In the Supreme Court of Appeals of West Virginia

Docket No 21-0009

JAY M. POTTER,
Plaintiff Below, Petitioner

Appeal from a final order
of the Circuit Court of Kanawha
County (19-C-686)

V.

BAILEY & SLOTNICK, PLLC, AND
CHARLES R. "CHUCK" BAILEY,
Defendants Below, Respondents

Petitioner's Reply Brief

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Petitioner

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SUMMARY OF REPLY ARGUMENT

This is the latest stage in the Petitioner's two-years-and-counting effort to convince the West Virginia judiciary to order two defendants to answer a complaint. The Respondents' resistance to that began with a Motion to Dismiss containing a "preface" that reads like something that Stephen Glass might have written for *The New Republic*. See *In re Glass*, 58 Cal.4th 500, 316 P.3d 1199, 167 Cal.Rptr.3d 87 (Cal 2014). The Petitioner appreciates the Respondents' explanation (Respondents' Brief, p. 9, n.1) that the Motion was "prepared" by their counsel; however the issue is not who prepared the Motion for filing but, rather, who drafted it in the first place, that person having been the Respondent Mr. Bailey.

The seven arguments in the Respondents' Brief fall into the **two** categories discussed below.

First, the Respondent's fifth argument, which applies to the Count III equal opportunity claim against Mr. Bailey, contends that this Court should follow the statutory reasoning of a single federal opinion but fails to mention the existence of a more recent, and contrary, federal opinion.

Second, the Respondents' other six arguments disregard the standards that this Court has established for ruling on motions to dismiss. Those standards are cited on pages 20 and 21 of the Petitioner's Brief. The Respondents' Brief, on page 3, describes those standards as being "nothing more than boilerplate propositions of law"; and the Respondents' remaining six arguments are based on the implied – but never really stated -- premise that those "boilerplate propositions" do not apply to those six claims. The Respondents argue that, contrary to the reasoning on pages 20 and 21 of the Petitioner's Brief, the Complaint needed not only to state the necessary elements of its claims, but also to allege supporting facts that would demonstrate some level of proof of those elements. That approach amounts to asking this Court to apply, at the motion-to-dismiss stage (where no proof of claims is required), a standard that does not become applicable until the summary-judgment stage (where some level of proof is required).

The best indication of the Respondents' strategy of comingling summary-judgment standards with motion-to-dismiss standards is the extent to which they (1) cite, in support of their arguments for dismissal, judicial opinions that had dismissed factually similar claims but (2) fail to mention that those dismissals had not occurred at the motion-to-dismiss stage but, rather, at the summary-judgment, or other subsequent, stages.

In addition to comingling different standards for dismissal, the Respondents' Brief continued their practice – which was criticized on page 22 of the Petitioner's Brief – of (1) excluding from their arguments allegations in the Complaint that supported a denial of their Motion to Dismiss, (2) altering allegations that they did include in ways that were unfavorable to the Petitioner, and (3) drawing from the allegations only inferences that were favorable to them and unfavorable to the Petitioner.

In the reply arguments that follow, the Petitioner will explain why each of his claims would not have been dismissed if (1) the Circuit Court had applied motion-to-dismiss standards, not other standards; and (2) the allegations to which the Circuit Court applied those standards had been the actual allegations in the Complaint, not the Respondents' inaccurate and incomplete versions of those allegations.

REPLY ARGUMENTS REGARDING ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DISMISSING THE FRAUD CLAIM IN COUNT I OF THE COMPLAINT

The Petitioner's Brief argued that the dismissal of this count was erroneous because it was not based on a conclusion that the Complaint failed to state all the essential elements of a fraud claim but, rather, on the conclusions that the Petitioner would not be able to (1) prove that the claim was filed within the two-year statutory limitations period (Conclusion of Law 26, A.R. 185) and (2) prove that the claim was based on more than a promise that was not performed (Conclusion of Law 27, A.R. 186). In their Brief, the Respondents appear to have abandoned the

latter issue and to be proceeding only on the statute-of-limitations issue. As discussed below, there are **three reasons** why the statute-of-limitations argument is erroneous.

First, as previously explained on pages 7-9 of the Petitioner's Brief, Mr. Bailey induced the Petitioner to return to B&W (i.e. Bailey & Slotnick) in 2014 because that would produce short-term "professional" and "financial" benefits to Mr. Bailey. As Mr. Bailey stated in the preface to the Motion to Dismiss, he considered the Petitioner to be "at the brink of retirement" (A.R. 48). Consequently Mr. Bailey viewed the Petitioner as having a period of usefulness that would end at the earlier of (1) the point at which Mr. Bailey's need for his services ended or (2) the point at which the Petitioner retired. The resultant challenge for Mr. Bailey was to ensure that the Petitioner's retirement occurred after – not before – the end of his period of usefulness to Mr. Bailey. The Complaint contains multiple allegations regarding the secretive and misleading approach that Mr. Bailey took in response to that challenge.

