IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0906

KIMBERLY A. BAKER,

Petitioner,

v.

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

Respondents.

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

RESPONDENTS' BRIEF

Counsel for Repondents The Chemours Company FC, LLC, Shawn Busch and Kevin Crislip

Eric W. Iskra (WV State Bar # 6611)
Samuel M. Brock, III (WV State Bar # 9216)
Ellen J. Vance (WV State Bar # 8866)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (ZIP 25301)
P.O. Box 273
Charleston, West Virginia 25321-0273
304.340.3800
304.340.3804 (Facsimile)
eiskra@spilmanlaw.com
sbrock@spilmanlaw.com
evance@spilmanlaw.com

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I. STATEMENT OF THE CASE

On March 8, 2017, Petitioner filed a Complaint (hereinafter "Baker I") in the Wood County Circuit Court against Chemours, alleging claims of "hostile environment gender harassment," "gender discrimination," and "retaliation" under the West Virginia Human Rights Act ("WVHRA")(Civil Action No. 17-C-99). (Appx. 222-33). On March 10, 2017, Petitioner filed an Amended Complaint in Baker I alleging claims of gender discrimination and retaliation under the WVHRA (and voluntarily dismissing her hostile environment gender harassment claim). (Appx. 234-45). The Amended Complaint also added Shawn Busch and Jay Starcher, Petitioner's supervisors, as defendants under the theory that they "aided and abetted" Chemours. Id.

On August 29, 2017, the Wood County Circuit Court entered a Scheduling Conference Order (hereinafter "Original Scheduling Order") in Baker I establishing a deadline of September 15, 2017 to join any party and to amend any pleading. (Appx. 429-33). Thereafter, in mid-November 2017, the Parties entered into an Agreed Order Amending Scheduling Conference Order (hereinafter "Amended Scheduling Order"). (Appx. 434-40). Through that Amended Scheduling Order, the Circuit Court extended discovery through October 4, 2018 and set a new trial date of December 4, 2018. (Appx. 434).

When agreeing to the Amended Scheduling Order in Baker I, Petitioner did not request (or even mention a need for) additional time to amend her pleadings (despite the fact that several of the allegations that she included in Baker II occurred prior to the time the Parties submitted the Amended Scheduling Order to the Circuit Court).[1] (Appx. 484). As a result, the Amended

[1] By the time the Parties submitted their agreed Amended Scheduling Order in mid-November 2017, Petitioner clearly was aware of the conduct alleged by her in Paragraphs 28, 38, 39, 42, and 46 of her Complaint in Baker II. (Appx. 185, 187, 188, 189-90).

Scheduling Order did not change the date originally set by the Circuit Court for amending pleadings.

Baker I proceeded for approximately **21 months**. Depositions and discovery, including numerous supplemental discovery responses, proceeded through October 15, 2018. (Appx. 484). On October 5, 2018, Respondents filed their Motion for Summary Judgment and Memorandum. (Appx. 1-35). On October 26, 2018, Petitioner filed a Response and Memorandum in Opposition to Defendants' Motion for Summary Judgment in which she raised, for the first time, additional allegations upon which discovery had been taken but which were not set forth in her Amended Complaint.[2] (Appx. 258-92). When Petitioner filed her Response to Respondent's Motion for Summary Judgment in Baker I, she had known, for months, about the additional allegations that she raised (for the first time) in her response to summary judgment. Yet, despite having been fully aware of these additional allegations, she never made any attempt to further amend her Amended Complaint in Baker I.

Ultimately, Baker I was finally and fully resolved by the Circuit Court's December 6, 2018 Order Granting Defendants' Motion for Summary Judgment wherein Judge Jason Wharton refused to consider the additional allegations asserted by Petitioner in her response to summary judgment for purposes of ruling on Respondent's Motion for Summary Judgment. (Appx. 246-57). In reaching this holding, the Circuit Court found that it was improper for Petitioner to raise additional (newly asserted) allegations (to supplement her Amended Complaint) through her response to summary judgment. (Appx. 254-56). Petitioner did not appeal the Circuit Court's decision in Baker I.

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[2] In addition to raising these allegations in her response to summary judgment, Petitioner also raised these allegations in her Pretrial Memorandum (which she filed on October 30, 2018)(Appx. 323-37) and in her Consolidated Response to Defendants' Motions *in Limine* (which she filed on November 1, 2018)(Appx. 293-322). These allegations are the same allegations that she raises in Baker II.

On July 9, 2019 (seven months after the summary judgment order in Baker I), Petitioner filed a second action in the Wood County Circuit Court (hereinafter "Baker II") alleging claims of "failure to accommodate - gender discrimination," "hostile work environment - gender discrimination," and "retaliation" under the WVHRA. (Appx. 181-202). The defendants in Baker II are Chemours, Shawn Busch and Kevin Crislip (who replaced Jay Starcher as one of Petitioner's supervisors during the time Baker I was pending), and, as in Baker I, these supervisors were sued because they allegedly "aided and abetted" Chemours. (Appx. 10, Complaint, ¶¶ 47-48). All of the facts set forth in Baker II occurred in 2017 through July 2018 (well in advance of the October 4, 2018 discovery cutoff deadline in Baker I, well before the pretrial briefing phase of Baker I, and well before the Circuit Court's December 6, 2018 Order granting of summary judgment in Baker I). (Appx. 483, 181-93). Through her filings in Baker II, and through this Appeal, **Petitioner has never disputed that she had full knowledge of all facts supporting her claims in Baker II during the course of Baker I.** (Appx. 483). In Baker II, Circuit Court Judge John D. Beane properly concluded that the doctrine of *res judicata* and the prohibition against claim splitting barred Petitioner's dilatory attempt to assert additional allegations in Baker II that could have been resolved had they been properly presented in Baker I. (Appx. 482-91).

