IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-ICA-168

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DONALD C. NICHOLS,
Plaintiff Below, Petitioner,

vs.

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

BRIEF OF PETITIONER DONALD C. NICHOLS

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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BRIEF OF PETITIONER DONALD C. NICHOLS

Petitioner Donald C. Nichols ("Petitioner"), by counsel, hereby submits his brief in furtherance of his appeal of the Circuit Court of Kanawha County's final order granting a partial motion to dismiss and a motion for summary judgment 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.

I. ASSIGNMENTS OF ERROR

The Petitioner raises four assignments of error:

A. First Assignment of Error

The Circuit Court committed reversible error by dismissing the Petitioner's negligence claim based upon the statute of limitations. Taking the allegations in the Complaint as true for purposes of analyzing the Respondents' partial motion to dismiss, the Petitioner raised factual allegations that warrant his negligence claim proceeding beyond the motion-to-dismiss stage.

B. Second Assignment of Error

The Circuit Court committed reversible error by prematurely granting summary judgment in favor of the Respondents. Several months remained prior to the discovery deadline contained in a Scheduling Order that was agreed to by the parties' counsel and that was entered less than three months before the Circuit Court's decision on the Respondents' summary-judgment motion.

C. Third Assignment of Error

The Circuit Court committed reversible error by granting summary judgment on the Petitioner's negligence claim based upon the statute of limitations. Pursuant to *Evans v. United Bank, Inc.*, 235 W. Va. 619, 775 S.E.2d 500 (2015), there are genuine issues of material fact that

should be resolved by a jury regarding when the two-year statute of limitations began to run and whether it should be tolled relative to the Petitioner's negligence claim.

D. Fourth Assignment of Error

The Circuit Court committed reversible error by granting summary judgment on the Petitioner's breach-of-contract claim. In essence, the Circuit Court improperly concluded that the Petitioner's breach-of-contract claim was actually a time-barred negligence claim.

II. STATEMENT OF THE CASE

A. Procedural History

The Petitioner's Complaint was filed in the Circuit Court of Kanawha County on June 25, 2020, and the case was assigned Civil Action No. 20-C-518.[1] (AR 002.) The Complaint, which is based on allegations of legal malpractice, contains two claims against the Respondents: (1) breach of express and/or implied contract, and (2) negligence. (AR 002-010.) The Petitioner's combined discovery requests were served on the Law Firm with the Complaint. (AR 011-018.)

A Summons, the Complaint, and the initial combined discovery requests to the Law Firm were served upon Mr. Maroney via certified mail on June 30, 2020. (AR 019.) The same were served upon the Law Firm through the West Virginia Secretary of State on July 1, 2020. (AR 073-074.) "Defendants' Partial Motion to Dismiss, Answer, and Affirmative Defenses to Plaintiff's Complaint" was served on July 31, 2020. (AR 020-049.) The Respondents' partial motion to dismiss solely challenged the Petitioner's negligence claim. (AR 02-024.) "Plaintiff's Response to Defendants' Partial Motion to Dismiss" was served on August 25, 2020. (AR 050-076.)

[1] Although not technically part of the record, it bears noting that the Complaint was filed during the relatively early stages of the COVID-19 pandemic.

On September 11, 2020, the Law Firm served its initial responses to the Petitioner's interrogatories and requests for production that were served with the Complaint. (*See* AR 077-089 for the Law Firm's written discovery responses, excluding production.) A Notice of Mediation was served on June 17, 2021, setting mediation for August 17, 2021 (AR 090-091) – though the parties subsequently agreed not to move forward with the mediation at that time.

On July 21, 2021, the Circuit Court entered an Agreed Protective Order, the contents of which were approved by the parties' respective counsel. (AR 092-096.) And on July 26, 2021, the Law Firm served its supplemental responses to the Petitioner's combined discovery requests. (*See* AR 097-108 for the Law Firm's supplemental discovery responses, excluding production.)

On April 19, 2022, the Respondents served a motion for summary judgment and supporting brief, attacking both of the Petitioner's claims. (AR 109-157.) On June 6, 2022, the Respondents served a notice of hearing, scheduling their August 2020 partial motion to dismiss and their April 2022 motion for summary judgment to be heard on August 23, 2022. (AR 158-159.)

