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No. 22-CV-0599

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JEROME STIEBER,

Plaintiff-Appellant,

v.

BURCHELL & HUGHES, PLLC, *et al.*,

Defendants-Appellees.

***On Appeal from the Superior Court of the District of Columbia, Civil Division No.* 2021 CA 004380 M**
(*Hon. Maurice Ross, Judge*)

BRIEF OF APPELLEES

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CERTIFICATE REQUIRED BY RULE 28(a)(2) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned counsel of record for appellees, Burchell & Hughes, PLLC and Kelly Burchell, Esquire, certifies that the following listed parties appeared below and/or will appear before this court:

1. Plaintiff below and appellant herein: Jerome Stieber, an individual;

2. Counsel for plaintiff below and appellant in this court: Neil S. Hyman, Esquire of the Law Office of Neil S. Hyman, LLC;

3. Counsel for plaintiff below and appellant in this court: Richard Evans, Esquire and Jeffrey Sickle, Esquire of the law firm of McCarthy Wilson, LLP;

4. Counsel for appellant in this court: Amy Leete Leone, Esquire of the law firm of McCarthy Wilson, LLP;

5. Defendant below and appellee herein: Burchell & Hughes, PLLC, a law firm;

6. Defendant below and appellee herein: Kelly Burchell, Esquire, an individual;

7. Counsel for defendants-appellees, Burchell & Hughes, PLLC and Kelly Burchell, Esquire below and in this court: Laura N. Steel, Esquire of the law firm Wilson, Elser, Moskowitz, Edelman, & Dicker LLP;

8. There are no *amici*;

9. There are no corporate entities, parent companies, subsidiaries and affiliates.

These representations are made in order that judges of this court, *inter alia*, may evaluate possible disqualification or recusal.

Respectfully submitted,

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STATEMENT REGARDING APPELLATE JURISDICTION

In accordance with D.C. App. R. 28(a)(5), undersigned counsel of record for appellees, asserts that this is an appeal from a final order or judgment that disposes of all parties' claims, such that this court has appellate jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

On this appeal, Burchell & Hughes, PLLC and Kelly Burchell, Esquire ("the Firm") submit that the following issue is presented for this court's review:

A. Whether the trial court properly dismissed this legal malpractice complaint which, on the face of the pleadings, was based on the compound speculation that plaintiff would have obtained a more favorable settlement in the underlying case, that any such hypothetical settlement would have been approved by both the Bankruptcy Trustee and the United States Bankruptcy Court, that additional money would have been recovered from a bankrupt company, and that an excess insurance policy would have been available in view of the company's bankruptcy and its inability to satisfy its $350,000 "primary" self-insured retention.

STATEMENT OF THE CASE

On November 22, 2021, appellant-plaintiff, Jerome Stieber, filed a legal malpractice lawsuit in the Superior Court of the District of Columbia. JA 001-06. After a lengthy delay in the effectuation of service and the reissuance of the summonses on February 8, 2022, defendants were served with process on March 2,

2022. As its responsive pleading, the Firm filed, on March 23, 2022, an initial Motion to Dismiss, and thereafter plaintiff filed a First Amended Complaint (cited as "FAC") on April 4, 2022. JA 007-017. On April 18, 2022, defendants moved to dismiss Plaintiff's First Amended Complaint, JA 018-042, to which Stieber responded by filing an Opposition on April 28, 2022. JA 043-054. The Firm filed a Reply on May 2, 2022. JA 055-061.

After briefing was completed, the Superior Court (Ross, J.) heard oral argument in two separate hearings held on July 1, 2022, and July 13, 2022. JA 062-128. The trial judge granted the defense motion and dismissed the First Amended Complaint with prejudice, setting forth his rulings and rationale orally on the record. *Id*. The Superior Court issued a written Order on July 13, 2022. JA 129-130. This appeal followed.

STATEMENT OF FACTS

This legal malpractice claim arises from the legal representation provided by appellees, experienced employment counsel, in connection with the settlement of Stieber's claims against his former employer, Cumulus Media, LLC ("Cumulus") for wrongful discharge and disability discrimination. The Firm was retained to pursue potential employment claims in connection with a Charge of Discrimination before the District of Columbia Office of Human Rights ("DCOHR") ("the underlying employment claim"), JA 007-017, FAC, *passim*, which was filed on

February 12, 2018. After plaintiff's discharge from employment, but before the Charge was filed, Cumulus filed for Chapter 11 bankruptcy protection. *Id.*, FAC at ¶¶ 11, 17; *In Re: Cumulus Media*, Case No. 17-13381 (SCC) (Bankr. S.D.N.Y.) (filed November 29, 2017) ("the Cumulus Bankruptcy").

After rendering a 'probable cause' finding in Stieber's favor, DCOHR conciliated the matter. A settlement was reached in October 2019, and a written agreement was signed on January 10, 2020. JA 012, FAC at ¶¶ 31, 33-34. The parties agreed to a settlement – of which plaintiff's share was set at $300,000 – but Cumulus was only willing to pay the settlement in the form of stock of the reorganized company. JA 013, FAC at ¶¶ 39-40. Because Cumulus had filed for Chapter 11 reorganization, the agreed-upon settlement had to be submitted to, and approved by, both the Trustee and the U.S. Bankruptcy Court. Fed. R. Bankr. P. 9019; 11 U.S.C. § 363.

A Proof of Claim was filed in the Cumulus Bankruptcy on Stieber's behalf and with Cumulus' consent (through counsel), which in turn permitted the settlement to proceed with the approvals of both the Trustee and the bankruptcy judge. *See In Re: Cumulus Media*, Case No. 17-13381 (Docs. 1232 and 1244) (Motion seeking approval of Stipulation and Compromise, and Court Order dated February 20, 2020, referencing Stieber's Proof of Claim filed on January 16, 2020, which was designated as Claim 1127). The claim was ultimately allowed and Stieber was designated as a Class 6 Unsecured Creditor. *Id.*[1]

On March 2, 2020, Stieber received the shares, which he alleges were worth $12,000. *See* JA 013-014, FAC at ¶¶ 40, 44; *id.* at 016, FAC at ¶ 51 (final bullet) (cash payout was "1% of the total value" of the claim). That the settlement was worth only 'pennies on the dollar' was a function of Cumulus' bankruptcy and the fluctuating valuation of its stock, a result that could not have been prevented by the Firm. Obviously dissatisfied with the bargain to which he had previously agreed, Stieber brought this legal malpractice claim on the theory that he could have recovered more.