II. SUMMARY OF THE ARGUMENT

The Circuit Court did not err in its application of the doctrine of *res judicata* and the prohibition against claim splitting. Under well-settled West Virginia law, the doctrine of *res judicata* bars a party from relitigating claims that were or "could have been resolved" had they been "properly presented" in the prior action. Likewise, the prohibition against claim splitting prohibits a plaintiff from pursing interrelated claims in a piecemeal fashion. Petitioner admittedly knew all allegations which she sought to assert in Baker II during the course of Baker I, and the

allegations in Baker II, most definitely, were intertwined with the allegations in Baker I. Petitioner, however, decided to sit on this evidence instead of following the West Virginia Rules of Civil Procedure by properly and timely seeking to further amend her Amended Complaint in Baker I to raise these allegations. Petitioner's own failure to properly and timely raise allegations that she knew existed does not preclude them from being barred by the doctrine of *res judicata* or the prohibition against claim splitting. As the Circuit Court in Baker II correctly reasoned, "it was plaintiff's failure to seek leave to amend in Baker I which generated the issue now before this Court," and "she must accept its consequences." The Circuit Court's Order dismissing Baker II should be affirmed by this Court.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not believe that the decisional process would be aided by oral argument as the facts and legal arguments are adequately presented in the briefs and record on appeal. Should the Court require oral argument, oral argument is suitable under W.Va.R.App.P. 19 because petitioner is claiming, although improperly, that the Circuit Court erred in its application of the well-settled law of *res judicata*.

IV. ARGUMENT

A. Standard of Review.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). In her Brief, Petitioner acknowledges this is the correct standard of review for this appeal. Petitioner's Brief, p. 2.

At the end of her Brief, Petitioner argues that the Circuit Court applied the wrong legal standard in Baker II because the Circuit Court relied upon matters extrinsic to the Complaint,

thereby converting the motion to dismiss into a motion for summary judgment. Petitioner's Brief, pp. 12-13. This is wrong. This Court has specifically held that "Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice." Forshey v. Jackson, 222 W.Va. 743, 747, 671 S.E.2d 748, 752 (2008).

Additionally, in this case, it was appropriate for the Circuit Court to take judicial notice of pleadings filed by the Parties in Baker I, as such pleadings came from the Circuit Court's own record and were relied upon only for the establishment of the facts and positions presented by the parties in the underlying litigation and related filings (and not for the truth of the matters being asserted).[3] See Starcher v. Pappas, 2017 WL 5157366 (W.Va. 2017) (memorandum decision) (circuit court appropriately dismissed case based on doctrine of *res judicata* and appropriately took judicial notice of pleadings and other documents filed in other court); Gulas v. Infocision Mgmt. Corp., 215 W.Va. 225, 229, n. 4, 599 S.E.2d 648, 652, n. 4 (2004)(citing Answers v. Daw, 201 F.3d 521, 524, n.1 (4th Cir. 2001)("[W]hen entertaining a motion to dismiss on the ground of *res judicata*, a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact . . . ."); see also In the Matter of Meredith M. Breedlove, 186 W.Va. 279, 412 S.E.2d 473 (1991)(W.Va.R.Evid. 201 is substantially the same as Fed.R.Evid. 201, and numerous federal courts have recognized that an adjudicative body may take judicial notice of facts contained within a court's own files); W.Va.R.Evid. 201.

Petitioner never objected to the use of the record documents from Baker I submitted by Respondents in the Circuit Court. In fact, in her Response to Respondent's Motion to Dismiss, Petitioner referred to the same record documents from Baker I and even presented additional record

[3] Furthermore, the issue of whether *res judicata* applies to Petitioner's claims in Baker II is purely a legal issue, and Petitioner has never articulated -- either to the Circuit Court to this Court -- what discovery would be needed to decide this purely legal issue.

documents from Baker I beyond those submitted by Respondents, to which no objection was made. Accordingly, despite Petitioner's unfounded contention, the Circuit Court committed no error in its application of Rule 201 of the West Virginia Rules of Evidence when it took judicial notice of the various pleadings from Baker I and ruled on Respondent's Motion to Dismiss in Baker II, and, in any event, the Parties do not disagree that this Court should apply the *de novo* standard in evaluating the Circuit Court's dismissal order below.

B. The Circuit Court Did Not Err In Its Application of the Doctrine of *Res Judicata*, And It Correctly Found That Petitioner's Allegations in Baker II Were Barred By The Judgment Entered in Baker I.

Under well-settled West Virginia law, the doctrine of *res judicata* "assures that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W.Va. 549, 559, 803 S.E.2d 519, 530 (2017). *Res judicata* "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and . . . encourage[s] reliance on adjudication." Id. Courts have long-recognized that "public policy dictates that there be an end of litigation; that those who have contested an issue should be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Hall v. Grant Co. Bd. of Ed., 2010 WL 2948495, *4 (N.D. W.Va. 2010)(citing Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 401(1931)).

In support of this long-recognized public policy, this Court has determined that the doctrine of *res judicata* bars "a party from suing on a claim that has already been litigated to a final judgment by that party . . . and **precludes the assertion by such party of any legal theory, cause of action, or defense which could have been asserted in that action.**" Dan Ryan Builders, 239 W.Va. at 560, 803 S.E.2d at 530 (emphasis added). In applying the doctrine of *res judicata*, this

Court has established the following three-part test to determine the preclusive effect of a prior judgment: (1) First, there must be a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; (2) Second, the two actions involve either the same parties *or* persons in privity with those same parties; and (3) Third, the cause of action identified for resolution in the subsequent proceedings *either* (a) must be identical to the cause of action determined in the prior action *or* (b) must be such that it could have been resolved, had it been properly presented, in the prior action. Id.; Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997); Lloyd's, Inc. v. Lloyd, 225 W.Va. 377, 384, 693 S.E.2d 451, 458 (2010)(per curiam).

1. The Circuit Court Did Not Err In Its Application of the Doctrine of *Res Judicata* When It Correctly Found That Kevin Crislip Was in Privity With Chemours.

The Circuit Court did not err in its application of the second part of the *res judicata* test when it found that Kevin Crislip was in privity with Chemours. In her Brief, Petitioner correctly cites case law stating that the second part of the *res judicata* test requires that "the two actions must involve either the same parties or persons in privity with those same parties." Petitioner's Brief, p. 6, citing Blake, 201 W.Va. at 472, 498 S.E.2d at 44. Without any analysis, Petitioner then claims that this part of the test was not met in Baker II: "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." Petitioner's Brief, pp. 7-8. Petitioner, however, has made no effort whatsoever to address whether the newly named individual defendant in Baker II (Kevin Crislip, the supervisor who replaced Jay Starcher, one of the defendants in Baker I) was in privity with Chemours and cites to no pertinent authority upon which this Court could determine that Kevin Crislip was not in privity with

Chemours. Petitioner presumably punted on this argument because it is clear that Kevin Crislip (who is being sued in his capacity as a supervisor at Chemours) was in privity with Chemours.[4]

Under West Virginia law, privity "'is merely a word used to say that the relationship between one who is party on the record and another is close enough to include the other within the *res judicata*.' *One relationship long held to fall within the concept of privity is that between a non-party and party who acts as the nonparty's representative.*" Rowe v. Grapevine Corp., 206 W.Va. 703, 715, 527 S.E.2d 814, 826 (1999)(emphasis in original)(citing Martin v. Wilks, 490 U.S. 755 (1989)); see also Horne v. Lightning Energy Serv., LLC, 123 F.Supp.3d 830 (N.D. W.Va. 2015).