The Circuit Court entered a Scheduling Order in the underlying case on June 16, 2022. (AR 160-162.) Without objection, the Respondents' counsel agreed to all dates and deadlines in the Scheduling Order, including the following: a deadline of July 29, 2022, for the parties to identify fact witnesses; a deadline of December 16, 2022, for the Petitioner's disclosure of expert witnesses; a deadline of January 16, 2023, for the Respondents' disclosure of expert witnesses; a discovery deadline of March 31, 2023; a deadline of May 1, 2023, for filing dispositive motions; a date and time of May 30, 2023, at 2:00 p.m. for a hearing on dispositive motions; a date of June 29, 2023, for the pre-trial conference; and a date of July 10, 2023, for the start of trial. (AR 160-162.) The parties immediately began following the Scheduling Order, with a "Notice of Selection

of Mediator" served on July 12, 2022 (AR 163-164), and with the parties' respective disclosures of fact witnesses served on July 28, 2022 (AR 165-171).

The Petitioner served his response in opposition to the Respondents' motion for summary judgment on August 18, 2022. (AR 172-206.) Among other things, the Petitioner's response contained an affidavit from his counsel. (AR 191.) The affidavit confirmed such 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.)

A hearing on the Respondents' partial motion to dismiss and motion for summary judgment was held on August 23, 2022. (AR 158-159, 274.) Toward the conclusion of the hearing, Judge Tabit noted that she "appreciate[d] the briefing and the argument[,]" that the parties were "clearly on point[,]" and that it was "a pleasure." (AR 303.) Judge Tabit then directed the parties to submit proposed findings of fact and conclusions of law within 15 days. (AR 303.) The parties submitted their proposed orders on September 7, 2022. (*See* AR 207-231 for the Petitioner's notice and proposed order; AR 232-245 for the Respondents' proposed order.)

On September 9, 2022, the Respondents' counsel emailed Judge Tabit and her law clerk to advise that, because the Respondents have already submitted their proposed order, they "do not plan on lodging any objections to Plaintiff's competing proposed Order." (AR 272.) In the same email, the Respondents' counsel noted his belief "that the issues before the Court are sufficiently (perhaps even exhaustingly) addressed in the competing Orders." (AR 272.)

On September 9, 2022, the Circuit Court entered its "Order Granting Defendants' Partial Motion to Dismiss and Motion for Summary Judgment," concluding that the Petitioner's negligence claim is time-barred by the applicable statute of limitations and that the Petitioner's breach-of-contract claim is actually a negligence claim that, again, is time-barred. (AR 246-259.)

Having not yet received the final order entered in the underlying case,[2] on September 14, 2022, the Petitioner timely filed his objections and exceptions to the Respondents' proposed order. (AR 1, 261-270.) The Petitioner timely filed his notice of appeal on October 11, 2022. (AR 306-342.) In accordance with this Court's Scheduling Order, the Petitioner now perfects his appeal.

B. Statement of the Facts

The Petitioner developed a form of cancer known as multiple myeloma, which he alleges resulted from exposure to benzene while working for FMC Corporation ("FMC") over the course of approximately 39 years. (Compl. at ¶¶ 13-14 (AR 003); Ans. at ¶¶ 13-14 (AR 025).) In 2014, he applied for occupational disease benefits related to his alleged exposure to benzene while working for FMC. (AR 246.) On March 12, 2014, a Third-Party Administrator for FMC denied the Petitioner's application for occupational disease benefits. (AR 246.) The Petitioner protested the decision, and the matter proceeded to an Administrative Law Judge ("ALJ"). (AR 247.) The Respondents represented the Petitioner at the ALJ level regarding the Petitioner's cancer diagnosis and work-related benzene exposure. (Compl. at ¶¶ 12-13, 18 (AR 003-004); Ans. ¶¶ 12-13, 18 (AR 025-026).) In furtherance of such representation, on March 28, 2014, the Respondents and the Petitioner entered into an "Authority to Represent & Limited Power of Attorney." (AR 201.) As the title suggests, the representation agreement incorporates a power of attorney. (AR 201.)

On June 15, 2017, the ALJ affirmed a Claim Administrator's denial of the Petitioner's workers' compensation claim. (*See* AR 039-048 for the ALJ's decision.) In doing so, the ALJ observed, among other things, that "[t]he claimant's application for Occupational Disease benefits

[2] Although entered on September 9, 2022, the Circuit Court's final order was not mailed to the Petitioner's counsel until September 13, 2022. (*See* AR 260 for a copy of the envelope in which the order was mailed to the Petitioner's counsel.)

has not been placed of record for the protest herein. Therefore the physician's statement cannot be reviewed indicating that the claimant has multiple myeloma or whether the physician found and indicated on the application that the claimant has multiple myeloma as a result of his occupation." (AR 44.) The ALJ ultimately concluded that the "[t]he only persuasive medical evidence of record" was from the report prepared by FMC's expert. (AR 045.) As reflected at the conclusion of the ALJ's report, the Respondents did not submit any actual medical evidence, nor did they offer any challenge to the report submitted by FMC's expert on April 7, 2017, or the closing argument submitted by FMC on April 19, 2017. (AR 047-048.) In fact, the Respondents did not submit any evidence whatsoever on the Petitioner's behalf after January 19, 2016 – over one year and five months before the ALJ's decision. (AR 047.)