On July 13, 2022, the Superior Court (Ross, J.) dismissed the lawsuit with prejudice because proximate cause was indisputably lacking. There was no allegation, JA 007-017, FAC *passim*, let alone a plausible one, that Stieber would have obtained a more favorable settlement, received more money, or 'fared better' in the underlying employment claim, a required element for legal causation.

Moreover, dismissal was proper because the existence of an insurance policy with a $350,000 self-insured retention ("SIR") through Chubb, JA 011-012, FAC ¶¶

[1] By law, Stieber's claim was extinguished by virtue of the Cumulus Bankruptcy. *See* 11 U.S.C. § 524(a)(2); 11 U.S.C. § 1141(d)(1); *Holcombe v. US Airways, Inc.*, 369 Fed. App'x. 424, 427 (4th Cir. 2010).

26-29, did not cure plaintiff's causation problem.[2] By definition, Cumulus was self-insured for the first $350,000 of loss, *id*., and because of its bankruptcy, did not have the ability to pay/exhaust its primary layer of insurance (its SIR). As a result, Cumulus was effectively uninsured for the underlying employment claim as the insurer had no obligation to indemnify or pay money on Cumulus' behalf because the policy was never triggered where the underlying primary limits were not, and would never be, exhausted. Based on the allegations of the First Amended Complaint, there was no available insurance asset outside of Cumulus' Bankruptcy Estate and no coverage for Stieber's underlying employment claim.

LEGAL STANDARDS

Because a motion to dismiss under Super. Ct. Civ. R. 12(b)(6) presents a question of law, the standard of review for a dismissal by a lower court is *de novo*. *Casco Marina Dev. L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003); *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 730 (D.C. 2000). This court "may affirm a judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court," so long as doing so would not be procedurally unfair.

[2] Although plaintiff consistently referred to the insurance company as "Chubb," the policy was issued by Federal Insurance Company. Chubb is a trade name.

Logan v. Lasalle Bank Nat'l Ass'n, 80 A.3d 1014, 1020-1021 (D.C. 2013); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 n.10 (D.C. 2013); *In re Walker*, 856 A.2d 579, 586 (D.C. 2004) (citation omitted).

SUMMARY OF ARGUMENT

Affirmance is warranted because, on the face of the pleadings, plaintiff's causation theory in this legal malpractice case is predicated upon conjecture and compound speculation that: a) Stieber would have obtained a more favorable settlement from Cumulus; b) such hypothetical settlement would have been approved by the Bankruptcy Trustee and the U.S. Bankruptcy Court; c) a bankrupt company had the wherewithal to pay more; and d) excess insurance would have been available in view of Cumulus' bankruptcy and the inability to satisfy its $350,000 "primary" self-insured retention. Under governing precedent, dismissal was proper in the absence of a non-speculative allegation that Stieber would have recovered more in the "case-within-the case" since his causation theory was based on compound hypotheticals, conjecture and speculation about a future result.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THIS LEGAL MALPRACTICE CASE WITH PREJUDICE BASED ON THE ABSENCE OF PROXIMATE CAUSE.

A. Elements Of A Legal Malpractice Claim.

Under District of Columbia law, the essential elements of a legal malpractice claim are that: (1) "there is an attorney-client relationship;" (2) "the attorney neglected a reasonable duty;" and (3) "the attorney's negligence resulted in and was the proximate cause of a loss to the client." *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985) (citing *Niosi v. Aiello*, 69 A.2d 57, 60 (D.C. 1949)). It is Stieber – as plaintiff – who bears the burden of establishing all of the required elements, including the third element of proximate cause, i.e., a causal relationship between the violation and the harm alleged. *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982) (citing *Morrison v. MacNamara*, 407 A.2d 555, 560 (D.C. 1979)).

A legal malpractice plaintiff is said to have multiple burdens of proof and must present *two cases*: (1) "one showing that his attorney performed negligently"; and (2) a second or underlying predicate case, "showing that [plaintiff] had a meritorious claim that he lost due to his attorney's negligence." *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 187 (D.D.C. 2006); *Niosi*, 69 A.2d at 60. The essential element of proximate cause requires that the "case within the case" would have been successful. *Steele v. Salb*, 93 A.3d 1277, 1281 (D.C. 2014); *Waldman v. Levine*, 544 A.2d 683, 691 (D.C. 1988); *McCord v. Bailey*, 636 F.2d 606, 611 (D.C. Cir. 1980).

Under established precedent, if a plaintiff cannot show that he would have "fared better" in the absence of the attorney's negligence, he cannot prevail. *See, e.g., Salb*, 93 A.3d at 1281; *Chase*, 499 A.2d at 1212. Where "there are absolutely no facts or circumstances from which a jury could reasonably find . . . negligence was the proximate cause of injury, the matter would be a question of law for the court." *Bragg v. Owens-Corning Fiberglas, Corp.*, 734 A.2d 643, 648 (D.C. 1999).

Proximate cause cannot be based on speculation and attorney malpractice cases will be subject to dismissal on an initial Rule 12(b)(6) motion if causation is lacking or if there is an inadequate or implausible factual predicate. *Pietrangelo*, 68 A.3d at 712-713 (legal malpractice claim properly dismissed where causation allegation "is purely speculative"); *id.* at 710 (compound speculation, including about a future legal result, is insufficient to support breach of fiduciary duty claim); *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002) (affirming dismissal of Claim II where conclusory allegations of 'but for' causation held insufficient). *See Chase*, 499 A.2d at 1211-12.

B. <u>Any Claim That Stieber Would Have Obtained A More Favorable Settlement Is Pure Speculation.</u>

The courts routinely reject as wholly speculative legal malpractice claims predicated upon a theory that a former client might have obtained a 'better settlement.' In *Macktal v. Garde*, 111 F. Supp. 2d 18 (D.D.C. 2000), the district court dismissed such a claim on a 12(b)(6) motion and aptly observed that:

> Settlements necessarily involve compromise, as well as considerations evaluated in the thick of litigation, and *so hindsight challenges to recommended settlements as being inadequate must fail if they are based only on speculation about what alternative results could have been achieved*.

