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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONSTANCE M. (CONNIE) BLESSING,

Petitioner

vs.

Docket No. 13-0953
Appeal from Final Order
Circuit Court of Kanawha County

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, BRENT D. BENJAMIN, IN HIS CAPACITY AS CHIEF JUSTICE, THE WEST VIRGINIA STATE BAR and ANITA R. CASEY, IN HER CAPACITY AS EXECUTIVE DIRECTOR,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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INTRODUCTION

The respondents argue this Court should uphold the circuit court's decision under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure that dismissed petitioner Connie Blessing's lawsuit in its entirety. With six (6) separate counts or causes of action, the respondents' argument in support of that dismissal misstates applicable laws and ignores or omits numerous facts set forth in the amended complaint.

The respondents are correct the unwarranted abuse visited upon the petitioner (and the rest of the all-female staff) at The West Virginia State Bar resulted from the animosity of certain board members toward the former executive director. However, the respondents are wrong saying this discounts the validity of Blessing's claims concerning their conduct that arose from this animosity.

DISCUSSION

The issues in concern are whether the petitioner's claim for invasion of privacy is time barred; the validity of her claims for constructive discharge, substantial public policy violations and intentional infliction of emotional distress, whether age or gender discrimination occurred; and whether the Supreme Court of Appeals and its chief justice should be dismissed from this action. This Reply shall address these matters and seek to show the respondents' arguments are not valid. The most important issue here is whether the circuit properly applied the principles which govern motions to dismiss.

As set forth explicitly and repeatedly in the amended complaint the petitioner has

yet to truly learn whether her privacy was actually invaded while working at The West Virginia State Bar. Further, the authority cited by respondents and adopted by the circuit court dismissing her claim for invasion of privacy instead supports the petitioner. Contrary to respondents' argument and the lower court's ruling, Blessing's constructive discharge claim referred to her protective status while it is even arguable whether such status is a necessary prerequisite for a claim of this nature. Whether the state bar's conduct was in breach of its own constitution and by-laws thus violating a substantial public policy represents a question of law; however the petitioner believes this constituted a violation. Additionally, this Court should exercise its inherent authority to determine whether an even more fundamental substantial public policy was violated with respect to the actions of the state bar's executive director and certain board members when they discovered a co-worker had secretly tape-recorded Ms. Blessing and did nothing about it.

With respect to Blessing's claim for intentional infliction of emotional distress while the state bar and lower court may view the state bar's conduct as merely "impolite," it caused her both emotional and physical problems including the threat of criminal repercussions; hardly a matter of petty workplace harassment respondents would have this Court believe. Whether age or gender discrimination occurred, the petitioner alleged none of this abuse would have happened had she been male; and the abuse was focused upon her because of her long time tenure and increased when she decided not to retire. As whether the state bar is an agency of the state supreme court, state law expressly says it is, and the state supreme court immediately intervened in bar operations when it suspected wrongful conduct had occurred.

1. Whether Petitioner's Claim for Invasion of Privacy is Time-Barred

Petitioner Connie Blessing does not deny she found a recording device hidden in her office just prior to her forced retirement and filed this lawsuit over two years later. She also does not deny a one-year statute of limitations governs an action for invasion of privacy. What she disputes is respondents' version of the facts surrounding this matter and their interpretation of the law in this incident, a version and interpretation the circuit court wholly adopted to dismiss this particular claim.

Although Ms. Blessing quickly learned who had planted the hidden tape recorder, she made it abundantly clear in her pleadings she has yet to learn its purpose or what it may have accomplished. (Appendix Record, "A. R". pp. 28-29) The respondents mock this saying she seeks to gain through discovery something she already knows or should have known. (Respondents' Brief, "R.B." at 7-8)

Nowhere does the amended complaint indicate Blessing knew the purpose of the device, only identification of the perpetrator and his ludicrous explanation for its placement. (A.R. at 28, para. 66) On the other hand, Anita Casey and certain state bar board members were fully aware of this incident yet never discussed it with the petitioner. (A.R. at 28-29, paras. 67 & 74-76) Only when outside counsel learned nearly a year later about this incident did anything transpire – the supreme court intervened with the eavesdropping employee being immediately terminated. (A.R. at 9-10, paras. 72-74) This hardly represents a proportional response to what respondents would like this Court to regard as a harmless office prank.

