the Respondents cite relative to the Rule 12(b)(6) standard.

In addition to exceeding its authority by making erroneous findings and conclusions regarding the issues of fraudulent concealment and the date by which the Petitioner purportedly should have known of his negligence claim, the Circuit Court improperly assessed "whether Plaintiff has produced evidence or made a compelling argument that the statute of limitations should be tolled." (AR 256.) By considering whether the Petitioner produced evidence deemed sufficiently supportive of his arguments regarding the statute of limitations on his negligence claim, the Circuit Court unquestionably moved beyond the proper framework for Rule 12(b)(6) analysis. *See Mountaineer Fire & Rescue Equip., LLC*, 244 W. Va. at 526, 854 S.E.2d at 888.

B. The Circuit Court Improperly Granted Summary Judgment on the Petitioner's Negligence Claim, Despite the Existence of Jury Issues Regarding the Doctrine of Fraudulent Concealment and Application of the Discovery Rule in the Context of the Statute of Limitations.

In contending that the Circuit Court properly granted summary judgment on the Petitioner's negligence claim based upon the applicable two-year statute of limitations, the Respondents appear to rely largely, if not exclusively, on the argument that the Petitioner knew or should have known of the Respondents' negligence by the July 15, 2017, deadline for appealing the ALJ's ruling regarding the Petitioner's workers' compensation claim. (*See* Resp'ts' Br. at p. 12.) The Respondents argue that, by July 15, 2017, the Petitioner knew that the "Respondents owed him a duty to act with due care and may have engaged in conduct that breached that duty by failing to properly develop evidence in support of his claim[.]" (*See* Resp'ts' Br. at p. 12.) The Respondents' argument, however, ignores the role of fraudulent concealment in this case.

As addressed in the Petitioner's initial appeal brief, through a June 27, 2017, letter Mr. Maroney purportedly sent to the Petitioner, the Respondents advised that they would "not be appealing the June 15, 2017, Order of the Administrative Law Judge to the Workers' Compensation Board of Review." (AR 142.) In explaining the Respondents' decision, Mr.

Maroney wrote: "Based upon the evidence in your claim, it does not appear that the Board of Review will enter a favorable decision for you. It is our opinion that any further appeal of your claim will be unsuccessful." (AR 142.) By June 27, 2017, nearly half of the Petitioner's thirty-day period for appealing the ALJ's decision had already passed.

Importantly, Mr. Maroney's letter provides no explanation regarding the Respondents' deficiencies in terms of not properly developing evidence in the workers' compensation matter. Mr. Maroney's message that the Petitioner's appeal would be unsuccessful based upon the evidence suggests that there was no evidence to support the workers' compensation claim. However, there was evidentiary support for the Petitioner's claim; the Respondents simply failed to bring it, or develop and then bring it, before the ALJ. As reflected at the conclusion of the ALJ's decision, the Respondents did not submit any actual medical evidence, nor did they offer any challenge to the report submitted by FMC Corporation's ("FMC")[4] expert on April 7, 2017, or FMC's closing argument submitted on April 19, 2017. (AR 047-048.) The ALJ concluded "[t]he only persuasive medical evidence of record" was from FMC's expert's report. (AR 045.)

The Respondents chose to conceal the fact that their deficiencies in representing the Petitioner were the cause of the insufficient evidentiary support regarding the workers' compensation claim. There is nothing in the record to suggest that the Petitioner has any form of legal expertise. To the contrary, the ALJ's decision notes that the Petitioner worked 39 years for FMC, having been hired by FMC as a laborer. (AR 040.) The Respondents' implication that the Petitioner knew of should have known of the evidence that should have been presented in furtherance of his claim or the impact of the Respondents' failure to present such evidence is wholly unrealistic – but nevertheless is a jury issue. *See* Syl. pt. 4, *Evans*, *supra* (in part) (holding

[4] FMC is the employer that was the subject of the Petitioner's workers' compensation claim.

that the resolution of issues regarding application of the discovery rule and the doctrine of fraudulent concealment "will generally involve questions of material fact that will need to be resolved by the trier of fact") (quoting Syl. pt. 5, *Dunn*, *supra* (in part)).

Even so, the Circuit Court wholesale adopted the Respondents' arguments regarding the statute of limitations relative to the negligence claim. In doing so, the Circuit Court committed reversible error by improperly stepping into the role of juror in the context of its findings and conclusions regarding the statute of limitations. *See Evans*, *supra*; *see also Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 410, 825 S.E.2d 351, 357 (2019) (recognizing that "'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge'") (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995)).

