IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Feb 23 2023
01:43PM EST
Transaction ID 69206804

Docket No. 22-ICA-168

DONALD C. NICHOLS,

Plaintiff Below, Petitioner,

v.

MARONEY WILLIAMS WEAVER & PANCAKE PLLC and PATRICK K. MARONEY,

Defendants Below, Respondents.

RESPONDENTS' BRIEF

Kevin A. Nelson (WVSB #2715)
Clayton T. Harkins (WVSB #13409)
Dinsmore & Shohl LLP
707 Virginia Street, East, Suite 1300
Charleston, West Virginia 25301
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
kevin.nelson@dinsmore.com
clayton.harkins@dinsmore.co

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Respondents Maroney Williams Weaver & Pancake PLLC and Patrick K. Maroney ("Mr. Maroney") (collectively, "Respondents") submit this brief in opposition to Petitioner Donald C. Nichols' ("Petitioner") appeal from the Final Order of the Circuit Court of Kanawha County, West Virginia granting Respondents' Partial Motion to Dismiss and Motion for Summary Judgment in favor of Respondents and against Petitioner.

I. Assignments of Error

Respondents need not, and do not, specifically restate the assignments of error. W. Va. R.A.P. 10(d).

II. Statement of the Case

This is a legal malpractice claim stemming from Respondents' representation of Petitioner in connection with his underlying workers' compensation claim. (*See* Appx. at 2-10). In 2014, Petitioner applied for occupational disease benefits related to his alleged exposure to benzene while working for FMC Corporation ("FMC"). (*See* Appx. at 3, 112, 122-23). Respondents were counsel for Petitioner in connection with his workers' compensation claim. (*See* Appx. at 3-4). Petitioner asserted in the workers' compensation case that he had developed a severe and aggressive form of cancer known as multiple myeloma as a result of benzene exposure. (*See* Appx. at 3).

On March 12, 2014, a Third-Party Administrator for FMC (the "TPA") denied Petitioner's application for occupational disease benefits. (*See* Appx. at 3, 112, 125). Petitioner protested the TPA's decision to the West Virginia Workers' Compensation Office of Judges. (*See* Appx. at 3, 113, 127-29). Subsequently, on June 15, 2017, an Administrative Law Judge ("ALJ") affirmed the TPA's denial of Petitioner's claim for occupational disease benefits. (*See* Appx. at 5, 113, 131-40).

The ALJ notified Petitioner in her decision of Petitioner's right to file an appeal within thirty days of receipt of that determination. (*See* Appx. at 117, 138). By letter dated June 27, 2017, Respondents advised Petitioner that they would not represent him on appeal because they did not believe the West Virginia Workers' Compensation Board of Review ("Board of Review") would enter a favorable decision based upon the evidence in his claim.[1] (*See* Appx. at 117, 142). In that letter, Respondents further advised Petitioner of his right to file an appeal within thirty days of the ALJ's decision and that he could pursue the appeal *pro se* or obtain other counsel. (*See* Appx. at 117, 142). Petitioner did not appeal the ALJ's decision to the Board of Review, (*see* Appx. 5, 113), nor, apparently, did he retain counsel to prosecute an appeal.

On June 25, 2020, Petitioner filed the present civil action against Respondents asserting claims of breach of contract and negligence. (*See* Appx. at 2-10). Petitioner maintains that Respondents failed to adequately represent him in connection with his workers' compensation claim, thus causing him damages. (*See* Appx. at 2-10).

Respondents filed a Partial Motion to Dismiss on July 31, 2020, asserting that Petitioner's negligence claim is barred by the applicable statute of limitations. (*See* Appx. at 20-49). On August 27, 2020, Petitioner filed his Response asserting that there are genuine issues of material fact regarding when the statute of limitations began to run on Petitioner's negligence claim. (*See* Appx. at 50-79).

The Parties then engaged in written discovery, (s*ee* Appx. at 11-18, 77-89, 97-108), after which, on April 19, 2022, Respondents filed a Motion for Summary Judgment on all of Petitioner's claims. (*See* Appx. at 109-57). In their Motion for Summary Judgment, Respondents maintained that Petitioner could not establish a breach of contract claim against Respondents as a matter of

[1] The letter itself memorialized a conversation between Petitioner and Respondents on June 26, 2017. (*See* Appx. at 142).

law and reasserted their argument that Petitioner's negligence claim is barred by the applicable statute of limitations. (*See* Appx. at 109-57). On August 18, 2022, Petitioner filed his Response in which he argued that: (1) Respondents' Motion was premature; (2) he brought a viable breach of contract claim that raised genuine issues of material fact; and (3) there were genuine issues of material fact regarding when the statute of limitations began to run on his negligence claim. (*See* Appx. at 172-206).