As the U.S. District Court for the Northern District of West Virginia stated in Horne, a manager for an employer has a significant interest of identity with the employer so as to trigger virtual representation thereby establishing that the manager is in privity with the employer. Id. at 840-41; see also Briggs v. Newberry Co. School Dist., 838 F.Supp. 232 (D.S.C. 1992)(interest of individual defendants who were district employees involved in decisions relating to plaintiff were in privity with the school district and school board).

In Baker II, Petitioner's allegations against Kevin Crislip related to his alleged involvement in hiring decisions, return to work issues, and performance issues in his capacity as a supervisor at Chemours. (Appx. 181-202). In fact, Kevin Crislip -- like all the other individual defendants in both Baker I and Baker II -- was alleged to have "aided and abetted" Chemours. (Appx. 190, Complaint, ¶ 48). As such, his interests are aligned with the interests of Chemours between the

[4] Due to Petitioner's cursory treatment of the issue, this Court should find that Petitioner has waived any argument that Kevin Crislip is not in privity with Chemours. See State of West Virginia v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996)("Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.")

subject matter of this lawsuit and Petitioner's prior lawsuit such that *res judicata* applies and bars Petitioner from pursing her claims in Baker II against him.

2. The Circuit Court Did Not Err In Its Application of the Doctrine of *Res Judicata* When It Correctly Found That Petitioner's Allegations in Baker II Could Have Been Resolved Had They Been Properly Presented in Baker I.

In her Brief, Petitioner's primary argument -- the only argument that is not made in a merely passing, cursory manner -- focuses on subpart (b) of the third part of the *res judicata* test. Specifically, Petitioner contends that, although all conduct alleged in Baker II admittedly occurred during the course of Baker I, the alleged conduct in Baker II could not have been resolved during the course of Baker I because it did not occur until after the deadline for amendment of the pleadings set forth in Circuit Court's Original Scheduling Order in Baker I.[5] Petitioner's Brief, p. 1. In making this unfounded contention, Petitioner: (a) fails to cite to any case law or legal support, ignores Rules 15 and 16 of the West Virginia Rules of Civil Procedure, and provides no justification for her failure to properly and timely seek leave from the Circuit Court to further amend her Amended Complaint in Baker I; (b) ignores key West Virginia Supreme Court decisions cited by Respondents in their Motion to Dismiss in Baker II which require that a plaintiff raise all allegations known by her that relate to her underlying claims as part of her first lawsuit; and (c) ignores numerous federal cases cited by Respondents' in their Motion to Dismiss in Baker II, all of which held that a plaintiff's successive employment discrimination claims were barred under the doctrine of *res judicata* when the plaintiff failed to present all factually intertwined allegations known by her during the course of the first lawsuit.

[5] Petitioner, admittedly, never requested to extend this deadline at any time.

a. Petitioner fails to provide any justification for her failure to seek leave to further amend her Amended Complaint.

As admitted by Petitioner, she made no effort to change the date for amending the pleadings set by the Circuit Court's Original Scheduling Order, and she never made any effort to further amend her Amended Complaint in Baker I. Petitioner has not -- and cannot -- provide a valid basis for her failure to properly and timely raise all factually intertwined allegations known by her as part of her underlying claims in Baker I. Scheduling orders are amended all the time (and, in Baker I, the Original Scheduling Order was amended once based upon agreement of the parties to do so). Moreover, Petitioner clearly had ample opportunity to seek leave to further amend her Amended Complaint, during the **21 months** that Baker I was pending, as she clearly knew of (and took discovery on) all the factual contentions that she now seeks to assert in Baker II in advance of the discovery cutoff, the summary judgment filings, and the other pretrial deadlines in Baker I. (Appx. 219-409).[6]

Additionally, Petitioner has failed to cite any legal authority -- let alone any legal authority from this Court -- supporting her contention that she could not have sought an amendment to the pleadings in Baker I after the deadline for amendment set forth in the Original Scheduling Order. In fact, Petitioner's argument is not only illogical but it also is contrary to the West Virginia Rules of Civil Procedure.

Rule 16 of the West Virginia Rules of Civil Procedure plainly allows scheduling orders to be modified "by leave of the judge." W.Va.R.Civ.P. 16. Petitioner clearly knew that the scheduling order could be modified by leave of the Circuit Court because she entered into and

[6] The timeline for each allegation by Petitioner in Baker II is fully addressed in Respondents' Memorandum of Law in Support of Motion to Dismiss. (Appx. 205-18). The details of that timeline are not included herein because Petitioner freely admits that she was aware of all facts upon which she based Baker II well before the discovery cutoff and summary judgment deadline in Baker I.

agreed to an Amended Scheduling Order, through which the discovery cutoff deadline was moved from March 18, 2018 to October 4, 2018, and the trial date was moved from May 15, 2018 to December 4, 2018. At the time the Parties agreed to the Amended Scheduling Order, Petitioner did not seek to modify the deadline originally set by the Circuit Court for amending pleadings (even though, by the time the Original Scheduling Order was modified in mid-November 2017, several of the allegations Petitioner included in Baker II had already come to pass, and Petitioner clearly was aware of her continuing complaints against Respondents).[7] Likewise, despite having ample opportunity to do so and being allowed to do so under Rule 16, Petitioner never made any other effort, at any other time, to ask the Circuit Court to modify the deadline for amending pleadings that was set in its Original Scheduling Order.

