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Docket No. 20-0311

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

SCANNED

ASAD DAVARI,

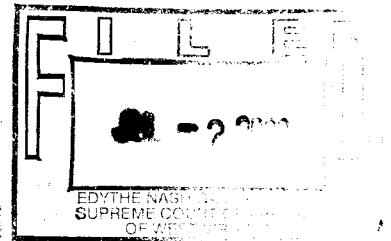
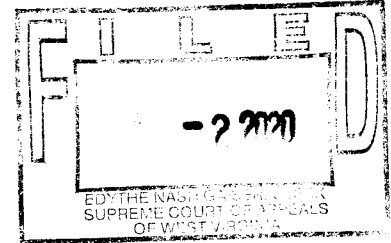
Plaintiff Below, Petitioner

v.

**THE WEST VIRGINIA UNIVERSITY BOARD
OF GOVERNORS,**

Defendant Below, Respondent

**(Appeal from an Order in Kanawha County Civil Action No.: 14-C-263,
consolidated with Kanawha County Civil Action No.: 15-C-838)**



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

Based on the assignment of error identified below, the Circuit Court's entry of summary judgment in favor of the Respondent should be reversed, and this action should be remanded to the Circuit Court for a jury trial on the merits.

- I. The Circuit Court erred when granting summary judgement in favor of the Respondent on the issue of sovereign immunity because inconsistent provisions in the Respondent's insurance policy created the potential for coverage.
- II. The Circuit Court erred when granting summary judgement in favor of the Respondent on the issue of sovereign immunity because of the application of the West Virginia Wage Payment and Collection Act.
- III. The Circuit Court erred when granting summary judgement in favor of the Respondent because a jury could find from the evidence of record that a binding contract existed between the parties pertaining to the Petitioner's extra work as the Director of the Center for Research in on Advanced Control of Autonomous Systems and Manufacturing at the West Virginia University Institute of Technology.
- IV. The Circuit Court erred when granting summary judgement in favor of the Respondent because it ignored evidence of record establishing the amount of the Petitioner's supplemental salary.
- V. The Circuit Court erred when granting summary judgement in favor of the Respondent because the evidence does not establish as a matter of law the Petitioner has been compensated for his extra work as the Director of the Center; nor does the evidence establish as a matter of law that he has waived his right to a supplemental salary for that work .
- VI. The Circuit Court erred when granting summary judgement in favor of the Respondent because the doctrine of laches does not bar the Petitioner's alternative claims based on quantum meruit and unjust enrichment.
- VII. Even if the doctrine of laches applies, the Circuit Court erred when granting summary judgement in favor of the Respondent because the question of whether laches bars the Petitioner's alternative claims is a factual question that on a jury can decide.
- VIII. The Circuit Court erred when granting summary judgement in favor of the Respondent when the Court made multiple improper and erroneous Findings of Fact and Conclusions of law.

STATEMENT OF THE CASE

I. Preliminary Statement

Petitioner Asad Davari, Ph.D., joined the faculty of West Virginia Institute of Technology in 1985. (App. 18).¹ Since that time to the present, Dr. Davari has performed teaching and other duties as a professor in the Leonard C. Nelson College of Engineering at WVU Tech. (App. 263).

On January 5, 2004, WVU Tech offered the Petitioner an appointment as the Founding Director of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing at WVU Tech's College of Engineering (hereinafter sometimes referred to as the ("Center")). (App. 263). Dr. Davari accepted the appointment as Director of the Center. (App. 264).

As Director of the Center, Dr. Davari was to be paid a supplemental salary of \$24,000.00 per year. (App. 265-268). This supplemental salary was in addition to the Plaintiff's summer salary and other incentive payments. (App. 263). The supplemental salary for serving as Director for the Center was to be paid over the regular nine month academic year. (App. 263).

From 2004 through 2014, the Petitioner generated a total of \$5,495,539.58 from various projects that have been awarded to WVU Tech. The school was awarded these projects as a direct result of the work performed by the Plaintiff in his capacity as Director of the Center. (App. 362). WVU Tech has never paid Dr. Davari his supplemental salary of \$2,000.00 per month for his extra work as the Director of the Center. (App. 363).

II. Facts

A. **The Petitioner is appointed as the Director of the newly created Center for Research on Advanced Control of Autonomous Systems and Manufacturing.**

¹ On July 1, 2007, West Virginia Institute of Technology became a division of West Virginia University. Hereinafter, the West Virginia Institute of Technology will be referred to as "WVU Tech." Even though this case involves the Petitioner's work for WVU Tech, the proper Respondent is the West Virginia University Board of Governors ("WVU BOG").

On December 2, 2003, the Cabinet of WVU Tech conducted its regular monthly meeting. During that meeting, the creation of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing was discussed and approved. Minutes from that meeting established the salient facts identified below. (App. 265-268):

1. The Center for Research on Advanced Control of Autonomous Systems and Manufacturing will be established within the Leonard C. Nelson College of Engineering.
2. The primary mission of the center is to focus on research and development of a new generation of control systems and to contribute substantially to the research and development to WVU Tech as well as the State of West Virginia. (App. 265);
3. The Control Systems Center will be a research unit within the College of Engineering and it will be mostly self-supporting with its own annual budget derived from contracts, private funds, foundation funds, external grants, research grants and contracts from federal and state agencies research grants and contracts from industries, etc.
4. The Director will be paid a supplemental salary based on effort. (App. 267);
5. Dr. Davari will serve as the Director. (App. 267);
6. He is the only person who has the knowledge and experience and a track record on externally funded research in the area of control systems. (App. 267);
7. The supplemental salary will be in addition to the summer salary received from other external funding sources and the salary may be received during the summer or distributed over the entire year. (App. 267);
8. All Control Systems Center research grants and contracts will be processed through Tech's Research and Development Corporation. (App. 267);
9. LCNCE grant proposals which are not related to the Control Systems Center will be processed according to institutional policies. (App. 267);

10. Annual Budget for the Center Budget Categories
Salaries and Wages Director is \$24,000.00 (App. 268).

In 2004, M. Sathyamoorthy, Ph.D., was the Dean of the Leonard C. Nelson School of Engineering at WVU Tech. (App. 263). By letter dated January 5, 2004, Dr. Sathyamoorthy relayed the appointment as Director of the Center to Dr. Davari. (*Id.*). In that letter, Dr. Sathyamoorthy advised Dr. Davari about the extra compensation that he would receive for his work as the Director, reiterating the terms of payment specified in the minutes of the December, 2003, Cabinet meeting. (App. 265-267).