In a June 27, 2017, letter purportedly sent to the Petitioner, Mr. Maroney noted the Respondents would not appeal the ALJ's decision, though the Petitioner could do so on his own within thirty days of the decision. (AR 142.) 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.) The letter does not address, among other things, the Respondents' failure to present any medical evidence, failure to oppose FMC's expert, or failure to even provide a closing argument. Although not clearly apparent on the record, it is undisputed that the Petitioner did not appeal the ALJ's decision.

As noted in the Procedural History, the Petitioner's Complaint was filed on June 25, 2020, and contains claims of breach of express and/or implied contract and negligence. (AR 002-010.) In his Complaint in this case, the Petitioner alleges, among other things, the following:

> 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).) In the present case, the Petitioner seeks, in part, the following:

> Damages that would have otherwise been available to Plaintiff pursuant to W. Va. Code § 23-4-2 (*i.e.*, damages over and above the workers' compensation award the Plaintiff should have received) but for the material weakening and/or compromised viability of his subsequent civil action (*i.e.*, Civil Action No. 16-C-888 in the Circuit Court of Kanawha County, WV) based upon FMC Corporation having taken 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

(Compl. at ¶¶ 42.b., 50.b. (AR 7, 9).) The Petitioner's "damages [in this case] are linked, to a degree, to the separate deliberate-intent case[.]" (AR 262.) As of September 14, 2022 (*i.e.*, the time of filing objections and exceptions to the Respondents' proposed order), it was the Petitioner's counsel's understanding that the separate deliberate-intent case was ongoing. (AR 262.)

III. SUMMARY OF ARGUMENT

The Circuit Court committed reversible error by granting the Respondents' motion to dismiss the Petitioner's negligence claim. The Circuit Court incorrectly ruled that the Petitioner's negligence claim is time-barred. The Petitioner sufficiently pleaded his negligence claim in a manner that, treating the allegations in the Complaint as true for purposes of analyzing the Respondents' Rule 12(b)(6) motion, should have resulted in a denial of such motion.

The Circuit Court also committed reversible error by granting the Respondents' motion for summary judgment regarding the Petitioner's negligence and breach-of-contract claims. The Circuit Court prematurely ruled on the motion for summary judgment several months prior to the completion of the discovery deadline set forth in an agreed-upon Scheduling Order.

On June 16, 2022, the Circuit Court entered its Scheduling Order in the underlying case. The content of the Scheduling Order was agreed to by the parties' respective counsel. At the time of entry of the Circuit Court's final order, over six months remained before the discovery deadline in the Scheduling Order. The Circuit Court, however, denied the Petitioner's request to continue conducting discovery within the timeframe agreed to by the parties and permitted under the Scheduling Order. The Circuit Court recognized that, "[a]s a general rule, summary judgment is appropriate only after adequate time for discovery." (AR 250.) However, the Circuit Court did not allow the Petitioner to complete discovery under the Scheduling Order before ruling on summary judgment. It is well-recognized in federal district courts sitting in West Virginia that the measure of what a court considers adequate time for discovery is embodied in the court's scheduling orders. *See 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). Because the Petitioner was not given adequate time to finish discovery within the timeframe established in the Scheduling Order, the Circuit Court's ruling on the Respondents' motion for summary judgment was premature and constitutes reversible error.

Additionally, in ruling on the Respondents' motion for summary judgment, the Circuit Court incorrectly decided issues that should have been reserved for a jury regarding application of the statute of limitations to the Petitioner's negligence claim. Moreover, the Circuit Court incorrectly ruled that the Petitioner's breach-of-contract claim was a time-barred negligence claim.

Regarding his negligence claim, the Petitioner raised issues that, pursuant to *Evans*, should be decided by a jury, including when the two-year statute of limitations on his negligence claim began to run and whether it should be tolled due to fraudulent concealment by the Respondents.

Further, pursuant to *Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996), even assuming *arguendo* that the Petitioner's negligence claim is time-barred, a complaint that could be construed as being either in tort or on contract should be presumed to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort. The Petitioner pleaded a viable claim of breach of contract and presented sufficient evidence in the form of a representation agreement, as well as legal support for the Petitioner's argument regarding the scope and effect of such agreement. 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, 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)), under the West Virginia Uniform Power of Attorney Act ("UPAA"), W. Va. Code §§ 39B-1-101, *et seq.* Regardless of whether the contractual obligation is express (ten-year statute of limitations) or

implied (five-year statute of limitations), the Petitioner's breach-of-contract claim against the Respondents was indisputably brought within the applicable statute of limitations.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to W. Va. R. App. P. 18(a). This case should be set for a Rule 19 oral argument, because the Circuit Court erred in its application of settled law, engaged in an unsustainable exercise of discretion where the law governing that discretion is settled, and reached an outcome unsupported by the record. The Petitioner respectfully submits that a published opinion be issued, fully reversing the Circuit Court and remanding this case.