Id. at 22 (citing R. Mallen & J. Smith, *Legal Malpractice,* § 29.38 at 746-48, 754-57 (4th ed. 1996 & Supp.1999)) (emphasis added).

Conclusory allegations that reflect a subsequent dissatisfaction with a settlement or that the former client would be in a better position but for the settlement, without more, do not make out a legal malpractice cause of action. *See Estate of Botvin v. Heideman Nudelman & Kalik, P.C.*, 2022 U.S. Dist. LEXIS 175134, *29-30, 2022 WL 4482734 (D.D.C. Sept. 27, 2022), reconsid. denied by *Estate of Yael Botvin v. Nudelman*, 2022 U.S. Dist. LEXIS 234101 (D.D.C. Dec. 12, 2022) (dismissing legal malpractice claim as "compound speculation" based on theory that law firm moved too slowly and made errors that caused a delay in obtaining judgments that, in turn, forfeited an opportunity to participate in settlement and disbursement of U.S.-based Iranian assets that would have allowed plaintiffs to recover more than they actually did); *Venable LLP v. Overseas Lease Grp., Inc*., 2015 U.S. Dist. LEXIS 98650, *10 (D.D.C. July 27, 2015) (dismissing as speculative legal malpractice counterclaim premised on allegation that, but for law firm's alleged negligence, plaintiff would have recovered the amount it believed it was entitled to instead of the settlement it voluntarily entered into); *Belmar v. Garza* (*In re Belmar*), 319 B.R. 748, 758-759 (Bankr. D.D.C. 2004) (rejecting legal malpractice theory as "pure speculation" as to "what might have happened" had plaintiffs retained greater settlement "leverage," observing that alleged impact on negotiations or on subsequent events related to the bankruptcy proceedings was "grossly speculative.").

Numerous other courts have dismissed claims of this nature as simply too speculative and tenuous and the cases so holding are legion. *See*, *e.g.*, *Judd Burstein, P.C. v. Long*, 797 Fed. App'x. 585, 588 (2d Cir. 2019) (malpractice counterclaim properly dismissed because former client did not plausibly allege proximately caused damages, finding that allegations concerning "wished-for settlement award" are wholly speculative); *Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP*, 2013 U.S. Dist. LEXIS 93762, *25-26, 2013 WL 3357921 (S.D.N.Y. July 2, 2013) (dismissing as "too conjectural" and "speculative" claim that did not offer any concrete factual allegations to support assertion that clients would have fared better had lawyers conducted settlement negotiations differently); *Steffen v. Akerman Senterfitt*, 2005 U.S. Dist. LEXIS 30575, 2005 WL 3277894, at *7 (M.D. Fla. Dec. 2, 2005) (". . . loss of negotiating leverage[] is too speculative to support the causation element of Plaintiff's legal malpractice claim."); *Maroulis v Sari M. Friedman, P.C.*, 60 N.Y.S.3d 468, 153 A.D.3d 1250, 1252 (N.Y. App. Div. 2017) (dismissing claim that plaintiff would have obtained a more favorable divorce settlement).[3]

[3] Summary judgment is routinely granted for the same reason. *See, e.g.*, *Long v. Parry*, 679 Fed. App'x. 60, 62-63 (2d Cir. 2017); *Waithe v. Arrowhead Clinic*,

In a one-paragraph response, Stieber summarily references what he denominates as "the so-called 'judgment rule,'" Pl. Brief at pp. 13-14,[4] which does not transform an otherwise conjectural allegation – that Cumulus might have offered more money in settlement – into a viable claim for 'negligent advice.' Having failed to substantively or meaningfully address this first causation hurdle in his appellate briefing, Stieber has waived any argument regarding the inherent speculativeness of a claim that he would have obtained a more favorable settlement since "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Comford v. United States*, 947 A.2d 1181, 1188 (2008); *McFarland v. George Washington Univ*., 935 A.2d 337, 351 (D.C. 2007); *Wagner v. Georgetown University Medical Center*, 768 A.2d 546, 554 n.9 (D.C. 2001) (citation omitted).

Rather than address relevant precedent, appellant relies on two inapposite and easily distinguishable cases involving former clients who rejected offers *that had*

Inc., 491 Fed. App'x. 32, 41 (11th Cir. 2012); *Szurovy v. Olderman*, 530 S.E.2d 783, 786 (Ga. Ct. App. 2000); *Whisler v. Lundy Flitter Beldecos & Berger*, 2014 WL 3749123 (N.J. Super. Ct. App. Div. July 23, 2014); *Sevey v. Friedlander*, 83 A.D.3d 1226, 1227, 920 N.Y.S.2d 831 (N.Y. App. Div. 3d Dep't 2001); *Joudeh v. Pfau Cochran Vertetis Amala, PLLC*, 2015 Wash. App. LEXIS 2430, *10-12 (Wash. Ct. App. Oct. 12, 2015).

[4] Presumably, appellant is referring to the "judgmental immunity" doctrine, first recognized by this court in *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 664-65 (D.C. 2009), a legal defense to certain types of legal malpractice claims.

actually been extended, thus providing the necessary causal nexus between the alleged damages (loss of settlement opportunity) and the advice given by the attorneys. *Id.* (citing *Seed Co. v. Westerman*, 840 F. Supp. 2d 116, 126 n.10 (D.D.C. 2012) (causation not speculative where plaintiffs sufficiently alleged that they lost money due to erroneous legal advice that led them to reject two settlement offers) and *Jones v. Lattimer*, 29 F. Supp. 3d 5, 9, 13 (D.D.C. 2014) (allegation that plaintiff turned down multiple settlement offers in reliance on lawyer's advice was sufficient for proximate cause at 12(b)(6) stage)). The third case on which Stieber relies, *Crawford v. Katz*, 32 A.3d 418, 436 (D.C. 2011) (cited at Pl. Brief at p. 13), did not address causation or speculative damages, issues that were remanded to the trial court to address in the first instance.

In the present situation – where it is pure guess-work as to whether Cumulus might have ever offered more money and where no greater offer was ever made to Stieber – it is impossible to say whether some "wished-for" settlement could have been negotiated. The notion that a 'better settlement' might have been obtained is pure conjecture as to 'what might have happened' had there been an imaginary change in Cumulus' settlement position, which is neither concretely alleged in nor logically inferable from Stieber's pleadings. A causal connection based solely on pure speculation about an alternative settlement that could have possibly occurred is far too tenuous to survive. *See, e.g.*, *Macktal*, 111 F. Supp. 2d at 22. Dismissal was therefore proper for this reason alone.

