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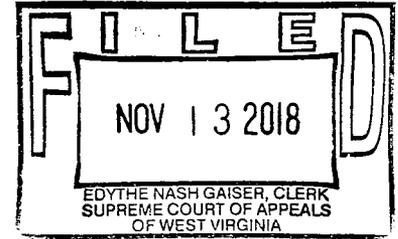
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID L. HENZLER,

Petitioner,

v.

No. 18-0507



(Appeal from Civil Action No.16-C-1580,
Circuit Court of Kanawha County)

**TURNOUTZ, LLC and
LARRY MARKHAM,**

Respondents.

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

In the roughly two pages of actual analysis contained in Respondents' Brief, respondents reveal no evidence to this Court that they are "Company Released Parties" pursuant to the contract the Petitioner executed with his former employer. (*See* Respondent's Brief at 12-14). Given the lack of evidence and argument contained in Respondent's Brief (notwithstanding the length of the Brief), the Petitioner's Reply Brief need not repeat the same clear arguments contained in his initial brief. Instead, it is sufficient to briefly point out the obvious flaws in respondents' positions.

II. ARGUMENT

As stated in Petitioner's Brief, there are only two ways the Circuit Court could have determined that the respondents were parties to the contract between Petitioner David L. Henzler and his former employer:

1. If respondents were actually named as parties to the contract;
or
2. If respondents were successors, affiliates, assigns or heirs of
M&J Operations, LLC, CST Brands, Inc. or CrossAmerica
Partners LP (f/k/a Lehigh Gas Partners LP).

Importantly, Respondents do not disagree with this representation. Instead, in Respondents' Brief they allege that Turnoutz, LLC should be considered a "successor" or "affiliate" of Petitioner's former employer. However, despite respondents' conclusory arguments, no actual evidence is revealed that indicates Turnoutz, LLC is a "successor" or "affiliate".

A. Turnoutz, LLC Is Not A “Successor” or “Affiliate”.

Respondents’ lack of entitlement to the benefit of the Release can be established by focusing on several critical, uncontroverted facts:

- The parties to the Release Agreement are Petitioner David L. Henzler, M&J Operations, LLC, CST Brands, Inc., Cross America Partners, LP and their successors and affiliates.¹ (A.R. at 00097-00102).
- The parties to the Master Lease Agreement and Amendments are Lehigh Gas Wholesale Services, Inc., Lehigh Gas Wholesale, LLC and Respondent Turnoutz, LLC. (A.R. at 00106-00163).
- Neither Lehigh Gas Wholesale Services, Inc. nor Lehigh Gas Wholesale, LLC are named parties to the Release Agreement.
- Even if, as respondents’ argument suggests, a contract for the lease of property could transform a “Tenant” into a successor or affiliate, Turnoutz, LLC could only be considered a “successor” or “affiliate” of Lehigh Gas Wholesale Services, Inc. or Lehigh Gas Wholesale, LLC, the parties with which they actually have a contract.
- Turnoutz, LLC cannot be a “successor” or “affiliate” of M&J Operations, LLC, CST Brands, Inc. or Cross America Partners, LP when there is no evidence of any relationship between those parties whatsoever.

¹ Despite Respondents’ argument, the Petitioner has never admitted for any purpose that Turnoutz, LLC is a successor or affiliate of Cross America Partners. Further, it is uncontroverted that there is no lease agreement between Cross America Partners and Turnoutz, LLC.

- Even if Lehigh Gas Wholesale Services, Inc. or Lehigh Gas Wholesale, LLC are successors or affiliates of M&J Operations, LLC, CST Brands, Inc. and/or Cross America Partners, LP, (there is no evidence of such relationship) respondents' arguments still fail. The Release does not state that a "successor" or "affiliate" *of an affiliate* of the Company Released Parties is entitled to anything, only direct "successors" and "affiliates". Therefore, all respondents' arguments would accomplish, even if correct, is that Lehigh Gas Wholesale Services, Inc. and Lehigh Gas Wholesale, LLC are entitled to the benefits of the Release, not the respondents.

B. None Of The Released Parties Controlled, Or Were Controlled

By, The Respondents.

It is clear that Turnoutz, LLC cannot be considered an "affiliate" of Cross America Partners, LP or any of the released entities. An "Affiliate" is defined in the Settlement Agreement and Release as:

[A] person or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person or entity specified. The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract, or otherwise.

(A.R. at 98) (emphasis added).

The respondents provided no evidence whatsoever that M&J Operations, LLC, CST Brands, Inc., Cross America Partners, LP or even Lehigh Gas Wholesale Services, Inc. have the power to direct the management and policies of Turnoutz, LLC, or vice versa. The best

respondents could do was to make the argument, without presenting any evidence, that these companies “were in several significant contractual relationships with Respondent Turnoutz” that somehow “granted CAP and its affiliates authority to make decisions that controlled or impacted the management and/or policies of Respondents.” (Respondents’ Brief at 13). The respondents’ entire argument on this issue is contained in that one conclusory sentence.

Remember, as shown above, M&J Operations, LLC, CST Brands, Inc. and Cross America Partners, LP have no contractual relationship with Turnoutz, LLC. Further, the contractual relationships that exist between Lehigh Gas Wholesale Services, Inc. and Lehigh Gas Wholesale, LLC do not confer the right of either entity to “control” the other as that term is defined. Neither do respondents point to any provision in those contracts that provides such a right. Accordingly, it is apparent that respondents’ arguments on this issue must fail.

C. Summary Judgment On The Merits Is Inappropriate.

Nowhere in Respondent’s Motion for Summary Judgment below did it move for summary judgment on the merits of the case. (A.R. at 00020 to 00039). Nowhere in the Circuit Court’s Order Granting Summary Judgment did it rule, in any way, upon the actual merits of the case. (A.R. at 00083 to 00095). Moreover, at the time the Order was entered by the Circuit Court related solely to the issue of whether respondents were entitled to the benefit of the release, discovery in the case was ongoing. Based upon the above, it would be unnecessary and improper for this Court to consider the issue of summary judgment as it relates to Petitioner’s allegations of age discrimination.

III. CONCLUSION

Based upon the foregoing (as well as the argument and authority contained in Petitioner’s Brief), it is apparent that the Circuit Court committed error in granting respondents’ Motion For

Summary Judgment. Therefore, this Court should reverse and vacate the Order of the Circuit Court of Kanawha County on the issue addressed above, direct the Circuit Court to deny respondents' Motion for Summary Judgment and grant the Petitioner such other and further relief as the Court deems appropriate.

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CERTIFICATE OF SERVICE

I, Paul L. Frampton, Jr., counsel for Petitioner, do hereby certify that service of the "PETITIONER'S REPLY BRIEF" was made upon the parties listed below by mailing a true and exact copy thereof to:

W. Jesse Forbes, Esq.
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Respondents

in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 13TH day of November, 2018.


Paul L. Frampton, Jr. (WVSB#9340)
Counsel for Petitioner