The Circuit Court similarly erred by adopting the Respondents' argument that, "no later than July 15, 2017, Plaintiff knew or should have known" of his negligence claim. (AR 256; *see also* Resp'ts' Br. at p. 12 (arguing that, by July 15, 2017, the Petitioner knew that the "Respondents' conduct may have had a casual relation to his alleged injury").[5])

As alleged in the Complaint, until January 13, 2020, the Petitioner was unaware of the adverse impact that the Respondents' negligence had on the Petitioner's deliberate-intent claim. (*See* Compl. at ¶¶ 33-34 (AR 006).) Although the Respondents argue that the Petitioner had prior notice of such adverse impact based upon FMC's assertion of res judicata as an affirmative defense in its February 3, 2016, answer to the Petitioner's deliberate-intent claim in a separate case (*see* Resp'ts' Brief at pp. 10-11), such an argument simply lacks merit.

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[5] It appears that the Respondents' reference to a "casual relationship" is likely a typo that was intended to be a reference to a "causal relationship."

FMC's answer was served on February 3, 2016 (AR 156) – over a year before the June 15, 2017, ALJ decision on the workers' compensation claim in which the Respondents represented the Petitioner. Thus, FMC's answer could not have effectively placed the Petitioner on notice of the res judicata argument in the context of the ALJ's decision. At the time such a defense was asserted, the ALJ's decision had not yet been issued; the workers' compensation matter was ongoing.

In its answer in Civil Action No. 16-C-888, FMC asserted 34 affirmative defenses, not counting the "defense" dedicated to its specific responses to the allegations in the complaint in that case. (AR 146-156.) It appears many of FMC's affirmative defenses were inapplicable or were asserted provisionally, including, but not limited to, the following: affirmative defenses "raise[d] so as not to waive" in FMC's "**Twenty-Fourth Defense**" (emphasis in original), such as "lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, and improper venue[;]" and the purported affirmative defenses of "payment and release" that are asserted in FMC's "**Twenty-Eighth Defense**" (emphasis in original) – the same defense in which FMC lists res judicata. (*See* AR 150-155.) FMC clearly chose to throw a significant number of boilerplate affirmative defenses into the answer, regardless of applicability, in an effort to see what may stick. Such a practice is not a proper use of affirmative defenses and, thus, cannot support the argument advanced by the Respondents in the present case in opposition to applying the discovery rule.

"Pleadings are not an opportunity for lawyers to throw things against the wall and see what sticks." *Greenspan v. Platinum Healthcare Group, LLC*, Case No. 2:20-cv-05874-JDW, 2021 U.S. Dist. LEXIS 48884, at *10 (E.D. Pa. Mar. 16, 2021) (memorandum opinion). In criticizing an answer in which 25 affirmative defenses were asserted, including lack of personal jurisdiction, lack of subject matter jurisdiction, execution of a jury waiver or an arbitration agreement, comparative or contributory negligence, assumption of risk, the statute of limitations, *res*

judicata or collateral estoppel, and accord and satisfaction, the District Court in *Greenspan* observed that "[t]he assertion of prophylactic affirmative defenses is not harmless." *Id.* at *3, *7-8. "Rule 11 does not permit counsel to assert defenses that might apply based on experience in a particular field. It only allows affirmative defenses that the evidence supports **in this case**." *Id.* at *6 (emphasis in original). In the present case, the Respondents should not be given the benefit of relying upon, nor can the Petitioner have been effectively placed on notice by, FMC's affirmative defense of res judicata – an affirmative defense that, at the time when asserted in FMC's answer lacked a proper basis (like many other affirmative defenses in FMC's answer), as such defense preceded the ALJ's decision in the workers' compensation matter by over a year.

Additionally, the Respondents attack the Petitioner for not having explained in more detail the additional discovery to be conducted. In doing so, the Respondents leap to the unsupportable presumption that summary judgment was not premature. As addressed in the Petitioner's initial appeal brief and again in Section II.D. of this brief, summary judgment was unquestionably premature, given that several months remained before the court-ordered discovery deadline to which the parties agreed. Although likely unnecessary given that the period for discovery was far from complete, the Petitioner's counsel submitted an affidavit regarding additional discovery to be conducted. The affidavit confirmed the Petitioner's counsel's intention to conduct additional discovery that will support the Petitioner's case, including depositions and the disclosure of experts to be utilized in furtherance of the case. (AR 191.)

