IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0004

DIANE SIGISMONDI JUDY,

Plaintiff Below, Petitioner,

v.

EASTERN WEST VIRGINIA COMMUNITY AND TECHNICAL COLLEGE,

Defendant Below, Respondent.

(On Appeal From a Final Order of the Honorable H. Charles Carl, III; Circuit Court of Hardy County, West Virginia; Case No. CC-16-2020-C-28)

RESPONDENT'S RESPONSE TO PETITION FOR APPEAL

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I. STATEMENT OF THE CASE

As Petitioner appeals a grant of motion to dismiss, Respondent relies on the allegations in Petitioner's *Complaint* and the Circuit Court's findings in its *Order Granting Defendant's Motion to Dismiss* (hereinafter *Order*).[1]

Respondent filed its *Motion to Dismiss* and *Memorandum* on September 17, 2020,[2] asserting, *inter alia*, qualified immunity, that Petitioner failed to limit her relief under and up to the limits of applicable insurance coverage, and that Petitioner failed to allege specific facts to satisfy the essential elements of her employment discrimination claim.[3] On September 21, 2020, Petitioner moved to amend her *Complaint*.[4] Petitioner's proposed amended complaint added one paragraph, limiting her prayer for relief to "the applicable insurance coverage."[5] Critically, Petitioner's proposed amendment added no specific allegations to overcome Defendant's qualified immunity, and Petitioner's *Complaint* failed to allege specific facts to show an adverse decision, denial of equal opportunity, and that, but for her protected status, the adverse decision would not have been made.[6]

II. SUMMARY OF ARGUMENT

Petitioner filed a barebones *Complaint* in Circuit Court and has filed a barebones *Brief* here. Petitioner's *Complaint* consisted of bald statements that she was entitled to relief, and Petitioner's *Brief* consists of bald statements, insisting that her claim was sufficiently pled, while failing to account for the heightened pleading standard, misstating the Circuit Court's *Order* as

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[1] Compl, App. 1–3; Order, App. 97–104.
[2] App. S64.
[3] App. 10–11, 16–21. Respondent raised other dispositive grounds, such as the West Virginia Human Rights Act's inapplicability to Plaintiff as she was an independent contractor. However, the Circuit Court declined to address this argument. App. 102.
[4] App. S1–S7.
[5] App. S5, ¶ 24.E.
[6] *See* syl. pt. 2, *Johnson v. Killmer*, 219 W. Va. 320, 633 S.E.2d 265 (2006).

relying on a federal pleading standard, failing to show how her *Complaint* satisfies the applicable pleading standard, and requesting discovery not previously requested.

Petitioner's *Complaint* fails to plead specific facts to overcome Respondent's immunity and show that Respondent made an adverse decision concerning Petitioner, Respondent denied her an equal opportunity, and, but for her protected status, the adverse decision would not have been made.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent leaves oral argument to the Court's discretion and only disputes Petitioner's statement regarding the same to the extent Petitioner states, without support, that the case involves issues of fundamental public importance. Respondent further asserts that pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure, disposition by issuance of a memorandum decision affirming the ruling of the circuit court is appropriate. There exists no substantial question of law; the circuit court did not commit prejudicial error; and just cause exists for summary affirmance.

IV. ARGUMENT

A. STANDARD OF REVIEW

In her brief, Petitioner asserts that the Circuit Court applied a federal pleading standard to her *Complaint.* [7] However, the Circuit Court cited to no federal law in its restatement of the standard of review; the Circuit Court applied the correct pleading standard.[8] As the Circuit Court *Order* states, under West Virginia law, what "the pleader is required to do is set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these

[7] Pet'r's Br. 5–6.
[8] App. 99–100.

elements exist."[9] Indeed, "the plaintiff's attorney must know every essential element of his cause of action and must state it in the complaint."[10] At the same time,

> more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant. Moreover, if the allegations in the complaint, taken as true, do not effectively state a claim, the added assertion by plaintiff that they do state a claim will not save the complaint.[11]

"[A] plaintiff may not fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint."[12] The Court applied the proper standard, viewed Petitioner's allegations as true and in a light favorable to her, and found that Petitioner had failed to support her claim with facts sufficient to outline the elements.[13]