A hearing on Respondents' Motions was held on August 23, 2022. (*See* Appx. at 158-59, 274-305). Following the hearing, at the request of the Circuit Court, the Parties submitted proposed orders thereon. (*See* Appx. at 207-245, 303). On September 9, 2022, the Circuit Court entered an Order Granting Respondents' Partial Motion to Dismiss and Motion for Summary Judgment. (*See* Appx. at 246-260). It is from this Order that Petitioner appeals to this Court.

III. Summary of Argument

Petitioner asserts four assignments of error. First, Petitioner argues the Circuit Court committed reversible error by dismissing Petitioner's negligence claim based on the statute of limitations. Respondents submit, however, that the Circuit Court appropriately dismissed Petitioner's negligence claim because Petitioner failed to bring his claim within the applicable limitation of actions. Petitioner's contentions that the statute of limitations should be tolled by the discovery rule or the doctrine of fraudulent concealment lack merit as the evidence before the Circuit Court showed that Petitioner knew or should have known of his potential cause of action against Respondents more than two years before he filed the instant civil action and there is no evidence that Respondents fraudulently concealed any facts that prevented Petitioner from discovering or pursing his cause of action.

Second, Petitioner contends that the Circuit Court committed reversible error by prematurely granting summary judgment in favor of Respondents. To the contrary, however, Respondents maintain that Petitioner had more than two years within which to conduct discovery, which was more than adequate. Moreover, Petitioner has failed to both explain or even articulate what discovery he could or would have undertaken that would have specifically addressed Respondents' statute of limitations argument, or to articulate the reasons he could not present, by affidavit, relevant questions of fact that required discovery prior to the Circuit Court's consideration of Respondents' Motion for Summary Judgement as required by Rule 56(f) of the West Virginia Rules of Civil Procedure.

Third, Petitioner argues the Circuit Court committed reversible error by granting summary judgment on Petitioner's negligence claim based on the statute of limitations. As set forth above, Petitioner's negligence claim is time barred and there is no applicable tolling doctrine that precluded the Circuit Court from granting summary judgment.

Fourth, Petitioner asserts that the Circuit Court committed reversible error by granting summary judgment on Petitioner's breach of contract claim. Respondents, however, submit 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. Instead, Petitioner asserts that Respondents breached duties imposed by law on the attorney/client relationship and not of the contract itself. Therefore, Petitioner's claims lie in tort, not in contract, and are barred by the applicable statute of limitations.

IV. Statement regarding Oral Argument and Decision

Respondents suggest that oral argument is unnecessary in this matter because the appeal lacks substantial merit, the dispositive issue or issues have been authoritatively decided, the facts

and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. W. Va. R.A.P. 18(a).

V. Argument

A. Standard of Review of an Order Granting Motion to Dismiss.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires the dismissal of an action for failure to state a claim upon which relief can be granted. *See Forshey v. Jackson*, 222 W. Va. 743, 749, 671 S.E.2d 748, 754 (2008) (explaining that a motion to dismiss should be granted where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"). The purpose of a motion to dismiss under Rule 12(b)(6) is to "test the formal sufficiency of the complaint" and "weed out unfounded suits." *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." W. Va. R. Civ. P. 8(a). Although a plaintiff's factual allegations must be accepted as true for purposes of a motion to dismiss, the court need not accept a plaintiff's "legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014). Accordingly, the "complaint must set forth enough information to outline the elements of a claim." *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986). "[I]f a plaintiff does not plead all of the essential elements of his or her legal claim, a [trial] court is required to dismiss the complaint pursuant to Rule 12(b)(6)." *Brown*, 177 W. Va. at 119, 755 S.E.2d at 661.

