IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

CLAY R. HUPP, Individually,

Plaintiff,

v.

Civil Action No. 18-C-265
(Honorable Tod Kaufman)

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

Final ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On Wednesday, June 10, 2020, at 2:15 p.m., the parties appeared before the Court for a telephone hearing during which time the status of the case was discussed and oral argument was presented on the Defendants' motion to dismiss Plaintiff's complaint on the basis that the statute of limitations had run before its filing. Having reviewed and carefully considered (TGK) the Defendants' motion and the parties' briefs in support and opposition thereto, and having heard the oral arguments of the parties, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. This lawsuit for legal malpractice sounds in tort and is not based upon contract principles. Plaintiff Clay R. Hupp did not "retain" the Defendants to represent him. No contingency fee contract or hourly contract existed between the parties. Rather, in 2010, at the request of The West Virginia Troopers Association, the Defendants agreed to provide pro bono legal services to the Plaintiff in order to assist him in handling his appeal of the termination of his

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partial-disability retirement benefits based upon an improperly conducted and ...uded recertification exam.[1]

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

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

[1] As noted herein, on a motion to dismiss, this Court may consider documents referenced in and/or integral to the claims of the complaint. Additionally, the Court may take judicial notice of all of the administrative and judicial decisions, pleadings, motions, legal memoranda, and evidence of record relevant to the claim at issue in this case.

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

4. By letter dated November 5, 2010, the WVCPRB informed Mr. Hupp that it had considered his disability medical recertification information at its November 3, 2010, meeting and had voted to terminate his partial-duty disability retirement benefits effective December 1, 2010. Because Mr. Hupp had enough years of service and had reached an acceptable retirement age, a termination of his disability benefits meant that he would be switched to a regular full retirement pension, unless he opted to return to active service which he declined to do.

5. A hearing was held before Hearing Examiner Jack W. Debolt on February 1, 2011, during which all of the relevant past and current medical and other related records produced by the Plaintiff were admitted.[2] These documents included the Plaintiff's relevant medical records and

[2] Because the Defendants' motion to dismiss is not premised upon the merits of the case, the Court makes no findings as to the merits. However, the Court notes that the Defendants maintain that the Plaintiff was instructed by the Defendants to produce all of his past and current medical and related records concerning his hearing-loss disability and to get updated reports from his medical doctors supporting that he remained disabled from performing the essential duties of a West Virginia State Trooper with or without hearing aids. At no time did the Defendants as part of their pro bono legal services agree to pay to retain medical or other experts on behalf of the Plaintiff in order to render reports or testimony. The burden to produce all prior and current medical and related evidence as well as to obtain any new reports remained on the Plaintiff.

the reports of Dr. Stephen Wetmore, Dr. Robert W. Azar, and audiologist George F. Evans, and a recent report of Richard L. Cunningham, Sr., H.I.S. ("Hearing Instrument Specialist") of the Better Hearing Center of Wheeling, who was serving as Mr. Hupp's current hearing-loss specialist. Additionally, Mr. Hupp testified concerning his continued disability, that a majority of his duties as Sheriff had been administrative, and gave numerous examples of how his hearing aids did not assist him in performing the essential duties of a State Trooper. Defendants filed a legal memorandum in support of his appeal and a reply brief following receipt of the Board's response brief.

6. Unfortunately, the Hearing Examiner in a decision entered on April 27, 2011, found in support of the termination of Mr. Hupp's disability based upon Dr. Bailey's conclusions. (**Exhibit 1**). However, in order to do so, the hearing examiner essentially re-framed Dr. Bailey's conclusion to be that Mr. Hupp was no longer disabled because he now had hearing aids. Disregarding the irreversible and progressive nature of Mr. Hupp's hearing loss and ignoring the reports of Dr. Wetmore, Dr. Azar and audiologist Evans, the hearing examiner also asserted that no medical evidence had been offered against her opinions because the Hearing Instrument Specialist, Richard Cunningham, who has issued a recent report, was not a medical doctor.

7. Defendants filed a motion for reconsideration which essentially objected to the hearing examiner rewriting Dr. Bailey's conclusions; basing his finding on Mr. Hupp's use of hearing aids; his disregard of Mr. Hupp's testimony that hearing aids did not assist his hearing in critical ways necessary for the performance of the full spectrum of essential duties of a State Trooper; and his refusal to consider the supporting opinions of Mr. Cunningham who was a hearing

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All of the relevant medical and related documents produced by the Plaintiff was introduced as evidence at his hearing as well as his testimony concerning all relevant matters.

instrument specialist as well as the prior medical evidence demonstrating that Mr. Hupp's hearing disability was irreversible and progressive, thereby preventing him from ever returning to the duties of a State Trooper. Defendants also argued that no notice was provided by Dr. Bailey's report or otherwise that the use of hearing aids was the factor supposedly at issue for terminating Mr. Hupp's irreversible and progressive disability. For these reasons as well as the fact that the recertification statute/regulation failed to provide for, let alone require, the submission of new medical evidence by the retirant opposing the findings of the recertification doctor, Defendants asked for the Plaintiff to be permitted to obtain and present new medical evidence demonstrating the incorrectness of Dr. Bailey and the Hearing Examiner's conclusions.