C. <u>Any Allegation That Stieber Would Have Recovered More Is Compound Speculation In View Of The Cumulus Bankruptcy.</u>

Adding further speculation to an otherwise conjectural claim is that any hypothetically greater settlement would still have required approval by the Cumulus Trustee and the bankruptcy judge under Fed. R. Bankr. P. 9019 as being *in the best interests of the estate*. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) (bankruptcy court must determine that a settlement is fair, equitable, and in the best interests of the estate); *In re WorldCom, Inc*., 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006) ("The Court must make an informed judgment whether the settlement is fair and equitable and in the best interests of the estate."); *In re Hibbard Brown & Co., Inc*., 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998) (recognizing bankruptcy court's discretion to approve or deny a settlement). Leaving aside that Stieber's pleadings do not allege that the Cumulus Trustee and the court would have approved any additional terms, JA 007-017, FAC *passim*, such compound speculation is insufficient as a matter of law.

This court has made clear that legal malpractice cases should be dismissed where proximate cause is lacking or speculative on the face of the pleadings. *Pietrangelo,* 68 A.3d at 709-10, 712-13. In *Pietrangelo,* dismissal on an initial Rule

12(b)(6) motion was held proper where legal malpractice allegations of the "but for" outcome of the underlying case were predicated upon "mere speculation." *Id*. at 709-10. There, the speculative causation theory was that the Supreme Court would have granted *certiorari*, found in plaintiff's favor on the merits, remanded the case, and the district court would have issued an order granting plaintiff's reinstatement or striking down federal legislation regulating treatment of gays in the military. *Id*. As the *Pietrangelo* Court stated:

> [Plaintiff's] allegation that the federal district court, the United States Court of Appeals for the First Circuit, or the United States Superior Court would have struck down [the "Don't Ask Don't Tell statute] if [the lawyers] had advanced [certain additional] claims is purely speculative. Accordingly, we affirm the dismissal of [the legal malpractice claim].

Pietrangelo, 68 A.3d at 712-13 (citations omitted)

The court confirmed this basic principle in affirming the dismissal of a related claim for breach of fiduciary duty. *Id.* at 710 ("We have declined to find proximate cause where we would have to speculate about a legal result. Such compound speculation is insufficient as a matter of law . . . .") (citations omitted).

Other speculative legal malpractice causation theories have likewise been found inadequate. *See Herbin,* 806 A.2d at 196 (finding too conclusory allegations that, but for lawyer's conduct, a search warrant would not have been issued and without evidence seized during the search, former client would not have been charged and/or have been acquitted in criminal trial); *Chase*, 499 A.2d at 1211-12 (allegations of what law firm might have done and what the result would have been had the attorneys made a report or appealed FCC's initial decision involves the kind of speculation that cannot support theory that negligence caused former client to be disqualified for radio station license). *See also Taylor v. Law Office of Galiher, Clarke & Galiher*, 2015 U.S. Dist. LEXIS 116568, *14-15 (D.D.C. Sept. 1, 2015) (Rule 12(b)(6) motion granted where legal malpractice complaint did not allege causal nexus between lawyers' conduct at evidentiary hearing and loss of plaintiff's workers' compensation case and where former client neither identified the evidence that would have presented nor how this evidence would have been relevant or dispositive); *Rocha v. Brown & Gould, LLP*, 101 F. Supp. 3d 52, 77-78 (D.D.C. 2015) (where plaintiff alleged that the outcome of her case would have been different had it been filed in Maryland, the district court agreed that "it is at best an issue of pure guess-work requiring the impermissible use of both hindsight and speculation as to different legal results a court might reach."); *United States Telesis, Inc. v. Ende*, 64 F. Supp. 3d 65, 67-69 (D.D.C. 2014) (legal malpractice suit dismissed as speculative because former client did not plausibly allege that it would have achieved a different result in the underlying case since its damages claim was foreclosed by liability limitations clause in contract at issue); *Bigelow v. Knight*, 737 F. Supp. 669, 671 (D.D.C. 1990) (failure of lawyer to locate and interview witnesses insufficient to establish causation without allegations of what witnesses would have testified to and how they would have supported a defense resulting in plaintiff's acquittal).

Similarly, here, the allegations of causation are pure conjecture and compound speculation. Stieber would have to make multiple impossible showings to establish that he would have 'fared better' in the underlying employment claim: *first*, as discussed *supra*, his former (bankrupt) employer would have offered more and/or been willing to pay money rather than stock in the reorganized company; *second*, Cumulus' bankruptcy trustee would have agreed to a greater settlement amount; *third*, the bankruptcy judge would have approved/allowed such a hypothetical settlement (contrary to the interests of Cumulus' other creditors); *fourth*, Stieber's bankrupt former employer had the financial resources to actually pay more or that the stock in the reorganized company would have been worth more; and *fifth*, a hypothetical increased settlement amount would have been collectible, i.e., there were assets available to satisfy a greater settlement even if one could have been obtained. Under *Pietrangelo*, such multiple hurdles render any causation theory wholly speculative, in large measure because Cumulus was bankrupt and had insufficient assets to cover its pre-existing liabilities.

This final factor is the 'death knell' to this legal malpractice claim as a hypothetical greater monetary settlement would have been uncollectable by virtue of Cumulus's bankruptcy. Non-collectability is an insurmountable legal obstacle to Stieber's malpractice claim against the defendants, who could *not* have secured a better result regardless because Cumulus had no assets to satisfy any such hypothetical greater settlement (or judgment).