B. Standard of Review of an Order Granting Motion for Summary Judgment.

"A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper where the moving party has shown that there is no genuine issue as to any material fact and that it is entitled to summary judgment as a matter of law. W. Va. R. Civ. P. 56(c); *Painter*, 192 W. Va. at 192, 451 S.E.2d at 758. "The [Court's] function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Painter*, 192 W. Va. at 192, 451 S.E.2d at 758. Consequently, the Court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.*

"Nevertheless, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.,* 192 W. Va. at 192-93, 451 S.E.2d at 758-59. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.,* 192 W. Va. at 193, 451 S.E.2d at 759. "Therefore, while the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint." *Id.* (cleaned up).

C. Petitioner's Negligence Claim is Barred by the Applicable Statute of Limitations.

The Circuit Court found that, as a matter of law, Petitioner's negligence claim is barred by the applicable statute of limitations. (*See* Pet'r's Br. at 12-16, 18-21). Petitioner argues that he pled facts that raise a jury issue as to when the statute of limitations began to run and whether it should have been tolled, and that therefore the Circuit Court erred in granting the Respondents' Motion to Dismiss and Motion for Summary Judgment thereon. (*See* Pet'r's Br. at 12-16, 18-21). Respondents disagree and instead suggest that, despite two years within which Petitioner could have conducted discovery on the statute of limitations issue, which was unequivocally raised in their Answer and Motion to Dismiss, and because of Petitioner's consistent failure to articulate any questions of fact with regard to **the statute of limitations** as it applies to his negligence claim, Judge Tabit was not only correct in granting Respondents' Motions on that issue but realistically had no choice but to rule in Respondents' favor thereon.

Petitioner's negligence claim is subject to the two-year statute of limitations contained in West Virginia Code Section 55-2-12. *Evans v. United Bank, Inc.*, 235 W. Va. 619, 627 n.8, 775 S.E.2d 500, 508 n.8 (2015). A statute of limitations typically begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know: "(1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." *Id.* at 507 (quoting Syl. pt. 3, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009)). The Supreme Court of Appeals has stated that a five-step analysis should be applied 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 [Syl. pt. 4, *Gaither v. City Hosp., Inc.*, 487 S.E.2d 901 (W. Va. 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.

Id. (quoting Syl. pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255).

Here, the Circuit Court correctly found that, no later than July 15, 2017, Petitioner knew or should have known that: (1) he had allegedly been injured (by the ALJ's affirmation of the denial of his workers' compensation claim and Respondents' supposed acts or omissions that led to that denial); (2) Respondents owed him a duty to act with due care, and they may have engaged in conduct that breached that duty; and (3) Respondents' alleged negligent conduct may have had a casual relation to his alleged injury (*i.e.* his failure to obtain workers' compensation benefits). (*See* Appx. at 256). The Circuit Court based these findings on these uncontroverted facts: (1) the ALJ affirmed the TPA's denial of Petitioner's claim for occupational disease benefits on June 15, 2017; (2) the ALJ's decision notified Petitioner of his right to file an appeal within thirty days of its receipt (*i.e.* on or before July 15, 2017); and (3) Respondents similarly notified Petitioner by letter dated June 27, 2017 of the need to file an appeal within thirty days of the ALJ's decision, their determination that they would not represent him on appeal because they deemed such an effort to be futile, and his ability to proceed *pro se* or obtain other counsel to prosecute his appeal.

(*See* Appx. at 255-256). There is no dispute that Petitioner did not appeal the ALJ decision. (*See* Pet'r's Br. at 6).

In support of his appeal, Petitioner asserts that the Circuit Court failed to properly consider the discovery rule and the doctrine of fraudulent concealment with regard to the statute of limitations. (*See* Pet'r's Br. at 14). With regard to the discovery rule, Petitioner maintains that it wasn't until Petitioner's former employer, FMC, took the position in Petitioner's deliberate intent civil action against it that his claim is barred by the doctrine of res judicata (because of the adverse ruling against him in his workers' compensation claim) that he "discovered" his potential claim against the Respondents. (*See* Pet'r's Br. at 14-15, 18-19). Petitioner alleges that FMC first asserted this defense on January 13, 2020, (*see* Appx. at 6), and that as a result he did not have knowledge of Respondents' alleged negligence until January 30, 2020 (*See* Pet'r's Br. at 14, 19). Based on this analysis, Petitioner therefore argues that his Complaint in the matter *sub judice* was timely filed.[2]