Dr. Sathyamoorthy wrote to Dr. Davari:

For your information, I have attached a copy of the Center proposal and the associated business plan approved by the WVU Tech's Cabinet on December 2, 2003. (App. 263).

As the Director, you will be paid a supplemental salary based on research effort fully derived from external sources by the Center. The supplemental salary will be in addition to the summer salary and others received from external funding sources. The supplemental salary will be paid over the nine month academic period. (App. 263).

B. Dr. Davari's work as the Director of the Center results in WVU Tech receiving over almost \$5,500,000.00 in funds from external sources.

Dr. Davari accepted the appointment as Director of the Center. (App. 264). Dr. Davari's work as Director of the Center ultimately brought to WVU Tech \$5,495,539.58 from external funding sources. (App. 379). Dr. Davari completed work on the last project for the Center in 2015 (App. 295). The individual projects, project dates, and respective amounts of revenue from each project generated are identified below:

<u>SOURCE & DATE</u>	<u>AMOUNT</u>
1. DOE/EPSCoR. "On-Line Modeling and Control of Circulating Fluidized Bed" (2004-2007)	\$360,000.00

2.	DOD/ONR "Cooperative Control of SWARM UAVs" (2004-2005)	\$753,000.00
3.	DOD/NAVAIR "Intelligent Control System for SWARM UAVs" (2005-2006)	\$616,027.12
4.	DOD/NAVAIR "Intelligent Control System for SWARM UAVs" (2006-2007)	\$ 440,512.46
5.	Alion Sciences and Technology "Intelligent Control System for SWARM Systems Evaluation" (2005-2006)	\$116,000.00
6.	"Development of Advanced Control Laws for UAVs" NASA, WV Space Grant Consortium, in collaboration with MAE Dept. of WVU (2005-2006)	\$40,000.00
7.	DOD/NAVAIR "Sensor Optimization-Basic Research" (2007-2008)	\$300,000.00
8.	DOD/NAVAIR "Sensor Optimization-Basic Research" (2008-2009)	\$240,000.00
9.	DOD/NAVAIR "Sensor Optimization-Basic Research (2009-2010)	\$120,000.00
10.	DOD/NAVAIR "Sensor Optimization-Basic Research" (2009-2010)	\$110,000.00
11	DOD/ARL "Direct Carbon Fuel Cell for DOD <u>Application (2010-2014)</u>	<u>\$2,400,000.00</u>
TOTAL:		\$5,495,539.58

(App. 369-362). However, WVU Tech has never paid Dr. Davari the supplemental salary that he earned while working as the Director of the Center. (App. 363).

C. Dr. Davari asked about WVU Tech's failure to pay his supplemental salary on multiple occasions.

After accepting the appointment as Director of the Center from Dr. Sathyamoorthy, Dr. Davari first inquired about the payment of his supplemental salary to Dr. Sathyamoorthy and Dr. Janeksela by e-mail on November 2, 2004. (App. 364-365).

On May 19, 2006, Dr. Davari wrote to Dr. Sathyamoorthy again asking about the supplemental salary. (App. 366-367). On June 5, 2006, Dr. Davari wrote to Dr. Sathyamoorthy again to confirm that he would be entitled to a supplemental salary for his work as Director of the Center. (App. 368).

Dr. Davari made another series of complaints about payment of his supplemental salary to Carolyn Long, President of WVU Tech, beginning in the Spring of 2012. (App. 369). In an e-mail to Ms. Long, on October 29, 2012, once again inquired about payment of the supplemental salary. (App. 370). In that e-mail, Dr. Davari wrote:

However, I have not received any of the approved supplement salary so far. Now that you are addressing the distribution of overhead funding, I am requesting that you address the too long overdue supplemental salary well.

(App. 370).

On January 23, 2013, Dr. Davari sent an e-mail to Carolyn Long asking about any progress and the status of WVU's investigation. (App. 371). Dr. Davari sent a similar e-mail to Ms. Long on February 12, 2013. (App. 371). Ms. Long sent an e-mail in reply on February 20, 2013, stating "I've heard nothing from Morgantown. I will ask tomorrow while I am in Stewart Hall." (App. 371).

Dr. Davari sent additional e-mails to Carolyn Long on February 20, 2013 and February 27, 2013, and March 3, 2013 asking about the status of his supplemental pay. (App. 371). On March 6, 2013, Carolyn Long sent an e-mail to Dr. Davari explaining that the supplemental salary should come from external grants, and requested that he send documentation on all grants awarded through the Center since 2004. (App. 372).

Dr. Davari sent Ms. Long the requested information on March 8, 2013. (App. 372-376). He followed up with an e-mail to Ms. Long on March 15, 2013, asking about the progress on the issue. (App. 373-376).

Dr. Davari requested a status report from Carolyn Long by e-mail on the following additional dates:

March 26, 2013, (App. 376);

April 8, 2013, (App. 376);

April 22, 2013, (App. 375);

May 9, 2013, (App. 375);

May 14, 2013, (App. 374);

May 16, 2013, (App. 374);

May 24, 2013, (App. 374);

May 26, 2013, (App. 373);

June 11, 2013, (App. 373); and,

June 13, 2013 (App. 373).

Dr. Davari received e-mail messages from Carolyn Long about his supplemental salary inquiries at various times from March 6, 2013, through July 8, 2013. None of Ms. Long's messages contained a substantive response. (App. 371 -377). On July 6, 2013, Ms. Long wrote that Dr. Davari would "need to contact Ms. Minn as to the status of this inquiry." (App. 377).

As directed by Ms. Long, on July 8, 2013, Dr. Davari sent an e-mail to April Min, Esq., of WVU, asking about his supplemental salary. (App. 377). On December 17, 2013, Dr. Davari was advised in a letter from Carolyn Long that he would not be paid a supplemental salary for his service as Director of the Center. (App. 380). After receiving Dr. Davari's e-mail message of October 29, 2012, WVU's investigation concerning the payment of his supplemental salary lasted over one year. (App. 380).

Upon receipt of the December 17, 2013 letter denying payment of the supplemental salary,

Dr. Davari sent an e-mail message to Dr. Sathyamoorthy on December 23, 2013. (App. 381). Dr. Sathyamoorthy had appointed Dr. Davari as Founding Director of the Center on January 5, 2004, In the e-mail message to Dr. Sathyamoorthy, Dr. Davari advised Dr. Sathyamoorthy about the external funding he had acquired for the Center and the lack of payment of his supplemental salary. and the fact that overhead money had not been distributed. (App. 381).