Rule 15 of the West Virginia Rules of Civil Procedure also provides a party the ability to seek leave to amend the party's pleadings at any point in the litigation (even during trial) and provides a liberal standard that such leave "**shall be freely given** when justice so requires," so long as doing so would not be prejudicial to the other party. W.Va.R.Civ.P. 15 (emphasis added); see Syl. Pt. 6, Lloyd's, Inc., 225 W.Va. at 379, 693 S.E.2d at 453 ("The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long

[7] Petitioner's suggestion that a plaintiff would never get her claims to trial if she was required to amend her complaint to add additional allegations as they occurred is nothing more than a straw man argument. Clearly, this was not applicable in this case (and was never even argued to the Circuit Court). In fact, by the time Petitioner filed Baker II on July 9, 2019, seven months had passed since the date that the Circuit Court entered the Order dismissing Baker I, and more than nine months had passed since the discovery cutoff deadline in Baker I. Yet, in Baker II, Petitioner raised no additional allegations -- beyond those that were already known to her prior to the discovery cutoff deadline in Baker I. Additionally, and as discussed further below, Rule 15 of the West Virginia Rules of Civil Procedure provides a party the ability to seek leave to amend the party's pleadings at any point in the litigation (even during trial) and provides a liberal standard that such leave "shall be freely given when justice so requires." W.Va.R.Civ.P. 15. Trial courts are more than capable of applying Rule 15 in a fair and equitable manner.

period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.")(citing Syl. Pt. 3, State ex rel. Vedder v. Zakaib, 217 W.Va. 528, 618 S.E.2d 537 (2005)). As admitted by Petitioner, she never formally sought to further amend her Amended Complaint in Baker I to assert the additional allegations that she has asserted in Baker II. Instead of doing so, Petitioner attempted to raise these additional allegations in Baker I -- in an informal, improper and untimely manner -- through her Response to Defendants' Motion for Summary Judgment,[8] which was justifiably rejected by the Circuit Court. (Appx. 258-92).

As the Circuit Court in Baker II correctly reasoned in its Order dismissing Petitioner's Complaint, "it was plaintiff's failure to seek leave to amend in Baker I which generated the issue now before this Court and which prevented the Baker I court from resolving the matter. In addition, the decision to not to seek leave to amend was the plaintiff's alone and she must accept its consequences." (Appx. 482-91).

The important public policy principles underlying the doctrine of *res judicata* bar Petitioner's attempt to punish Respondents for her failure to properly and timely present all allegations relating to her underlying claims during the course of Baker I. Moreover, the judgment in Baker I foreclose Petitioner's dilatory attempt to raise such allegations through her second lawsuit. See Dan Ryan Builders, 239 W.Va. at 562, 803 S.E.2d at 532; Lloyd's, Inc., 225 W.Va. at 384-85, 693 S.E.2d at 458-59; Serna v. Holder, 559 Fed. Appx. 234, 237 (4th Cir. 2014)(per curiam)(plaintiff's claims existed at the time of the first lawsuit, and *res judicata* "prevent[ed] the sort of dribbling of claims from earlier lawsuits to later ones that occurred here"); Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985 (9th Cir. 2005)(denial of motion to amend in a prior action

[8] Petitioner also raised these additional allegations in her Consolidated Response to Defendants' Motions *in Limine* and in her Pretrial Memorandum. (Appx. 258-322).

based on dilatoriness does not prevent application of *res judicata* in second action); Hall, 2010 WL 2948495, *4 (allegations of misconduct occurring before the dismissal of prior lawsuit are barred by *res judicata* because such allegations could have been raised in prior lawsuit); Kerr v. Marshall Univ. Bd. of Gov., 2017 WL 9534582, *6 (S.D. W.Va. 2017)(Mag. Tinsley)("because the plaintiff failed to seek amendment of her complaint before it was dismissed, [failed] to have the dismissal order properly set aside, and further failed to continue her appeal . . . , she [waived] the ability to seek relief in a second civil action")(adopted by Kerr v. Marshall Univ. Bd. of Gov., 2017 WL 4176229 (S.D. W.Va. 2017)); Zimmerman v. College of Charleston, 2013 WL 4523585. *4-6 (D.S.C. 2013)(plaintiff had full and fair opportunity to litigate claims in prior action, "had ample time to amend her state court complaint to assert causes of action," and "could have, and should have, asserted the claim").

Petitioner's entire argument to the Circuit Court below, and even to this Court on appeal, is based on the faulty premise that her claims in Baker II could not have been resolved in Baker I solely because the events alleged in Baker II took place after the deadline for amendment of the pleadings set by the Circuit Court's Original Scheduling Order in Baker I (regardless of, and ignoring, Rules 15 and 16 of the West Virginia Rules of Civil Procedure). In making this argument, Petitioner has failed to cite to any legal authority supporting her contention that the doctrine of *res judicata* is somehow linked to the deadline for amendment set forth in a court's scheduling order. Respondents, on the other hand, have cited to several cases (including the decision of the West Virginia Supreme Court in Lloyd's, Inc., which has been ignored completely by Petitioner) holding that the key issue is whether the allegations contained in Baker II **could have been** disposed of on the merits had they been **properly** and **timely** raised in Baker I. The answer to that question in regard to Baker II is a resounding **YES**. As discussed more fully below,

several cases cited by Respondents in their Motion to Dismiss specifically hold that *res judicata* bars a plaintiff from bringing a second lawsuit based upon allegations that **could have been** disposed of on the merits had they been **properly** and **timely** raised in the first lawsuit.

b. The Causes of Action in Baker II Could Have Been Resolved Had They Been Properly and Timely Presented in Baker I, And Petitioner Was Obligated to Assert All Factually Intertwined Allegations In Her First Lawsuit.

Under West Virginia law, subpart (b) of the third element of the *res judicata* test requires a determination of whether the cause of action identified for resolution in the subsequent proceedings could have been resolved had it been presented in the prior action. Dan Ryan Builders, 239 W.Va. at 560, 803 S.E.2d at 530. In making this determination, this Court applies the "same evidence" test. Id. West Virginia law conclusively establishes that factually intertwined allegations **occurring before the dismissal of a prior lawsuit** are barred by *res judicata* because a plaintiff is obligated to assert all matters which **could have been resolved** had they been **squarely** and **properly** presented in the first action.

When applying the "same evidence" test, this Court has consistently taken a pragmatic[9] approach for measuring the "sameness" of two actions by focusing on factors such as whether the second lawsuit comes "within the legitimate purview of the subject matter of the [first] action," whether the two lawsuits would require "the same evidence" or "substantially different evidence to sustain them," whether the two lawsuits arose out of the same "core of operative facts," and whether the claims in the first and second lawsuit were closely enough related that the plaintiff should have foreseen the consequences of failing to raise the alleged misconduct in the first lawsuit. See Lloyd's, Inc., 225 W.Va. at 384, 693 S.E.2d at 458 (an adjudication is final and

[9] Applying this "same evidence" test in the literal manner suggested by Petitioner (as opposed to the pragmatic manner followed by this Court in its prior decisions) would encourage a plaintiff to sit on evidence that would support her underlying claims in hopes of getting a second bite at the apple and would encourage piecemeal litigation. See cases cited below.