V. ARGUMENT

A. Standard of Review

1. Appeal

"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, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Likewise, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. Rule 12(b)(6) Dismissal[3]

The Respondents' motion to dismiss was filed pursuant to W. Va. R. Civ. P. 12(b)(6). In the context of a Rule 12(b)(6) motion, the Supreme Court of Appeals "has consistently held that a trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief." *Cantley v. Lincoln County Comm'n*, 221 W. Va. 468, 470,

[3] By granting both a motion to dismiss and a motion for summary judgment regarding the Petitioner's negligence claim, the Circuit Court created a certain degree of confusion regarding the standards applied and the factors that relate to its decision on the separate motions. The Petitioner has attempted to separately address (in Sections V.B. and V.D. in this brief) the two rulings relative to the negligence claim; however, the arguments necessarily overlap to a certain degree.

655 S.E.2d 490, 492 (2007). In 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." *See John W. Lodge Distrib. Co. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

3. Rule 56(c) Summary Judgment

The Respondents' motion for summary judgment was filed pursuant to W. Va. R. Civ. P. 56(c). "It has long been established that '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 410, 825 S.E.2d 351, 357 (2019) (quoting Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). "'The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.'" Syl. pt. 2, *Dailey*, *supra* (quoting Syl. pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). Therefore, "'any permissible inference from the underlying facts'" must be drawn "'in the most favorable light to the party opposing the motion.'" *Dailey*, 241 W. Va. at 410, 825 S.E.2d at 357 (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995)). The Supreme Court of Appeals has recognized:

> [b]ecause "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [s]ummary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom."

Id. (quoting *Williams*, *supra* (internal quotations and citations omitted)).

B. The Petitioner Pleaded a Viable Negligence Claim that Should Have Survived the Respondents' Rule 12(b)(6) Motion to Dismiss.

The Circuit Court improperly granted the Respondents' motion to dismiss the Petitioner's negligence claim on the ground that such claim is time-barred by the applicable two-year statute of limitations.[4] The Complaint in this case was filed on June 25, 2020. (AR 002.) In granting the Respondents' motion to dismiss, the Circuit Court concluded the Petitioner was required to file his negligence claim within two years of his July 15, 2019, deadline for appealing the adverse ALJ decision in the workers' compensation matter in which the Respondents represented him. (AR 254-258.) The Circuit Court's conclusion was improper, because the Petitioner pleaded facts that raise a jury issue (or certainly, at a minimum, an issue worthy of surviving a motion to dismiss) regarding when the statute of limitations began to run and whether it should be tolled with respect to the negligence claim. Such facts must be treated as true for purposes of analyzing the four corners of the Complaint in response to the Respondents' partial motion to dismiss. *See Cantley*, *supra*; *John W. Lodge Distrib. Co.*, *supra.* Thus, the Circuit Court committed reversible error by granting the Respondents' partial motion to dismiss the Petitioner's negligence claim.

In evaluating whether a negligence claim is time-barred, "[a] five-step analysis should be applied" pursuant to Syl. pt. 4, *Evans*, *supra*. The trial court should first identify the applicable statute of limitations; the remaining steps, including when the statute of limitations began to run and whether it should be tolled by fraudulent concealment, should be decided by a jury. *See id.*

[4] There is no dispute that a two-year statute of limitations applies to the Petitioner's negligence claim. However, as addressed herein, the Petitioner disputes the Circuit Court's findings and conclusions regarding when the statute of limitations began to run and whether it should be tolled. As discussed in detail below, these are not issues that should be decided on a motion to dismiss or on summary judgment; these are issues that should be reserved for a jury.

The five factors to be considered when analyzing the issue of whether a claim is time-barred based upon the applicable statute of limitations are as follows:

> "First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. **Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.**"

Id. (*quoting* Syl. pt. 5, *Dunn v. Rockwell*, *supra*) (emphasis added). Recognizing that a complaint must be construed in a light most favorable to a plaintiff for purposes of analyzing a defendant's Rule 12(b)(6) motion, the Supreme Court of Appeals in *Evans* reversed the trial court's dismissal of, among other things, 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. *See Evans*, 235 W. Va. at 627, 775 S.E.2d at 508. In the present case, the Circuit Court went down a similarly premature and flawed path. (*See* AR 256 for the Circuit Court's finding that, "no later than July 15, 2017, Plaintiff knew or should have known" of his negligence claim.)

