UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1063

September Term, 2015

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FRANKLIN BROWN ET AL.

v.

ISAAC NEUBERGER ET AL.

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Woodward,
Graeff,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: May 31, 2016

Franklin C. Brown, and his wife, Karen S. Brown (the "Browns"), appellants, filed suit in the Circuit Court for Baltimore City against appellees, Isaac M. Neuberger, Esq., PNC Financial Services Group, Inc. and PNC Bank, National Association ("PNC"), and Martin Grass, for tortious interference with a contract (Count I), tortious interference with an economic/business relationship (Count II), and intentional infliction of emotional distress (Count III), and against appellees Duane Morris, LLP ("Duane Morris"), and Matthew Taylor, Esq., for professional malpractice (Count IV), breach of contract (Count V), and negligence (Count VII). The Browns also alleged civil conspiracy (Count VI), against all appellees.[1]

The complaint alleged that Mr. Neuberger and PNC interfered with the Browns' relationship with their attorney. Ray Shepard, a former partner at Duane Morris, had represented the Browns in two cases that followed Mr. Brown's 2003 convictions in federal court. The Browns alleged that Duane Morris pressured Mr. Shepard to leave the firm during the pendency of those cases, and as a result, there was a delay in Mr. Brown's federal resentencing hearing, which resulted in the loss of two months of liberty for Mr. Brown and caused the Browns severe emotional distress.

Appellees filed motions to dismiss, which the circuit court granted. The court subsequently denied the Browns' motion to alter or amend.

[1] The Browns filed their complaint on April 2, 2014. On September 15, 2014, they filed a first amended complaint, which is the subject of this appeal and discussed, *infra*. The Browns do not contest the circuit court's dismissal of Mr. Grass as a defendant. Mr. Grass did not file a brief in this Court, and he is not a party on appeal.

On appeal, the Browns raise several questions for our review,[2] which we have consolidated and rephrased, as follows:

1. Did the circuit court err in dismissing the claims against Duane Morris and Mr. Taylor on the ground that there were no damages?

2. Did the circuit court err in concluding that there must be physical injury to recover for mental distress?

3. Did the circuit court err in concluding that the Browns' retainer agreement with Duane Morris was an at-will contract, and therefore, there was no cause of action against Mr. Neuberger for tortious interference of contract?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

[2] The questions presented by appellant were:

I. Did the trial court err in dismissing Appellants' claims against Duane Morris LLP and Taylor, when it determined that no damages occurred because (a) there was no evidence to support the claim that Franklin would have received an earlier hearing, and (b) that it was speculative as to whether the federal judge would have released Franklin from home detention at an earlier hearing?

II. Did the trial court err in determining that no damages occurred as a result of the breach of contract by Duane Morris LLP?

III. Does mental injury resulting in the need for psychiatric treatment constitute a physical injury, for purpose of damages arising out of tortious conduct?

IV. Did the trial court err in determining that the retainer agreement was an "at will" contract?

## FACTUAL AND PROCEDURAL BACKGROUND

### I.

### Complaint

Mr. Brown is the former general counsel of Rite Aid Corporation ("Rite Aid"). In 2003, when he was 75 years old, Mr. Brown was convicted of criminal offenses relating to financial dealings at Rite Aid. Following his convictions, Mr. Brown was incarcerated for seven years and eight months. Duane Morris did not represent Mr. Brown in his federal criminal case.

The complaint alleged that, subsequent to Mr. Brown's convictions, appellees interfered with the Browns' "rights to undisturbed access to legal services being rendered by their contracted counsel, Duane Morris." It asserted that the interference was prompted by Mr. Neuberger's and Mr. Grass' "fear of the Browns' litigation accusing them of committing fraud and forgery."[3] The complaint set forth the "relevant history and background" of two underlying suits to demonstrate Mr. Neuberger's and Mr. Grass' "motivation for their tortious interference with the Browns' access to their own counsel."

In September 2005, the "first underlying case," Rite Aid sued the Browns, Mr. Grass, and others, jointly and severally for $100 million in a Pennsylvania court. This lawsuit, which was transferred to the Court of Appeals of New York, alleged that, in October 1994, Mr. Grass and others, with the complicity of Mr. Brown, used Mr. Brown's signature on fraudulent Assets Disclosure Statements to steal more than $30 million in

[3] Mr. Martin Grass is the former Chairman and CEO of Rite Aid.

Investment Securities from Rite Aid in its sale of Sera-Tec Biologicals ("Sera-Tec"), a wholly-owned subsidiary of Rite Aid. Because Mrs. Brown acted as Trustee of a Trust for Mr. Grass, into which the proceeds of the Sera-Tec sale had been deposited, she was sued as a Trustee. On the same day that Mrs. Brown was served in the case, Mr. Neuberger, a principal of Neuberger, Quinn, Gielen, Rubin & Gibber, P.A. ("NQGRG"), a Baltimore law firm, called and offered the Browns free legal representation, which they accepted.