This principle is well-established by other courts that have considered the issue. *See, e.g.*, *McGillewie v. Parker, Poe, Adams & Bernstein, P.A.*, 1996 U.S. App. LEXIS 20571 (4th Cir. August 16, 1996) (because judgment obtained by attorneys was not collectible, summary judgment was properly granted in legal malpractice action); *Bankruptcy Estate of Rampy v. Messerli*, 224 B.R. 701, 706 (Bankr. D. Minn. 1997) (rejecting, as speculative, legal malpractice claim that former client would have been more successful in collecting a settlement against company that had been shut down and no longer had significant assets); *LeHouillier v. Gallegos*, 434 P.3d 156, 162 (Colo. 2019) (where judgment was uncollectible due to insufficient assets or bankruptcy, the lost value of the judgment is not the proximate result of an attorney's negligence); *Selimanovic v. Finney*, 337 S.W.3d 30, 41 (Mo. Ct. App. 2011) (JNOV proper where lawyers failed to file wrongful death action against putative defendants who had no income, assets, or insurance coverage to satisfy a judgment had the case been filed); *Bogart v. Gutmann*, 115 N.E.3d 711, 718 (Ohio App. 2018) (underlying claim was uncollectable and therefore plaintiff could not prove causation in legal malpractice case); *Schmidt v.*

Coogan, 335 P.3d 424, 428 (Wash. 2014) ("If the underlying judgment was uncollectible, for example, due to insufficient assets or bankruptcy, the lost value of the judgment is not the proximate result of an attorney's negligence. The client could not have collected the judgment even if the attorney used reasonable care.").

Any claim that Stieber could have recovered more from Cumulus is pure guess-work based on multiple hypothetical outcomes and compound speculation, which does not cross the legally required "line . . . to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). Even if the Firm handled the underlying employment claim differently or given different advice, Stieber would still not have recovered more from a bankrupt Cumulus. This court's holding in *Pietrangelo* forecloses a plausible allegation of proximate cause where it is necessary to speculate about an alternative result, 68 A.3d at 710, 712-13, which is precisely what Stieber urges here.

As appellant implicitly acknowledges, a hypothetically different outcome would have necessitated the undertaking of several additional steps to obtain bankruptcy court approval, *see* Pl. Brief at pp. 3-4 – i.e., appearing at a meeting of creditors, objecting to Cumulus' Reorganization Plan, initiating an adversary proceeding, and moving to lift the bankruptcy stay – all of which require this court to speculate about what a bankruptcy judge would have ruled had such multiple endeavors and motions been undertaken. This is precisely the type of "purely speculative" and "compound speculation about a legal result," *Pietrangelo supra*, which cannot sustain ‘but for’ causation.

For this precise reason, the Second Circuit affirmed the 12(b)(6) dismissal of a legal malpractice case brought by another Cumulus creditor against its attorneys on the theory that a hypothetical objection to the Chapter 11 Reorganization Plan would have been successful. In *WGH Communs. Inc. v. Penachio Malara LLP*, 2022 U.S. App. LEXIS 5097, *5-6, 2022 WL 569665 (2d Cir. Feb. 25, 2022), the court rejected as “baseless speculation” a claim that, had the law firm done something differently in the bankruptcy proceedings (i.e., timely filed objections or appeared at a plan restructuring hearing), plaintiff would have received more in its Proof of Claim. The same rationale applies here.

Judge Ross properly concluded that, based on the facts alleged, Stieber did not satisfy even a minimum pleading requirement to meet the proximate cause threshold. There is no plausible allegation, let alone one with adequate factual support, that plaintiff would have recovered more or ‘fared better’ in the underlying case-within-the case, as D.C. law requires.

D. Any Allegation Of Available Excess Insurance Is Also Speculative.

Any argument that Cumulus had insurance through Chubb is also wholly speculative in view of the explicit allegations in the pleadings both that the policy in question was subject to a $350,000 self-insured retention and that Cumulus was in bankruptcy. JA 010-011, FAC at ¶¶ 17, 26. The mere existence of an insurance policy does not cure plaintiff's causation problem, as Stieber erroneously believes.

The proffered policy was concededly subject to a $350,000 self-insured retention, *id.* at ¶ 26, the primary layer of insurance. Thus, by definition, Cumulus was *self-insured* for the first $350,000 of loss and, because of its bankruptcy, did not have the ability to exhaust its primary layer of insurance. For the Chubb excess policy to be triggered, the underlying limits had to be exhausted such that Cumulus would have had to have paid the first $350,000 of any settlement with Stieber, which the company simply could not do. Presumably, for this reason, Stieber never says, *id.*, *passim*, nor can he plausibly allege, that a bankrupt Cumulus would have been able to satisfy/pay such a huge SIR – the first layer of primary insurance – a required pre-condition to trigger Chubb's excess coverage.

Under basic insurance law principles, an insurer's responsibilities arise only after the self-insured retention amount specified in the policy (also called an "attachment point") has been satisfied. SIRs are considered by the courts to be equivalent to primary liability insurance, and policies subject to self-insured retentions are deemed to be excess insurance, such that no duty on the part of the carrier to defend or to indemnify arises until the retention is exhausted, i.e. paid by the policyholder. *See Eli Lilly & Co. v. Home Ins. Co.*, 653 F. Supp. 1, 11 n.10 (D.D.C. 1984) (with an SIR, ". . . insurance begins after an initial level of loss or liability for which [the policyholder] is self-insured. This self-insured amount is generally referred to as a self-insured retention or SIR. Above the SIR amount is an initial layer of insurance which insures [] against losses in excess of the SIR up to the policies stated limit of liability.”).

This principle is well-established. *See, e.g., State Indus. v. Twin City Fire Ins. Co.*, 158 Fed. App’x. 694, 697 (6th Cir. Dec. 14, 2005) (“[i]nsureds with a self-insurance retention . . . are their own primary carriers.”); *Pacific Employers Ins. v. Domino's Pizza*, 144 F.3d 1270, 1276-77 (9th Cir. 1998) (“It is well-recognized that self-insurance retentions are the equivalent to primary liability insurance, and that policies which are subject to self-insured retentions are ‘excess policies’ which have no duty to indemnify until the self-insured retention is exhausted.”); *City of Phoenix v. First State Ins. Co*., 2016 U.S. Dist. LEXIS 119024, *20, 2016 WL 4591906 (D. Ariz. Sept. 2, 2016) (quoting *Pacific Employers Ins., supra*); *General Star Nat'l Ins. Corp. v. World Oil Co*., 973 F. Supp. 943, 948-949 (C.D. Ca. 1997) (an SIR is a specific amount of loss that is not covered by the policy but instead must be borne by the insured); 2 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 13.13 at 1088 (14th ed. 2008) (“self-insured retention” is “the dollar amount of a loss that is retained by the policyholder and not covered by the excess insurance”); Allan D. Windt, 3 Insurance Claims and Disputes § 11:31 (6th ed. 2013).