In the present case, the Circuit Court improperly adopted the Respondents' argument that the two-year statute of limitations with respect to the Petitioner's negligence claim expired on July

15, 2019 – two years after the date that the Respondents contend was the deadline for appealing the June 15, 2017, ALJ decision regarding the Petitioner's workers' compensation matter. By doing so, the Circuit Court failed to properly take into consideration the discovery rule and the Petitioner's contention that the Respondents fraudulently concealed facts that further support tolling the statute of limitations on his negligence claim.

First, the Petitioner has alleged an ample basis for tolling the statute of limitations based on the discovery rule. In the Complaint, the Petitioner alleges, among other things, the following:

> 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.
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> 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 judicate, given that the Plaintiff's application for workers' compensation benefits was denied.
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> 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).) Treating those allegations as true, as is required for purposes of analyzing the Respondents' motion to dismiss the Petitioner's negligence claim, the Petitioner did not have knowledge of the Respondents' negligence until on or about January 30, 2020. Thus, the two-year statute of limitations would not have started to run until on or about January 30, 2020, which brings the June 25, 2020, filing of the negligence claim well within the applicable two-year

filing period.[5] 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, pursuant to *Evans*, quite clearly an issue to be resolved by a jury.[6]

Second, if the Respondents fraudulently concealed or fraudulently misrepresented the ALJ's decision and/or the Respondents' negligence in connection therewith, an additional basis exists for tolling the two-year statute of limitations relative to the Petitioner's negligence claim. The Petitioner absolutely makes this argument, drawing support from the June 27, 2017, letter that Mr. Maroney purportedly sent to the Petitioner.[7] (*See* AR 142 for a copy of the letter.) However,

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[5] As part of their partial motion to dismiss, the Respondents attached the June 15, 2017, ALJ decision regarding the Petitioner's workers' compensation matter (AR 038-048); however, the ALJ decision on its face does not establish when the Petitioner received it. At best, the decision reflects (in the upper righthand corner of the first page) that the Law Firm received the decision on June 16, 2017. (AR 039.) Although the decision contains a cc, the cc does not clarify whether the decision was sent to the Petitioner, to Mr. Maroney (as his counsel), or to both. (AR 046.)

[6] The Circuit Court not only exceeded its authority by making an erroneous factual finding regarding when the Petitioner should have known of his negligence claim, the Circuit Court also 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 the Petitioner's arguments, the Circuit Court moved beyond the appropriate framework for Rule 12(b)(6) analysis.

[7] The June 27, 2017, letter had not yet been produced by the Respondents as of the date when the Petitioner responded to the partial motion to dismiss. (*See* AR 050-076 for the Petitioner's August 25, 2020, response to the partial motion to dismiss; AR 077-089 for the Law Firm's September 11, 2020, initial discovery responses, excluding document production.) But in their Answer, the "Defendants state Plaintiff was advised via letter on June 27, 2017, that Defendants would not appeal the Administrative Law Judge's decision to the Board of Review." (Ans. at ¶ 30 (AR 027-028).) Even before receiving the June 27, 2017, letter in discovery, the Petitioner recognized the potential significance of such letter based upon the Respondents' Answer. In his response to the Respondents' partial motion to dismiss, the Petitioner pointed out that "[t]he June 27, 2017 letter, although not appropriate for consideration with regard to this motion to dismiss, is certainly discoverable and could possibly be an important or at least noteworthy piece of evidence with regard to the Plaintiff's claims and with regard to the statute-of-limitations issue that the Defendants are prematurely advancing through their partial motion to dismiss." (AR 057.)

given that the letter was a product of discovery in this case, it is more appropriately considered in the context of the Respondents' motion for summary judgment, as addressed below.

In summary, the Petitioner adequately pleaded a negligence claim sufficient to survive a Rule 12(b)(6) motion regarding the two-year statute of limitations. The Circuit Court committed reversible error in granting the Respondents' motion to dismiss the Petitioner's negligence claim.

C. Summary Judgment Was Premature.

The Circuit Court committed reversible error by prematurely ruling on the Respondents' motion for summary judgment. On June 16, 2022, the 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. The Petitioner had already engaged in some discovery, and the Petitioner's counsel submitted an affidavit regarding his intention to engage in further discovery in support of the Petitioner's claims.

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*, *supra* (emphasis added) (quoting *Miller*, *supra*) (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)).[8] "Deciding a case summarily before adequate discovery and on the basis of an incomplete record 'works an

[8] "The 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.

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.

Prior to filing their motion for summary judgment, the Respondents provided no indication of any urgency in moving this case forward. As noted above, the Complaint was filed during the relatively early stages of the COVID-19 pandemic. Moreover, there was no need to proceed urgently, as no Scheduling Order was entered until June 16, 2020 (AR 160-162), and given that the Petitioner's damages in this case are linked, to a degree, to the separate deliberate-intent case that, to the Petitioner's counsel's knowledge, was ongoing as of September 14, 2022 (AR 262).