On June 26, 2006, during discovery in the "first underlying case," the Browns learned that Mr. Brown's signature had been "photocopy-lifted (forged) onto [the] fraudulent Assets Disclosure Statements." The signature pages "carr[ied] in their fax tail the time, date, phone number, and identification initials of NQGRG," which "clearly implicat[ed]" Mr. Neuberger in the forgeries. The complaint alleged that the "first underlying case" was significant because discovery disclosed to them the forged signature and gave a "strong showing" of Mr. Brown's "**non**-involvement" in the theft of more than $30 million in Investment Securities from Rite Aid.[4]

On June 25, 2009, while Mr. Brown was still incarcerated, the Browns, through their counsel, Duane Morris and Mr. Shepard, filed a complaint (the "second underlying case") in the United States District Court for the District of Maryland, against Mr. Neuberger and others, for the forgery of Mr. Brown's signatures, which forgeries "were used in effectuating the apparent theft of over $30 million in Investment Securities from Rite Aid

[4] The "first underlying case" was dismissed on limitations grounds, and this ruling was affirmed on appeal.

in its sale of Sera-Tec." The lawsuit was dismissed on limitations grounds, and the United States Court of Appeals for the Fourth Circuit affirmed.

In addition to the "second underlying case," Duane Morris and Mr. Shepard represented Mr. Brown in the appeal of his 2003 convictions. The appeal was premised on Rite Aid's illegal withholding of defense funds during Mr. Brown's criminal proceedings, which amounted to a constitutional violation. Argument was scheduled in the United States Court of Appeals for the Third Circuit on May 23, 2011, and Mr. Shepard "anticipated that a re-sentencing hearing before the District Court would follow within a relatively short period of time" after that argument.

The complaint alleged that, as a result of the Browns' filing of the "second underlying suit," Mr. Neuberger was fearful that he "could be found both criminally/or and civilly responsible for forgeries, a fraudulent scheme, and cover-up," which provided motivation for the "intentional interference with the Browns' representation by chosen and contracted counsel, Duane Morris and [Mr.] Shepard." Thus, Mr. Neuberger and PNC pressured Duane Morris to withdraw from its representation of the Browns during the pendency of "critical" proceedings.

Specifically, the complaint alleged that, in 2009, after Mr. Shepard and Duane Morris informed Mr. Neuberger of the contemplated litigation against him and his firm, Mr. Neuberger sent a letter to the Managing Partner of Duane Morris' Washington, D.C. office, with copies to nine Duane Morris partners known to Mr. Neuberger, attempting to intimidate Duane Morris into withdrawing from representation of the Browns in the

contemplated litigation against him. At that time, Duane Morris "refused to be intimidated by" Mr. Neuberger and remained supportive of the Browns.

On April 4, 2011, however, Mr. Shepard advised Mrs. Brown that his boss, Mr. Matthew Taylor, Chair of Litigation Practice at Duane Morris, told him that Mr. Neuberger had asked a bank client of Duane Morris' to contact and pressure Duane Morris to withdraw from representing the Browns. When Mr. Taylor learned of Mr. Shepard's conversation with Mrs. Brown, he reprimanded and intimidated Mr. Shepard, suggesting that Mr. Shepard "might not be a good fit at Duane Morris." Mr. Shepard indicated to Mrs. Brown that Duane Morris was "resolutely moving in" the direction of terminating the Browns as clients, and if it did so, he would be unable to remain with the firm.

At that time, Duane Morris lawyers "had read thousands of pages of transcripts and close to a thousand filed documents in the criminal case plus the documents in the second underlying case, all of which work would have to be duplicated in warp speed by a new legal team." Mrs. Brown, who knew that the Browns' reply brief in the Fourth Circuit case would be due within a few weeks, and knew that there was an upcoming argument and an "anticipated re-sentencing hearing" in the criminal case, was concerned about what would happen if Mr. Shepard could not continue to represent the Browns.

The complaint alleged that the information Mrs. Brown received, at a time "when they had never been closer to [Mr.] Brown's release, had a devastating, severe emotional effect" on Mrs. Brown. She "suffered severe emotional distress, anxiety, and fear that impelled her to place herself under the care of a psychiatrist for the first time in her 67

years." She was "greatly distraught that all of her and [Mr.] Brown's efforts to gain freedom and justice for [Mr.] Brown would be torn asunder by the interference with the Browns' contract with their counsel . . . which would result from Duane Morris's withdrawal as the Browns' counsel." Mr. Brown, then 83 years old and still incarcerated, also "suffered great emotional distress as a result of having to discontinue his relationship with Duane Morris," and "[g]iven [that he] knew that he was unjustly incarcerated, which had lasted for too long already, the knowledge that his liberty was now being lost for an additional indeterminate period of time as a result of Duane Morris' withdrawal was emotionally devastating." Mr. Brown feared that "his hampered ability to communicate with new counsel as effectively as necessary during that critical time would have an adverse effect," and the "substitution of a new lawyer and law firm . . . could signal to the court that Duane Morris had lost faith in [Mr.] Brown's cause, thus, adversely affecting the court's decision."

Despite Duane Morris' efforts, Mr. Shepard "did, in fact, argue in the Third Circuit Court of Appeals on May 23, 2011." Following the appeal, the Court ordered Mr. Brown's release to home confinement on May 25, 2011, until his resentencing hearing. At the end of June 2011, Mr. Shepard "chose to leave" Duane Morris, and he began working at a new firm on July 1, 2011. He was at the new firm when he argued the Fourth Circuit appeal on September 20, 2012.