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"); Dan Ryan Builders, 239 W.Va. at 560, 803 S.E.2d at 530 (analyzing whether "the same evidence would support both actions or issues" or whether "the two cases require substantially different evidence to sustain them" and finding that all "factually intertwined claims" must be brought in the same action); Beahm v. 7 Eleven, Inc., 223 W.Va. 269, 275-76, 672 S.E.2d 598, 604-05 (2008) (claims in a second action could have been brought in first action because "they arose out of the same core of operative facts" and were not "so vastly different" from first action); Blake, 201 W.Va. at 477, 498 S.E.2d at 49 (considering whether party should have "foreseen consequences" of the failure to raise the subsequently raised issue in prior action).

For instance, the reasoning of the West Virginia Supreme Court in Lloyd's, Inc. is key to the issue being contested by Petitioner through her appeal. Yet, despite being part of the basis for Respondents' Motion to Dismiss, the Lloyd's, Inc. case has been completely ignored by Petitioner -- both in this appeal and before the Circuit Court.

Like Petitioner, plaintiff Lloyd's, Inc. filed two separate lawsuits in the lower court against defendant Charles Lloyd. 225 W.Va. at 377, 693 S.E.2d at 451. Like Petitioner, in the first action, plaintiff Lloyd's, Inc. attempted to raise additional factual assertions in response to a motion for summary judgment filed by defendant Charles Lloyd (which such motion for summary judgment related to counterclaims and a third-party complaint that defendant Charles Lloyd had brought against plaintiff Lloyd's, Inc.).[10] Id. at 380, 693 S.E.2d at 454. Like Petitioner, plaintiff Lloyd's, Inc. never moved to amend its pleadings to formally allege the matters raised in its response to

[10] Although Lloyd's, Inc. dealt with the issue of counterclaims and a third-party complaint, it is clear that the doctrine of *res judicata* and prohibition against claim splitting make the same underlying principles equally applicable to the claims stated by Petitioner in her Complaint.

defendant Charles Lloyd's motion for summary judgment. Id. The case then proceeded to trial, and plaintiff Lloyd's, Inc. again attempted to raise the additional allegations (despite having never moved to amend its pleadings to "squarely and properly" assert such allegations as part of its case). Id. at 382, 693 S.E.2d at 456. The trial court refused to permit the late assertions by plaintiff, ruling that such "issues . . . unfortunately . . . aren't in this lawsuit" (and, unlike the Circuit Court in Baker I, the trial court suggested that plaintiff might pursue a separate action to assert the additional matters). Id. at 380, 693 S.E.2d at 454. Ultimately, the trial court granted defendant's motion for judgment as a matter of law and ruled against plaintiff Lloyd's, Inc. Id. at 380, 693 S.E.2d at 455.

Five months later, plaintiff Lloyd's, Inc. followed the suggestion of the trial court and filed a second lawsuit attempting to raise the same allegations that the trial court previously refused to permit plaintiff Lloyd's, Inc. to assert ("on the periphery," without amending its pleadings) in the first lawsuit. Id. at 382, 693 S.E.2d at 456. In response to the second lawsuit, defendant Charles Lloyd filed a motion to dismiss, arguing -- in part -- that the claims asserted in the second lawsuit were barred by the doctrine of *res judicata.* Id. The trial court granted defendant's motion to dismiss and found that the matter raised by plaintiff in the second lawsuit "could have been resolved had it been properly presented in the prior action." Id. at 381, 693 S.E.2d at 455. The trial court stated that the plaintiff "had ample opportunity to amend the pleadings prior to trial [in the first case], and the Court believes that the [p]laintiff was required to amend the pleadings prior to the first trial . . . ." Id. at 382, 693 S.E.2d at 456. Like Petitioner here, plaintiff Lloyd's, Inc. then appealed the dismissal of the second lawsuit to the West Virginia Supreme Court of Appeals.

Applying the doctrine of *res judicata*, this Court held as follows:

> "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*."

Id. at 384, 693 S.E.2d at 458 (emphasis added)(quoting Syl. Pt. 1, Sayre's Adm'r v. Harpold, 33 W.Va. 553, 11 S.E. 15 (1890)). In Lloyd's, Inc., this Court ultimately affirmed the trial court's decision to dismiss the second lawsuit, and, in doing so, this Court found that the additional allegations in the second lawsuit "were matters 'that . . . could have been resolved, had [they] been [**properly**] presented in the prior action," and that, once the plaintiff "**learned of the existence** of [its claim], [it] was **required** to **timely** assert it in the **prior** litigation." Id. at 384-85, 693 S.E.2d at 458-59 (emphasis added).

Similarly, in this case, Petitioner had an obligation to properly and timely raise allegations that she now seeks to assert in Baker II upon learning of them. Through her present appeal, Petitioner concedes that she knew all of the alleged wrongful acts comprising her claims in Baker II well prior to the discovery cutoff in Baker I and well in advance of the Circuit Court's decision to grant summary judgment in Baker I. Petitioner's attempt to twist the Circuit Court's holding in Baker I (through which the Circuit Court found that it was improper for Petitioner to raise new allegations in response to a motion for summary judgment) has no bearing whatsoever on whether *res judicata* should be applied in Baker II. As the West Virginia Supreme Court found in Lloyd's, Inc., a plaintiff is required to properly (i.e., formally and squarely) raise such allegations in a timely manner. Id. at 383-85, 693 S.E.2d at 457-60; see Hall 2010 WL 2948495 at 4 (allegations of

misconduct occurring before the dismissal of prior lawsuit are barred by *res judicata* because such allegations could have been raised in prior lawsuit)(citing Federated Dept. Stores, Inc., 452 U.S. at 401)); Snell v. Mayor and City Council of Havre de Grace, 837 F.2d 173, 176 (4th Cir. 1998)(under "same evidence test," courts have "not allowed a plaintiff to avoid the *res judicata* effect of a prior judgment by adding new factual allegations, unless they are facts which could not, through the exercise of reasonable diligence, have been discovered in time to include them in the first suit");[11] Moore v. Knippenberg, 2016 WL 6833999 (N.D. W.Va. 2016)(plaintiff's attempt to remedy errors in first lawsuit by filing second lawsuit was barred by *res judicata* when plaintiff failed to plead and prosecute appropriate claims that were within his knowledge); Depaz v. Home Loan Serv., Inc., 2011 WL 1630323, *2 (D. Md. 2011)(neither "mere change in legal theory" nor "additional facts" pleaded in later suit will prevent claims from being barred "if those facts and issues could have been presented in earlier suit").