Contrary to the Respondents' representation that the Petitioner could not articulate the additional discovery to be conducted, the affidavit is clear. Moreover, at the hearing held before the Circuit Court regarding the Respondents' dispositive motions, the Petitioner's counsel clearly stated that the Petitioner has "every intention of also retaining an expert witness . . . to address the

standard of care, how a claim such as this should have been prosecuted by the defendants and, in fact, was not." (AR 290.) Through a standard-of-care expert, the Petitioner can address, among other things, the knowledge that an attorney should have regarding evidence important to workers' compensation claims, the types of evidence that should have been presented to the ALJ on the Petitioner's behalf, the Respondents' malpractice, the impact of such malpractice on the Petitioner and when he could reasonably be presumed to know about the malpractice, and the fraudulent concealment reflected by the June 27, 2017, letter Mr. Maroney purportedly sent to the Petitioner.

Based upon *Evans* and the facts of this case, a jury issue exists regarding whether the two-year statute of limitations on the negligence claim should be tolled by the doctrine of fraudulent concealment and the discovery rule. By not allowing those issues to go to a jury, and by instead prematurely granting summary judgment, the Circuit Court committed reversible error.

C. The Circuit Court Committed Reversible Error by Granting Summary Judgment on the Petitioner's Breach-of-Contract Claim, Despite the Contractual Allegations in the Complaint, the Respondents' Unlimited Incorporation of a Power of Attorney into Their Representation Agreement with the Petitioner, the Fact that Months Remained Before the Close of Discovery, and the *Smith v. Stacy* Presumption.

The Respondents argue "that Petitioner's breach-of-contract claim fails as a matter of law because it **lacks allegations** regarding a breach of any specific terms of the contract between Petitioner and Respondents." (Resp'ts.' Br. at p. 4 (emphasis added).) The Respondents, however, did not move to dismiss the breach-of-contract claim. Thus, the sufficiency of the breach-of-contract claim, on its face, was not properly before the Circuit Court and should not be before this Court. Even so, the allegations in the Complaint properly establish a claim of breach of contract.

In his Complaint, the Petitioner asserted a separate and distinct cause of action titled "**Breach of Express and/or Implied Contract**" (emphasis in original) (AR 006), and he brought allegations specifically related to the alleged breach of contract:

> 36. The Defendants had a contractual obligation, express and/or implied, to provide the Plaintiff with competent and effective legal advice, counsel, and representation in all aspects of the Plaintiff's workers' compensation matter.
>
> 37. The Defendants failed to fully fulfill their contractual obligations, express and/or implied, to provide the Plaintiff with competent and effective legal advice, counsel, and representation in all aspects of the Plaintiff's workers' compensation matter.
>
> 38. If the Defendants had provided the Plaintiff with competent and effective legal advice, counsel, and representation, as required pursuant to their express and/or implied contractual obligations, the Plaintiff would have ultimately prevailed on his workers' compensation claim and received workers' compensation benefits.
>
> 39. If the Defendants had satisfied their express and/or implied contractual obligations owed to the Plaintiff and the Plaintiff had ultimately prevailed on his workers' compensation claim, the Plaintiff's subsequent civil action would not have been materially weakened by, compromised due to, or otherwise susceptible to any form of a res judicata defense by FMC Corporation.
>
> 40. The Defendants failed to fully fulfill their express and/or implied contractual obligations owed to the Plaintiff relative to the Plaintiff's workers' compensation claim.

(Compl. at ¶¶ 36-40 (AR 065-066.)

In challenging the breach-of-contract claim, the Respondents (as did the Circuit Court) rely on Syl. pt. 2, *Hall v. Nichols*, 184 W. Va. 466, 400 S.E.2d 901 (1990), which provides as follows:

> Where the act complained of in a legal malpractice action is a breach of specific terms of the contract without reference to the legal duties imposed by law on the attorney/client relationship, the action is contractual in nature. Where the essential claim of the action is a breach of duty imposed by law on the attorney/client relationship and not of the contract itself, the action lies in tort.

However, as addressed in the Petitioner's initial appeal brief, *Hall* is distinguishable.