Over two years passed between service of the Respondents' partial motion to dismiss and the date on which it was heard. In responding to discovery, the Law Firm even indicated that certain requests were "premature" and that it would "disclose any discoverable information responsive" . . . "in accordance with the Court's Scheduling Order and the West Virginia Rules of Civil Procedure." (*See*, *e.g.*, AR 099 (using this language in response to, among other things, a request for an identification of fact witnesses for trial purposes).)

When the Respondents sprung their motion for summary judgment on the Petitioner, the Petitioner quickly moved to secure an agreed-upon Scheduling Order, and the parties immediately began complying with deadlines in the Scheduling Order. Further, as the Petitioner's counsel certified to the Circuit Court in response to the Respondents' motion for summary judgment, the Petitioner's counsel anticipated conducting additional discovery to be utilized in furtherance of this case. (AR 191.) Under the Scheduling Order, he should have been given that opportunity.[9]

Because the Circuit Court's decision regarding summary judgment was premature, the Petitioner respectfully requests that this Court reverse the Circuit Court's grant of summary judgment on his negligence and breach-of-contract claims. This case should be remanded for further proceedings, including the completion of discovery, with respect to both claims.

D. There Are Genuine Issues of Material Fact Regarding When the Two-Year Statute of Limitations Began to Run and Whether the Statute of Limitations Should Be Tolled Relative to the Negligence Claim.

As addressed above in Section V.B. of this brief, "[a] five-step analysis should be applied to determine whether a cause of action is time-barred.'" Syl. pt. 4, *Evans*, *supra* (*quoting* Syl. pt. 5, *Dunn*, *supra*). Once the trial court determines the statute of limitations, the remaining steps, including determining when the statute of limitations began to run and whether it should be tolled by fraudulent concealment, should be decided by a jury. *See id.*

[9] If this Court were to conclude that the Respondents' motion for summary judgment was not premature, despite the fact that over six months (at the time of entry of the final order) remained before the discovery deadline set by the Circuit Court, the impact would extend to both plaintiffs and defendants going forward. Such a decision would invite arbitrary line-drawing regarding the point when discovery is adequate – as opposed to affording parties the certainty of knowing the discovery deadline in a Scheduling Order (not to mention an agreed-upon Scheduling Order) provides the baseline for finding all parties have had adequate time to conduct discovery.

As also addressed in Section V.B. of this brief, the Circuit Court improperly adopted the Respondents' argument that the statute of limitations with respect to the Petitioner's negligence claim expired on July 15, 2019 – two years after the date that the Respondents contend was the deadline for appealing the June 15, 2017, ALJ decision regarding the Petitioner's workers' compensation matter. As the Petitioner had asserted, and should have been given the opportunity to build upon in the remaining time left for discovery, he did not learn of the adverse impact of the Respondents' malpractice until January 13, 2020, when FMC effectively took the position that the Petitioner's deliberate-intent claim (in his separate civil action) was barred by the doctrine of *res judicata*, given the denial of his application for workers' compensation benefits in the matter in which the Respondents' had previously represented him. (*See* Compl. at ¶¶ 32-34 (AR 006).) The issue of whether the Petitioner should have known of the negligence claim sooner is a jury issue.[10]

Additionally, as alluded to in Section V.B. of this brief, there is also a genuine issue of material fact regarding whether the Respondents fraudulently concealed their negligence, thus providing an additional basis for tolling the two-year statute of limitations relative to the Plaintiff's negligence claim in this case. In furtherance of their summary-judgment brief below, the Respondents attached a June 27, 2017, letter that Mr. Maroney purportedly sent to the Petitioner, advising that the Defendants "will 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

[10] If a jury were to find that the statute of limitations on the Petitioner's negligence claim did not begin to run until January 13, 2020, then the negligence claim (as contained in the Complaint filed on June 25, 2020) would have undoubtedly been timely filed.

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. Through his letter, which supports a fraudulent-concealment theory, Mr. Maroney communicates the Respondents' opinion that "any further appeal of his claim will be unsuccessful" – an opinion "[b]ased upon the evidence in [the Plaintiff's] claim[.]" (AR 142.) That explanation suggests the evidence does not support the Petitioner's workers' compensation claim. However, there was evidentiary support for the Petitioner's workers' compensation 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 report, the Respondents did not submit any actual medical evidence, nor did they offer any challenge to the report submitted by FMC's expert on April 7, 2017, or the closing argument submitted by FMC on April 19, 2017. (AR 047-048.) The ALJ concluded that "[t]he only persuasive medical evidence of record" was from the report prepared by FMC's expert. (AR 045.)