Dr. Davari attached to the e-mail message the initial appointment letter from Dr. Sathyamoorthy to Dr. Davari dated January 5, 2004, and asked him to clarify the intention of the 2004 agreement, that 1) the amount of the supplemental salary to be paid Dr. Davari as Director was \$24,000 per year and 2) that the salary was to come from the generated overhead money. Dr. Sathyamoorthy responded on December 25, 2013, stating, “I am pleased to say YES to both of your questions. That was my intention when I appointed you as the Director.” (App. 381).

III. Procedural History

Petitioner Asad Davari, Ph.D., filed a *Complaint* against the Defendant on February 3, 2014, alleging claims of breach of contract, quantum meruit, and unjust enrichment. Dr. Davari filed a second *Complaint* against the Defendant alleging unlawful discrimination on May 5, 2014. On October 28, 2014, Dr. Davari filed his *First Amended Complaint* in the contract based action. The two separate actions were consolidated on April 7, 2015.²

On September 30, 2019, the Defendant filed a Motion for Summary Judgment. (App. 35-241). Dr. Davari filed his response to WVU Tech’s motion on October 11, 2019. (App. 242-382). The Circuit Court held a hearing on the Defendant’s motion for summary judgment on October 15, 2019. Pursuant to the Court’s directive, both parties submitted proposed findings of fact and

² In the Petitioner’s *Response to the Defendant’s Motion for Summary*, Dr. Davari indicated that he was no longer pursuing the claim of unlawful discrimination. Consequently, in the Circuit Court’s order granting summary judgment for the Defendant, the Court deemed “all claims brought in Civil Action No. 14-C-838 to be dismissed.” Therefore, this appeal involves only the breach of contract claim, and the other related claims, asserted in Civil Action No. 14-C-263.

conclusions of law. (App. 394-418). The Defendant titled its submission of proposed findings and conclusions “*Order Granting Defendant’s Motion for Summary Judgment.*” (App. 402-418).

On February 11, 2020, the Circuit conducted a Pre-Trial Conference. During that conferee, the Circuit Court once again heard arguments on the Defendant’s motion for summary judgment. (App. 419-463). On February 28, 2020, the trial judge signed the Defendant’s proposed *Order Granting Defendant’s Motion for Summary Judgment.*” (App. 402-418). The order was entered on March 2, 2020. (App. 1-16).

On March 30, 2020, the Petitioner filed a “*Notice of Appeal.*” Dr. Davari now files this “*Brief of Petitioner,*” in which he seeks a reversal or the Circuit Court’s entry of summary judgment against him.

SUMMARY OF ARGUMENT

The Circuit Court committed reversible error when it granted summary judgment in favor of Respondent West Virginia University Board of Governors (“WVU BOG”). The trial court erred when it found material facts concerning genuine issues that only a jury can decide.

The Circuit Court granted the Respondent summary judgement, in part, based on a provision in its insurance policy that purports to exclude coverage for damages attributable to wages, salaries, and benefits. Because another provision in the policy provides coverage for incidental contracts, this ambiguity creates a potential for coverage. The Respondent is not protected from liability by the doctrine of sovereign immunity due to this potential for insurance coverage. Sovereign immunity also does not apply in this case because WVU BOG is subject to the West Virginia Wage Payment and Collection Act.

A contract that entitled the Petitioner to a supplemental salary for his extra work as Director of the Center at WVU Tech existed between the parties. The Respondent’s failure to pay Dr.

Davari his supplemental salary as promised constitutes a breach of that contract for which the WVLU BOG is liable. The Circuit Court committed reversible error when it found, as a matter of law, that no contract existed.

The Petitioner has not been paid for his work as the Director of the Center; nor has he waived his right to receive a supplemental salary for that work by signing yearly notices of appointment. Those notices pertained only to Dr. Davari's normal teaching duties at WVU Tech. The annual notices did not apply to Dr. Davari's extra work as the Director of the Center.

The doctrine of laches does not bar as a matter of law Dr. Davari's claims alternatively based on quantum meruit and unjust enrichment. The Respondent has failed to meet its burden of showing prejudice as a result of any alleged delay. The question of whether laches bar these alternative claims is a question of fact for a jury to decide.

Summary judgment in favor of the Respondent should also be reversed because the trial court improperly invaded the province of the jury by making multiple findings of fact. Findings of Fact Numbers 12 and 16 are improper and erroneous because those facts are disputed.

The Circuit Court also committed reversible error when it made conclusions of law adverse to the Petitioner. Conclusions of Law Numbers 1 through 30 are improper and erroneous because those conclusions are based on disputed facts that only a jury can decide.

The trial court's erroneous summary judgment in favor of the Respondent should be reversed, and this action should be remanded to the Circuit Court for a jury trial on the merits.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Due to the nature and number of the issues in this case, the Petitioner respectfully submits that oral argument is necessary, and that oral argument will significantly aid the decisional process. Therefore, *West Virginia Rule of Appellate Procedure* 18(a) does not apply.

Pursuant to *West Virginia Rule of Appellate Procedure 20(a)*, the Petitioner respectfully submits that this case presents issues that are proper for consideration by oral argument. This case involves the contractual obligation of one of this State's universities to one of the university's professors. Dr. Davari's work as the Director of the Center was extra work, which was in addition to his normal teaching duties. Dr. Davari's extracurricular work as the Director of the Center earned the university over five million dollars from external funding sources. For this significant monetary contribution to the school and the State, the Petitioner was promised a supplemental salary of \$2,000.00 per month for this extracurricular work.

The Respondent's failure to pay the Petitioner his supplemental salary as promised obviates the incentive to university professors in this State to assume the responsibility of extracurricular work that benefits the university, its employees, and the sectors of society positively affected by the extra work. Therefore, this case involves issues of fundamental public importance that are proper for consideration by oral argument.

Pursuant to *West Virginia Rule of Appellate Procedure 20(e)*, oral argument should be scheduled for at least twenty minutes per side. This amount of time is needed due to the nature and number of contested issues in this case.