Respondent's assertions concerning the mechanics of the discovery rule and its effect on this case are manifestly misguided. As the Circuit Court explained, when Petitioner knew of the potential effect of the adverse workers' compensation decision on his deliberate intent claim is irrelevant to the application of the discovery rule. (*See* Appx. at 257). Simply put, the "discovery" that is relevant here is not the date on which the Respondent, or his current counsel, perceived that the ruling on his workers' compensation claim may have a negative effect on his deliberate intent claim. The intended inquiry with regard to "discovering" his potential claim against the

[2] In light of the fact that FMC allegedly took this position on January 13, 2020, it is unclear why Petitioner supposedly did not know of Respondents' alleged negligence until January 30, 2020. Regardless, the evidence shows that Petitioner indisputably knew or should have known of his potential cause of action against Respondents at a much earlier date.

Respondents is when Petitioner knew or should have known of the elements of a potential cause of action against Respondents. *Evans*, 235 W. Va. at 627, 775 S.E.2d at 507; (*see* Appx. at 257).

Even accepting Petitioner's factual allegations as true (that he first became aware on January 13, 2020, that FMC would claim that Petitioner's deliberate intent claim is barred by the doctrine of res judicata (*see* Appx. at 6)), it is undeniable that Petitioner knew or should have known of a potential claim against Respondents at a much earlier date. Indeed, Petitioner does not dispute receiving the letter from Respondents notifying him that they were withdrawing as counsel and advising him of his appellate rights in July 2017, nearly three years before this civil action was filed. (*See* Appx. at 285). Respondents never represented Petitioner in his deliberate intent case. There is no event in that case that can link Respondents' representation of Petitioner to a claim arising therefrom. The "discovery" of the potential effect of the denial of his workers' compensation claim is simply irrelevant to when Petitioner knew or should have known that he had been damaged by Petitioners' alleged negligence as a result of their representation of him in the workers' compensation case, which is undoubtedly July 2017 at the latest.

Moreover, Petitioner had at least constructive, if not actual, notice of the potential res judicata defense much earlier than he now claims. FMC initially took that position not on January 13, 2020 as alleged, but instead, on February 3, 2016 when it served its answer to the complaint in that case. Petitioner, therefore, either knew or should have known of FMC's position at the time the ALJ decision was rendered, since his Complaint in the deliberate intent case was filed, and FMC answered and asserted the defense of res judicata prior to, the ALJ's decision. (*See* Appx. at 257). Thus, as the Circuit Court found, Petitioner either knew or should have known that he had allegedly been injured by the ALJ's affirmation of the denial of his workers' compensation claim, the Respondents' supposed acts or omissions that led to that denial (and FMC's position with

respect to the denial of his workers' compensation claim), and the potential adverse effect on his deliberate intent claim before the appeal deadline in his workers' compensation claim expired. (*See* Appx. at 257).

With respect to the doctrine of fraudulent concealment, Petitioner suggests that if Respondents fraudulently concealed or misrepresented to him the basis of the ALJ's decision, then an additional ground exists for tolling the statute of limitations. (*See* Pet'r's Br. at 15, 19-21). This argument is premised on the letter that Respondents sent to Petitioner on June 27, 2017 advising that they would not represent him on appeal based on their determination that the evidence did not support his claim and that he may proceed pro se or seek other counsel. (*See* Pet'r's Br. at 15-16, 19-21; Appx. at 142). This assertion is further based upon the absurd premise that the Respondents should have recognized their supposed negligence in their representation of Petitioner in his workers' compensation claim (which they have, and continue to, deny) and that it was "fraudulent" for them to not inform Petitioner that their negligence was the true reason why his appeal had been denied.

There is simply no evidence to support this theory, as evidenced by the fact that Respondents contemporaneously informed Petitioner of the ALJ's decision, that they would not represent him further, and provided options should he decide to pursue an appeal. (*See* Appx. at 142, 257-258). As the Circuit Court found, Respondents' letter to Petitioner "cannot be read, by any reasonable interpretation, as fraudulent concealment." (Appx. at 258).

West Virginia law is clear that although a plaintiff's factual allegations must be accepted as true for purposes of a motion to dismiss, the court need not accept a plaintiff's "legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Brown*, 233 W. Va. at 127, 755 S.E.2d at 661 (2014).

Accordingly, 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.