The Browns alleged that, because they "were forced to depart Duane Morris, the re-sentencing (after a small delay caused by the government) was further delayed until [Mr.] Shepard was established at his new firm." They assert that the judge was "ready to

have [Mr. Brown's] hearing in the middle of July 2011," but Mr. Shepard was "unable to participate in that hearing until August 30, 2011 because he was in the process of leaving Duane Morris and transferring his practice to his new firm." As a result of this delay, Mr. Brown "spent two extra months of custody in restrictive home confinement than otherwise would have been the case had Duane Morris remained as their counsel" and not engaged in "the egregious behavior of pressuring [Mr.] Shepard to terminate the Browns as clients thereby causing Duane Morris effectively to withdraw as counsel."

Count I of the complaint, alleging tortious interference with contract, asserted that Mr. Neuberger and PNC deliberately interfered with the Browns' retainer agreement with Duane Morris, which deprived the Browns of their legal representation at a critical juncture in their cases. As a result, Mr. Brown was subject to home detention for two extra months, and Mrs. Brown was unable to cope with the emotional stress. Counts II and III alleged that Mr. Neuberger and PNC intentionally interfered with the Browns' attorney-client relationship with Duane Morris and intentionally inflicted emotional distress on the Browns by acting with "great animosity and hostility," which caused the Browns to "experience the sheer panic of losing their attorney." Count IV alleged that Duane Morris and Mr. Taylor committed professional malpractice by failing to act in good faith and loyalty with regard to the Browns and their legal matters. Count V alleged that Duane Morris breached its retainer agreement with the Browns by terminating its representation of them "due to ceding to the demands of Neuberger, PNC, and Grass." Count VI alleged civil conspiracy against all defendants. And Count VII alleged negligence against Duane

Morris and Mr. Taylor for failing to meet the standard of care required of attorneys representing clients.

Based on the allegations in the complaint, the Browns sought an award of "compensatory damages in an amount in excess of $75,000.00, plus interest and costs of suit," as well as an award of "punitive damages for the willful, wanton, outrageous, and malicious misconduct of Defendants in an amount in excess of $75,000.00."

## II.

## Motions to Dismiss

As indicated, appellees each filed a motion to dismiss. Mr. Neuberger argued that Count I, tortious interference with a contract, should be dismissed for three reasons: (1) it failed to state a claim because the contract at issue was "at-will," and the tort does not apply to at-will contracts; (2) it did not allege facts to support a finding that Duane Morris breached the contract; and (3) it did not allege that the Browns sustained any compensable damages as a result of his alleged conduct. With respect to Count II, tortious interference with an economic relationship, Mr. Neuberger asserted that it failed to state a claim because it did not allege: (1) improper means of sufficient severity to support such a tort, such as violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law, or the institution or threat of groundless civil suits or criminal prosecution in bad faith; or (2) facts supporting a finding that the Browns sustained damages as a result of his conduct. With respect to Count III, intentional infliction of emotional distress, Mr. Neuberger asserted that it failed to state a claim because it failed to allege facts indicating that the alleged conduct: (1) was intentional or reckless; (2) was extreme or

outrageous; (3) caused the alleged mental distress; or (4) resulted in "severe emotional distress." With respect to Count VI, civil conspiracy, Mr. Neuberger asserted that, because conspiracy is not a stand-alone tort, the failure of the other claims required a finding that this claim failed as well.

PNC moved to dismiss the claims against it on the ground that the complaint did not allege with sufficient particularity that PNC committed any of the alleged acts for which the Browns sought to hold PNC liable, as the Browns based their claims against PNC solely on "information and belief," without providing the requisite factual allegations to establish a basis for imposing liability on PNC. PNC asserted that the Browns admitted in their first amended complaint that they lacked any evidence to identify "the bank" that allegedly pressured Duane Morris to terminate the Browns as clients, but nevertheless named PNC as a defendant. The failure to plead any factual basis for naming PNC as a defendant, it argued, warranted dismissal of PNC as a defendant. With respect to the substantive claims, PNC adopted the legal arguments set forth in Mr. Neuberger's brief.

In the motion to dismiss filed by Duane Morris and Mr. Taylor, they argued that Count IV, professional malpractice, and Count VII, negligence, failed to state a claim because the complaint did not meet the standard for criminal malpractice or identify any actionable breach of duty or compensable harm. In support, they argued that, to sustain a claim arising out of Duane Morris' appellate representation of Mr. Brown in the appeal of his criminal conviction, Mr. Brown was required to first pursue post-conviction relief premised on attorney error, which he did not, and could not, do. Moreover, they asserted, the Browns' claims centered on an alleged delay of Mr. Brown's resentencing hearing,

which "actually occurred on the day that it was scheduled" and was not postponed. With respect to Count V, breach of contract, Duane Morris and Mr. Taylor incorporated the above arguments and further asserted that the Browns did not identify a breach of any contractual obligation. With no viable tort claims against Duane Morris and Mr. Taylor, they asserted that Count VI, civil conspiracy, must also be dismissed.

As indicated, the court granted appellees' motions to dismiss. The substance of this ruling will be discussed in more detail, *infra*.