Complaint paragraph 33 (A.R. 11) alleges that Mr. Bailey "orchestrate(d) a situation in which" the Petitioner would not realize "what was going to happen to him when Mr. Bailey no longer needed his assistance." This was because, as alleged in Complaint paragraph 99 (A.R. 34), if the Petitioner "became aware of Mr. Bailey's long-term plan for him, he might cease assisting Mr. Bailey." Mr. Bailey's misrepresentations included his January 19, 2017 assurance, alleged in Complaint paragraph 61 (A.R. 20), that he had "no concerns about (the Petitioner's) productivity." Complaint paragraph 100 (A.R. 34) alleges that Mr. Bailey's efforts to mislead the Petitioner "ended abruptly on July 13, 2017, when Mr. Bailey finally revealed to (the Petitioner) the long-term plans for him that Mr. Bailey had been camouflaging." As alleged in Complaint paragraph 70 (A.R. 23), July 13, 2017 was also the point at which the Petitioner realized that Mr.

Bailey's January 19, 2017 assurance that he was not concerned about the Petitioner's productivity had been false. As explained in Complaint paragraph 73 (A.R. 24), that revelation occurred when Mr. Bailey stated, in his July 13, 2017 e-mail, that he and "multiple other attorneys at B&W" had discussed the Petitioner's productivity over an "extended period of time" and had "decided to keep (the Petitioner) unaware of the discussions that they were having regarding him or the plans that they had for him once his assistance on Mr. Bailey's high-profile case was no longer needed."

The Respondents' statute-of-limitations argument is basically an expansion of the Conclusion of Law 26 statement that "there can be no question that (the Petitioner) knew – or ought to have known – of his potential fraud claim no later (than) January 2017" (A.R. 185). That Conclusion was erroneous because (1) it is in direct contradiction with all of the above-referenced allegations in the Complaint; and (2) at the motion to dismiss stage, complaint allegations "must be taken as true" (see Petitioner's Brief p. 21).

The January 19, 2017 meeting is discussed in paragraphs 61 and 62 of the Complaint (A.R. 20) and on pages 10 and 11 of the Petitioner's Brief. According to the Respondents' statute-of-limitations argument, something occurred during that meeting that made – or should have made – the Petitioner aware of the falsity of statements that Mr. Bailey made during and before that meeting. However, the Respondents have never gotten around to explaining what that occurrence was. Their inferential argument is in direct contravention of the requirement that, at the motion-to-dismiss stage, a plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleading (see Petitioner's Brief p. 21).

In summary, the Respondents have never argued that this claim should be dismissed because it did not state adequately the necessary elements of a fraud claim. Instead, they convinced the Circuit Court to dismiss the claim on the basis of nothing more than an allegation that the claim had not been filed within a statutory limitations period that began on a certain date; however, they have never specified what occurred on that date to cause the statutory period to begin. Nor have they explained why they contend that the limitations period for the Petitioner's fraud claim began in January 2017 while also contending, as discussed on page 15 below, that the limitations period for the Petitioner's equal opportunity claim did not begin until six months later, in July 2017. Both of those claims are based on the exact same transactions.

Second, the Petitioner had no basis for asserting a fraud claim until after Mr. Bailey no longer needed his assistance with the defense of *Taylor v. W.Va. Dep't of Health and Human Res.*, 788 S.E.2d 295 (W.Va. 2016). This is because proof of a fraud claim must include clear and convincing evidence that, when a defendant made a promise that he or she later failed to keep, the defendant did not intend to keep that promise. (see Petitioner's Brief p. 26).