In addition, even if Petitioner pled sufficient facts to survive a motion to dismiss, there is no genuine issue as to any material fact that would preclude summary judgment. By July 15, 2017, the deadline for filing an appeal in his workers' compensation claim, Petitioner knew that: (1) his workers' compensation claim had been denied; (2) Respondents' would not appeal his claim based upon their determination that the evidence did not support his claim; and (3) he could proceed with an appeal pro se or obtain other counsel. Accordingly, by July 15, 2017, he knew or should have known that: (1) he had allegedly been injured by the denial of his worker compensation claim; (2) 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; and (3) Respondents conduct may have had a casual relation to his alleged injury, that is, his failure to receive workers' compensation benefits. These facts are indisputable. As such, Respondents submit that Petitioner's negligence claim was properly dismissed.

D. Petitioner had Adequate Time to Conduct Discovery and the Additional Discovery Requested by Petitioner Does Not Bear on the Claims at Issue in Respondents' Motions Below.

Petitioner argues that the Circuit Court committed reversible error by prematurely ruling on Respondents' Motion for Summary Judgment. (Pet'r's Br. at 16). This argument is premised on the Parties having until March 31, 2023 to complete discovery under the Scheduling Order entered below, and the submission an affidavit by Petitioner's counsel regarding his intention to engage in further discovery in support of Petitioner's claims. (Pet'r's Br. at 16).

The Supreme Court of Appeals has recognized that "[a]s a general rule, summary judgment is appropriate only after adequate time for discovery." *Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 416, 825 S.E.2d 351, 363 (2019). In this case, Petitioner had over two years to conduct discovery, which the Circuit Court appropriately found was adequate time to explore whatever factual issues Petitioner and his counsel believed was necessary to the prosecution of their case. (Appx. at 256). Petitioner's argument that the Parties had additional time to conduct discovery under the Scheduling Order does not preclude the Circuit Court from granting summary judgment. Indeed, Respondents filed their Motion for Summary Judgement and noticed it for a hearing prior to the entry of the Scheduling Order. (Pet'r's Br. at 3). As Petitioner acknowledges, after Respondents' filed their Motion for Summary Judgment, "Petitioner quickly moved to secure an agreed-upon Scheduling Order." (Pet'r's Br. at 18). Put differently, it would be a reasonable interpretation of that Petitioner's (and his counsel's) actions to conclude that they sought a Scheduling Order to enable them to take the position that Respondents' Motion for Summary Judgment was premature because discovery was ongoing.

More fundamentally, Petitioner and his counsel have consistently failed to articulate, either in their Rule 56(f) affidavit or their various briefs, what it is that they needed to "discover" with regard to Respondents' dispositive Motions. As a result, the Circuit Court properly disregarded the Rule 56(f) affidavit submitted by Petitioner's counsel. The Supreme Court of Appeals has explained that a Rule 56(f) affidavit should:

> (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the movant; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 702, 474 S.E.2d 872, 882 (1996). The Rule 56(f) affidavit provided by Petitioner's counsel met none of these requirements. It merely contained the claim that Petitioner's counsel "anticipates conducting additional discovery in the Civil Action, including depositions and the disclosure of experts, to be utilized in furtherance of [Petitioner's] case" and that "such additional discovery will support [Petitioner's] case." (Appx. at 191). When questioned by the Court below at the hearing on Respondents' dispositive Motions with regard to what discovery he needed to conduct related to Respondents' Motion for Summary Judgment, Petitioner's counsel was wholly unable to articulate what additional discovery was necessary. (*See* Appx. at 279-295). Accordingly, the Circuit Court appropriately found that Petitioner failed, to justify why additional discovery was necessary before the court below ruled on the dispositive Motions, and correctly ruled thereon. (*See* Appx. at 251).

E. Petitioner Cannot Establish a Breach of Contract Claim Against Respondents.

Petitioner argues that he has pled a viable breach of contract claim and asserts that, because the representation agreement between Petitioner and Respondents incorporated a limited power of attorney, the duties set forth in the Uniform Power of Attorney Act ("UPOAA") became part of the representation agreement which Respondents may have violated. (Pet'r's Br. at 21-27).