8. Defendants additionally filed a supplemental memorandum in support of the motion for reconsideration wherein they submitted a decision of the same hearing examiner in the case of Stephen Burdette, entered in 2000, which was based upon studies and concluded that hearing aids were not sufficient to improve law enforcement officers' abilities to perform the required essential duties of their position. (At this time, the Defendants had begun representing Mr. Burdette who had also just lost his disability retirement based on a similar report of Dr. Bailey, and Defendants had just obtained his file and relevant records including such prior decision.) Without providing any substantive explanation, the Hearing Examiner in a conclusory fashion denied Defendants' motion for reconsideration by letter and the WVCPRB adopted his decision by letter dated May 26, 2011. (**Exhibit 2**).

9. On June 24, 2011, Defendants submitted a petition of appeal of administrative ruling to the Circuit Court of Tyler County, WV, raising all of the above referenced grounds. On November 30, 2011, Defendants submitted an argument brief in support of the petition for appeal. On January 30, 2012, the WVCPRB filed its brief in opposition to the appeal to which Defendants

filed a reply brief on March 15, 2012. On May 24, 2012, Defendants submitted to the Circuit Judge Mark A. Karl of Tyler County a copy of a decision of Kanawha County Circuit Judge Louis ("Duke") H. Bloom granting the appeal of Stephen Burdette. In his decision, consistent with Defendants' position on behalf of Mr. Hupp, Judge Bloom found that the termination of Mr. Burdette's disability was against the clear weight of the evidence inasmuch as Dr. Bailey did not perform any audiometric tests on Mr. Burdette to determine his present day hearing loss or have him fitted with hearing aids to determine whether such devices would in fact correct his disability to the extent that he could perform the essential duties of a State Trooper. Judge Bloom held that actual new medical evidence must support the conclusion that the former disability has improved and that Dr. Bailey's mere anecdotal conclusion would not suffice. A hearing was held before Judge Karl in Mr. Hupp's appeal on April 5, 2012. Unfortunately, to the dismay of Defendants and Plaintiff, on July 3, 2013, a final order was entered by Judge Karl affirming the final order of the WVCPRB. (**Exhibit 3**).

10. This ruling was timely appealed to the West Virginia Supreme Court of Appeals. Defendants filed Petitioner's Brief on November 4, 2013, and a reply brief on January 22, 2014, after receiving a response brief. On June 13, 2014, the West Virginia Supreme Court of Appeals entered a Memorandum Decision with the majority (3-2) affirming the Tyler County Circuit Court's Final Order. (**Exhibit 4**). On July 11, 2014, Defendants filed a Petition for Rehearing which was denied on August 26, 2014. (**Exhibit 5**). On September 2, 2014, the Court entered its Mandate that its Memorandum Decision was final. (**Exhibit 6**).

11. Upon entry of the mandate of the West Virginia Supreme Court of Appeals, nothing else could be done as to the termination of the Plaintiff's disability benefits which had been awarded in 1999 and terminated in 2010 as a result of the recertification exam. Accordingly, the

two-year statute of limitations on any claim for legal malpractice based upon the allegation that Defendants had failed to submit new medical evidence on his behalf began to run on September 3, 2014.

12. It is undisputed that at no time during this two-year period did the Plaintiff ever inform the Defendants that he believed that they had negligently handled his appeal and/or was responsible for its lack of success. No threat or discussion of a possible legal malpractice claim ever occurred. Indeed, Plaintiff has admitted in its response brief that no contention or suggestion is being made that the Defendants acted in any deliberate manner to cause the statute of limitations to run. (Plaintiff's Response at p. 3).