Respondents and the lower court refer to a prior holding of this Court to support this dismissal stating the facts in that earlier holding differ because here Ms. Blessing "actually found the recording device." (R.B. at 9 citing Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547, 188 W.Va. 144 [1992]) However, the differences are inconsequential. Blessing has never learned the purpose of the recording device aside from the perpetrator's lame explanation. In Slack the claimant suspected she was being recorded yet never found the actual device. 423 S.E.2d 547 at 549-550. In Slack the claimant only learned at a later criminal trial her privacy had been invaded, while here Ms. Blessing has yet to learn anything about this unwarranted intrusion.

The respondents argue Blessing's discovery of the recording device and knowing who placed it commences the statute of limitations to run thus making this claim time-barred. However, Slack holds "in actions where the discovery rule applies, the statute of limitations does not begin to run until the plaintiff knows, or by the exercise of reasonable diligence should know, that he has been injured and the identity of the person or persons responsible. 423 S.E.2d 547 at 553 [emphasis supplied] While Blessing knew who placed the device, the amended complaint is replete with her efforts to learn without success its purpose. Slack states, "[w]e have consistently recognized the injustice of commencing the statute of limitations before a claimant is aware of all elements of an enforceable claim." 423 S.E.2d 547 at 553 Connie Blessing has never learned whether her privacy was violated and whether she was a victim of a crime.

This raises the question of whether Ms. Blessing by exercise of due diligence could

have learned the purpose of the recording device. She turned the tape recorder over to the police and despite making inquiries, never learned its true purpose. (A.R. at 28-29, paras. 65, 68, 69 & 78. The state bar also investigated this matter but never related to Blessing what had occurred. Connie Blessing in all probability was a crime victim yet officers and board members of the state bar chose to withhold this information from her.

Respondents note the recording device was placed by a co-worker and not by the state bar or the state supreme court. (R.B. at 6, fn 1) This does not discard the state bar's knowledge of what occurred, its not informing the petitioner, and whether the state bar authorized and sanctioned this invasion of Blessing's privacy. The perpetrator of the recording device had previously monitored her activities and continued working at the state bar for nearly a year after its officials learned what had occurred. (A.R. at 25, paras. 42-43; 28, paras. 67 & 71 and 29, paras. 76-77. It seems fundamental that covering up for criminal conduct constitutes a violation of substantial public policy especially when done by persons affiliated with the state bar who are also officers of the court. *Infra.*

2. Whether Petitioner Has Plead a Valid Claim for Constructive Discharge

Respondents argue in support of the decision of the circuit court that in order for a claim of constructive discharge to be valid it must arise from intolerable conduct due to the employee's protective status of age, race, sexual or other unlawful discrimination. (R.B. at 9-11) They add the lower court ruled correctly in dismissing Blessing's claim for constructive discharge because she had not attributed the respondents' conduct to such protective status. (Id.)

However, Connie Blessing here attributed the state bar's intolerable conduct to her protective status of age, gender and other unlawful discrimination. At the same time she questions whether claims of constructive discharge have such a requirement in the first place. It is indisputable Blessing was caught in a vendetta that included personal overtones because she had been the previous executive director's top assistant. The amended complaint notes numerous instances of intolerable conduct adding the abuse directed toward her increased after Blessing announced she had decided not to retire after all. This amounted to age discrimination. She also said the conduct toward her would not have occurred at all had she been male thus constituting gender discrimination. (A.R. at 27, para. 61, 32-33 and Count 2) Furthermore, all of the parties to this action agree and cite authority that "other unlawful discrimination" also constitutes a protective status suggesting retaliatory conduct as an example of such other unlawful discrimination. (R.B. at 10. quoting Syl. Pt. 4, Slack, also 423 S.E.2d at 555) There is no dispute the state bar's conduct toward Blessing was related to the former executive director, arguably retaliation or other unlawful discrimination.