The Respondents chose to conceal the fact that their deficiencies in representing the Petitioner are the cause of the insufficient evidentiary support regarding the workers' compensation claim. An attorney's obligation to properly explain a matter is more than a mere theoretical exercise; it is a professional responsibility. Rule 1.4(b) of the West Virginia Rules of Professional Conduct expressly provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The June 27, 2017, letter lacks any explanation regarding the insufficiency of the evidence the Respondents presented to the ALJ or the fact that their failure relative to the presentation of evidence was the true basis for their opinion that a further appeal would be unsuccessful, nor does the letter provide

any explanation on the impact on other litigation, including the Petitioner's deliberate-intent claim. Respectfully, that is arguable concealment. Coupled with the fact that such concealment hides the Respondents' own errors and does so in direct contravention of their obligations under, at a minimum, the West Virginia Rules of Professional Conduct, there is ample support for a jury finding fraudulent concealment and tolling the statute of limitations.

The Circuit Court, however, ignored or disregarded such evidence and arguments. (AR 256.) In doing so, the Circuit Court not only improperly stepped into the role of juror. *See Evans*, *supra*; *see also Dailey*, 241 W. Va. at 410, 825 S.E.2d at 357 (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*, 194 W. Va. at 59, 459 S.E.2d at 336).

E. The Petitioner Brought a Viable Breach-of-Contract Claim that Raises Genuine Issues of Material Fact to Be Decided by a Jury.[11]

1. The Petitioner pleaded a viable breach-of-contract claim.

The Supreme Court of Appeals has clearly held that a plaintiff in a legal-malpractice action can assert both negligence and breach of contract. "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*, *supra* (quotations marks and citations omitted.) "A complaint that could be construed as being either in tort or on contract will

[11] The Respondents chose not to challenge the Petitioner's breach-of-contract claim on Rule 12(b)(6) grounds, instead opting to attack the breach-of-contract claim on summary judgment. In the context of a Rule 56(c) motion for summary judgment, the standard is whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to judgment as a matter of law" – not whether a claim is what it purports to be. Nevertheless, the Circuit Court concluded that the breach-of-contract claim was actually a negligence claim; thus, the Petitioner focuses on the substantive viability of his breach-of-contract claim, in addition to the existence of genuine issues of material fact that preclude summary judgment relative to such claim.

be presumed 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).

In *Smith v. Stacy*, the Supreme Court of Appeals reversed a trial court's grant of summary judgment for a defendant in a legal-malpractice case, concluding the trial court improperly found the action sounded only in tort and solely applied a two-year statute of limitations. In reversing the trail court, the Supreme Court of Appeals determined that the "action sounds in tort and contract and should not be precluded by a tort statute of limitations." *Id.* at 503, 482 S.E.2d at 120.

In ruling against the Petitioner on his breach-of-contract claim, the Circuit Court erroneously concluded that the Complaint "contains no allegations regarding a breach of any 'specific terms of the contract' between Plaintiff and Defendants." (AR 252.) In reaching this conclusion, the Circuit Court improperly relied 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.

Hall, however, is distinguishable from the present case.

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 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.)

Moreover, as addressed at length below, the Petitioner and the Respondents entered into a representation agreement, titled "Authority to Represent & Limited Power of Attorney;" however, the representation agreement contains no reference to how the power of attorney was limited.[12] The Respondents sought the benefits of incorporating a power of attorney into their

[12] The Circuit Court found "the power of attorney was limited to endorsing checks Plaintiff received from the claims administrator or other sources related to his workers' compensation claim." (AR 253.) There is no such limitation in the representation agreement (AR 201), nor does the record reflect the parties' intentions. The Circuit Court also found "the duties set forth in the UPOAA would only apply to actions undertaken as the power of attorney." (AR 253.) Again, there is no support in the record for this finding, and the Circuit Court cites no legal basis for it.

representation agreement with the Petitioner; thus, the Respondents must also assume the obligations associated with a power of attorney. Those obligations became part of the Respondents' representation agreement with the Petitioner. Under the West Virginia Uniform Power of Attorney Act, there are specific obligations imposed upon an agent, including, but not limited to, the obligation 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). As reflected above, among other things, in support of his breach-of-contract claim, the Petitioner has alleged: "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." (Compl. at ¶ 38 (AR at 065.)