13. Over a year after the Supreme Court's mandate ending his appeal, the Plaintiff sent the Defendants a letter dated September 28, 2015, regarding a new and only tangentially related issue, wherein he stated "[a] year has passed since the denial of my claim, with the WV Consol. Ret. Bd., (partial duty disability). I am asking that you make reapplication to the Board on my behalf for a partial or full disability award. The basic grounds I would suggest is a substantial, progressive loss, since my last attempt at this. . . ." (**Exhibit 7**). The Defendants responded by letter dated October 13, 2015, stating "[o]ur firm does not file applications or re-applications for partial or full disability awards for applicants. It would be your responsibility to file such application or re-application. If the Board denies your reapplication and the West Virginia Troopers Association approves our firm representing you in any appeal, then we can assist in that regard. . . ." (**Exhibit 8**). Clearly, this request for new representation did not involve the continuous representation of the Plaintiff for the matter underlying his claim of malpractice, i.e., the handling of his appeal of the termination of his prior partial-disability benefits. At best the Plaintiff's request

for new representation on a separate and new issue was only tangentially related to his prior representation.

14. In regard to such new matter, in December, 2015, upon receiving a request from the West Virginia Troopers Association that Defendants discuss the Plaintiff's current issue with him (**Exhibit 9**), the Defendants stressed to Plaintiff that he might not be able to apply for new disability benefits since he had begun receiving his regular retirement pension based upon his age and years of service immediately upon termination of his partial-disability benefits, but that if he was to have any chance at all he needed to get one or more medical doctor's opinion that his hearing loss had substantially worsened from 2010 when Dr. Bailey issued her report until the current time.

15. The Plaintiff attempted to get Dr. Stephen Wetmore, who had examined him on behalf of the WVCPRB in 1999, to issue such a report. On behalf of the Plaintiff, as alluded to in his Complaint, the Defendants sent a letter to Dr. Wetmore on April 20, 2016 (**Exhibit 10**), explaining the situation and what evidence was needed. (Complaint, at ¶ 23, at pp. 4-5). As alleged by the Plaintiff, Dr. Wetmore did issue a report on August 30, 2016, wherein he found that the Plaintiff was still disabled from performing the essential duties of a State Trooper. (Complaint, at ¶¶ 23-24, at p. 3). However, Dr. Wetmore didn't address any worsening during the relevant time period. **(Exhibit 11)**.

16. As also asserted in his Complaint, the Plaintiff got a report from an audiologist, Gary Harris, Ph.D., on May 21, 2016, essentially saying that he was still disabled and criticizing Dr. Bailey's conclusions but again not addressing the relevant period of time. **(Exhibit 12;** Complaint, at ¶¶ 26-27, at p. 4).

17. Subsequently, Defendant Monahan had a telephone conversation with Dr. Wetmore on January 11, 2017, explaining again what evidence the Plaintiff needed and sent him relevant records on January 16, 2017, for comparison purposes. (**Exhibit 13**). On February 20, 2017, Dr. Wetmore issued another report which again failed to address any hearing loss differences during the relevant time period. (**Exhibit 14**).

18. On September 29, 2017, the Defendants again sent Dr. Wetmore relevant records and explained to him what time period was relevant. (**Exhibit 15**). Finally, on October 30, 2017, Dr. Wetmore issued a letter/report that unfortunately stated "[t]o sum up the findings, there is not much difference in this man's hearing between 2009 and 2016. (**Exhibit 16**). At that time, upon receiving Dr. Wetmore's letter, Defendants told the Plaintiff that they were not aware of anything else that could be done by them to help him concerning his request to apply for new benefits based upon a worsening of his hearing loss since the recertification exam. That was the last time Defendants heard from the Plaintiff until receiving the Complaint on October 9, 2018.

Conclusions of Law

1. A Rule 12(b)(6) motion should only be granted where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Forshey v. Jackson*, 222 W.Va. 743, 749, 671 S.E.2d 748, 754 (2008). Concomitantly, dismissal is proper if the plaintiff fails "to set forth sufficient information to outline the elements of his/her claim." *Brown v. City of Montgomery*, 233 W.Va. 119, 127, 755 S.E.2d 653, 661 (2014) (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2], at 384–88 (4th ed. 2012)). And in assessing the Complaint, "a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations." *Id.*