ARGUMENT

I. Standard of Review

A summary judgment proceeding is not a substitute for a trial of an issue of fact. *West Virginia Rule of Civil Procedure 56(c)*; *George v. Blosser*, 157 W. Va. 811, 204 S. E. 2d 567 (1974). A motion for summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be tried, and inquiry concerning the facts of the case is not desirable to clarify the application of law. *Painter v. Peavy*, 192 W. Va. 189, 451 S. E. 2d 755

(1994). The circuit court's function at the summary judgment phase is not to weigh the evidence and determine the truth of the matter, but to determine whether there are any genuine issues for trial. *Painter*.

When deciding a motion for summary judgment, the court must draw all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). Credibility determinations, weighing the evidence, and drawing legitimate inferences from facts are functions for the jury, and not the judge. *Id.*

To justify an award of summary judgment, the movant must demonstrate a lack of evidence to support the non-movant's case, and that the evidence is so one-sided that the movant must prevail as a matter of law. *Poling v. Pre-Paid Legal Servs.*, 212 W. Va. 589, 575 S. E. 2d 199 (2002). Summary judgment should be denied "even when there is no dispute as to the evidentiary facts in the case but only as to the conclusion to be drawn therefrom. *Id.*; *Pierce v. Ford Motor Co.*, 190 F. 2d 910, 915 (4th Cir.) *cert. denied*, 342 U.S. 887, 96 L. Ed. 666, 72 S. Ct.178 (1951). On appeal, "a circuit's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter*.

II. The Respondent is Not Entitled to Sovereign Immunity.

- A. Inconsistent Provisions of the Respondent's insurance policy creates a contractual ambiguity that obviates the defense of sovereign immunity.

An exception to the defense of sovereign immunity applies in cases where a plaintiff merely seeks recovery under the State's liability insurance coverage. *Eggleston v. West Virginia Department of Highways*, 189 W. Va. 230, 429 S. E. 2d 636 (1993). Suits that seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State. *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S. E. 2d 675 (1983).

Because an insurance policy is prepared exclusively by the insurer, any ambiguity in a policy is to be construed liberally in favor of the insured. *State Bancorp, Inc. v. United States Fide. & Guar. Ins. Co.*, 199 W. Va. 99, 483 S. E. 2d 228 (1997). A case against a state agency should proceed to trial if the state's liability insurance policy **potentially provides coverage**. *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S. E. 2d 814 (1991) (Emphasis added).

In *Arnold*, an advertising agency sued the West Virginia Lottery Commission for fraud and breach of contract based on the Commission's failure to award to the plaintiff an advertising and public relations contract. The Commission moved for summary judgment, contending that, as an agency of the State, it was immune from suit because the State's insurance policy did not provide coverage for Arnold's claims. *Arnold*.

The exclusions portion of the Commercial General Liability ("CGL") section of the State's policy stated that such coverage does not apply "to liability assumed by the Insured under any contract or agreement except an Incidental Contract" An endorsement to the CGL section defined an "Incidental Contract" as "any written contract or agreement relating to the conduct of the Named Insured's business." *Arnold*.

The trial court found that the State's insurance policy did not provide coverage for the plaintiff's claims, and granted the Commission's motion for summary judgment. On appeal, the *Arnold* court found that the agency's claim of fraud was potentially covered by the CGL policy. Because of the potential for coverage, the trial court committed reversible error when it granted summary judgment in favor of the Lottery Commission. *Arnold*.

In *Arnold*, the trial court correctly found that the advertising contract at issue was an "incidental contract" as defined by the State's policy. The same policy provision exists in this

case. The Respondents' policy provides coverage for incidental contracts. Just as in *Arnold*, WVU's policy defines "incidental contract" as "any written contract or agreement relating to the conduct of the Named Insured's business." In this case, the research conducted by Dr. Davari for the Center at WVU Tech was related to the conduct of the insured university's business.

In *Arnold*, one provision provided coverage for incidental contracts while another provision in the policy excluded coverage for fraud under certain circumstances. The fraud exclusion did not take precedence over the provision providing coverage for incidental contracts.

Just as in *Arnold*, the WVUBOG's policy contains language that provides coverage for incidental contracts. Because the contract regarding the Center is an incidental contract as defined in the Respondent's policy, the potential for coverage exists. This potential for insurance coverage defeats the Respondent's claim for sovereign immunity. *Arnold*; *State Bancorp.*

- B. The West Virginia University Board of Governors is not protected by sovereign immunity because the board is subject to the West Virginia Wage Payment and Collection Act.

The West Virginia Wage Payment and Collection Act provides that any person whose wages have not been paid may bring any legal action necessary to collect a claim. *W. Va. Code* § 21-5-12(a). "[T]he sovereign immunity doctrine is not implicated in the context of employee relations where the State, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary. *Gribben v. Kirk*, 195 W.Va. 488, 495, 466 S. E. 2d 147, 154 (1995); *American Federation of State, County and Municipal Employees v. CSC of W. Va.*, 176 W. Va. 73, 79, 341 S.E.2d 693, 699 (1985). The State's sovereign immunity does not bar the claim of a State employee for unpaid wages asserted under the West Virginia Wage Payment and Collection Act. *W.Va. Code* § 21-5-1 (1987), *et seq.* *Beichler v. W. Va. Univ.at Parkersburg*, 226 W. Va. 321, 325-326, 700 S. E. 2d 532, 536-537 (2010).

In *Beichler*, the plaintiff taught physics for West Virginia University at its campus in Parkersburg. During Mr. Beichler's employment with the University, he entered into discretionary contracts with the University for the provision of teaching services beyond his regular teaching duties. These contracts were known as Faculty Overload Contracts that provided a means for professors at the University to earn additional compensation. *Beichler*.

Mr. Beichler was denied payment, and his employment was terminated due to declining enrollment in physics classes at the University. However, Mr. Beichler was never paid for his additional teaching services under the Faculty Overload Contracts. Consequently, he filed an action in circuit court under the seeking payment of his additional salary pursuant to the Wage Payment and Collection. The trial court dismissed Mr. Beichler's complaint based, in part, on the contention that the action was barred by the sovereign immunity provisions of *W. Va. Const.* art. VI, § 35. *Beichler*.

On appeal, this Supreme Court of Appeals noted that Mr. Beichler's claim was based on the fact that he had not been fully compensated for his teaching services. His action involved "accounting issues concerning unpaid wages," which was a matter squarely within the scope and reach of the Wage Payment and Collection Act." *Beichler*. The Act is "is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld." *Mullins v. Venable*, 171 W.Va. 92, 94, 297 S.E.2d at 866, 869 (1982); *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000). Accordingly, a person whose wages have not been paid in accord with the West Virginia Wage Payment and Collection Act may initiate a claim for the unpaid wages either through the administrative remedies provided under the Act, or by filing a complaint for the unpaid wages directly in circuit court. *Beichler*.