The practical effect of Cumulus' large self-insured retention further forecloses causation in this legal malpractice case. The requirement – that Cumulus exhaust its self-insured retention before the policy's coverage took effect – effectively left Stieber's former employer uninsured for the first $350,000 in loss related to the underlying employment claim. *See In re Tailored Brands, Inc.*, 2021 Bankr. LEXIS 1375, *14-15 (Bankr. S.D. Tex. May 20, 2021) (SIR effectively left debtor uninsured for the first $500,000 in relation to employment claim); *In re CJ Holding Co*., 2018 Bankr. LEXIS 2437, 2018 WL 3965225, at *2 (Bankr. S.D. Tex. Aug. 15, 2018) (noting "that there was effectively no primary insurance as the Debtor had a large self-insured retention.").

It is wholly implausible to suggest that an insolvent Cumulus could satisfy its large SIR (well in excess of a quarter of a million dollars). Based on the pleadings, bankruptcy precluded Cumulus from exhausting its self-insured retention – and there was no excess insurance available – such that Stieber could not, and would not, have obtained more money regardless of how the Firm handled the representation. *See Young v. Hammer*, *Hewitt*, *Jacobs & Floch*, *PLLC*, 491 P.3d 725, 732 (Mont. 2021) (summary judgment affirmed in legal malpractice claim where lawyer's failure to submit timely insurance claim did not proximately cause injury because there was no coverage under the policy for former clients' injuries).

There is no non-conjectural causation theory that Cumulus could have satisfied its SIR in view of its bankruptcy and, with no remotely plausible allegation of insurance coverage, dismissal was proper.

II. **STIEBER HAS WAIVED ANY ARGUMENT NOT RAISED IN THE TRIAL COURT.**

For the first time on appeal, Stieber raises an argument suggesting that Cumulus's bankruptcy did not relieve Chubb of the obligation to pay claims and that the insurance policy continued to apply even though Cumulus, as the debtor, was unable to pay its SIR under the policy. Pl. Brief at pp. 14-22. Appellant devotes more than seven pages of his opening Brief to a general discussion of the bankruptcy code and a self-serving selection of New York and Illinois cases that, while might allow liability claims to proceed against a debtor's insurer, neither create coverage obligations on the part of Chubb nor excuse Cumulus' non-compliance with the pre-conditions imposed for coverage under the policy, such as paying its SIR.

However, because Stieber did not present this argument to the trial court, *see* JA 043-054, 062-128, he has waived the right to raise any such claim on appeal. *See Hackney v. Chamblee*, 980 A.2d 427, 430 (D.C. 2009); *Wallace v. Skadden, Arps, Slate, Meagher & Flom LLP*, 799 A.2d 381, 388 (D.C. 2002).

III. STIEBER'S NEW ARGUMENT DOES NOT CURE THE DEFECTS IN HIS FIRST AMENDED COMPLAINT.

Stieber now suggests that he could have moved for "a limited lift" of the bankruptcy stay for the purpose of "releasing the [Chubb] insurance proceeds," followed by litigation to establish Cumulus' liability (either by way of a separate legal action or through an adversary proceeding brought in the bankruptcy court). Pl. Brief at pp. 14-19. Stieber then speculates that, if these legal processes had been undertaken (and assuming they were successful), it would have allowed him to 'reach' the Chubb policy notwithstanding the inability of his bankrupt former employer to exhaust its $350,000 SIR, *id.* at pp. 19-22, although plaintiff never explains precisely how. He goes on to theorize – in only the most skeletal and conclusory manner – that the underlying employment claim would have exceeded the applicable SIR and that the policy would somehow have been triggered. Pl. Br. at p. 22.

Plaintiff's new argument not only fails to cure the defects in his First Amended Complaint, but actually makes his proximate cause problem worse. Any claim – that Stieber could have convinced a bankruptcy judge to allow his liability claims to proceed against Chubb, Pl. Brief at pp. 14-22 – introduces the multi-faceted, complicated federal bankruptcy procedure and the complexities of insurance coverage, which pose numerous additional legal hurdles and render his malpractice causation theory even more tenuous and speculative.

In making his argument, Stieber omits, whether unintentionally or by design, that his former attorneys (who were not licensed in New York or in the U.S. Bankruptcy Court for the Southern District) would have had to have pursued *and prevailed in* at least four different legal undertakings – *first*, a motion to lift the bankruptcy stay; *second*, an action to establish Cumulus' liability; *third*, a proceeding to determine Stieber's potentially recoverable damages; and *fourth*, a declaratory judgment to determine the insurer's obligations, if any, under the policy, including whether the unexhausted SIR was a legal impediment to recovery from Chubb. This is, again, precisely the type of compound speculation about future legal outcomes that *Pietrangelo*, *supra*, expressly precludes.

As to the first legal hurdle, the Second Circuit has adopted a 12-factor analysis for deciding whether or not to lift a bankruptcy stay so that litigation may continue to completion in another tribunal. *Schneiderman v. Bogdanovich* (*In re Bogdanovich*), 292 F.3d 104, 110 (2d Cir. 2002) (citing *Sonnax Indus., Inc. v. Tri Component Prods. Corp.* (*In re Sonnax Indus.*), 907 F.2d 1280, 1285-86 (2d Cir. 1990)). For an unsecured creditor, such as Stieber, the public policy rationales underlying the automatic bankruptcy stay *weigh against* granting a motion to lift, particularly where no insurance carrier has assumed financial responsibility to pay the claim, an important factor in the *Sonnax* analysis. *See, e.g.*, *In re Residential Capital, LLC*, 2012 Bankr. LEXIS 3624, *10, *15-16, 2012 WL 3249641 (Bankr. S.D.N.Y. Aug. 7, 2012) (denying request to lift stay to litigate pre-petition state law claims where no insurer assumed responsibility to pay for damages and where allowing action to proceed would require debtors to pay damages directly from their insurance policy deductible). *See also In re Celsius Network LLC*, 642 B.R. 497, 504 (Bankr. S.D.N.Y 2022) ("Unsecured creditors . . . bear a heavy burden in proving that the balance of hardships favors lifting the [bankruptcy] stay . . . . ."); *In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1214, 2007 WL 1129170, at *3 (Bankr. D. Del. Apr. 13, 2007) (creditors bear "the heavy and possibly insurmountable burden of proving that the balance of hardships tips significantly in favor of granting relief [to lift stay]"). The ultimate decision to lift a stay depends heavily upon the complexities of the facts underlying a given motion, and is neither straightforward nor automatically granted as Stieber implies.