In *Hall*, the only link to a contract claim was the single word "contractual" buried in a paragraph of an amended complaint; "*there was no express charge of breach of contract or any further reference to the contract in the complaint*." *Hall*, 184 W. Va. at 468, 400 S.E.2d at 903 (emphasis in original). In the present case, the Complaint contains a specific cause of action devoted to the Petitioner's breach-of-contract claim, as well as a number of supporting allegations.

Regardless, again, the Respondents did not move to dismiss the breach-of-contract claim. Thus, pursuant to the agreed-upon scheduling order entered by the Circuit Court, the Petitioner still had several months to conduct discovery at the time when the Circuit Court prematurely granted summary judgment. The Petitioner properly placed the Respondents on notice of his breach-of-contract claim, and he should have been given an opportunity to continue conducting discovery within the applicable timeframe for discovery under the agreed-upon scheduling order. Upon completion of discovery, the Petitioner could have then, if necessary, amended his Complaint to conform to the evidence pursuant to W. Va. R. Civ. P. 15(b).

The Respondents also argue that summary judgment was warranted regarding the breach-of-contract claim because there is no evidence of the breach of an express and/or implied contract. In addition to the fact that the Petitioner was not given the opportunity to complete discovery within the agreed-upon deadline for doing so under the scheduling order, the Respondents' argument overlooks the effect of their decision to incorporate a power of attorney (without express limitation on such power of attorney) into their representation agreement with the Petitioner.

As addressed in the Petitioner's initial appeal brief, by incorporating a power of attorney into the applicable representation agreement, the Respondents undertook contractual duties (expressly or impliedly) to the Petitioner, including, but not limited to, the following duties expressly set forth in the West Virginia Uniform Power of Attorney Act ("UPAA"), W. Va. Code

§§ 39B-1-101, *et seq.*: a duty to "[a]ct with the care, competence and diligence ordinarily exercised by agents in similar circumstances" (*see* W. Va. Code § 39B-1-114(b)(3)); and a duty to "[a]ct in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest" (*see* W. Va. Code § 39B-1-114(a)(1)).[6] Those duties became contractual obligations baked into the representation agreement as a result of the way in which the Respondents drafted the agreement. To hold otherwise would have significant implications on a long line of case law regarding contractual interpretation and obligations. And to the extent there is any ambiguity or uncertainty regarding the scope of the power of attorney in the context of the representation agreement drafted by the Respondents, including, but not limited to, the scope of contractual duties undertaken through the Respondents' incorporation of the power of attorney in the representation agreement, those ambiguities or uncertainties should be resolved against the Respondents. *See* Syl. pt. 3, *CONSOL Energy, Inc. v. Hummel*, 238 W. Va. 114, 792 S.E.2d 613 (2016) (holding that "[u]ncertainties in an intricate and involved contract should be resolved against the party who prepared it" (internal quotations and citation omitted)).

But perhaps most telling is an omission from the Respondents' brief. In their brief, the Respondents fail to address *Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996). In *Smith*, the Supreme Court of Appeals held: "Unless a complaint in a malpractice action against an attorney sounds only in tort, such action may be brought on contract or in tort and the fact that the statute of limitations bars the tort action does not preclude an action on contract which is not barred by the applicable limitation statute." Syl. pt. 2, *Smith*, *id.* (quotations marks and citations omitted.) **"A complaint that could be construed as being either in tort or on contract will be presumed**

[6] The UPAA "applies to all powers of attorney[,]" with certain exceptions that are inapplicable in the present case. *See* W. Va. Code § 39B-1-103.

to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort." Syl. pt. 4, *id.* (quotation marks and citation omitted). Thus, if the Petitioner's negligence claim is ultimately determined to be time-barred, then the Petitioner's Complaint must be presumed to be based upon a breach of contract. And there is no dispute that the breach-of-contract claim was timely filed. *See Casto v. Dupuy*, 204 W. Va. 619, 622, 515 S.E.2d 364, 367 (1999) (quoting Syl., in part, *Sansom v. Sansom*, 148 W. Va. 603, 137 S.E.2d 1 (1964)); *see also* W. Va. Code § 55-2-6 (providing, in part, that an action brought on an implied contract must be brought within five years of the date when the right to bring the action accrued); *see also* Syl. 4, in part, *Hanshaw v. City of Huntington*, 193 W. Va. 364, 456 S.E.2d 445 (1995); *see also* W. Va. Code § 55-2-6 (providing, in part, that an action brought on an express contract must be brought within ten years of the date when the right to bring the action accrued).