It is also arguable whether a specific protective status is necessary for bringing a claim of constructive discharge. Contrary to respondents' argument, the authority they cite does not make this a prerequisite; it only uses protective status as an example stating, "(t)ypically, in these federal cases, the constructive discharge cause of action arises when the employee claims that because of age, race, sexual or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment." Slack, 423 S.E.2d at 556.

This Court previously found Slack did not involve a claim of age or civil rights discrimination but instead constituted retaliation because the plaintiff had cooperated with a federal investigation. 423 S.E.2d at 558 Retaliation occurred here as well as certain state bar operatives were determined to bring a criminal indictment against the former executive director. The respondents' argument this abrogates the well-settled "employee-at-will" doctrine is both misplaced and ingenuous. The retaliation that occurred here as grounds for an actionable constructive discharge claim does displace the employee-at-will doctrine.

The critical inquiry for a constructive discharge claim is whether the employer engaged in conduct so intolerable as to force the employee to quit.

> With regard to the constructive discharge aspect of this case, we adopt the majority view that in order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit.

Slack, 423 S.E.2d at 558.

There is no predicate of a civil rights violation for a constructive discharge claim to lie, although this also occurred here with Connie Blessing. Other unlawful discrimination also occurred as the state bar retaliated against the petitioner because of her previous working relationship with the former executive director, who board insiders sought to have indicted after earlier forcing him to resign. (A.R. at 23, paras. 24 & 27) Their efforts went so far as to accuse the petitioner of covering up for the former executive director's wrongdoing and threatening her with criminal sanctions as well.. (Id.) Aside

the common predicates of civil rights issues, the gravamen of a claim for constructive discharge remains and has always been whether the employer engaged in intolerable conduct toward the employee, and that is most certainly what occurred here.

3. Whether Petitioner Has Identified Violations of Substantial Public Policies

Respondents claim the petitioner has failed to identify a sufficiently specific substantial public policy they have violated. (R.B. at 11-14) Court Four of the amended complaint alleged the state bar had violated its own policies which were public in nature, and these violations were tolerated or sanctioned by its supervising judicial entity. (A.R. at 33) The state bar's constitution calls for advancing the administration of justice and upholding standards of honor, integrity, competency and courtesy in the legal profession. The state bar's conduct toward its longtime employee, Connie Blessing, violated all these precepts save perhaps for the competent manner they tormented her into resigning. The state supreme court by virtue of express state law and by virtue of actions it unilaterally took upon learning that wrongdoing had occurred within the state bar office confirms its ultimate authority over the state bar.

With respect to other substantial public policies which may have been violated the petitioner asks this Court to exercise its inherent authority to determine whether the surreptitious tape-recording of Connie Blessing amounted to a crime, whether the tape-recording was sanctioned or authorized by others in authority and whether the matter was wrongfully concealed. The executive director and at least two other state bar board members were aware of this incident, yet the perpetrator continued working at the state

bar for nearly a year. (A.R. at 28, para. 66 & 29, paras. 74-78) The perpetrator had previously monitored Blessing's activities, and earlier three months work had been mysteriously and deliberately erased from her computer. (A.R. at 25, paras. 42-43 and at 26, paras. 52-55) Under these circumstances it is conceivable this same employee was directed to secretly tape record Blessing notwithstanding his implausible explanation for doing so. He remained working at the state bar for nearly a year, and Ms. Casey never discussed the incident with the petitioner. (A.R. at 28, para. 67)

Only after the state supreme court was made aware of this incident was something ultimately done. (Id., paras. 70-73) However, Connie Blessing has never been advised of what happened. (A.R. at 29, para. 78) This episode amounts to a petty, yet vicious dispute carried too far. Where a crime had occurred regardless of its inane objections, those knowledgeable have a greater duty than simply wishing it away, especially if those same persons in addition to being officials of the state bar are also officers of the court.

