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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET No. 19-0906

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**KIMBERLY A. BAKER**

Petitioner

V.)

Appeal from a final order  
of the Circuit Court of Wood County  
(Civil Action No. 19-C-177)

**THE CHEMOURS COMPANY FC,  
LLC, a Delaware Limited Liability  
Company, SHAWN BUSCH and  
KEVIN CRISLIP,**

Respondents

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**Petitioner's Brief**

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## **ASSIGNMENT OF ERROR**

1. The circuit court erred in its application of the doctrine of res judicata resulting in improper dismissal of petitioner's complaint.

## **STATEMENT OF THE CASE**

This West Virginia Human Rights Act claim was dismissed by the Circuit Court pursuant to the Circuit Court's Order entered September 6, 2019, following an August 26, 2019 hearing on Defendant's Motion to Dismiss on grounds of res judicata. Petitioner alleged that her ongoing employment with the Defendants was adversely affected because of her gender and disability, as well as in retaliation for her previous complaint of gender discrimination.

## **SUMMARY OF ARGUMENT**

In applying the doctrine of res judicata to the facts of this case, the Circuit Court erred by concluding that Petitioner's claims "could have been resolved, had it been presented," in the prior action. This conclusion is not supported by the evidence. The record supports the Petitioner's position that the critical events of her current claim occurred five months after the deadline for the amendment of pleadings in her previous case and were explicitly excluded from consideration by the Court in her previous case. Because the record establishes that the critical events plead in this civil action took place months after the deadline for amendment of pleadings in Petitioner's initial case, they could not have been resolved in that previous case. Therefore, the doctrine of res judicata does not apply to Petitioner's claim and the Circuit Court dismissed this case improperly.

Petitioner seeks reversal of the dismissal of these cases and reinstatement of the case to the active docket of the Circuit Court of Wood County for further proceedings.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument to be necessary in this matter and asks the Court to grant argument to determine the scope and intent of the doctrine of res judicata as applied in this matter. Accordingly, Petitioner believes that oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate as this case involves a narrow issue of law. W. Va. R. App. P. 19 (a) (4).

## STANDARD OF REVIEW

An order granting a motion to dismiss is reviewed de novo. Factual findings are reviewed under a clearly erroneous standard. However, where a finding of fact is intimately connected to the lower court's legal conclusion, that finding of fact is reviewed de novo.

## FACTUAL AND PROCEDURAL HISTORY

This matter concerns two separate but related actions filed in the Circuit Court by the petitioner. For convenience, the actions will be referred to as Baker I and Baker II. The current appeal challenges the Circuit Court's dismissal of Baker II pursuant to W.Va. R. Civ. P. 12(b)(6) based upon the doctrine of res judicata.

### 1. Procedural History of Baker I

Baker I was filed in the Circuit Court of Wood County, West Virginia on March 8, 2017, with an amended complaint (styled 17-C-99) filed on March 10, 2017. These complaints initiated, Kimberly A. Baker v. The Chemours Company FC, LLC, Shawn Busch, and Jay Starcher, Civil Action No. 17-C-99, referred to as "Baker I." A copy of the initial Baker I complaint may be found at APPENDIX 000222. The amended complaint filed March 10, 2017 made some corrections to the language of the original complaint. The Baker I amended complaint may be

found at APPENDIX 000234. The parties in Baker I were the Petitioner, Chemours, and individual Defendants Shawn Busch and Kevin Crislip. The factual allegation closest in time to the filing of the complaint in Baker I upon which the complaint is based is an allegation dated May 25, 2016. A scheduling order was entered on August 15, 2017, setting the case for trial on May 15, 2018. APPENDIX 000429. The order also specified that no further amendments to pleadings would be permitted after September 15, 2017. The discovery cutoff was set for March 15, 2018. On November 17, 2017, this scheduling order was amended, moving the trial date back to December 4, 2018, and the discovery deadline back to October 4, 2018. APPENDIX000434. At a hearing on November 5, 2018, the Circuit Court granted Defendants' Motion for Summary Judgment in Baker I, entering the final order dismissing the case on December 6, 2018. APPENDIX 000153.

But to be more specific in describing the procedural issues at the fore of the issue at hand, in Baker I, the Circuit Court entered a scheduling conference order on August 29, 2017, which established a schedule for all matters related to Baker I, including setting a trial date for May 15, 2018. Although the trial date was later amended through an agreed order amending scheduling conference order entered November 17, 2017, no amendment was made to the provisions of paragraph 2 of the original scheduling conference order, the paragraph governing amendment of the pleadings. APPENDIX 000429. Thus, the following provision of the scheduling conference order governed the consideration of Baker I from August 29, 2017, through the conclusion of litigation in Baker I on December 6, 2018: "Joinder of any party other than those named in the Complaint, the filing any cross-claim or counterclaim and reply, **and any amendment by any party of any pleading shall be fully effected by September 15, 2017.**" (Emphasis added). This deadline was not altered by the agreed order amending scheduling conference order subsequently entered on November 17, 2017.