The *Hall* case cited by the Circuit Court does not alter the standard of notice pleading in West Virginia. Thirty years after *Hall* and only slightly over two years ago, the Supreme Court of Appeals in *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020), recognized that, "[t]aken as a whole, the West Virginia Rules of Civil Procedure establish the principle that a plaintiff pleading a claim for relief need only give general notice as to the nature of his or her claim." Unquestionably, the Petitioner placed the Respondents on notice of his breach-of-contract claim, and, in doing so, he alleged a viable breach-of-contract claim. And certainly, he would be within his right in seeking to amend the Complaint to conform to the evidence "at any time, even after judgment[.]" *See* W. Va. R. Civ. P. 15(b).

2. There is sufficient evidence of a breach of contract, express and/or implied, by the Respondents in this case.

There is no dispute that the Respondents represented the Petitioner in connection with the underlying workers' compensation matter. (*See* Compl. at ¶¶ 12, 18 (AR 003-004); Ans. at ¶¶ 12, 18 (AR 025-026).) On March 14, 2018, the Respondents entered into a representation agreement with the Petitioner regarding such matter. (*See* AR 201 for an "Authority to Represent & Limited Power of Attorney" produced by the Defendants.) The Respondents characterized the agreement, in part, as a power of attorney. (AR 201.) The agreement specifically refers to "compensation for . . . **services**" to be performed on the Petitioner's behalf. (AR 201 (emphasis added).) The contract also contains language that could have resulted in a unilateral escalation in the fee percentage under certain circumstances, as well as language that permitted the Law Firm "to endorse [in the Petitioner's name] any and all checks [the Petitioner] receive[s] from the Claims Administrator, or any other source, relating to the above-styled claim." (AR 201.)

The Respondents – or, at a minimum, the Law Firm – prepared the "Authority to Represent & Limited Power of Attorney" and presented it to the Petitioner for his signature. To the extent that there is any ambiguity regarding the Respondents' duties (including, but not limited to, the "services" to be performed), those 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)).

Because the Respondents chose to proceed with a representation agreement that encompassed a power of attorney in the context of their representation, the Respondents contractually undertook certain duties set forth in the West Virginia Uniform Power of Attorney Act ("Uniform Power of Attorney Act" or "Act"), W. Va. Code §§ 39B-1-101, *et seq.* The Act

"**applies to all powers of attorney**[,]" with certain exceptions that are inapplicable in the present case. *See* W. Va. Code § 39B-1-103 (emphasis added). The Act also specifically lists an agent's duties. *See* W. Va. Code § 39B-1-114. To that end, W. Va. Code § 39B-1-114(a) provides:

> Notwithstanding provisions in the power of attorney, an agent who has accepted appointment shall:
>
> (1) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
>
> (2) Act in good faith; and
>
> (3) Act only within the scope of authority granted in the power of attorney.

W. Va. Code § 39B-1-114(b) further provides, in part, as follows:

> Except as otherwise provided in the power of attorney, an agent who has accepted appointment shall:
>
> (1) Act loyally for the principal's benefit;
>
> * * *
>
> (3) Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances. . . .

"If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence and diligence under the circumstances[.]" W. Va. Code § 39B-1-114(e). Because the Uniform Power of Attorney Act was enacted in 2012, the Respondents were effectively on notice of the Act's language at the time of entering into the "Authority to Represent & Limited Power of Attorney" with the Petitioner on March 28, 2014.

The Respondents sought the benefits of incorporating a power of attorney into their representation agreement with the Petitioner; thus, the Respondents must also assume the responsibilities that accompany such an approach. Those responsibilities became part of the Respondents' contract with the Petitioner. As alleged, the Respondents breached their contract with the Petitioner. To the extent there is a dispute in that regard, a jury should resolve the dispute.

The Respondents could have utilized a separate document, other than the representation agreement, for the power of attorney. Or they could have carved out the power of attorney in such a way as to clarify the scope of its application in the context of the representation agreement. The Respondents, however, did none of those things. By incorporating the power of attorney into the representation agreement, the Respondents essentially baked their obligations under the Uniform Power of Attorney Act into the representation agreement. To conclude otherwise would effectively undermine well-established principles of contract law.

3. A five-year statute of limitations applies to the breach of an implied contract, and a ten-year statute of limitations applies to the breach of an express contract.

"Under our law, an obligation 'which is not in writing is based on an implied contract and the statute of limitations applicable thereto is five years.'" *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). A ten-year statute of limitations applies to actions brought on a written contract. 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). The Complaint was filed on June 25, 2020. Thus, by any measure, the Petitioner timely alleged his breach-of-contract claim.

VI. CONCLUSION

The Petitioner respectfully requests that the Circuit Court's decision granting the motion to dismiss and motion for summary judgment be entirely reversed, that both claims be recognized as presenting genuine issues of material fact to be decided by a jury, and that the case be remanded for further proceedings, including, but not limited to, the completion of discovery and a jury trial.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 9, 2023, the "Brief of Petitioner Donald C. Nichols" 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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