Petitioner's *Brief* fails to acknowledge that appellate review of a circuit court's order denying a motion to dismiss a complaint is *de novo*.[14] Petitioner's *Brief* also ignores the heightened pleading standard that applies when immunity is raised. Nonetheless, the Circuit Court was correct for implementing a heightened pleading standard as qualified immunity is involved here.[15] "[I]n civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."[16] Heightened pleading is necessary to determine, at the earliest stage possible, whether immunity applies. The importance of determining immunity

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[9] *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695,246 S.E.2d 907 (1978) (citations omitted).
[10] *Malone v. Potomac Highlands Airport Auth.*, 237 W. Va. 235, 240–41, 786 S.E.2d 594, 599-600 (2015) (citing *Sticklen v. Kittle*, 168 W. Va. 147, 157-58, 287 S.E.2d 148, 154 (1981)); App. 100.
[11] *Malone*, 237 W. Va. at 240–241, 786 S.E.2d at 599–600.
[12] *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (internal citation and quotations omitted).
[13] *See* App. 103–104.
[14] *See* syl. pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998) (holding that "[w]hen a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo)*; *Crites v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0087, 2017 W. Va. LEXIS 171, at *4 (Mar. 24, 2017); *Eagle v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0093, 2017 W. Va. LEXIS 173, at *3 (Mar. 24, 2017). *Accord* Syl. pt. 2, *State ex rel. McGraw v. Scott Runyon Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).
[15] Petitioner's *Brief* at Argument §§ A and B.2 is thus inaccurate.
[16] *W.Va. Bd. of Educ. v. Marple*, 236 W.Va. 654, 661, 783, S.E.2d 75, 82 (2015) (quoting *Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996)); App. 100–101.

early in a case cannot be overstated. "[T]he need for early resolution in cases ripe for summary disposition is particularly acute when the defense is in the nature of an immunity."[17] This Court has explained,

> The legislative decision to clothe certain actions of governmental agencies and employees in a cloak of immunity is not one that should be casually disregarded. Without that promise of immunity, it is probable that many critical governmental decisions would cease to be made and the services that most citizens expect their government to provide would consequently be unavailable.[18]

As stated by Justice Cleckley: "Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all."[19] "The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case. In this vein, unless expressly limited by statute, the sweep of these immunities is necessarily broad."[20] Recently, this Court iterated, "one of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive."

Notably, below, Petitioner never disputed that a heightened pleading standard applied. *See* App. 65–71, 90. Rather, Petitioner persisted in failing to allege specific facts to satisfy essential elements of her claim, as further explained *infra*.

B. The Circuit Court Properly Dismissed Petitioner's *Complaint* For Petitioner's Failure To Outline The Elements Of Her Claim

Here, after Petitioner was on notice of Defendant's immunity defense, Petitioner filed a proposed amended complaint that added no allegations, factual or not, to allow any inference that she was denied an equal opportunity, that she was subjected to an adverse decision, or that "but

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[17] *Hutchison*, 198 W. Va. at 147, 479 S.E.2d at 657.
[18] *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014).
[19] *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658 (1996).
[20] *Id.*

for" her protected status, the adverse decision would not have been made.[21] Petitioner had opportunity to satisfy the heightened pleading standard and plead facts to support her claim, but Petitioner failed to do so.[22] Under the normal pleading standard, Petitioner failed to outline the elements of her claim, and under the heightened pleading standard, Petitioner failed to plead specific facts to support her claim.

1. PETITIONER FAILED TO PLEAD ANY FACTS SHOWING SHE WAS DENIED AN EQUAL OPPORTUNITY OR SUBJECT TO AN ADVERSE DECISION

Petitioner's *Complaint* alleges that "Defendant was motivated, in part, to discriminate against her . . . ."[23] Under W. Va. Code § 5-11-3(h), "discriminate" means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate." Under West Virginia law,

> In order to make a prima facie case of employment discrimination . . . the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made.[24]

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[21] App. S1–S7; *see Crites v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0087, 2017 W. Va. LEXIS 171, at *6 (Mar. 24, 2017); *Eagle v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0093, 2017 W. Va. LEXIS 173, at *6 (Mar. 24, 2017).