A mere shift in evidence offered to support an unproven claim in a prior action does not suffice to make a new claim and does not avoid the preclusive effect of the prior judgment. Instead, Petitioner was required to present all evidence known by her that related to her underlying employment discrimination and retaliation claims in Baker I during the course of Baker I because all alleged conduct and events in Baker II clearly fit within the legitimate purview of the subject-matter of Baker I, and Petitioner could have, and should have, foreseen the consequences of failing to raise these allegations in Baker I. See Lloyd's, Inc., 225 W.Va. at 384, 693 S.E.2d at 458. In fact, Petitioner's inclusion of the new allegations in her Response to Defendants' Motion for Summary Judgment, in her Consolidated Response to Defendants' Motions *in Limine* and in her

[11] See also Blake, 201 W.Va. 469, 478, n. 7, 498 S.E.2d 41, 50, n. 7 (suggesting that *res judicata* would apply in Suit 2 if discovery established that plaintiffs were aware of fraud and misrepresentation allegations made in Suit 2 during the course of Suit 1).

Pretrial Memorandum in Baker I demonstrates that Petitioner was well aware of the allegations and knew that they were factually intertwined with, and fit within the legitimate purview of the subject matter of, her employment discrimination and retaliation claims in Baker I.

Petitioner's Brief also includes a citation to Slider v. State Farm Mutual Auto. Ins. Co., 210 W.Va. 476, 557 S.E.2d 883 (2001), and generally claims that Baker II was not based upon the "same evidence" as Baker I because (a portion of) the additional conduct that she alleged in Baker II occurred after the deadline to amend the pleadings that was set out in the Original Scheduling Order in Baker I. Petitioner's Brief, p. 9. Again, Petitioner's own failure to seek leave to further amend her Amended Complaint to raise allegations that she knew existed and which she claimed (although informally and improperly) supported her employment discrimination and retaliation claims in Baker I does not preclude them from being barred by the doctrine of *res judicata.* Petitioner should not be rewarded for sitting on evidence that she believed supported her underlying claims.[12]

In Baker II, Petitioner merely attempts to shift the focus of the evidence being offered to support her same claims (adding new apples to old apples) to try to make "new" claims. In Slider, on the other hand, the nature of evidence required for the insureds to prevail on their statutory bad faith and intentional tort claims was substantially different (adding oranges to apples) than what was necessary to demonstrate their common law Hayseed's claim for consequential damages under Marshall. Slider, 210 W.Va. at 483, 557 S.E.2d at 890. More specifically, the insureds' statutory

[12] After citing Slider, Petitioner makes no effort to analyze the Slider decision or its applicability to her employment discrimination and retaliation claims in Baker II. See State v. LaRock, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996)(citing State v. Lilly, 194 W.Va. 595, 605, n. 16, 461 S.E.2d 101, 111, n. 16 (1995)("casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.")). Petitioner does not even attempt to apply this Court's reasoning in Slider to her two employment discrimination and retaliation lawsuits because she realizes that the nature of the evidence required to prevail on her claims in Baker II was **not** substantially different from the evidence that would have been necessary to prevail on her claims in Baker I.

bad faith claim necessarily focused on the process (instead of the result) for how the insureds' claims were handled and whether the insurance company acted wrongfully in the handling of the claim. Id. at 482, 557 S.E.2d. at 889. The insureds' common law claim, on the other hand, focused on the ultimate result (instead of the process for handling the claim) and whether the insured substantially prevailed in their underlying dispute with the insurer (and without regard to whether the insurance company acted in bad faith). Id. at 481-82, 557 S.E.2d at 888-89.

Moreover, to the extent that Petitioner is contending that the Circuit Court erred (which it did not) in refusing to allow her to raise new allegations in response to summary judgment in Baker I, such claim is "of no moment because, even if an error had occurred, it would not protect the claim from being barred by *res judicata*." Lloyd's, Inc., 225 W.Va. at 385, 693 S.E.2d at 459. If Petitioner did not agree with the Circuit Court's decision in Baker I, she could have appealed it. See Id. at 385, 693 S.E.2d at 459 (finding that any possible avenues of relief were foreclosed by plaintiff Lloyd, Inc.'s failure to file an appeal in prior litigation).

Likewise, Petitioner's abandonment of the sexual harassment claim that she alleged in her original Complaint in Baker I does not preserve that claim from the doctrine of *res judicata.* In Dan Ryan Builders (another West Virginia case relied upon by Respondents in their Motion to Dismiss that is completely ignored by Petitioner), Dan Ryan voluntarily dismissed a claim for contribution and indemnification which was part of a lawsuit that it had filed in federal court. Later, Dan Ryan attempted to file a third-party complaint (in a related state court proceeding) asserting the same claim that it had abandoned in federal court. 239 W.Va. at 554-55, 803 S.E.2d at 524-25. The trial court dismissed the third-party complaint, in part, on the ground of *res judicata*, and Dan Ryan appealed the decision to this Court. Id. at 558, 803 S.E.2d at 528. Applying West Virginia law, this Court found that "*res judicata* prohibits not only the re-litigation

of claims that were actually asserted in the prior action, but also precludes '**every other matter which the parties might have litigated as incident thereto.**'" Id. at 561, 803 S.E.2d at 531 (emphasis added)(quoting Blake, 201 W.Va. at 477, 498 S.E.2d at 49). This Court further found that Dan Ryan was required to pursue "all of its factually intertwined claims" in the first action. Id. at 562, 803 S.E.2d at 532. Similarly, in this case, Petitioner's voluntarily dismissal and abandonment of her sexual harassment claim (that she presented in her original Complaint but then abandoned in her Amended Complaint in Baker I) precludes her from bringing a second action on the abandoned claim because she had an obligation to bring all factually intertwined claims in Baker I so that Respondents were not subjected to "unfair and unjust cost and a vexation of a second, unnecessary lawsuit." Id.

c. Multiple Federal Cases Further Support The Prohibition Against A Plaintiff Bringing Successive Employment Discrimination Claims.