The West Virginia Legislature did not intend to bind private employers to certain wage

payment and collection guidelines designed to protect workers, yet exclude State and political subdivision from such protections. The Legislature intended its statutory wage payment and collection guidelines to apply to both governmental and nongovernmental employers alike. *Ingram*, 208 W. Va. at 356, 540 S. E. 2d at 573. The State's sovereign immunity does not bar the claim of a State employee for unpaid wages asserted under the West Virginia Wage Payment and Collection Act. *Beichler*.

In this case, like Mr. Beichler, Dr. Davari entered into a Faculty Overload Contract with WVU. Dr. Davari has also asserted a claim for unpaid salary pursuant to the West Virginia Wage Payment and Collection Act. Like Mr. Beicher's case, Dr. Davari's action involves "accounting issues concerning unpaid wages," which is a matter squarely within the scope and reach of the Wage Payment and Collection Act. Therefore, the doctrine of sovereign immunity does not bar Dr. Davari's claim for payment of his additional salary as the Director of the Center. *Beichler*; *Ingram*; *Gribben*.

III. The Respondent is Not Entitled to Judgment as a Matter of Law on the Plaintiff's Contract Claim Because the Evidence of Record Could Lead a Jury to Find the Existence of a Valid Contract, Which the Defendant Breached.

The elements of a contract are an offer, and an acceptance of that offer that is supported by consideration. *Kirby v. Lion Enters.*, 233 W. Va. 159, 736 S. E. 2d 493 (2014); *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 153 S. E. 2d 172 (1967). Generally, the existence of a contract is a question of fact for the jury. *Poling*; Syl. pt. 4, *Cook v. Heck's, Inc.*, 176 W. Va. 368, 342 S. E. 2d 453 (1986). Summary judgment is not appropriate when there is a genuine issue of fact concerning whether there is a contract between the parties. *Geibel v. Clark*, 185 W. Va. 505, 408 S. E. 2d 84 (1991). **When the evidence is in conflict concerning whether**

there is a valid contract, the issue should be decided by a jury, and not the trial court. *Hines v. Hoover*, 156 W. Va. 242, 192 S. E. 2d 485 (1972) (Emphasis added).

When one makes an unequivocal statement in writing that he or she will pay another a certain sum of money, and the latter, in reliance upon that statement, performs to his or her detriment as expected from the circumstances surrounding the parties, a contractual relationship is consummated. *First Nat'l Bank*. This contractual relationship arises from an offer and an acceptance, which are supported by consideration. *Id.*

In *First Nat'l Bank*, J. L McCorry sought a loan from the First National Bank of Gallipolis ("Bank"). Defendant Marietta Manufacturing Company ("Marietta") was indebted to Mr. McCorry for various supplies and equipment. As collateral for the loan, Marietta sent the Bank a letter stating that, pursuant to the wishes of Mr. McCorry, Marietta would pay its debt owed to Mr. McCorry by checks made payable jointly to the Bank and Mr. McCorry. *First Nat'l Bank*.

After the Bank made the loan, Marietta issued only one joint check in partial payment of the loan. The remaining amount that Marietta owed to Mr. McCorry was paid only to him. The Bank sued Marietta for the balance of the loan. *First Nat'l Bank*.

In the subsequent litigation, Marietta substantially admitted to the allegations in the Bank's amended complaint. However, Marietta denied that the letter from Marietta to the Bank created a legally binding contract. Marietta contended that there was no acceptance of its offer in the letter to pay the amount owed Mr. McCorry to the Bank because Marietta was not notified that the loan was made. After a trial, the Circuit Court struck the testimony of the Bank's witnesses and entered judgment in favor of Marietta. *First Nat'l Bank*.

On appeal, this Court held that, in Marietta's letter to the Bank, Marietta unequivocally committed itself to pay the Bank the amount owed to McCorry. Testimony at trial from Bank

employees proved the existence of the letter. Testimony from Bank employees also proved that the Bank made the loan to Mr. McCorry solely in reliance on Marietta's letter to the Bank. *First Nat'l Bank*.

The *First Nat'l Bank* Court said that, in determining the legal effect of the letter, "we must examine not only the letter . . . , but all of the circumstances surrounding this case as revealed by record." In the letter at issue, Marietta informed the Bank that it was indebted to Mr. McCorry. Marietta then stated that it would pay to the Bank and Mr. McCorry the amount of Marietta's indebtedness to McCorry. Based on the undisputed evidence, Mr. McCorry then delivered the letter to the Bank, which then issued the loan to McCorry in reliance on the letter. *First Nat'l Bank*.

Based on these facts, this Court held that "[w]hen the Bank, relying solely upon the unequivocal commitment of Marietta, made the loan to Mr. McCorry, a contractual relationship between those two parties was effected." Marietta's promise to pay was an offer, and the Bank's action in granting the loan to Mr. McCorry was an acceptance. An acceptance may be effected by silence accompanied by an act of the offeree that constitutes a performance of the action requested by the offeror. The Court found Marietta's contention that there was no acceptance by the Bank because Marietta was not notified that the loan was made "wholly untenable." 151 W. Va. at 641, 154 S. E. 2d at 176.

The Court also rejected Marietta's contention that there was no consideration for the parties' contract. Marietta promised to pay the Bank a certain amount if the Bank would make the requested loan. This risk assumed by the Bank was sufficient consideration for the contract. However, as a result of Marietta's gaining an extension of six months in the payment of the amount owed to McCorry, there was a "flow consideration in both directions." *First Nat'l Bank*.

The conduct of the parties created a contract, which Marietta breached when it failed to pay the full amount of the loan. This Court reversed the trial court's judgment in favor of Marietta, and after remand, directed the trial court to enter summary judgment in favor of the Plaintiff Bank. *First Nat'l Bank*.

In this case, on January 5, 2004, on behalf of WVU Tech, Dr. Sathyamoorthy, Dean of the School of Engineering, gave the letter to Dr. Davari appointing him as Director of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing at the school. The supplemental salary that was promised to Dr. Davari was based on his "research effort fully derived from external sources." Just like the letter from Marietta Manufacturing to the First National Bank of Gallipolis, the appointment letter from Dr. Sathyamoorthy to Dr. Davari constituted an offer.