4. Whether Petitioner States a Valid Claim for Intentional Infliction of Emotional Distress

Respondents argue the requisite extreme and outrageous conduct toward the petitioner meriting a claim for intentional infliction of emotional distress never occurred. They further this claim is also barred by the statute of limitations. The amended complaint is replete primarily with examples of emotional abuse and some instances of physical abuse that made Blessing ill and ultimately caused her to resign. The respondents quite naturally agree with the lower court's arbitrary conclusion abuse of this nature and magnitude simply never occurred. This Court has set forth the tests for de-

termining whether a claim amounts to intentional infliction of emotional distress.

> In order for a plaintiff to prevail on a claim of intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer from emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Syl. pt. 3, Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998)

The zeal of those board members wanting to see the former executive director indicted and the petitioner as a convenient scapegoat clearly would suggest the presence of the above second element in Travis of deliberate intent. Likewise the third element is also satisfied as Ms. Blessing suffered emotional distress to the extent it caused her stomach disorders and fear she would be caught up in the state bar's witch hunt seeking criminal prosecution. (A.R. at 30, paras.81-82)

The remaining elements for intentional infliction of emotional distress of whether the offending conduct is sufficiently atrocious, and whether one could not be expected to endure such distress are inherently subjective. However the holding in Travis offers some guidance. A critical element discussed in that decision is whether the perpetrator of the abuse occupies a position of authority particularly in the work place. 504 S.E.2d at 426 In dismissing Blessing's claim for intentional infliction of emotional distress, the lower court did not trouble itself to consider Blessing's role as a subordinate in a vicious, vin-

dictive workplace where her superiors were seeking criminal retribution against her former and possibly even against her as well. (A.R. at 22, para. 19 and at 24, para. 24) The underlying court in dismissing this particular claim simply ignored the petitioner's subordinate role to her tormentors and blithely concluded the conduct of certain state bar officials toward her had not been outrageous.

Instead the respondents characterize what was occurred at the state bar as "critical and impolite comments" adding the lower court gave the petitioner "every benefit of a doubt." (R.B. at 15) This self-serving conclusion does not accord with what occurred in Travis where as here a superior-subordinate employment relationship existed, and the petitioner sought every possible recourse to stop the abuse. In Travis the defendant was found liable for conduct no worse than occurred here.

The respondents further argue this claim for intentional infliction of emotional distress is time-barred because it was filed two years after petitioner's last day of employment, and any actionable conduct toward her had occurred prior to that last day. (R.B. at 15-17) Filed February 28, 2013 the amended complaint states, "February 28, 2011 she was forced to resign from the employment." (A.R. at 21, para. 4) [emphasis supplied] This allegation alone states she was forced to resign two years from the date she filed this lawsuit. However, in dismissing this action the circuit court simply ignored any allegations inconvenient for the respondents.

Referring to this Court's ruling in Travis the respondents argue only certain matters occurred prior to this final day at work that Blessing had alleged constituted the requisite

outrageous conduct for a claim of this nature. (R.B. at 15-16) However in Travis, unlike the instant case, the plaintiff had been removed from his tormentor during the period prior to his resignation. 504 S.E.2d at 432 Here Ms. Blessing was subject to her tormentor's whims, wiles and potential transgressions through her last day of work. Exactly two years from that day she filed this lawsuit. This Court stated in Travis, "the two-year statute of limitations for personal injuries begins to run on the date of the last extreme and outrageous conduct, or threat of extreme and outrageous conduct, which precipitated the termination of employment." 504 S.E.2d at 433 (emphasis supplied) Ms. Blessing was exposed to the executor director and other board members up to and including her final day thus also facing the threat of such conduct. (emphasis supplied)

However, the respondents' extreme and outrageous conduct extended beyond Connie Blessing's last day of employment. According to the amended complaint the criminal pursuit of Tinder continued after [Blessing's] retirement causing her to believe she would be implicated as well. (A.R. at 30, para. 82) This post-employment torment by the state bar means the filing of this lawsuit occurred well within the two-year statutory period.