## STANDARD OF REVIEW

This Court recently reiterated the standard of review of a circuit court's grant of a motion to dismiss:

> "A trial court may grant a motion to dismiss if, when assuming the truth of all well-pled facts and allegations in the complaint and any inferences that may be drawn, and viewing those facts in the light most favorable to the non-moving party, 'the allegations do not state a cause of action for which relief may be granted.'" *Latty v. St. Joseph's Soc'y of the Sacred Heart, Inc.*, 198 Md. App. 254, 262-63 (2011) (quoting *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010)). The facts set forth in the complaint must be "pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC*, 413 Md. at 644.
>
> "'We review the grant of a motion to dismiss de novo.'" *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (quoting *Reichs Ford Road Joint Venture v. State Roads Comm'n*, 388 Md. 500, 509 (2005)). *Accord Kumar v. Dhanda*, 198 Md. App. 337, 342 (2011) ("We review the court's decision to grant the motion to dismiss for legal correctness."), *aff'd*, 426 Md. 185 (2012). We will affirm the circuit court's judgment "'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) (quoting *Pope v. Bd. of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995)).

*Advance Telecom Process, LLC v. DSFederal, Inc.*, 224 Md. App. 164, 173-74 (2015).

## DISCUSSION

### I.

### PNC

We begin with the claims against PNC.[5] In the circuit court, PNC moved to dismiss the claims against it because, among other reasons, the complaint did not plead any facts to support the assertion that PNC was "the bank" involved in the alleged interference with the Browns' relationship with counsel. In that regard, PNC stated:

> Plaintiffs allege that [Mr.] Neuberger persuaded "a bank" that was a client of Duane Morris to pressure Duane Morris to drop Plaintiffs as clients under the implied threat if Duane Morris did not do so, it would lose "the bank" as a client.
>
> Plaintiffs admit right in their First Amended Complaint that they lack any evidence to identify "the bank" that allegedly pressured Duane Morris in this way. But Plaintiffs have nevertheless named PNC as a defendant in this case, not on the basis of facts available to them after reasonable investigation showing that PNC was "the bank" that pressured Duane Morris to drop Plaintiffs, but on mere "information and belief" that PNC was "the bank" that did so. Not only did Plaintiffs not bother to plead any facts to support this bald assertion, their First Amended Complaint concedes that facts might well "materialize" that would establish that PNC did not participate in this alleged plan, in which case Plaintiffs asked the [c]ourt to ignore the fact it had sued PNC and to treat its allegations as directed against an unknown, unnamed generic "bank."
>
> This failure to plead any factual basis for naming PNC as a defendant in this action, in and of itself, warrants dismissal of Plaintiffs' First Amended Complaint as it pertains to PNC.

[5] As indicated, the complaint against PNC alleged tortious interference with a contract, tortious interference with an economic/business relationship, and intentional infliction of emotional distress, asserting that Mr. Neuberger and PNC pressured Duane Morris to withdraw from its representation of the Browns.

(citations omitted). Counsel asserted that the Browns' "information and belief allegation is not supported by any factual basis whatsoever to make it a plausible allegation sufficient to withstand the motion to dismiss."[6]

When the court asked the Browns' counsel "what support is there that PNC was the bank," counsel responded that there was a close relationship between Mr. Neuberger and Mercantile Bank, which subsequently became PNC. Counsel stated:

> Knowing this strong connection with Mercantile . . . it's the only known bank that is represented by the Neuberger firm and the Duane Morris firm. . . .
>
> And if you're going to call upon someone to act, do your dirty deeds essentially, to make this type of call, to leverage as kind of influence on someone, it's going to be with someone that you have a close relationship with.
>
> And the only known bank that we know of that has that type of relationship is PNC, that Neuberger would have that connection, who would also have a connection with Duane Morris. . . . So that's the facts at this point.

At the conclusion of the November 7, 2014, motions hearing, the court ruled as follows with regard to PNC:

> This [c]ourt is concerned about the suit brought against PNC Bank, given the lack of an identity. The [c]ourt is aware that the pleading is based on information and belief.
>
> However, under the circumstances of the facts presented in this case, and the arguments, the [c]ourt is satisfied that there is insufficient evidence

[6] In paragraph 44 of the complaint, the Browns asserted:

> On information and belief, Plaintiffs aver that PNC is the bank that contacted [Mr.] Taylor in order to pressure Duane Morris to withdraw as counsel for the Browns. [If it should materialize that PNC was not the bank being referenced herein, then any references hereinafter to PNC should be read as "a bank," and should be deemed to refer to the "bank."].

> to support the prosecution of this case against PNC Bank, and the [c]ourt accepts the arguments of counsel, and this matter is dismissed in toto as to PNC Bank.

As PNC points out, appellants did not challenge in their opening brief the ruling dismissing the claims against PNC on the ground that there were not sufficient facts identifying PNC as the bank involved.[7] Accordingly, PNC asserts that appellants have waived any right to challenge this ruling in this Court. We agree.

The Court of Appeals has made clear that "a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review." *Health Svcs. Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 664 (1984). Similarly, this Court has declined to address an issue not sufficiently argued. *See Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 670 n.4, 28 A.3d 178 (2011) ("Appellants failed, however, to present any argument on this issue. Therefore, we will not address it."), *cert. denied*, 424 Md. 291, 35 A.3d 488 (2012); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618, 822 A.2d 551 (refusing to address argument because appellants failed to adequately brief the argument), *cert. denied*, 376 Md. 544, 831 A.2d 4 (2003). Moreover, "'[w]hen a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm.'" *Tower Oaks Blvd., LLC v. Procida*, 219 Md. App. 376, 392 (2014) (quoting *Bailiff v. Woolman*, 169 Md. App. 646, 653 (2006)), *cert. dismissed as improvidently granted*, 444 Md. 691 (2015).