A plaintiff may assert a claim for legal malpractice under a breach of contract theory "[w]here the act complained of in a legal malpractice action is a breach of **the specific terms of the contract** without reference to the legal duties imposed by law on the attorney/client relationship." Syl. pt. 2, *Hall v. Nichols*, 184 W. Va. 466, 400 S.E.2d 901 (1990) (emphasis added). As the Supreme Court of Appeals has explained, "if an attorney fails to perform an act which is covered by the contract of employment such as when he is employed to initiate suit and does not

file suit within the statutory period, the breach at issue is one grounded in contract." *Id.* at 904. "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." *Id.* at Syl. pt. 2.

In this case the Circuit Court correctly concluded that the Complaint contains no allegations regarding a breach of any "specific terms of the contract" between Petitioner and Respondents. (Appx. at 252). Petitioner alleges that Respondents "had a contractual obligation, express and/or implied, to provide [Petitioner] with competent and effective legal advice, counsel, and representation in all aspects of [Petitioner's] workers' compensation matter." (Appx. at 6). As the Circuit Court explained, "these are duties 'imposed by law on the attorney/client relationship,' not by the 'specific terms of the contract.'" (Appx. at 253).

Similarly, with respect to Petitioner's contention that the representation agreement incorporated the duties set forth in the UPOAA, the Circuit Court found that the power of attorney was limited to endorsing checks Petitioner received from the claims administrator or other source related to his workers compensation claim. (*See* Appx. at 253). This conclusion is supported by the representation agreement itself. (*See* Appx. at 201) ("I do hereby constitute and appoint Maroney, Williams, Weaver & Pancake, PLLC, of Charleston, West Virginia, as my true and lawful attorney for me and in my name to endorse any and all checks I receive from the Claims Administrator, or any other source, relating to the above-styled claim."). The Circuit Court further found that the duties set forth in the UPOAA would only apply to actions undertaken as the power of attorney, (Appx. at 253), not as his legal counsel, a wholly logical conclusion that Petitioner has consistently refused to recognize. (*Compare* Pet'r's Br. at 23 n.12, *with* Pet'r's Br. at 26 (quoting W. Va. Code § 39B-1-103) (limiting applicability of UPOAA to powers of attorney)).

The Complaint in this matter lacks any allegations related to a breach of the specific terms of the contract between Petitioner and Respondents, much less any allegations regarding a breach of the power of attorney or related duties. (*See* Appx. at 2-10). Accordingly, the Circuit Court appropriately concluded that Petitioner failed to plead facts or present issues of fact that the Respondents either breached a term of that contract or that the limited power of attorney contained in the representation agreement imposed different, or additional, contractual duties upon Respondents that were not already present in the relationship with regard to Plaintiff's actual representation. (*See* Appx. at 253).

VI. Conclusion

For the reasons set forth above, Respondents submit that the Circuit Court appropriately dismissed Petitioner's negligence claim and granted summary judgment with respect to Petitioner's negligence and breach of contract claims pursuant to Rules 12(b)(6) and 56 of the West Virginia Rules of Civil Procedure. Therefore, Respondents respectfully request that this Court affirm the Order Granting Respondents' Partial Motion to Dismiss and Motion for Summary Judgment, deny any relief to Petitioner, and grant any further relief to Respondents that this Court deems appropriate.

MARONEY WILLIAMS WEAVER & PANCAKE PLLC and PATRICK K. MARONEY

By Counsel

/s/ Clayton T. Harkins
Kevin A. Nelson (WVSB #2715)
Clayton T. Harkins (WVSB #13409)
Dinsmore & Shohl LLP
707 Virginia Street, East, Suite 1300
Charleston, West Virginia 25301
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
kevin.nelson@dinsmore.com
clayton.harkins@dinsmore.com

CERTIFICATE OF SERVICE

I, Clayton T. Harkins, hereby certify that the foregoing **Respondents' Brief** was electronically filed with the Court on February 23, 2023, via File & ServeXpress, which will send notification of such filing to the following counsel of record:

Matthew B. Hansberry
Hansberry Law Office, PLLC
1400 Johnson Avenue, Suite 4-P
Bridgeport, West Virginia 26330
Counsel for Plaintiff

Ronald G. Kramer II
Mountain State Injury Law
P.O. Box 1267
Virginia Beach, Virginia 23451
Counsel for Plaintiff

/s/ Clayton T. Harkins
Clayton T. Harkins (WVSB # 13409)