This significance of this provision is evident when the Court considers the order granting Defendants' motion for summary judgment in Baker I. This order, entered December 6, 2018, lays out the factual findings upon which the dismissal of Baker I was based at paragraphs 1 through 20 of that order, pages 1 through 5. APPENDIX 000246-000250. Therein, the Circuit Court states that "Plaintiff failed to state any facts and/or otherwise allege that any adverse employment action was taken against her after May 25, 2016 (the last date of conduct alleged by Petitioner in her amended complaint). APPENDIX 000247, Order granting Defendants' Motion for Summary Judgment, Baker I, ¶ 4, page 2. None of the various issues which Petitioner attempted to raise in support of her claims which occurred after May 25, 2016 are indicated as a basis for the court's ruling dismissing Baker I and, in fact, the court specifically explains that subsequent discriminatory and/or retaliatory events are not being considered as a basis for the Petitioner's claims being considered in Baker I.

The reason for this is set forth in the Court's conclusions of law (styled "applicable law") which begin on page 5 of the order granting Defendants' motion for summary judgment. APPENDIX 000250. Therein, the court notes that "[a] Plaintiff's claims are limited to those asserted in the complaint and it is improper for a plaintiff to attempt to raise new theories and/or new claims in response to summary judgment." APPENDIX 000254, Order Granting Defendants' Motion for Summary Judgment, Baker I, ¶ 11, page 9. The Circuit Court then cited authorities holding that "matters that took place while action was pending were beyond the scope of the complaint" and that "it is fundamental that a plaintiff may not obtain relief on the basis of factual allegations not set forth in the complaint." (Citations omitted). APPENDIX 000254-000255, Order Granting Defendants' Motion for Summary Judgment, ¶ 11, pages 9-10. Finally and most decisively, in a section of the Order Granting Defendants' Motion for Summary Judgment titled

“Ruling” the court held that “Plaintiff’s claims are limited to those stated in her amended complaint and this Court will not consider additional allegations and/or claims which are outside the scope of those raised in Plaintiff’s amended complaint for purposes of ruling on Defendants’ motion for summary judgment.” APPENDIX 000255-000256.

## **2. Procedural History of Baker II**

Petitioner commenced Baker II by filing a complaint on July 9, 2019, styled Kimberly A. Baker v. The Chemours Company FC, LLC, Shawn Busch, and Kevin Crislip. APPENDIX 000181. On August 8, 2019, Defendants filed their motion to dismiss. On August 26, 2019, the parties appeared in Wood County Circuit Court at the hearing for the motion to dismiss, where the motion was granted. A transcript of that hearing appears at APPENDIX 000457. On September 6, 2019, the Circuit Court entered the final order granting Defendants’ motion to dismiss. APPENDIX 000482. In granting that motion to dismiss, the Circuit Court focused on the granting of summary judgment in Baker I and concluded that the Scheduling Order and the Amended Scheduling Order did not preclude amending the complaint a second time in Baker I, especially where discovery had been extended to October 2018. See Rule 15.

The petitioner appeals to this Court from the final order of the Circuit Court entered September 6, 2019.

## **ARGUMENT**

- 1. The Circuit Court erred in its application of the doctrine of res judicata resulting in improper dismissal of petitioner’s complaint.**

As this Court can readily determine from the procedural history related above, the Circuit Court’s ruling from Baker I may not properly be invoked as a basis to bar Petitioner’s claims in



Baker II on the grounds of res judicata. The order demonstrates that the Circuit Court's ruling in Baker I was limited strictly to those factual allegations raised in the Petitioner's March 2017 amended complaint. Given the fact that the allegations upon which the Baker II complaint before this Court is based did not occur until 2018, it is clear that the Petitioner's mistreatment by Defendants related in the Baker II complaint pending before this Court could not have been considered or ruled upon by the Court in Baker I.

The West Virginia Supreme Court addressed the standards to be applied to claims of res judicata in detail in Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997). Therein the Court held that three elements must be satisfied in order to support the application of res judicata to bar Petitioner's claims: Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. *First*, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. *Second*, the two actions must involve either the same parties or persons in privity with those same parties. *Third*, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997).

The third element may be satisfied in two distinct ways: (1) if the cause of action identified for resolution in the subsequent proceeding is identical to the cause of action determined in the prior action; or (2) if the cause of action identified for resolution in the subsequent proceeding is such that it could have been resolved, had it been presented, in the prior action. Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997).