D. It Is Well-Established that a Ruling Granting Summary Judgment Prior to the Completion of Discovery Is Premature.

The entry of a scheduling order is not discretionary. In pertinent part, W. Va. R. Civ. P. 16(b) provides the following:

> Except in categories of actions exempted by the Supreme Court of Appeals, **the judge shall**, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, **enter a scheduling order that limits the time**:
>
> (1) To join other parties and to amend the pleadings;
>
> (2) To file and hear motions; and
>
> (3) **To complete discovery**.

(Emphasis added.) On June 16, 2022, the Circuit Court entered a scheduling order in the underlying case. (AR 160-162.) The scheduling order was agreed to by the parties' respective counsel. Under the scheduling order, the parties had until March 31, 2023, to complete discovery.

On September 9, 2022, the Circuit Court entered its "Order Granting Defendants' Partial Motion to Dismiss and Motion for Summary Judgment." (AR 246-259.)

There is no justification for granting summary judgment without first allowing a party (whether a plaintiff or a defendant) the opportunity to fully develop its case within the timeframe established for completing discovery pursuant to a scheduling order, not to mention a scheduling order that contains a discovery deadline agreed to by the parties. In asking this Court to conclude that the Circuit Court's ruling on summary judgment was not premature, the Respondents attempt to take this Court down a perilous path that lacks both legal and pragmatic support.

The Respondents have provided no effective rebuttal to the well-established line of cases that clearly prohibit summary judgment prior to the completion of discovery. As addressed in the Petitioner's initial appeal brief, the Supreme Court of Appeals has observed that, "'[a]s a general rule, summary judgment is appropriate only after adequate time for discovery.'" *Dailey*, 241 W. Va. at 416, 825 S.E.2d at 363 (quoting *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 701, 474 S.E.2d 872, 881 (1996)). "**What the Court considers adequate time for discovery is embodied in its scheduling orders**." *Palmer v. W. Va. Div. of Corr. & Rehab.*, Civil Action No. 2:22-cv-00347, 2022 U.S. Dist. LEXIS 226817, at *6 (S.D.W. Va. Dec. 16, 2022) (emphasis added) (quoting *Miller v. Dell Fin. Servs., L.L.C.*, Civil Action No. 5:08-cv-01184, 2009 U.S. Dist. LEXIS 40470 (S.D.W. Va. May 13, 2009)) (recognizing that the defendant was "entitled to conduct discovery at its own pace and according to its own schedule, provided that it does so within the time constraints of the scheduling order)).[7] "Deciding a case summarily before adequate

[7] As addressed in the Petitioner's initial appeal brief, "[t]he West Virginia Rules of Civil Procedure practically are identical to the Federal Rules. Therefore, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules." *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335 n.6.

discovery and on the basis of an incomplete record 'works an injustice.'" *Miller*, *supra*, at *4 (quoting *White v. Investors Mgmt. Corp.*, 888 F.2d 1036, 1041 (4th Cir. 1989)). "Therefore, 'a decision for summary judgment before the completion of discovery is "precipitous."'" *Dailey*, 241 W. Va. at 416, 825 S.E.2d at 363 (quoting *Precision Coil*, 194 W. Va. at 61, 459 S.E.2d at 338 (citing *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Architects, Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980) (observing that "[t]he proper course of action for the trial court to have taken would have been to defer action on the summary judgment motion until the completion of discovery and to set a date by which discovery must be concluded"))).

In the present case, the discovery deadline agreed upon by the parties and set by the Circuit Court in the scheduling order remained several months away at the time when the Respondents' summary-judgment motion was granted. Accordingly, the Circuit Court's decision regarding summary judgment was premature. If this Court were to conclude otherwise, such a conclusion would cut against well-established precedent and would invite discovery gamesmanship by litigants (plaintiffs and defendants), followed by premature summary-judgment filings and rulings.

III. CONCLUSION

The Petitioner respectfully renews his requests that this Court (a) fully reverse the Circuit Court's decision granting the Respondents' motion to dismiss and motion for summary judgment be entirely reversed, (b) recognize the Petitioner's breach-of-contract claim and negligence claim as presenting genuine issues of material fact to be decided by a jury, and (c) remand this case for further proceedings, including, but not limited to, the completion of discovery and a jury trial.

Date: March 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 2023, the "Petitioner's Reply Brief" was filed through the applicable e-filing system, which will send electronic notification of such filing to the following counsel of record for the Respondents in this matter:

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