In *First Nat'l Bank*, the Bank accepted Marietta's offer to pay the debt owed to McCorry to the Bank by taking the action of loaning money to McCorry. Likewise in this case, Dr. Davari accepted the offer made in the appointment letter from WVU Tech by taking action and working as the Director of the Center for eleven years.

In *First Nat'l Bank*, Marietta contended that the Bank had not accepted its offer because Marietta did not know about the issuance of the loan. This Court found this contention untenable. After all, after the Bank made the loan to Mr. McCorry, Marietta made a joint payment to McCorry and the Bank.

In this case, WVU BOG's position that no action was taken concerning the Center after the Cabinet's November, 2003 meeting is equally untenable. The evidence is undisputed that the Cabinet met again on December 2, 2003, and approved the business plan for the Center, in the plan's entirety. The Cabinet's approval of the Center's plan included a salary for the Director totaling \$24,000.00 per year. (App. 265-268).

Based on the same minutes from the December, 2003, Cabinet meeting, the Respondent's contention that the amount of the Directors' salary was never established is also without merit. The amount of the Director's supplemental salary was specified on page 4 of the minutes of the December 2, 2003, Cabinet meeting, during which the Director's pay was approved. (App. 265-268).

It also cannot be argued that the contract between the parties is not supported by valid consideration. Consideration is "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment loss, or responsibility given, suffered, or undertaken by another." *First Nat'l Bank*; 17 Am. Jur. 2d *Contracts*, Section 85. A benefit to the promisor or a detriment to the promise is sufficient consideration for a contract. *First Nat'l Bank*; 17 Am. Jur. 2d, *Contracts*, Section 96.

Just as in *First Nat'l Bank*, in this case, consideration in support of the contract between the parties flows both ways. Dr. Davari assumed extra work for the Center in exchange for an additional, supplemental salary. In consideration for promising to pay Dr. Davari a supplemental salary of \$24,000.00 per year, the Respondent received over \$5,000,000.00 in funds from external sources it would not have otherwise received. As noted in the December, 2003, Cabinet meeting, Dr. Davari was the "only person who has the knowledge, experience and a track record on externally funded research in the area of control systems." (App. 265-268).

The undisputed evidence in this case establishes the elements of a binding contract, which are an offer, an acceptance of that offer, and consideration. If, as in *First Nat'l Bank*, such undisputed evidence is sufficient to support summary judgment in favor of the offeror Bank, than similar undisputed evidence in this case should, at least, be deemed sufficient to defeat the offeror Defendant's motion for summary judgment.

IV. The Trial Court Erroneously Ignored the Evidence Establishing the Amount of the Director's Supplemental Salary.

Summary judgment is appropriate if, from **the totality of the evidence** presented, the record could not lead a rational trier of fact to find for the nonmoving party. Syl. Pt., 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). (Emphasis added). This Court, when reviewing the lower court's summary judgment order, must view all evidence in light most favorable to nonmoving party. *Estate of Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S. E. 2d 246 (2007).

In this case, the Circuit Court did not render a decision from the "totality of the evidence." On page 11 of the Circuit Court's summary judgment order, the Court wrote that "[t]here is no evidence on the record tending to indicate that there was a "meeting of the minds between WVUIT and Plaintiff with regard to the amount of the salary, if any."

This statement is blatantly incorrect. The minutes of WVU Tech's Cabinet meeting of December 2, 2003, indisputably show that all aspects of the business plan for the Center were considered and approved. (App. 265-268). Hand written notations of "OK . . . approved by Cabinet 12/2/03" appear on all 4 pages of the minutes. Page 4 of the minutes, approved like all of the other pages, includes a section entitled "Administration and Oversight." Within that section, in the sub-section entitled "Annual Budget for the Center," a salary of \$24,000.00 for the "Director" is indicated.

The Director's annual salary amount was relayed to Dr. Davari by Dr. Sathyamoorthy's appointment letter dated January 5, 2004. Dr. Sathyamoorthy attached to the appointment letter a **"copy of the Center proposal and the associated business plan approved by the WVU Tech's Cabinet on December 2, 2003."** (App. 263 and 265-268). (Emphasis added). This undisputed evidence in the record establishes the existence of a contract, and at a minimum, the existence of

a genuine issue of material fact concerning the existence of a contract. *First Nat'l Bank*. The trial court's failure to consider this evidence constitutes a failure in the duty to consider all the evidence of record, and justifies reversal. *Williams*.

V. Dr. Davari Has Not Been Compensated for His Work as the Director of the Center; Nor Has He Waived His Right to Supplemental Pay for this Work.

As required by WVU Tech, Dr. Davari has signed notices of appointment for each year he has taught at WVU Tech. The Respondent contends that the salary amount contained in these notices include payment for his work as Director of the Center. However, the yearly notices make no reference to a supplemental salary of \$2,000.00 per month; nor do the notices include the job title of "Director" of the Center. The job titles in the notices identify Dr. Davari's position only as "Professor/Electrical and Computer Engineering at WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY." Also, the notices fail to include the job title of "Director" of the Center. The job titles in the notices identify Dr. Davari's position only as "Professor/Electrical and Computer Engineering at WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY."

There is no dispute concerning the raw information contained in the annual notices of appointment. However, WVU BOG contends that these documents apply to all of his work for WVU Tech, while the Petitioner contends that the notices do not apply to his work as the Center's Director. The trial court should have denied summary judgment because of this dispute over the conclusion to be drawn from the notices.

VI. The Doctrine of Laches Does Not Bar Dr. Davari's Claims Because the Respondent Has Not Shown Prejudice.

The elements of laches consist of (1) unreasonable delay and (2) prejudice. *Department of Health & Human Resources, Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.*,

195 W. Va. 759, 466 S. E. 2d 827 (1995). "The burden of proving unreasonable delay and prejudice is upon the litigant seeking relief." " *Province*, 196 W. Va. at 484, 473 S.E.2d at 905. "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that a party has waived his rights." *Bank of Marlinton v. McLaughlin*, 123 W. Va. 608, 17 S.E.2d 213 (1941). In this case, the Respondent has not shown any prejudice. Equally important, any alleged delay on the part of Dr. Davari in asserting his right to payment does not warrant a presumption of waiver in light of the many inquiries Dr. Davari made over the course of several years.

In asserting the defense of laches, the Respondent has relied on *Maynard v. Board of Edu.*, 178 W. Va. 53, 357 S. E. 2d 246 (1987). In *Maynard*, this Court held that the controlling element of laches is prejudice, rather than the amount of time that has elapsed without asserting a known right or claim. Delay alone does not constitute laches; it is delay that places another at a disadvantage. *Maynard*.