[8] Nor did appellants address this issue in their reply brief.

Here, the circuit court dismissed the case "in toto" as to PNC based on the failure to sufficiently identify PNC as the bank involved. Appellants never challenged this ruling on the merits in its briefs filed in this Court. Accordingly, the circuit court's ruling dismissing the claims against PNC will be affirmed.

## II.

## Mr. Neuberger

### A.

### Proceedings Below

We turn next to the court's ruling dismissing the claims against Mr. Neuberger. At the hearing on Mr. Neuberger's motion to dismiss, Mr. Neuberger argued that Count I, tortious interference with a contract, should be dismissed for three reasons. First, this tort did not apply to an "at-will" contract, and the retainer agreement here was an at-will contract because there was no set duration and either party could terminate the contract at any time. Second, counsel argued that, even if the contract was not at-will, there was no breach of contract because Mr. Shepard represented the Browns "from start to finish in both cases," even after he chose to leave Duane Morris. And third, because Browns' chosen counsel, Mr. Shepard, continued to represent the Browns, there were no damages. With respect to the allegation that there was damage due to delay in Mr. Brown's release from home detention, counsel argued, among other things, that there was no delay, as shown by docket entries, of which the court could take judicial notice.

With respect to Count III,[8] intentional infliction of emotional distress, counsel argued that the complaint did not sufficiently plead any of the requisite elements. Specifically, he argued that the conduct alleged "comes nowhere close" to the extreme or outrageous conduct required, nor did the complaint allege the requisite severe emotional distress. With respect to Count VI, counsel asserted that, because the substantive counts failed, there could be no conspiracy.

At the conclusion of the hearing, the court ruled on Mr. Neuberger's argument, as follows:

> With respect to Neuberger's arguments, Count 1, the failure to state a claim for tortious interference, counsel . . . for Neuberger has argued that this was an at-will contract and there – even if not viewed as an at-will contract, there is no breach because Mr. Shepard was, in fact, the attorney for the Browns, and he continued to represent the Browns throughout.
>
> With respect to Count 2, interference with economic relationship, again, the argument speaks about no wrongful acts taken to interfere and no damages.
>
> The [c]ourt agrees with both arguments made by defense, and will dismiss Counts 1 and 2.
>
> With respect to 3, intentional infliction of emotional distress, I believe the courts make it extremely clear as to acts that would amount to intentional infliction of emotional distress, and that is not here either.
>
> And so Count 3 as well as Count 6, as there are no torts, are dismissed as well.

[8] Counsel for appellants stated at oral argument that they were not challenging the dismissal of Count II. Accordingly, we will not discuss the court's ruling in this regard.

**B.**

**Count I**

**Tortious Interference of Contract**

The Browns contend that the circuit court erred in dismissing the tortious interference with contract count against Mr. Neuberger on the ground that the retainer agreement was an at-will contract. They point to one clause in the agreement, which provides that Duane Morris "reserves the right to renegotiate the terms of this engagement, to terminate it and withdraw from this or any representation of you," and they argue that this is a "clear for-cause termination provision," which renders the contract not terminable at will.[9]

Mr. Neuberger disagrees, asserting that the circuit court properly found that the retainer agreement was an at-will contract, to which the tort of interference with a contract cannot apply. He asserts that the language relied upon by the Browns, viewed in context, was intended to "spell out the consequences of failing to pay bills on time, *not* to spell out the only grounds for terminating the agreement." Moreover, he argues that the written agreement related only to the Brown's civil suit against Mr. Neuberger, not the criminal case that is the subject of this appeal. Representation for the criminal case, he asserts, was pursuant to another, unwritten agreement, which was an at-will agreement. Accordingly,

[9] Given our resolution of this issue, we need not reach the merits of the argument that there was no breach of the agreement, or the contention that the Browns have waived their right to contest the circuit court's decision in this regard.

he asserts that the circuit court properly dismissed Count I, alleging tortious interference with contract.

In *Spacesaver Systems, Inc. v. Adam*, 440 Md. 1, 11-12 (2014), the Court of Appeals explained:

> "The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time."[]; *see also* Stanley Mazaroff & Todd Horn, *Maryland Employment Law* § 3.02[1] (2d ed. 2014) ("Recognizing the continued vitality of the employment at will doctrine, Maryland courts have held that an employment relationship presumptively is at will unless the parties clearly and expressly set forth their agreement that the contract is to last for a specific period of time.").

(quoting *Adler v. Am. Standard Corp.*, 291 Md. 31, 35 (1981)). The presumption in Maryland is that an employment relationship is "at will." *Id.* at 24-25. This presumption is "defeated when the parties explicitly negotiate and provide for a definite term of employment or a clear for-cause provision." *Id.* at 25. The Court explained:

> While the language of the contract itself may express a just cause requirement, a contractual delineation of the length of the employment period will also create a just cause employment relationship because by specifying the length or term of employment, the employer usually is considered to have surrendered its ability to terminate the employee at its discretion.

*Id.* at 13 (quoting *Towson Univ. v. Conte*, 384 Md. 68, 80 (2004)).