For purposes of res judicata, "a cause of action" is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata. Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 557 S.E.2d 883, 885 (2001).

Claim preclusion requires that litigants present in a single action all claims or defenses that may appropriately be resolved within the confines of such proceeding, since an adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata. Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 557 S.E.2d 883, 887-88 (2001)

In applying these three elements to Baker II, the first element for res judicata is met, as there was a final adjudication of Baker I. The dispute as to the application of res judicata in Baker II rests on analysis of the second and third elements. The second element deals with the actions involving the same parties or persons in privity with those same parties. In finding that the second element had been satisfied, the Court below erred because the two different actions did not involve

the same parties; an individual defendant from the Baker I is not a defendant in Baker II, and an individual defendant in Baker II was not a party to Baker I.

This action is clearly not identical to the Baker I case, nor could this Baker II matter have been resolved in Baker I for the reasons described herein, so the first test is not met. In ruling that all three elements for res judicata had been met, the Baker II Court found that Petitioner “could have sought to include” the Baker II cause of action in her Baker I proceedings by seeking permission to file a second amended complaint in Baker I.

In its order granting summary judgment in Baker I, the Circuit Court made it clear that none of the issues raised by the Plaintiff which were not specifically pled in the Baker I complaint could or would be considered. As the Baker I Court noted: “A plaintiff’s claims are limited to those asserted in the complaint and it is improper for a plaintiff to attempt to raise new theories and/or new claims in response to summary judgment”; “It is fundamental that a Plaintiff may not obtain relief on the basis of factual allegations not set forth in the complaint”. APPENDIX 000246, Baker I Order Granting Defendants’ Motion for Summary Judgment, ¶ 11, pages 9-10. By scheduling conference order entered August 29, 2017, the Baker I court provided that “[a]ny amendment by any party of any pleading shall be fully affected by September 15, 2017.” APPENDIX 000429, Baker I, Scheduling Conference Order, August 29, 2017, ¶ 2. Thus, Defendants rely in this motion upon the existence of facts that Petitioner could not have litigated in Baker I and which are explicitly excluded as a basis for Petitioner’s Baker I claims in the Court’s order dismissing Baker I.

Indeed, the critical Baker II events occurred five months after the deadline for the amendment of pleadings in Baker I, and were explicitly excluded from consideration by the Court in Baker I. Because the critical events took place five months after the deadline for amendment of

pleadings in Baker I, they *could not* have been resolved in the prior action, and therefore do not satisfy the third prong for res judicata.

“The Supreme Court of Appeals of West Virginia has not adopted a transaction-focused test for determining whether successive proceedings involve the same claim or cause of action. Rather, the court has embraced the ‘same-evidence’ approach for determining whether two claims should be deemed to be the same for purposes of claim preclusion.” Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 557 S.E.2d 883, 885 (2001). In the instant case, the record clearly demonstrates that the Court in Baker I forbade the Petitioner from introducing evidence which now serves as the basis for Baker II. Under this “same-evidence” approach, res judicata cannot apply to Baker II, as the evidence relied upon for this claim was explicitly and specifically excluded from consideration in Baker I. The bar to the inclusion of this conduct was not solely legal, either; the misconduct complained of in Baker II occurred five months or more after the deadline to amend Baker I had passed.

Petitioner was specifically estopped by the Court from bringing the matters which are the subject of Baker II into the Baker I case. APPENDIX 254-000256. Accordingly, Petitioner could not have litigated these matters which are the subject of Baker II as incident to Baker I. Defendants could point to the language which reads “It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits,” and under normal circumstances that argument might hold water, but in Baker I, the court specifically rejected inclusion of the facts which are now the basis of Baker II. Ergo, this formal rejection means that the Petitioner did not have the opportunity to dispose of the matters raised in Baker II on their merits.

The Circuit Court, in its order granting summary judgment in Baker I, made it clear that none of the issues raised by the Petitioner therein which were not specifically pled in the Baker I complaint could or would be considered. Thus, Defendants rely upon the existence of facts that Petitioner could not have litigated in Baker I and which are explicitly excluded as a basis for Baker II claims in the court's order dismissing Baker I. The critical Baker II events occurred five months after the deadline for the amendment of pleadings in Baker I, and were explicitly excluded from consideration in Baker I by the Court.

The Amended Scheduling Order in Baker I did extend the Baker I discovery deadline, but, in any event, the adverse actions at the heart of pertaining to Baker II did not occur until well into 2018 - such as the denial of multiple promotions Appellant sought and threats made to her physical safety which went unpunished.