[22] The Circuit Court's *Order* therefore does not run afoul of *Doe v. Logan Cty. Bd. of Educ.*, 242 W. Va. 45, 50, 829 S.E.2d 45, 50 (2019) (citing *Hutchison*, 198 W.Va. at 149–50, 479 S.E.2d at 659–60). *Doe* explains that under *Hutchison*, a trial court deciding qualified immunity on a motion to dismiss should first demand that the plaintiff file a reply or more definite statement. Here, however, after Respondent filed its *Motion to Dismiss* raising immunity, Plaintiff filed a *Motion to Amend* and attached a proposed amended complaint that added no new factual allegations to render her complaint well-pled under the normal pleading standard or the heightened one. Further, Plaintiff requested no opportunity to further amend her *Complaint*. Petitioner has thus "pleaded . . . her best case, [so] there is no need to order more detailed pleadings." *See Doe*, 242 W. Va. at 50, 829 S.E.2d at 50 (quoting *Hutchison*, 198 W.Va. at 149–50, 479 S.E.2d at 659–60). Most importantly, Petitioner did not raise this issue below and has not raised this issue on appeal. Syl. pt. 1, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 687 S.E.2d 403 (2009) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.") (quoting syl. pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971)).

[23] App. 2, ¶ 18.

[24] Syl. pt. 2, *Johnson v. Killmer*, 219 W. Va. 320,633 S.E.2d 265 (2006) (quoting syl. pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164,358 S.E.2d 423 (1986)).

Petitioner alleges that Respondent informed her it was moving the truck used for CDL training to Tucker County and that Respondent "had another instructor, a male, to teach her class and she would no longer be needed after the current semester."[25] Petitioner does not allege she was fired or terminated, and Petitioner's *Complaint* fails to identify what equal opportunities she was denied. Taking Petitioner's allegations as true, the allegations do not satisfy her discrimination claim.[26] That a male is working in a position she formerly worked is not evidence of an adverse decision and does not alone support a employment discrimination claim. Petitioner must plead facts showing that an adverse decision was made and that she was denied an equal opportunity, but Petitioner failed to do so.

Even in her proposed amended complaint, Petitioner failed to plead facts showing any adverse decision or denial of equal opportunities with specificity. This Court has explained, even outside the context of immunity, that "[e]specially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff's claim."[27] Here, not only did Petitioner fail to outline the elements of her claim under the normal pleading standard, but Petitioner failed to plead her claim with the requisite specificity to satisfy the heightened pleading standard. Therefore, the Circuit Court properly dismissed Petitioner's *Complaint*.

2. Petitioner Failed To Plead Any Facts Showing That, But For Her Protected Status, The Adverse Decision Would Not Have Been Made

Assuming *arguendo* that Petitioner's *Complaint* sufficiently pleads that Respondent made an adverse employment decision and denied her an equal opportunity, Petitioner must still plead

[25] App. 1–2, ¶¶ 7, 9.
[26] App. 1–3.
[27] *Fass v. Nowsco Well Serv., Ltd.*, 177 W.Va. 50, 53, 350 S.E.2d 562, 564–64 (1986).

facts to satisfy the "but for" element of her employment discrimination claim—that, "but for the plaintiff's protected status, the adverse decision would not have been made."[28]

Petitioner takes issue with the Circuit Court's reliance on *Barefoot v. Sundale Nursing Home*. The Circuit Court relied on *Barefoot* for the rule of law that satisfying the but for factor is a threshold inquiry. *Barefoot* indeed holds as such in syllabus.[29] The Circuit Court therefore did not err in relying on *Barefoot* for this proposition.[30] It is axiomatic that a "threshold" to stating a claim either sustains or defeats said claim. Here, Petitioner has failed to meet that threshold by failing to plead facts allowing an inference that she would not have been discriminated against but for her protected status.