Multiple federal courts have found a plaintiff's attempt to bring successive employment discrimination lawsuits was barred by the doctrine of *res judicata* in situations in which the plaintiff was aware of her claims during the pendency of the first suit and would have to rely on substantially the same evidence and/or the same core of operative facts to sustain both the first and second suits. Although some of these cases reference a transaction-focused test, in applying such test and determining whether *res judicata* applied as a bar to the second case, these courts focused on the same underlying considerations that this Court has focused on in its rulings on the issue of *res judicata* (i.e., whether the same -- or substantially different -- evidence would need to be relied upon in the second case; whether the same core of operative facts would need to be relied upon in both cases; and whether the second case fit within the legitimate purview of the subject matter of the first case). See Lloyd's, Inc., 225 W.Va. at 384, 693 S.E.2d at 458 (adjudication is final and conclusive as to every matter coming within the legitimate purview of the subject matter of the

action); Dan Ryan Builders, 239 W.Va. at 560-62, 803 S.E.2d at 530-32 (assessing whether "the same evidence would support both actions or issues" or whether "the two cases require substantially different evidence to sustain them" and finding all "factually intertwined" claims must be brought in the same action); Beahm v. 7 Eleven, Inc., 223 W.Va. at 275-76, 672 S.E.2d at 604-05 (claims could have been brought in first action because "they arose out of the same core of operative facts").

For instance, in Elkadrawy v. The Vanguard Group, 584 F.3d 169 (3rd Cir. 2009), a plaintiff filed a lawsuit alleging discrimination and retaliation by his employer and the trial court dismissed the plaintiff's first lawsuit as time-barred. The plaintiff then filed a second lawsuit asserting additional discrete discriminatory acts, including acts involving supervisors not referenced in the first complaint. Id. at 173. The district court dismissed plaintiff's second lawsuit finding that the plaintiff's claims were barred by the doctrine of *res judicata*, and plaintiff appealed the dismissal to the Court of Appeals for the Third Circuit. Id. at 171. In determining whether the two lawsuits were based on the same cause of action, the Third Circuit stated that *res judicata* "does not depend on the specific legal theory invoked, but rather the essential similarity of the underlying events giving rise to the various legal claims . . . . [T]he focal points of our analysis are whether the acts complained of were the same, whether the material facts alleged in each suit were the same and whether the witnesses and documentation required to prove such allegations were the same." Id. at 173. Applying that analysis, the Third Circuit held that the plaintiff's second lawsuit was barred by *res judicata* because the two lawsuits involved "fundamentally similar issues" and it was "beyond dispute that these allegations 'could have been brought' as part of his first complaint." Id.

Similarly, in Serna v. Holder, the Court of Appeals for the Fourth Circuit focused on the "'core of operative facts,' for the plaintiff's claims, not the legal labels attached to them," when

finding that the plaintiff's second lawsuit was barred by *res judicata* because the two lawsuits were based on the same claims. 559 Fed. Appx. at 237. The Fourth Circuit defined the term "transaction" in the claim preclusion context to mean "a natural grouping or common nucleus of operative facts." Id. The Fourth Circuit noted that the two lawsuits were "similar in scope and subject matter," "[b]oth suits concerned the same type of wrongdoing: employment discrimination," and plaintiff "could have brought in her first lawsuit all the claims she alleged in her second." Id. at 238. The Fourth Circuit held that, because the plaintiff's claims existed at the time of the first lawsuit, *res judicata* "prevent[ed] the sort of dribbling of claims from earlier lawsuits to later ones that occurred here." Id. at 238-39.

Elkadrawy and Serna are not unique. Numerous courts confronting successive employment discrimination claims -- like those presented by Petitioner -- have concluded that the second suit is precluded by the judgment entered in the first case. See Ellis v. Smithkline Beecham Corp., 363 Fed. Appx. 481 (9th Cir. 2010)(*res judicata* applied because "earlier action resulted in a final judgment on the merits concerning claims arising out of the employment relationship" and plaintiff neither sought a stay to pursue administrative remedies nor sought to include alleged wrongful conduct in amended complaint); Walker v. Baltimore Aircoil Co., 820 F.2d 1220 (4th Cir. 1987)(per curiam)(*res judicata* barred plaintiff from litigating Title VII claims that could have been raised in earlier lawsuit which arose from common nucleus of operative facts); Faggiano v. Eastman Kodak Co., 378 F.Supp.2d 292 (W.D.N.Y. 2005)(dismissal of employee's harassment claim in first lawsuit acted as a bar, under *res judicata*, to relitigation of facts that took place between the filing and dismissal of the first lawsuit); Mack v. South Carolina Dept. of Transport., 2016 WL 2848369 (D.S.C. 2016)(all of plaintiff's claims related to the same employment relationship and could have been brought during the pendency of the first lawsuit and prior to entry

of judgment in first lawsuit); Howard v. Inova Health Care Serv., 302 Fed. Appx. 166, 182 (4th Cir. 2014)(per curiam)(affirming dismissal of discrimination claim and stating that "it is a rule that when a party can present all grounds in support of his cause of action, he must do so, if at all, in the proceeding on that cause of action"); Hall v. St. Mary's Seminary & Univ., 608 F.Supp.2d 679 (D. Md. 2009)(under "same evidence test," additional allegations pled in later suit are precluded if those allegations could have been presented in earlier suit); Spencer v. Thomas, 2002 WL 31375499, *3 (N.D. Ill. 2002)(employee could have challenged discharge in prior action against employer for discrimination and retaliation -- the two cases "have sufficient factual overlap that it can fairly be said that they emerge from the same core of operative facts"); Vela v. The Village of Sak Village, 2002 WL 1916835 (N.D. Ill. 2002)(second lawsuit was barred by *res judicata* because it was based on same core of operative facts and newly asserted allegations could have been raised in first action); Alonso v. CenturyLink Comm., 2015 WL 4484335 (W.D. Wash. 2015)(*res judicata* barred plaintiff from bringing claims based on conduct that occurred before dismissal of first lawsuit).