The *Maynard* Court applied the defense of laches because the Defendant School Board was prejudiced by the teachers' ten year delay in seeking additional compensation. The budgets for county schools are approved on a yearly basis. Increasing the school budget each year going back ten years would result in a devastating loss to the county's school budget. This adverse financial impact constituted the degree of prejudice that supported the application of laches. *Maynard*.

The adverse financial impact imposed by the county teachers' claims in *Maynard* does not exist in this case. In *Maynard*, the funding source of the teachers' claims were solely state funds. In this case, pursuant to the contract between Dr. Davari and WVU Tech, as the January 5, 2004, appointment letter stated, the funds to pay Dr. Davari's supplementary salary had to be "derived from external sources." All of the money paid to the Center came from "external sources," and

not from state funds. Those external sources included the U.S. Department of Defense, the U.S. Department of Energy, and the U.S. Army Research Laboratory. (App. 19-20 and 29-30). If such were not the case, Dr. Davari would not be entitled to a supplemental salary.

The Respondent has acknowledged, and the trial court has found, that all of the funding for the Center came from external, non-state funds. (App. 5). Because all of the \$5,495,539.58 in funds paid to WVU Tech as a result of Dr. Davari's work at the Center were from external, non-state funds, the prejudice to the county school board's budget that supported the application of laches in *Maynard* does not apply in this case. Due to the Respondent's failure to show prejudice, the doctrine of laches does not bar Dr. Davari's claims of quantum meruit and unjust enrichment.

VII. Whether the Doctrine of Laches Bars Dr. Davari's Claims of Unjust Enrichment and Quantum Meruit is a Question for a Jury.

The doctrine of laches does not bar Dr. Davari's claims as a matter of law. Like the other issues in this case, whether the doctrine of laches bars Dr. Davari's claim is a question of fact that only a jury can decide. *Geibel v. Clark*, 185 W. Va. 505, 408 S. E. 2d 84 (1991).

In *Geibel*, the Defendants acquired real estate through a sheriff's tax sale that was conducted when the applicable statute did not require notice of the sale to the prior owners. Plaintiff Ruth Geibel was the daughter of the prior owners of the real property, Green and Ruby Wright. Even though a sheriff's deed had been delivered to the Defendant Clarks, the Wrights continued to reside at the property for many years. When Mr. and Mrs. Wright died, Mrs. Geibel learned that the Clarks held the sheriff's deed to the property. Mrs. Geibel sued to void the tax deed to the Clarks. The trial court ruled in Ms. Geibel's favor, and found that the deed to the Clarks was void. *Geibel*.

In addition to finding that the sheriff's tax deed was void, the trial court found that the

Clarks were guilty of laches as matter of law for not taking any procedures to eject the Wrights or Ms. Geibel from the property. The trial court also found that Ms. Geibel and the Wrights, as a matter of law, were not guilty of laches. On appeal, the *Geibel* Court held that the issue of laches raised factual questions for a jury that precluded summary judgment. *Geibel*.

Just as in *Geibel*, only a jury can decide whether the doctrine of laches bars Dr. Davari's claims based on unjust enrichment and quantum meruit. The Circuit Court in this case committed reversible error when it found that laches bars these claims as a matter of law. *Geibel*.

VIII. The Circuit Court's Summary Judgment Should be Reversed Because the Court Made Multiple Findings of Fact and Conclusions of Law that were Improper and Erroneous.

Summary judgment in favor of the Respondent should also be reversed because the trial court improperly invaded the province of the jury by making multiple findings of fact. Finding of Fact Number 12 is erroneous because the evidence does not show, as a matter of law, that Dr. Davari was paid for his work as the Director of the Center. Every annual notice to which this finding refers identifies Dr. Davari's position as only "Professor/Electrical and Computer Engineering at WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY. These notices do not refer to Dr. Davari's position as Director of the Center. This omission, and the exclusive reference only to Dr. Davari's position as a "Professor" create a genuine issue of material fact concerning whether WVUIT paid Dr. Davari his supplemental salary for his work as Director of the Center each year. Thus, this finding of fact on the part of the trial court constitutes reversible error.

Finding of Fact Number 16 contains multiple findings of fact arising from a letter from WVUIT President Long to the Petitioner. In that letter, Ms. Long advised Dr. Davari that he was not entitled to additional compensation for several reasons. The fact that Carolyn Long sent this

letter does not render those reasons undisputed facts which entitle the Respondent to judgment as a matter of law. Conversely, all of the purported reasons in Carolyn Long's letter arise from genuine issues of material fact that should not have been found as undisputed facts by the trial court.

For the first reason, Ms. Long asserts that Dr. Davari had already been compensated through grant funding from external sources. The assertion that Dr. Davari had already been paid for his work as the Director of the Center is one of the material disputes in this litigation. The mere assertion that Dr. Davari had been paid the supplemental salary does not establish as a matter of law that he was paid. This disputed fact must be decided by a jury, and not the court.

The same analysis applies to the second reason, in which Ms. Long states that there was no contract or other requirement requiring WVUIT to pay Dr. Davari the specific sum of \$24,000.00 per year for his additional work as Director of the Center. Whether a contract existed between the parties concerning payment for Dr. Davari's work as the Center's Director is the gravamen of the Petitioner's claims. Dr. Sathyamoorthy's January 5, 2004, letter appointing Dr. Davari as the Director expressly identified his salary for the Director's position as a supplemental salary, which was in addition to his summer salary and other incentive payments.

Dr. Sathyamoorthy attached to the appointment letter four pages of minutes from a WVUIT Cabinet meeting that was held on December 2, 2003. Those minutes were approved by the school's governing Cabinet. The minutes expressly approved the creation of the Center, and also expressly authorized the position of Director, with a monthly salary of \$2,000.00.

Ms. Long's third reason is waiver, based on the annual notices. This reason is disputed because the annual notices identify Dr. Davari's position only as "Professor." The notices do not refer to Dr. Davari's position as the Director of the Center; nor do the notices refer to a supplemental salary.

The issue of whether Dr. Davari waived his right to payment is also in dispute because he made inquiries about WVUIT's failure to pay. Indeed, Carolyn Long's letter of December 17, 2013, was sent in response to Dr. Davari's latest inquiries.