This Court has made clear that, to plead an employment discrimination claim, a plaintiff must plead facts showing that, but for her protected status, the adverse decision would not have been made.[31] For example, in *Crites v. Eastern West Virginia Community and Technical College et al*, a plaintiff asserted a discrimination claim based on a male being hired to fill her old position.[32] This Court found dismissal appropriate because, among other things, plaintiff had failed to sufficiently plead facts showing an adverse decision and failed to plead facts showing "that respondents would not have engaged in these acts but for her protected class."[33] Here, Petitioner's *Complaint* similarly fails to plead facts to support the same claims.

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[28] Syl. pt. 3, in part, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986).
[29] Syl. pt. 2, *Barefoot*, 193 W. Va. 475, 457 S.E.2d 152 (1995).
[30] *See* App. 103.
[31] *Crites v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0087, 2017 W. Va. LEXIS 171, at *6 (Mar. 24, 2017); *Eagle v. E. W. Va. Cmty. & Tech. Coll.*, No. 16-0093, 2017 W. Va. LEXIS 173, at *6 (Mar. 24, 2017); *Blessing v. Supreme Court of Appeals of W. Va.*, No. 13-0953, 2014 W. Va. LEXIS 580, at *15 (May 27, 2014); *see Fass v. Nowsco Well Serv., Ltd.*, 177 W.Va. 50, 53, 350 S.E.2d 562, 564–64 (1986).
[32] The plaintiff was represented by the instant Petitioner's attorney, and the respondent was represented by the undersigned's law firm.
[33] *Crites*, No. 16-0087, 2017 W. Va. LEXIS 171, at *6.

In *Eagle v. Eastern West Virginia Community and Technical College*, a plaintiff asserted a discrimination claim based on plaintiff testifying in another civil matter against the College.[34] This Court found dismissal appropriate because, among other things, plaintiff failed plead facts satisfying the adverse decision and the "but for" factor, *i.e.*, "that respondents would not have engaged in these acts but for his protected class."[35] Here, Petitioner's *Complaint* similarly fails to facts to support the same claims.

In *Blessing v. Supreme Court of Appeals*, a plaintiff filed a one-hundred-paragraph complaint asserting, among other claims, employment discrimination based on age and gender. This Court found dismissal was appropriate as plaintiff asserted no facts indicating she was mistreated because of her protected status.[36]

Pleading facts to support the "but for" element is thus essential to a sufficiently pled complaint, and failure to do so warrants dismissal. Here, like in *Crites*, *Eagle*, and *Blessing*, Petitioner has failed to plead facts showing she would not have been discriminated against but for her protected class. Rather, Petitioner pleads a bald statement that she is entitled to relief. Specifically, she pleads that Respondent "was motivated, in part, to discriminate against her in violation of West Virginia Code § 5-11-9 because she was a female." Under longstanding West Virginia law, "in order to withstand a 12(b)(6) motion, more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant."[37] Petitioner pleads no facts other than a bald statement that she was discriminated under the West Virginia Human Rights Act. Petitioner pleads no facts allowing an inference that she would not have been discriminated against but for her protected class. This Court has noted that, "if the allegations in

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[34] The plaintiff was represented by the instant Petitioner's attorney, and the respondent was represented by the undersigned's law firm.
[35] *Eagle*, No. 16-0093, 2017 W. Va. LEXIS 173, at *6.
[36] *Blessing*, No. 13-0953, 2014 W. Va. LEXIS 580, at *14.
[37] *Fass*, 177 W. Va. at 52, 350 S.E.2d at 564 (1986).

the complaint, taken as true, do not effectively state a claim, the added assertion by plaintiff that they do state a claim will not save the complaint."[38] That Petitioner insists her *Complaint* is sufficient does not make it so. Petitioner has failed to outline the elements of her claim and has failed plead facts to support the required elements.

Further, not only does Petitioner's *Complaint* fail under the normal pleading standard, it does not satisfy the heightened pleading standard. Under the heightened pleading standard, Petitioner is required to support her claims and each element of her claim with specific allegations. Petitioner's above-quoted bald statement falls far short. This Court recently explained, "a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm [s]he has alleged and that defeat a qualified immunity defense with equal specificity."[39] Petitioner's bald statement lacks specific facts to overcome Defendant's immunity, and the Circuit Court properly dismissed the *Complaint*.