As to proving liability and damages, the second and third legal hurdles, Stieber would also have to show that, rather than accept $300,000 (his negotiated portion of the settlement with Cumulus), he would have been awarded more from a judge, jury or administrative officer (in a secondary "trial-type" review before the Human Rights Commission under D.C. Code §§ 2-1404.01 *et seq*. and 4 DCMR § 400 *et seq*. (1995)), an outcome that is impossible to predict. Even if liability for the underlying employment claim had been pursued and established in another tribunal, it would still be left to the discretion of the bankruptcy judge to decide if the claim should be allowed against the estate, and if so, in what amount under 11 U.S.C. § 502(b). *See Robbins v. Thomson McKinnon Sec. Inc.* (*In re Thomson McKinnon Sec. Inc.*), 1997 U.S. Dist. LEXIS 23971, *7-8 (S.D.N.Y. June 9, 1997); *Bittner v. Borne Chemical Company, Inc.*, 691 F.2d 134, 135-56 (3d Cir. 1982). Such judicial discretion renders causation in this malpractice case even that much more speculative.[5]

Leaving aside the inherent speculativeness of predicting both what a factfinder in any forum would have awarded and what amount the bankruptcy court would have allowed against the Cumulus estate, plaintiff would still have held only a general unsecured claim to be paid proportionally and in accordance with the confirmed Chapter 11 Plan. *See In re Residential Capital*, LLC, 2012 Bankr. LEXIS 3624 at *14. Thus, in order to reach the $350,000 attachment point of the Chubb policy, Stieber would have had to recover at least $35 million in damages since, as

[5] Steiber's causation problem cannot be cured through expert testimony, Pl. Br. at p. 18, since it would be impermissible to opine about how a bankruptcy court would have decided a motion to lift the stay or how much would have been allowed against the estate. *See, e.g., Hickey v. Scott*, 796 F. Supp. 2d 1, 5-6 (D.D.C. 2011) (precluding expert testimony on causation in legal malpractice case as it would require a prediction of what some other fact finder would have concluded in the underlying case, which would be speculative and impermissible) (citing cases).

the Complaint makes clear, the Cumulus Plan paid only 1% of the total value of the underlying employment claim. JA 0016, FAC at ¶ 51 (final bullet).

It is pure conjecture to imagine such a recovery, particularly in view of the $300,000 statutory cap on compensatory damages under the Americans with Disabilities Act, 42 U.S.C. § 12117(a) and 42 U.S.C. § 1981a(b)(3)(D) (for employers with more than 500 employees) and that compensatory damage awards under the D.C. Human Rights Act are limited to back pay. *See* 4 D.C.M.R. § 4-201. Such an award is not, by any stretch of the imagination, a remotely plausible inference from the facts alleged in the pleadings.

As to the fourth and final causation hurdle – some perceived ability to recover under the Chubb policy – Stieber acknowledges that the insurer's obligations would be exactly what they would have otherwise been in the absence of Cumulus' bankruptcy, namely to pay a claim *only* to the extent it exceeded the amount of the self-insured retention. Pl. Brief at p. 20 (bankruptcy clauses do not require an insurer to 'drop down' to assume any self-insured retention, but rather it is "generally required that the coverage be afforded for amounts in excess of the SIR.") (citation omitted).

Thus, Stieber concedes this crucial point, which is just one more 'nail in the coffin' of his causation theory – even if he had an independent cause of action against Chubb, it was nevertheless still subject to the policyholder's compliance with the conditions contained in the policy, including exhaustion of the SIR. See discussion at Section I(D), *supra*. *See also, Rapid-Am. Corp. v. Travelers Cas. & Sur. Co*. (*In re Rapid-Am. Corp.*), 2016 Bankr. LEXIS 2224, *38-39 (Bankr. S.D.N.Y. June 7, 2016) (recognizing that New York insurance statute gives a limited cause of action to injured parties against the bankrupt or insolvent tortfeasor's insurer, but does not go further to excuse compliance with conditions precedent imposed under the policy).

Indeed, the cases upon which Stieber relies affirm the principle that a bankrupt policyholder still has to pay its SIR before coverage liability attaches. Pl. Brief at pp. 19-22 (citing *Am. Safety Indem. Co. v. Vanderveer Estates Holding, LLC* (*In re Vanderveer Estates Holding, LLC*), 328 B.R. 18, 22 (Bankr. E.D.N.Y. 2005) (notwithstanding policyholder's bankruptcy, policy's self-insured retention endorsement "requires the Debtor to pay the first $25,000 of defense costs, legal fees, and the costs of any settlement or judgment . . . .") and *Admiral Ins. Co., v. Grace Indus.* (*In re Grace Indus*.), 341 B.R. 399, 404 (Bankr. E.D.N.Y. 2006), *aff'd*, 409 B.R. 275, 277 (E.D.N.Y. 2009) (insurer was not required to pay the first $50,000 SIR of loss under policy issued to bankrupt debtor-policyholder, which was the responsibility of the insured)).

Thus, an insurance policy provider such as Chubb is *not* obligated to provide indemnity when an underlying policyholder is insolvent and unable to satisfy its SIR, effectively leaving a debtor, like Cumulus, uninsured up to its retained limit. *See, e.g., In re Tailored Brands, Inc*., 2021 Bankr. LEXIS 1375 at *14-15; *In re CJ Holding Co*., 2018 Bankr. LEXIS 2437, 2018 WL 3965225, at *2; *Associated Elec. & Gas Ins. Servs. Ltd. v. Border Steel Rolling Mills, Inc*., 2005 U.S. Dist. LEXIS 32198, *26-34, 2005 WL 3068787 (W.D. Tex. Sept. 27. 2005); *In re RIC United Corp. v. Litzler*, 2005 U.S. Dist. LEXIS 15536 (N.D. Tex. July 29, 2005) (regardless of its bankruptcy, self-insured trucking company is nonetheless responsible for its $1,000,000 SIR before insurance provider would be required to make payments).[6]