2. The West Virginia Supreme Court of Appeals has also explained that documents outside of the pleadings may be considered, without converting the motion to dismiss to one for summary judgment, when the documents are attached to the complaint, referenced in the complaint, or otherwise integral to the claims of the complaint. Additionally, the Court may take judicial notice of matters of public record, including, but not necessarily limited to, pleadings and other documents filed in other court or administrative actions. *E.g.*, *Forshey v. Jackson*, 222 W.Va. at 747-49, 671 S.E.2d at 752-54; *State ex rel. Veard v. Miller*, 238 W.Va. 333, 337, 795 S.E.2d 55, 59 (2016); *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W.Va. 77, 80 n. 4, 785 S.E.2d 627, 630 n. 4 (2016); *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W.Va. 421, 433 n. 14, 781 S.E.2d 198, 210 n. 14 (2015); *West Virginia Bd. of Educ. v. Marple*, 236 W.Va. 654, 659 n. 3, 783 S.E.2d 75, 80 n. 3 (2015); *Harrison v. Porsche Cars North America, Inc.* No. 15-0381, 2016 WL 1455864, at *3 n. 2 (W.Va. April 12, 2016); *Starcher v. Pappas*, No. 16-1160, 2017 WL 5157366, at **4-5 (W.Va. Nov. 7, 2017) (holding that in both motions to dismiss and motions for summary judgment, court may take judicial notice of pleadings and other documents filed in other court actions pursuant to W.Va.R.Evid. 201).

3. The West Virginia Supreme Court of Appeals has acknowledged that dismissal based upon a statute of limitations may be proper, when based upon a Rule 12(b)(6) motion to dismiss, where such defects are apparent upon allegations contained within the complaint, admissions made by counsel, or documents that the court may consider as set forth above. *E.g.*, *Sattler v. Bailey*, 184 W.Va. 212, 222 n.14, 400 S.E.2d 220, 230 n. 14 (1990); *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, 110 (1996) (utilizing admissions made by counsel during hearing in addition to allegations in complaint); *E.K. v. West Virginia Department of Health*, No. 16-0773, 2017 WL 5153221, at **6-7 (W.Va. Nov. 7, 2017); *Forshey v. Jackson*, 222 W.Va. at 747-49, 671

S.E.2d at 752-54 (noting that court may examine documents referenced in complaint, documents integral to the claims, or documents of which the court may take judicial notice). *See also Stuyvesant v. Preston County Com'n*, 223 W.Va. 619, 621-23, 678 S.E.2d 872, 874-76 (2009) (affirming grant of motion to dismiss on statute of limitations grounds based upon allegations in complaint); *State ex rel. Monongahela Power Co. v. Fox*, 227 W.Va. 531, 711 S.E.2d 601 (2011) (granting writ of prohibition concerning circuit court's denial of motion to dismiss on grounds of statute of limitations); *Kanode v. Czarnik*, No. 12-0282, 2013 WL 1707680, at **1-3 (W.Va. April 19, 2013) (affirming circuit court's dismissal of complaint filed on August 1, 2011, where circuit court concluded that any complaint regarding Plaintiff's criminal appeal would had to have been filed on or before April 22, 2011, two years within the refusal of Plaintiff's criminal appeal on April 22, 2009, the refusal of which was known by Plaintiff; holding "This Court concludes that this reason alone is sufficient to find that petitioner's action is time barred by the statute of limitations and the discovery rule is of no avail."); *Starcher v. Pappas*, No. 16-1160, 2017 WL 5157366, at **4-5 (W.Va. Nov. 7, 2017) (affirming dismissal of amended complaint; holding that in both motions to dismiss and motions for summary judgment, court may take judicial notice of pleadings and other documents filed in other court actions pursuant to W.Va.R.Evid. 201); *Davis v. Schooley*, No. 17-0435, 2018 WL 2192477, at *1-2 (W.Va. May 14, 2018) (affirming grant of motion to dismiss on statute of limitations grounds based upon allegations in complaint); *Magee v. Racing Corporation of West Virginia*, No. 17-0008, 2017 WL 4993455, at **1-4 (W.Va. Nov. 1, 2017) (same).

4. The West Virginia Supreme Court of Appeals has explained:

> [S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions "are strictly construed and are not enlarged by the courts upon considerations of apparent hardship." Finding that the plaintiff had

> failed to satisfy the requirements of any established exceptions to the statute of limitations, we further stated that "[d]efendants have a right to rely on the certainty the statute [of limitations] provides, and adoption of the rule plaintiff urges would destroy that certainty." Lastly, we concluded that "[b]y strictly enforcing statutes of limitations, we are both recognizing and adhering to the legislative intent underlying such provisions."

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

5. When the allegations of a complaint against an attorney for legal malpractice sound only in tort, the applicable statute of limitations is the two-year limitation set forth in W.Va.Code § 55-2-12. *Harrison v. Casto*, 165 W.Va. 787, 789, 271 S.E.2d 774, 775 (1980). *Accord Hall v. Nichols*, 184 W.Va. 466, 469-70, 400 S.E.2d 901, 904-05 (1990).

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

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

Syl. Pts. 6-8, *ibid.* (emphases added). *Accord* Syl. Pt. 2, *VanSickle v. Kohout*, 215W.Va. 433, 599 S.E.2d 856 (2004).