The circuit court's finding the state bar's conduct was not extreme and outrageous is wrong, arbitrary and without any supporting basis whatsoever. Ms. Blessing's claim for intentional infliction of emotional distress should have readily survived any motion to dismiss. Further, this claim is not time-barred as the threat of the extreme and outrageous conduct toward her was present the day she resigned and continued for some period thereafter.

5. Whether Petitioner Alleged Actionable Claims of Age and Gender Discrimination

In support of the circuit court's dismissal of both these causes of action, respondents contend Connie Blessing failed to state a claim under either scenario. (R.B. at 17-22) They argue none of her allegations in the amended complaint relate to age or gender discrimination. (Id.) However, the amended complaint is replete with allegations the state bar executive director and certain board members directed their ire at Blessing and the rest of holdover staff, all of whom were women. The most demeaning of these comments "they were overpaid and undereducated." (A.R. at 22, para. 16) It sounds like something the meanest slave driver would say, not just "impolite" as respondents try to excuse.

As the senior member of this holdover staff Ms.Blessing endured the brunt of this constant belittlement. (Id., paras. 13-14) While "(m)uch of Ms. Casey's criticism of both the state bar (in the past) and the plaintiff was related to her predecessor and the plaintiff's former supervisor, Thomas R. Tinder," the amended complaint also makes clear age and gender discrimination also influenced the conduct of Ms. Casey and other board members. (Id., para. 15)

The respondents take pains to summarize the allegations of humiliation and harassment in the amended complaint Casey and certain board members visited upon Blessing [and the rest of the holdover staff]. (R.B. at 18-19) These amounted to nearly two-thirds of the total allegations in contained in that document. (Id.) For her second cause of action Ms. Blessing stated the conduct described by these allegations had "amounted to sexual discrimination as the plaintiff and all others subject to the harassment and belittle-

ment are female thus members of a protected class, and such abusive behavior toward her would not have occurred had she been male." (A.R. at 32-33) In other words, this particular count or cause of action specifically says the prior allegations amounted to sexual discrimination and expressly states she was a member of a protected class.

Blessing's amended complaint is likewise replete with allegations because of her long-time tenure with the state bar and former executive director, the disparagement toward her even being accused of covering up for his criminality. (A.R. at 22, para. 19) When Ms. Blessing decided not to take early retirement after her husband's unexpected death, Anita Casey harassed her even more. (A.R. at 27, para. 61) The third count of Blessing's amended complaint states, the conduct toward her "also constituted age discrimination as plaintiff belongs to this protected class and the abuse she was subjected to was because she was near retirement age and designed to force her to retire against her will." Similar to her claim for gender discrimination, this claim for age discrimination also says various allegations in the amended complaint constituted discrimination and she was member of this protected class as well.

This Court has previously held in Barlow v. Hester Industries, Inc., 198 W.Va. 118, 136, 479 S.E.2d 628, 645-646 (1996), *quoting* Syl. Pt. Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 74, 479 S.E.2d 561, 584 (1986), in order to succeed on a claim for gender or age discrimination, the petitioner must establish "the alleged forbidden bias was a motivating factor in the defendant's decision to take an adverse action against the petitioner." (R.B. at 17) [emphasis supplied] This is precisely what the amended complaint

does. The West Virginia State Bar officials would not have engaged in the multiple acts against Blessing had she not been female nor would they have done this had she not served long years with the agency, was near retirement age, then increased the harassment when she decided not to take early retirement after all. Age and gender bias was a motivating factor for the actions taken against her, yet the circuit court still arbitrarily simply and casually tossed aside both these claims.

6. Whether the Circuit Court Erred Dismissing The Supreme Court and its Chief Justice

State law expressly makes the state bar an agency of the state supreme court, and the court received formal complaints from Ms. Blessing and other members of the state bar staff over their treatment by the executive director and board members. When outside counsel learned Blessing's fellow staffer had secretly tape-recorded her at work, the supreme court at last took action Under express statutory law and with respect to actual events the lower court erred in dismissing the supreme court and its chief justice from this lawsuit.