Thus, "employment contracts can be broken into three categories, those with: (i) specific temporal duration, terminable before the expiration only for cause; (ii) no specified temporal duration, but containing a clear for-cause termination provision; and (iii) no temporal duration, and no for-cause termination provision, which are terminable at will."

*Id.* at 15. The Browns assert that the "retainer agreement is of the second type described" in *Spacesaver*. We are not persuaded.

When interpreting a contract, "'the contract must be construed in its entirety,'" giving effect "'to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed.'" *Connors v. Gov't Employees Ins. Co.*, 442 Md. 466, 480 (2015) (quoting *Cochran v. Norkunas*, 398 Md. 1, 17 (2007)). Here, the contract provided, in relevant part, as follows:

> We are pleased that you each have retained Duane Morris to represent both of you in connection with litigation against [NQGRG], [Mr.] Neuberger and [Mr.] Grass.
>
> [Y]ou have each said that, because your interests in this matter are similar or identical for the most part, and in order to keep your respective legal costs to a minimum, you each would like Duane Morris to represent both of you.
>
> ***
>
> Our statements will be rendered monthly and are payable within 30 days. In the event that our statements are not timely paid, or that payment terms satisfactory to us are not established, we reserve the right to renegotiate the terms of this engagement, to terminate it and withdraw from this or any representation of you, and/or to pursue our other remedies, including the right to charge you a late fee of up to 1% per month for any statement which has not been paid within 30 days after we sent it to you.
>
> ***
>
> Unless previously terminated, our representation of you will terminate upon our sending you our final statement for services rendered in this matter.

In *Spacesaver*, 440 Md. at 15-16, the Court indicated that "a clear for-cause termination provision" involves a provision in the contract that allows termination only for

cause. *Accord Bell v. Ivory*, 966 F. Supp. 23, 29 (D.D.C.1997) ("The presumption of 'at will' employment can be overcome by the creation of a contract of employment for a fixed term **or an indefinite contract that allows termination only for cause**."), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998).

Here, the provision relied upon by the Browns, that "[i]n the event" that Duane Morris' statements "are not timely paid," Duane Morris reserved the right to terminate or withdraw from representation, is placed among several paragraphs pertaining to the payment of bills. There is no suggestion that this is the only basis on which Duane Morris could terminate its representation of the Browns. Given the absence of a "clear for-cause provision" of the contract and the lack of a fixed temporal duration, the contract was at-will, and the circuit court properly dismissed Count I against Mr. Neuberger.

**C.**

**Intentional Infliction of Emotional Distress**

The Browns next challenge the circuit court's ruling dismissing Count III, intentional infliction of emotional distress, against Mr. Neuberger. As indicated, the basis for this ruling was that the acts attributed to Mr. Neuberger did not amount to the extreme and outrageous acts required to support this tort.

Mr. Neuberger contends that the Browns did not challenge this ruling in their initial brief, and accordingly, they have waived their right to review on this issue. We agree that it was not clearly argued. There was, however, a sentence that included a statement that the court erred in dismissing the intentional infliction of emotional distress count, and one sentence stating that the "vindictive behavior" of Mr. Neuberger rose to the level of conduct

necessary for this tort. Although we could do otherwise, we will consider the issue on the merits.

In discussing the tort of intentional infliction of emotional distress, this Court has stated that it "is rarely viable, and is 'to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct.'" *Bagwell v. Peninsula Reg. Med. Ctr.*, 106 Md. App. 470, 514 (1995) (quoting *Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby*, 326 Md. 663, 670 (1992)), *cert. denied*, 341 Md. 172 (1996). To make a case for intentional infliction of emotional distress, four elements that must be shown: "'1) the conduct must be intentional or reckless, 2) the conduct must be extreme and outrageous, 3) there must be a causal connection between the wrongful conduct and the emotional distress, and 4) the emotional distress must be severe.'" *Mixter v. Farmer*, 215 Md. App. 536, 547-48 (2013) (quoting *Harris v. Jones*, 281 Md. 560 (1977)). Each of the "four requirements must be satisfied completely before a cause of action will lie." *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 58 (1986).

Here, the circuit court found that the acts alleged did not satisfy this standard. We agree.

The requirement that the conduct be "extreme and outrageous" encompasses conduct that is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Lasater v. Guttmann*, 194 Md. App. 431, 448 (2010) (quoting *Harris v. Jones*, 281 Md. 560, 566 (1977)). Behavior must be more than inappropriate; it must be "'atrocious[ ] and utterly intolerable'" behavior that goes "beyond all possible

bounds of decency." *Hines v. French*, 157 Md. App. 536, 559 (2004). "Whether the conduct complained of meets this test is, in the first instance, for the court to determine." *Batson v. Shiflett*, 325 Md. 684, 734 (1992).

The Browns' complaint focused on Mr. Neuberger's conduct in allegedly asking PNC Bank to contact Duane Morris and pressure Duane Morris to withdraw from representing the Browns, as well as sending a letter to Duane Morris's Washington, D.C. office, and to nine other Duane Morris partners known to Mr. Neuberger, seeking to intimidate Duane Morris so that the firm would withdraw from representation of the Browns in the contemplated litigation against him. We agree with the circuit court that this conduct was not "extreme and outrageous" in the sense that it exceeded "all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized community." *Lasater*, 194 Md. App. at 448. To accept the Brown's argument in this case would "dramatically expand the boundaries of the tort." *Carter*, 153 Md. App. at 248. The circuit court properly dismissed Count III, alleging intentional infliction of emotional distress, against Mr. Neuberger.