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

8. As explained by the Court:

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

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

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

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

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

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

Application of Law to Facts

The Plaintiff alleges in his Complaint that the Hearing Examiner held that the Plaintiff had failed to present medical evidence on his behalf. (Complaint, at ¶¶ 11-16). Assuming this finding was correct, and even further assuming that Defendants were responsible for such failure rather

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

The Plaintiff neither has nor can show a clear indicia of an ongoing, continuous relationship between the parties after the conclusion of such underlying matter. Absolutely nothing further could be done to remedy or cure the termination of Plaintiff's prior partial-disability benefits based upon the recertification exam after the conclusion of all judicial appeals available on such matter. Any further relationship between the parties was ***"only tangentially related to legal representation the [Defendants] provided in the matter in which [they were] allegedly negligent."*** Syl. Pt. 7, *Smith v. Stacy*, *supra* (emphasis added). *See also Kanode v. Czarnik*, No. 12-0282, 2013 WL 1707680, at **1-3 (W.Va. April 19, 2013) (affirming circuit court's dismissal of complaint filed on August 1, 2011, where circuit court concluded that any complaint regarding Plaintiff's criminal appeal would had to have been filed on or before April 22, 2011, two years within the refusal of Plaintiff's criminal appeal on April 22, 2009, the refusal of which was known by Plaintiff; holding

"This Court concludes that this reason alone is sufficient to find that petitioner's action is time barred by the statute of limitations and the discovery rule is of no avail.").

As previously noted, over a year after the Supreme Court's mandate ending his appeal, the Plaintiff sent the Defendants a letter dated September 28, 2015, wherein he stated "[a] year has passed since the denial of my claim, with the WV Consol. Ret. Bd., (partial duty disability). I am asking that you make reapplication to the Board on my behalf for a partial or full disability award. The basic grounds I would suggest is a substantial, progressive loss, since my last attempt at this. . . ." (**Exhibit 7**). The Defendants responded by letter dated October 13, 2015, stating "[o]ur firm does not file applications or re-applications for partial or full disability awards for applicants. It would be your responsibility to file such application or re-application. If the Board denies your reapplication and the West Virginia Troopers Association approves our firm representing you in any appeal, then we can assist in that regard. . . ." (**Exhibit 8**).

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

had substantially worsened since the recertification exam in 2010 such that he might be entitled to a new partial or full disability award.

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

Importantly, plaintiff has not alleged, and in light of documents referenced or integral to his claim could not truthfully allege, that such subsequent tangential relationship involved an agreement to continue to represent him for purposes of mitigating his damages so as to avoid the necessity of a malpractice lawsuit or for purposes of continuing their representation of him until the statute of limitations had run on his malpractice claim. Indeed, Plaintiff even admits in his response that he is not claiming any deliberate action on behalf of the Defendants in such regard.[3] *See* Response, at p. 3. And, as noted in Defendants' memorandum, and admitted by the Plaintiff in his response, the Plaintiff had never blamed the Defendants for losing his appeal or otherwise threatened a malpractice lawsuit. *Id.* Under these facts, the purposes for adopting the continuous representation doctrine to toll the statute of limitations are inapplicable to the claim in this lawsuit. Accordingly, any claim the Plaintiff might have had for the alleged malpractice would have had

[3] As previously noted, under the applicable holdings of the Supreme Court, the Defendants continued representation of the Plaintiff through his judicial appeals would have constituted their relevant attempts to mitigate or cure his damages. *VanSickle v. Kohout*, 215W.Va. at 437-38, 599 S.E.2d at 860-61; Syl. Pts. 6-8, *Smith v. Stacy*, *supra*. *See also Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, 110 (1996) (utilizing admissions made by counsel during hearing in addition to allegations in complaint).

to been filed by September 2, 2016, and Plaintiff's complaint is time-barred. Indeed, a ruling in Plaintiff's favor would enable a dilatory plaintiff to delay the running of the statute of limitations by contacting the attorney and requesting his assistance on a collateral matter merely tangentially related to the underlying representation at issue in the untimely malpractice action; thereby, thwarting both the public policy and legislative intent behind statutes of limitations and the purposes of the continuous representation doctrine.

Accordingly, for all of the foregoing reasons, the Defendants' motion to dismiss is **GRANTED**. The Clerk is directed to mail a certified copy of this Order to all counsel of record. Case dismissed. (TGK)

So **ENTERED** this 23rd day of June, 2020.

Tod G. Kaufman

Tod Kaufman, Kanawha County Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24 DAY OF June 2020
Cathy S Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared and submitted by:

Roger of Wecanis for RHM 3176

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