The respondents argue at length how The West Virginia State Bar constitutes an entity, separate and apart from The Supreme Court of Appeals of West Virginia. (R.B. at 22-26) However, this ignores *West Virginia Code 51-1-4a)(d)* which establishes the state bar as an administrative agency under the state supreme court. Equally important, the respondents' argument simply omits the Court's actual participation and intervention in those events which occurred in this matter.

The petitioner and the other staff members brought concerns for their treatment to the

Court's top clerks, yet the harassment continued. (A.R. at 31, para. 95) Only when Ms. Blessing informed outside counsel to the Court of the wiretapping incident was any action taken with the perpetrator being immediately terminated following a summons to the Court of Ms. Casey and another board member. (A.R. at 28, paras. 72-73). Blessing had earlier told the Court's top clerk about the hidden tape recorder, yet the perpetrator remained employed with the state bar for nearly a year following the incident although Ms. Casey and certain board members were aware of what had occurred. (A.R. at 28, para. 70 & 29, para. 74) The state supreme court vests supervision of its various administrative functions with the sitting chief justice. For this reason, aside from any personal friendship with Ms. Casey, the office, if not the individual, should remain a party to this action.

7. Whether the Circuit Court Erred in Applying Standards Governing Motions to Dismiss

Respondents term "curious" the petitioner's argument the lower court did not adhere to applicable jurisprudence relating to motions to dismiss. (R.B. at 26-27) More curious is their devoting less than a page to this matter which fundamentally the critical issue here of the standards and principles under well-settled law governing motions to dismiss. Trial courts are not to grant a motion to dismiss for failure to state a claim upon which relief can be granted unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Roth v. DeFeliceCare, Inc., 226 W.Va. 214, 700 S.E.2d 183 (2010) [emphasis supplied] It is simply incredulous that it is beyond doubt Ms. Blessing cannot prove some, if not all, her claims.

As in any litigation some claims here are undoubtedly stronger than others, however the circuit court violated these standards and principles throughout with its perfunctory dismissal of the petitioner's lawsuit which included the dismissal each of Connie Blessing's six (6) separate claims or causes of action. No pretense of neutrality even remotely occurred as petitioner's attorney was barely afforded the opportunity to speak before the circuit court in opposition to the motion to dismiss.

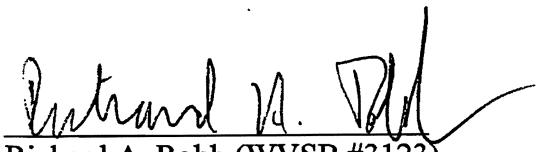
Additionally the respondents do not even take the trouble to cite supporting or relevant authority when it comes to customary standards for motions to dismiss.. (R.B. at 26-27) This is because there is nothing to support what the circuit court did here. Motions to dismiss must consider factual allegations in a light most favorable to the plaintiff. State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995) Notwithstanding this well-settled law, the circuit court did the very opposite. It viewed all matters in a light most favorable in every imaginable way for defendant/respondents, while the plaintiff's numerous allegations were simply discounted if considered at all. Adding insult to injury barely two weeks after the hearing on the motion to dismiss, the circuit court entered without alteration whatsoever, the proposed order respondents' counsel had submitted.

CONCLUSION

The lower court's dismissal of this lawsuit constituted a travesty of justice. The conduct of certain persons here affiliated with the state bar is far from flattering. This should not entitle them to have this whole matter swept under the proverbial rug just

because it might prove embarrassing to prominent persons in this state's legal community. This Court should set aside the dismissal of Connie Blessing's lawsuit.

CONSTANCE M. (CONNIE) BLESSING
By Counsel



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CERTIFICATE OF SERVICE

I, Richard A. Robb, counsel for the petitioner, certify I have sent by U.S. Mail this day of February 11, 2014 a true copy of the foregoing PETITIONER'S REPLY BRIEF to:

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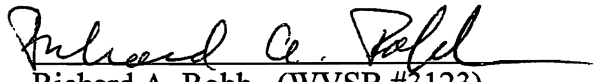

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