Since *Hutchison* was decided, this Court has consistently held that the question of immunity is a legal question and, where the facts underlying the immunities analysis are not disputed, immunity must be determined.[40] Here, Petitioner's allegations were taken as true and viewed in a light favorable to her. Nonetheless, Petitioner's *Complaint* lacks specific allegations showing that qualified immunity does not apply and lacks specific facts showing any decision was made based on her protected status. Petitioner's *Complaint* was properly dismissed. Accordingly, Petitioner's *Brief* at § B.1 and B.2 lack merit. Dismissal was warranted, and the Circuit Court's *Order* should be affirmed.

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[38] *Sticklen v. Kittle*, 168 W. Va. 147, 164 n.12, 287 S.E.2d 148, 158 (1981).
[39] *W. Va. State Police v. J.H.*, 856 S.E.2d 679, *18 (W. Va. March 26, 2021) (brackets omitted) (citing *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)).
[40] *See, e.g., Albert v. City of Wheeling*, 238 W. Va. 129, 131, 792 S.E.2d 628, 630 (2016); syl. pt. 3, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 496, 766 S.E.2d 751, 755 (2014).

3. PETITIONER DID NOT REQUEST DISCOVERY BELOW ON ANY ISSUES ON WHICH THE CIRCUIT COURT'S *ORDER* RESTS

Petitioner asserts that she was denied any opportunity to engage in discovery before the Circuit Court granted dismissal.[41] Petitioner does not include this argument in any assignment of error, and it is nonetheless meritless. demonstra However, below, Petitioner did not request discovery on any issue the *Order* is based on. Below, the Petitioner requested discovery only to determine whether Petitioner was an independent contractor.[42] The Circuit Court's *Order* expressly disclaims this issue,

> Here, Eastern has argued in its Motion that Plaintiff was an independent contractor and the West Virginia Human Rights Act ("HRA) does not apply to independent contractors. The Court finds Eastern's argument to be well-taken, although it would be a question of fact, for purposes of a motion to dismiss, regarding whether or not Plaintiff was an independent contractor. Nevertheless, the Court is deciding the Motion based upon the issue of qualified immunity and declines to make any findings or conclusions regarding whether the HRA applies to independent contractors. **For the purposes of the qualified immunity issue, the Court finds that whether or not Plaintiff was an independent contractor is irrelevant to the Court's findings regarding qualified immunity in this case.**[43]

Petitioner never asked the Circuit Court for discovery on any issue but the independent contractor issue, which the Court's *Order* expressly avoided. Thus, the issue not properly before this Court. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect."[44] "[A] party who has not raised a particular issue or defense below may not raise it for the first time on

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[41] Pet'r's Br. at 7.
[42] App. 66–67.
[43] App. 102 (emphasis added).
[44] Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996); *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 114, 459 S.E.2d 374, 391 (1995)("Objections on non-jurisdictional issues, must be made in the lower court to preserve such issues for appeal."); *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (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.").

appeal."[45] Petitioner cannot now base her appeal on an issue that was not before the Circuit Court. Thus, Petitioner's *Brief* lacks merit in this regard as well. The Circuit Court's *Order* is well-reasoned and should be affirmed.

V. CONCLUSION

Petitioner's *Brief* fails to apply the proper heightened pleading standard. Petitioner's *Complaint* below contained nothing more than bald statements that she is entitled to relief without pleading specific facts to outline and support essential elements of her claim. Accordingly, Petitioner's *Brief* is without merit and the Circuit Court's *Order* should be affirmed.

Defendant Below and Respondent, Eastern West Virginia Community and Technical College,

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[45] *State v. Costello*, No. 19-0326, 2021 W. Va. LEXIS 153, at *16 (Apr. 2, 2021).

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Defendant Below, Respondent.

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, *Eastern West Virginia Community and Technical College*, does hereby certify that on this 24th day of May, 2021, a true copy of the foregoing ***"Respondent's Response to Petition for Appeal"*** has been served via U.S. Mail to the following counsel of record:

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