## III.

## Duane Morris and Mr. Taylor

The Browns alleged, as stated in their reply brief:

> [T]hat the forced departure of the Browns' attorney, [Mr.] Shepard, caused a two month delay in the resentencing and resulting release of [Mr.] Brown from confinement, caused the Browns to incur additional legal expenses for

> the criminal case which they would not otherwise have incurred, and that [Mrs.] Brown became so distraught that she underwent psychiatric treatment.

The motion to dismiss filed by Duane Morris and Mr. Taylor was resolved in a separate hearing.

In dismissing the claims against Duane Morris and Mr. Taylor for Professional Malpractice (Count IV), Breach of Contract (Count V) (against Duane Morris only), and Negligence (Count VII), the circuit court found that, although the conduct of Duane Morris "would appear to be actionable," there was "no actual loss that is caused by the actions."

The Browns disagree with this finding. They challenge the court's findings with respect to each of the categories of damages alleged: (1) damages due to the alleged delay in resentencing; and (2) the emotional distress claims. We will address each category, in turn.

**A.**

**Delay in Resentencing**

On May 25, 2011, after Mr. Brown had been incarcerated for more than seven years, the United States Court of Appeals for the Third Circuit granted the motion filed by Mr. Shepard and Duane Morris seeking a resentencing of Mr. Brown. At the time the motion was granted, Mr. Brown was released to home confinement pending resentencing. On June 29, 2011, the court modified the conditions of Mr. Brown's home confinement. The following day, Mr. Shepard left Duane Morris, which the Browns admitted was of Mr. Shepard's own choosing, and joined a new firm. The next order in the criminal case was a scheduling notice filed on July 22, 2011, scheduling the resentencing hearing for

August 30, 2011. That hearing took place, and the court entered a new sentence, giving Mr. Brown time-served.

Counsel for the Browns argued that there was a two-month delay in the resentencing, which caused Mr. Brown to serve two additional months of home confinement and caused the Browns severe emotional distress. He asserted that the delay occurred because Mr. Shepard "went from working at a large firm to a small firm with files that had come with him," and that there were "exchanges," which were "not part of the claim . . . but exchanges between Mr. Shepard and the judge where they are talking about scheduling this. And he says he can't do it because of this transition basically."

Counsel for Duane Morris and Mr. Taylor argued that the docket entries show that there was no delay in the resentencing hearing. On July 22, the clerk scheduled a hearing for August 30, and the hearing took place and the court issued "a time served decision." Moreover, counsel argued, even if the Browns "could prove that somehow there was a delay in resentencing," any delay was "not actionable." Counsel stated that "there's no way for us to tell, nor can we litigate the issue of whether [the judge] would have ruled differently in June. Maybe those additional two months were an important part of her time served sentence."

At the conclusion of the hearing, the court ruled, in relevant part, as follows:

> With respect to the failure to state a claim, in the first instance Duane Morris and Mr. Taylor argue essentially that there is no breach of duty here. They – the Browns chose to leave the firm and follow their attorney to his new firm.
>
> However, in the light . . . most favorable to the non-moving party, it certainly is conceivable in a large firm to have exactly what was alleged in

that you have a partner who has a significant billing from a large client, and they allege there is pressure to essentially dump another client who is a much smaller figure in terms of billing in favor of the large client.

So that comment itself as alleged certainly would appear to be actionable. However, the part where this all comes apart or falls apart is with respect to the alleged losses or damages.[10]

The court explained its findings with respect to the lack of damages, as follows:

The two categories of damages essentially claimed, one being this period of time where there was an alleged delay in a resentencing hearing in Pennsylvania, it is purely speculative as to how that judge would have ruled if there had been an earlier hearing.

There is nothing to support the claim that there would have been an earlier hearing. But from my own personal experience in terms of dealing with sentencing people to a disposition of suspended all but time served, there are a host of reasons that could go into make [sic] that determination, one of which might be, in this instance, the judge's review of how the defendant complied with the terms of the home detention and whether that made them an adequate or appropriate candidate for probation.

But I can't read the judge's mind. I have no idea how that judge would have ruled if it had of [sic] been an earlier hearing, or if it would have been the same ruling.

So my conclusion is, and the [c]ourt's determination here is that there is no actual loss as a result of the conduct as it pertains to that particular claim.

[10] The court subsequently stated with respect to the breach of contract claim, as follows:

Breach of contract, there certainly, as I said with respect to the conduct, that as alleged, favoring one client over the others, there has to be an implied duty of fair dealing and good faith, and necessarily an understanding that attorneys will abide by the rules of professional conduct when contracting an engagement agreement with a client.

So again the conduct would be actionable, but I have determined that there is no actual loss that's been caused by the actions.

"It is well established in Maryland that damages based on speculation or conjecture are not recoverable as compensatory damages." *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007). *Accord Univ. of Maryland Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 348 (2001) ("Maryland has long followed the general principle that, 'if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture.'"), *cert. denied*, 368 Md. 527 (2002).

Here, we agree with the circuit court that the damages alleged by the Browns were speculative. Initially, as the court noted, "there was nothing to support the claim that there would have been an earlier hearing." The docket entries reflect one hearing scheduled, which occurred as originally scheduled on August 30, 2011.