Similarly, in this case, each of the allegations that Petitioner sought to raise in Baker II related to Petitioner's same employment relationship with Chemours and occurred during the time Baker I was pending before the Circuit Court. Petitioner does not deny that she was aware of each alleged wrong that she asserted in Baker II well in advance of the discovery cutoff deadline in Baker I (and she even was aware of some of the allegations prior to entering into, and agreeing, to amend the Original Scheduling Order, at which time she never requested any extension of the date to amend the pleadings). The allegations raised by Petitioner in Baker II also related to the same alleged wrongs asserted in Baker I, *i.e.*, alleged discrimination, harassment and retaliation by co-

workers, supervisors and human resources personnel.[13] Moreover, Petitioner cannot deny that she was aware that such evidence was factually intertwined with the conduct alleged by her in Baker I -- she attempted to rely upon such evidence at the pretrial briefing stage of Baker I to avoid summary judgment and in her other pretrial filings.

In order to state a claim for discrimination under the WVHRA, and "because discrimination is essentially an element of the mind," a plaintiff is required to show some evidence which sufficiently links the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." Conaway v. East Assoc. Coal Corp., 178 W.Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986). Accordingly, to prosecute her claims in Baker II, and in order to attempt to demonstrate discriminatory intent, Petitioner necessarily had to rely on much of the same underlying evidence relating to her employment (and employment history) at Chemours and much of the same underlying evidence relating to alleged statements and alleged misconduct by co-workers, supervisors, and human resources personnel that she relied on (and raised, though improperly and untimely) in Baker I. Moreover, the same key witnesses (including the same co-workers, supervisors and human resources personnel) identified in Baker I would have been necessary in Baker II.

[13] It does not matter that Petitioner attempted to assert a claim of "Failure to Accommodate - Gender Discrimination" (in addition to her gender discrimination and retaliation claims) in her Complaint in Baker II because West Virginia courts consider "cause of action," for purposes of *res judicata*, to mean operative facts, not legal theory of recovery. Dan Ryan Builders., 239 W.Va. at 560, 803 S.E.2d at 530. Additionally, in the facts alleged by Petitioner in her Complaint in Baker II, she intertwines her "Failure to Accommodate - Gender Discrimination" allegations as being acts of reprisal for her complaints of gender discrimination and as being motivated by gender discrimination. (Appx. 187-88, 190, Complaint, ¶¶ 38 and 42 and Count I).

In summary, Petitioner should not be rewarded for sitting on evidence that she believed supported her underlying employment discrimination and retaliation claims in Baker I: she was aware of this evidence during Baker I; she was aware that this evidence was factually intertwined with her underlying claims in Baker I; and she was aware that both cases would necessarily rely on substantially the same evidence and witnesses. The two lawsuits were closely enough related that Petitioner should have foreseen the consequences of failing to raise the alleged misconduct in a proper and timely manner in the first lawsuit. The Circuit Court correctly found that the allegations that Petitioner raised in Baker II could have been resolved had she properly and timely presented then in Baker I.

C. Petitioner Completely Ignored The Circuit Court's Reliance Upon The Prohibition Against Claim Splitting As An Additional Basis For Its Decision To Dismiss Baker II And Thereby Waived Her Right to Challenge That Finding on Appeal.

In Baker II, the Circuit Court granted Respondent's Motion to Dismiss, in part, based on the prohibition against claim splitting. (Appx. 482-491, Order, p. 1). Petitioner completely ignores that portion of the Circuit Court's Order and, as mentioned above, completely ignores the West Virginia Supreme Court's ruling in Dan Ryan Builders, 239 W.Va. at 561, 803 S.E.2d at 531. This Court has found that "[i]ssues not raised on appeal or merely mentioned in passing are deemed waived." See Tiernan v. Charleston Area Medical Center, Inc., 203 W.Va. 135, 140, n. 10, 506 S.E.2d 578, 583, n. 10 (1998) (citing Syl. Pt. 6, Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981))("Assignments of error that are not argued in the brief on appeal may be deemed by this Court to be waived."). Accordingly, Petitioner has waived any argument that the Circuit Court erred in its application of the prohibition against claim splitting when dismissing Baker II.

As stated by this Court in Dan Ryan Builders: "Like *res judicata*, claim splitting 'prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action.'" Id. (emphasis added). Under the prohibition against claim splitting, all claims that Petitioner sought to pursue in Baker II could have, and should have, been presented in Baker I.[14] The prohibition against claim splitting prevented Petitioner from pursuing her interrelated employment discrimination and retaliation claims in a piecemeal fashion, and the Wood County Circuit Court properly dismissed Baker II under the prohibition against claim splitting.

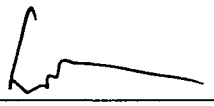
V. CONCLUSION

As demonstrated above, the Circuit Court did not err in its application of the doctrine of *res judicata* and the prohibition against claim splitting, and it properly dismissed Petitioner's Complaint in Baker II. Accordingly, the Circuit Court's Order dismissing Baker II should be affirmed by this Court.

[14] This Court stated in Dan Ryan Builders, the requirement against claim splitting "[e]specially [applies] in cases where the party voluntary drops a claim in a first action, and then later seeks to maintain a separate second action on the abandoned claim . . . ." Id. In this case, it is clear that Petitioner abandoned her hostile environment - gender discrimination claim when she filed her Amended Complaint in Baker I. Petitioner clearly had notice of the facts supporting her hostile environment gender discrimination claim at the time she filed her initial Complaint in Baker I (and certainly before summary judgment was entered dismissing Baker I). Yet, for some unknown reason, Petitioner chose to abandon the claim in Baker I and never tried to further amend her Amended Complaint as any further facts may have developed during Baker I. Because Petitioner voluntarily abandoned her hostile environment gender discrimination claim in Baker I, the Circuit Court did not err in finding that the doctrine of claiming splitting barred Petitioner from maintaining a separate, second suit in Baker II on this abandoned claim.

THE CHEMOURS COMPANY FC, LLC,
SHAWN BUSCH AND KEVIN CRISLIP

By: Spilman Thomas & Battle, PLLC



Eric W. Iskra (WV Bar # 6611)
Samuel M. Brock, III (WV Bar # 9216)
Ellen J. Vance (WV Bar # 8866)
300 Kanawha Boulevard, East (ZIP 25301)
P.O. Box 273
Charleston, West Virginia 25321-0273
(304) 340-3800
(304) 340-3801 (fax)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0906

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.

CERTIFICATE OF SERVICE

I, Eric W. Iskra, do hereby certify that on this 20th day of February, 2020, I served the foregoing "**Respondents' Brief**" upon the following counsel of record by e-mail and by depositing the same in the United States mail, postage prepaid, addressed as follows:

Walt Auvil, Esquire
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
Counsel for Petitioner

Eric W. Iskra (WV Bar # 6611)