Conclusions of Law Numbers 1 through 8 pertain to the issue of whether the Respondent is protected by doctrine of sovereign immunity. Coverage for "incidental contracts" relating to the university's business results in an inconsistency in the policy that creates the potential for coverage. Because of the potential for coverage, the conclusions reached by the trial court in Numbers 1 through 8 constitute reversible error.

Conclusions of Law Numbers 9 through 16 pertain to the doctrine of laches. The trial court's application of this doctrine as a matter of law is erroneous. First, laches does not apply to this action for monetary relief. Second, even if laches applies to the Petitioner's claims based on quantum meruit and unjust enrichment, laches is not a defense because the Respondent has not shown any prejudice. Third, if the doctrine of laches applies, the question of whether laches bars Dr. Davari's claims is an issue that a jury should decide.

Conclusions of Law Numbers 17 through 23 pertain to the issue of whether a contract existed between the parties pertaining to the Petitioner's additional work as the Director of the Center, and whether the Respondent breached the contract by failing to pay a supplemental salary of \$24,000.00 per year. There is compelling evidence of record from which a jury could find the existence of a contract, and a breach of that contract on the part of the Respondent. WVU BOG is not entitled to judgment as a matter of law concerning breach of contract issue.

Conclusion of Law Number 25 pertains to the payment of services provided to WVU BOG by Dr. Davari. The statement in this paragraph that Dr. Davari has been fully paid for his work as Director of the Center has not been shown by undisputed. The documentary evidence pertaining

to this issue are the annual notices of appointment that only reference Dr. Davari's position as a Professor. When assessing this evidence on this issue in the light most favorable to Dr. Davari, it is clear that the Respondent is not entitled to judgment as a matter of law.

Conclusion of Law Number 26 pertains to the sources for funding the Center. The trial court erred in finding that "[g]rant documentation on the record indicates that Plaintiff was compensated from those sources. Whether the Petitioner has been fully compensated for his work as the Director of the Center is a question of fact that only a jury can decide.

Conclusion of Law Number 27 states that the Petitioner has failed to show an inequity. This conclusion is erroneous. Inequity in this case arises from the Respondent's failure to pay Dr. Davari the supplemental salary he was promised for his work as Director of the Center. This erroneous conclusion also requires reversal.

Conclusions of Law Numbers 28, 29, and 30 pertain to the Petitioner's remedy under the West Virginia Wage Payment and Collection Act ("WPCA"). In Conclusion Number 30, the trial court erroneously concluded that there was no meeting of the minds between the parties guaranteeing Dr. Davari a supplemental salary for his work as Director of the Center. This conclusion is erroneous because the Petitioner has produced evidence that a valid and enforceable contract existed between the parties for Dr. Davari's additional work as Director, and that he was entitled to a supplemental salary of \$2,000.00 per month for that work.

There is also evidence of record that WVU BOG breached the contract by failing to pay Dr. Davari the supplemental salary of \$2,000.00 per month. Pursuant to the WPCA, this erroneous conclusion also requires reversal.

CONCLUSION

When evaluating the evidence in the light most favorable to the Petitioner, genuine issues

of material fact render the Circuit Court's entry of summary judgment in favor of the Respondent erroneous. A rational jury could find that a valid and binding contract existed between Dr. Davari and the WVU BOG concerning his extra work for the Center. The evidence also supports a finding that the Respondent promised to pay Dr. Davari an extra \$24,000.00 per year for this extra work.

The evidence also supports a finding that Dr. Davari has never been paid for his work as the Center's Director. The annual notices of appointment that Dr. Davrari was required to sign refer to and apply to only his duties as a Professor at WVU Tech, and not to his position as Director of the Center.

The doctrine of laches does not bar Dr. Davari's alternative claims based on quantum meruit and unjust enrichment because the Respondent has not shown prejudice. This Court's decision in *Maynard* does not apply in this case because no State funds are involved. The funds from which Dr. Davari should have been paid were all derived exclusively from "external sources." Pursuant to the contract between the parties, Dr. Davari would not have been entitled to the payment of a supplemental salary had the Center's funds not been derived from "external sources."

The Respondent's assertion that Dr. Davari failed to timely assert his right to payment does not affect the outcome of this case. First, a ten year statute of limitation applies to his primary breach of contract claim. Second, even if Dr. Davari had complained more often about the lack of payment, additional complaints would have been fruitless. Despite the inquiries Dr. Davari made before filing his *Complaint* in Circuit Court, the Respondent has steadfastly refused to pay him.

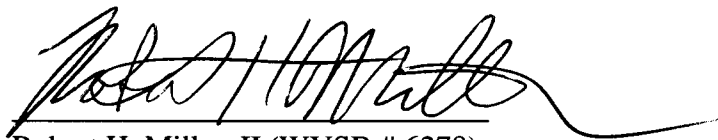
The Respondent is not protected by sovereign immunity. Inconsistent provisions in the State's insurance policy creates an ambiguity resulting in the potential for coverage. More importantly, even if there is no insurance coverage for Dr. Davari's claim for a supplemental salary, the West Virginia Wage Payment and Collection obviates the defense of sovereign immunity.

For the reasons discussed above and for any other reason appearing in the record, Petitioner Asad Davari respectfully requests that this Court reverse the Circuit Court's erroneous summary judgment in favor of the Respondent, and remand this case to the Circuit Court for a jury trial on the merits. The Petitioner also requests any other relief in his favor deemed just and proper.

Respectfully submitted,

ASAD DAVARI, Petitioner,

By Counsel.

A handwritten signature in black ink, appearing to read 'Robert H. Miller, II', with a long horizontal flourish extending to the right.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASAD DAVARI,

Plaintiff,

v.

**Civil Action No. 14-C-263
Judge Tera L. Salango
Consolidated w/14-C-838**

**THE WEST VIRGINIA UNIVERSITY
BOARD of GOVERNORS,**

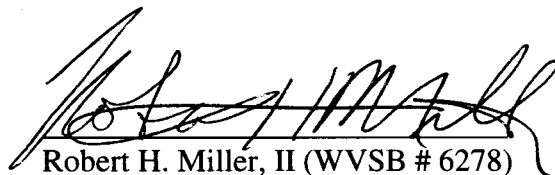
Defendant.

CERTIFICATE OF SERVICE

I, Robert H. Miller, II, counsel for the Plaintiffs, hereby certify that, on this 2nd day of July, 2020, I served a true copy of the foregoing “**Petitioner’s Brief**” by placing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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