Moreover, unlike in *Pickett, Houlon, & Berman v. Haislip*, 73 Md. App. 89, 111 (1987), upon which the Browns rely, in which we held that a jury could decide what a reasonable judge would have done regarding disposition of marital property had the attorney not been negligent, the issue here, what a judge would have done if there had been a resentencing in early July, does not involve an issue of fact. As Duane Morris and Mr. Taylor assert, criminal sentencing decisions are within the discretion of the court, *see Brown v. State*, 339 Md. 385, 391 (1995), and a jury in a malpractice case could not stand in the shoes of a federal sentencing judge and decide how the judge would have exercised his or her discretion in deciding what the criminal sentence would have been absent the alleged delay. Any such inquiry involves pure speculation, and the circuit court properly found that the Browns failed to plead sufficient damages relating to the alleged two month

delay between Mr. Brown being placed in home confinement pending resentencing and the sentencing rehearing, at which the court changed the sentence to "time served."

**B.**

**Emotional Distress**

The Browns next argue that the court erred when it concluded that their "allegations of emotional distress as an element of damages of their negligence and malpractice claims against [Mr.] Taylor and Duane Morris . . . were insufficient." In support, they argue that, "despite recognition that [they] had sufficiently pleaded the elements of negligence and professional malpractice," the court "inexplicably concluded" that they had "no tortious conduct to support the claim for emotional distress." In addition, they assert that the court "compounded" its error by "announcing that the Browns could not recover for "mental distress without physical impact." They assert that Mrs. Brown's distress, as pled, was "sufficient for alleging damages arising out of a tort," and the court "therefore erred in dismissing the negligence and malpractice claims against Duane Morris and Mr. Taylor."

Duane Morris and Mr. Taylor argue that the circuit court properly determined that the Browns "did not assert actionable damages by claiming emotional distress without alleging any corresponding physical injury." They assert that, although emotional distress is an element of damage, it is not sufficient to prove damages on its own. Instead, they argue, objective and demonstrable physical injury is a prerequisite to recovery for emotional distress, and the Browns mere conclusory allegations of emotional distress were insufficient and failed as a matter of law.

In ruling on this claim, the circuit court noted that recovery for "damages for emotional distress must arise out of tortious conduct." The court then stated as follows:

> In this matter, the claims against Duane Morris and Mr. Taylor include malpractice, breach of contract, negligence and civil conspiracy. The conspiracy is not obviously a stand alone tort.
>
> So you have no tortious conduct to support the claim for emotional distress, and secondarily, the EXXON Mobile versus Albright case notes that, on the same page, 350, they state that, "The seminal case is Green versus T. A. Shoemaker and Company where we adopted a rule allowing recovery for mental distress if physical injury resulted from the commission of a tort, regardless of impart. After noting that mental distress alone cannot be an independent cause of action, a recovery cannot be obtained for mental distress without physical impact, we express concern that emotional distress may be feigned easily.
>
> The [c]ourt finds that the allegations of emotional distress as pled in this case are insufficient and therefore must fail as a matter of law.

We agree with the circuit court that the Browns failed to adequately plead damages of emotional distress. In *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 359, *modified on other grounds*, 433 Md. 502, *cert. denied*, 134 S. Ct. 648 (2013), the Court of Appeals held that, to guard against feigned claims, "[t]he requirement of an objective and demonstrable physical injury stands unchanged for claims of recovery for emotional distress." "Three key principles" are relevant to determine "whether a physical injury is capable of objective determination": (1) the allegations of emotional suffering must be "'more than mere conclusory statements'"; (2) the victim should not be "'the sole source of all evidence of the emotional injury'"; and, (3) "'minor emotional injuries'" are less likely to succeed. *Id.* at 358-59 (quoting *Hunt v. Mercy Med. Ctr.*, 121 Md. App. 516, 531 (1998)).

This Court similarly has held that claims of emotional distress based on symptoms that were not objectively determinable were insufficient. *Bagwell*, 106 Md. App. at 518 (court did not err in granting judgment on the emotional distress count where the plaintiff testified he was in "'total shock,' became severely depressed, had difficulty sleeping, became introverted, lost his appetite, and was embarrassed to go out in public," as those injuries could not reasonably be measured); *Roebuck v. Stewart*, 76 Md. App. 298, 315 (1998) (where sole evidence was plaintiff's own claim that she saw a psychiatrist, evidence was inadequate to show "some clearly apparent and substantial physical injury.").

Here, Mrs. Brown alleged that she had to undergo psychiatric counseling, could not sleep, did not get dressed, stopped making phone calls, and ate continuously. With respect to Mr. Brown, the complaint alleged that he suffered great emotional distress as a result of having to discontinue his relationship with Duane Morris," and "[g]iven [that he] knew that he was unjustly incarcerated, which had lasted for too long already, the knowledge that his liberty was now being lost for an additional indeterminate period of time as a result of Duane Morris' withdrawal was emotionally devastating."

These allegations did not allege any objective and demonstrable physical injuries. Instead, the Browns relied on their own conclusory statements. Under these circumstances, the circuit court properly determined that the Browns' allegations of emotional distress, as pled, were insufficient. Accordingly, the circuit court properly dismissed the claims against Duane Morris and Mr. Taylor.

**JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANTS.**