Throughout 2018 the Petitioner continued to suffer mistreatment in a male-dominated workplace wherein she was experiencing overt gender harassment as well as the denial of multiple promotions in retaliation for having initiated the Baker I case seeking to hold Defendants accountable for a vile, derogatory and sexist work environment. She was supervised by managers (the individual defendants named in Baker II) who had taken no action to correct co-workers who referred to Petitioner as a "dirty whore" and a "cunt." APPENDIX 000119-000122. She was mocked by male coworkers for supposedly being incompetence despite the fact most of her other male coworkers could not perform the functions Petitioner was struggling to perform. APPENDIX 000186. Petitioner's male coworkers as referred to performing a task poorly as "Bakering" a job. APPENDIX 0002777. In 2018 she experienced an adverse performance review due to her "attitude" from the same managers who refused to correct the misconduct of Petitioner's male co-workers. APPENDIX 000196-000198.

Human Rights claims are strongly favored in West Virginia public policy. See Brown v. City of Montgomery, 233 W. Va. 119, 121-22, 755 S.E.2d 653, 655-56 (2014) (syllabus point 8). Here, Baker I itself caused new discrimination in the form of retaliation against Petitioner. Defendants' approach – adopted by the Circuit Court – would lead to the following situation for an female employee still working for a Defendant which chooses to retaliate against her for complaining about discrimination: If she moves to amend for each new act of discrimination, she will likely never get to trial because each amendment to add new claims will push the date for resolution of the original claims over the horizon, with each new amendment giving rise to the need for additional discovery, motions, and pretrial disclosures. Should she opt to keep her current claims and push forward, it would be a waiver of any future claim for the acts that occurred during the pendency of her existing claims, thereby rendering litigation a catch twenty-two by means of *res judicata* for any plaintiff remaining employed with a defendant employer.

Under such a scheme, a plaintiff would be forced to waive claims or perpetually restart litigation to add any and every conceivable piece of evidence to guard against *res judicata* if their current claim was dismissed, effectively creating a new class of previously. But during the new time frame, if any more new acts of discrimination occur, necessitating yet another request for amendment and yet another delay. The practical effect of the ruling appealed from is to deprive the Petitioner and all other similarly situated workers who remain employed with a defendant employer of the ability to resolve claims of ongoing discrimination if they have ever brought any such claim in the past. Such female workers would have to choose between effectively waiving their right to a cause of action or halting their cases to reincorporate any new resulting claims and starting the process over again repeatedly. Under the approach promoted by Defendants and adopted by the Circuit Court in Baker II, plaintiffs would face an ever-receding horizon for as long

as they chose to remain employed with an employer they are suing, should that employer continue to retaliate against them.

It was premature and speculative of the Circuit Court to hold that the mere filing of Baker I precluded all possible causes of action that might mature in the future. The above-mentioned events of 2018 took place while Baker I was pending, and, in fact, arose at least in part due to the existence of Baker I. Those facts gave rise to a new cause of action. The approach Defendants urge – endless amendment – would practically deprive Petitioner of any remedy while she remained employed and continued to suffer harassment and abuse. Adopting Defendants’ theory of res judicata, so long as a plaintiff alleging retaliation for bringing a lawsuit did not amend that lawsuit, even if the retaliation occurred long after the amendment period had ended, that plaintiff would be barred from bringing an action for retaliation.

Res judicata exists to bar plaintiffs from getting two bites at the same apple. Res judicata does not exist to convert non-compulsory claims into compulsory claims, which is what Defendants are seeking to do. Baker II sets forth an entirely different set of allegations than Baker I, which accrued after Baker I could have been amended. Res judicata, if applied in the stilted manner suggested by Defendants, would not act to prevent Petitioner from getting a second bite at the apple; she has had no opportunity to redress any of the grievances she has suffered since filing Baker I. It would protect Defendants from the consequences of their second round of harassment.

**2. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE RULE 12 STANDARD OF REVIEW**

Dismissal of the Baker II complaint under Rule 12 was inappropriate. Although the Circuit Court could take judicial notice of the earlier summary judgment order in Baker I, the record demonstrates that the Circuit Court considered and relied upon Baker I’s dismissal in Baker II and evaluated the Motion to Dismiss under a Rule 56 standard. There had been no discovery conducted

in Baker II at the time of dismissal, thus rendering a Rule 56 motion premature. As to evaluation of a motion to dismiss pursuant to Rule 12 this Court has held: "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45 - 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)." Syl. pt. 3, Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977). The Circuit Court committed reversible error as Petitioner had clearly plead appropriate causes of action in Baker II, quite independent of any that were or could have been raised in Baker I.

This does not support a dismissal based upon res judicata and the Circuit Court erred in dismissing the case on this legal basis while applying the incorrect legal standard.

#### CONCLUSION

The Circuit Court's ruling is in error and should be reversed by this Court. This Court should order reinstatement of Petitioner's complaint to the active docket of the Circuit Court of Wood County, West Virginia.

Signed: \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2020, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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