Leaving aside that there is no conceivably plausible allegation of available insurance through Chubb, Stieber also glosses over the additional uncertainties to be overcome regarding the interpretation of the policy, Pl. Brief at pp. 19-22, which add yet more speculation to the proximate cause analysis since it is unclear which forum would hear a claim aimed at trying to 'reach' the Chubb policy, *id.*, let alone what law would apply. In addition to the bankruptcy court, several possible legal venues existed, each with its own choice of law and contract interpretation rules, including: Georgia, where Cumulus was headquartered and the policy was delivered;

[6] This is in accord with the generally accepted principle that an excess insurer has no obligation to pay any sums not in excess of the underlying policy limit based on the insolvency of the primary insurer. *See, e.g., Premcor USA, Inc. v. Am. Home Assurance Co*., 400 F.3d 523 (7th Cir. 2005); *Schneider Nat'l Transp. v. Ford Motor Co*., 280 F.3d 532, 538 (5th Cir. 2002); *Molina v. United States Fire Ins. Co*., 574 F.2d 1176, 1178 (4th Cir. 1977).

Maryland, the state in which Stieber resided; the District of Columbia, where the alleged discriminatory workplace conduct occurred; and New Jersey, the situs of Federal Insurance Company and the likely origin of the policy.

In the absence of a choice of law provision, Georgia and Maryland would apply the rule of *lex loci contractus* to interpret the Chubb policy, *see Fed. Ins. Co. v. Nat'l Distrib. Co.*, 417 S.E.2d 671, 674 (Ga. App. 1992) and *TIG Ins. Co. v. Monongahela Power Co.*, 209 Md. App. 146, 161-162, 58 A.3d 497, 507 (2012), which favor the application of the law of Georgia, where the policyholder was domiciled, where the policy was delivered and the location from which premiums were paid. In contrast, New Jersey and the District of Columbia conduct a "governmental interest" analysis to determine which jurisdiction's law controls the interpretation and enforcement of a contract. *See Adolph Coors Co. v. Truck Ins. Exch.*, 960 A.2d 617, 620 (D.C. 2008); *Jersey, USA Continental Ins. Co. v. Honeywell International, Inc.*, 234 N.J. 23, 51, 188 A.3d 297, 314 (N.J. 2018).

The Cumulus bankruptcy court sitting in New York would apply the choice-of-law principles of the forum state, i.e., New York, *Bianco v. Elkins*, 243 F.3d 599, 601-02 (2d Cir. 2001), and employ the "center of gravity" or "grouping of contacts" approach to choice-of-law analysis in the context of liability insurance contracts, applying the law of "the jurisdiction which the parties understood was to be the principal location of the insured risk unless with respect to the particular issue, some other jurisdiction has a more significant relationship." *RLI Ins. Co. v. AST Eng'g Corp*., 2022 U.S. App. LEXIS 931, *4-5, 2022 WL 107599 (2d Cir. Jan. 12, 2022) (internal quotation omitted)). Where the policy covers risks in two or more states, "the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk," *id.*, which in this case would also favor application of Georgia law.

Based upon the number of variables, it is pure speculation to theorize about how a court might interpret the Chubb policy.[7]

When taken together, it is clear that Stieber's legal malpractice causation theory is built on nothing but 'smoke and mirrors,' the type of compound conjecture and "mere speculation" that cannot withstand dismissal under *Pietrangelo,* 68 A.3d at 709-10. To suggest that Stieber could have overcome all of these obstacles and contingencies to secure the multiple judicial rulings necessary to avoid the unexhausted SIR defies logic and common sense. *See Cambridge Holdings Group,*

[7] Stieber summarily asserts that the Chubb policy would be interpreted under the law of New York, Pl. Brief at pp. 20-21 nn.6 & 7, notwithstanding his concession that "it is not established that the policy follows New York law. . . ." *Id*. at p. 21 n.7. However, there is no allegation that the policy was either issued in or delivered to New York so as to come under NYCLS, *Ins.* § 3420(a)(1) (governing insurance policies "issued or delivered in [New York] state"). *See* JA 007-017, FAC, *passim.* Nor is there any discernible connection to New York or Illinois, two jurisdictions that have enacted specific legislation requiring insurers to maintain insurance notwithstanding the insolvency or bankruptcy of a policyholder. Thus, the statutes and cases relied upon, Pl. Brief at pp. 19-22, are neither apposite nor controlling.

Inc. v. Fed. Ins. Co., 357 F. Supp. 2d 89, 96 (D.D.C. 2004) (rejecting, on a 12(b)(6) motion, plaintiff's request that the court "draw unreasonable inferences from what appear to be relatively, straight-forward facts."). Even considering his new arguments on appeal, Stieber has not put forth any non-speculative and plausible allegations of 'but for' causation. *See O'Neil*, 452 A.2d at 341, *Morrison*, 407 A.2d at 560.

At the end of the day, Stieber does not come remotely close to setting out enough facts to state a claim that is arguably viable on its face, "having not nudged his claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

For these reasons, the trial court's dismissal was proper based not only on compelling legal reasons, but also because there is only one reasonable inference to be drawn from the First Amended Complaint, namely that Stieber could not have obtained more money regardless of how his lawyers handled the representation. The far "more likely explanation[]," *Iqbal*, 556 U.S. at 682, indeed, the obvious and unassailable one, is that any additional recovery was foreclosed by Cumulus' inability to pay its debts and obligations, the "objectively plausible" consequence of its bankruptcy.

CONCLUSION

Accordingly, the trial court's dismissal Order of July 13, 2022, should, respectfully, be affirmed.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from the foregoing Appeal Brief of Appellees:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including: an individual's social-security number; taxpayer-identification number; driver's license or non-driver's' license identification card number; birth date; the name of an individual known to be a minor; financial account numbers, except that a party or nonparty making the filing may include the following: (1) the acronym "SS#" where the individual's social-security number would have been included; (2) the acronym "TID#" where the individual's taxpayer identification number would have been included; (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included; (4) the year of the individual's birth; (5) the minor's initials; and (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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No. 22-CV-0599
Case Number(s)

Dated: March 9, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appeal Brief of Appellees was served this 9th day of March, 2023, via *D.C. Court of Appeals eFiling* pursuant to D.C. App. R. 25(a)(2)(B) to:

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