The Respondents were retained to defend the *Taylor* case in August 2012, the same month that they initially hired the Petitioner, and they closed their file on that case in June 2017. If, at any time during that almost-five year period, the Petitioner had asserted a fraud claim against the Respondents on the basis of promises that Mr. Bailey made to the Petitioner, they would have been able to defeat that claim easily by making the better-late-than-never argument that, although Mr. Bailey had made but not kept promises, he had always intended to keep those promises. The Respondents would have explained that (1) Mr. Bailey was so preoccupied by the *Taylor* case and was relying so much on the Petitioner's assistance with it that, regrettably, he

did not pay as close attention as he might have to the Petitioner's expressions of concern about his role at the firm; (2) if the Petitioner had just been patient for a bit longer – until Mr. Bailey was no longer enmeshed in the *Taylor* case -- instead of precipitously accusing the Respondents of fraud, everything that Mr. Bailey had promised would have come to pass; and (3) one obvious reason that the Respondents did fully intend to begin assigning cases to the Petitioner and involving him in their business development efforts was that they needed to increase his productivity, which would become an issue after he ceased assisting Mr. Bailey with the *Taylor* case.

If the Respondents had made the preceding three-part argument in answer to a fraud claim that the Petitioner filed, either on January 19, 2017 or at any other point while he was still assisting Mr. Bailey with the *Taylor* case, the Petitioner would not have been able to produce any evidence – much less clear and convincing evidence – that Mr. Bailey had never intended to keep the promises that he had made. Illustrated in another way, if we look at the Petitioner's situation as of any point before Mr. Bailey's July 13, 2017 e-mail, would it have seemed more likely that, upon the completion of the Petitioner's work on *Taylor,* (1) Mr. Bailey would have begun assigning cases to the Petitioner and including him in the firm's business development program so that he could resume being productive or (2) Mr. Bailey would have informed the Petitioner, without any prior discussion, that his salary would end in eight days because he had not been productive? The former option would have been the clear choice.

In summary, the Petitioner had no basis for filing a fraud claim as a result of events that occurred during or before January 19, 2017 because none of those events would have constituted clear and convincing evidence of the lack of intent that is a prerequisite to a valid fraud claim.

Third, regardless of what Mr. Bailey's intentions might have been prior to July 13, 2017, that was the point at which the Petitioner was damaged. In the absence of damage, the Petitioner had no basis for asserting this claim.

Because of the preceding **three reasons**, the limitation period for the Petitioner's fraud claim began no earlier than July 13, 2017. That was the date when Mr. Bailey finally disclosed that the Petitioner's work assisting Mr. Bailey had not been a precursor to being assigned cases of his own but, rather, had been the only work that B&W would ever need him to do.

2. THE CIRCUIT COURT ERRED IN DISMISSING THE CONTRACT CLAIM, AS TO THE RESPONDENT BAILEY & SLOTNICK, IN COUNT II OF THE COMPLAINT.

Employee-At-Will Issue (Petitioner's Brief pp. 17-21)

Beginning with the Motion to Dismiss that Mr. Bailey drafted and continuing through the appeal Brief that his counsel drafted, the Respondents have been making the argument that the Petitioner's contract claim should be dismissed because he was an at-will employee, which means that there was no agreement that would have prevented the Respondents from terminating his employment at any time. The Respondents' latest effort – to which the Petitioner is now replying – consists of a very thorough five-page argument explaining why the Petitioner never had such an agreement.

The problem with the Respondents' argument is that the Complaint never alleged that the Petitioner ever had such an agreement. The agreements that are at issue here include the following: (1) Mr. Bailey's September 2014 agreement that new cases would be assigned to the Petitioner, (2) Mr. Bailey's September 2014 agreement that the Petitioner would be paid his

salary regardless of his financial productivity, (3) Mr. Bailey's March 2016 reiteration of his September 2014 agreement that new cases would be assigned to the Petitioner; and (4) Mr. Bailey's January 2017 agreement that he had no concerns about the Petitioner's productivity and that, if the Petitioner resumed assisting him with the *Taylor* case, the shareholders who did have such concerns would cease having them.

As indicated by the preceding paragraph, the employee-at-will issue articulated by the Respondents is nothing more than a straw man argument. Basically, the Respondents convinced the Circuit Court to dismiss the Petitioner's contract count by (1) ignoring the claim that <u>was</u> asserted in that count and (2) arguing successfully against an entirely different claim, which <u>was not</u> asserted by that count.

The closest that the Respondents have come – at any point – to arguing against the contract allegations that the Complaint actually does make is in Mr. Bailey's preface to the Motion to Dismiss. As indicated in Plaintiff's Response to Defendant's Motion to Dismiss (at A.R. 61-65), the preface asserts what amounts to an impossibility-of-performance argument. Without mentioning what promises he did make to induce the Petitioner to join B&W in 2012 and return to B&W in 2014, Mr. Bailey explained at great length that B&W could not possibly have assigned cases to the Petitioner because he was such an inexperienced and grossly incompetent attorney that assigning cases to him would have violated the "fiduciary capacity" that B&W had to its clients and would have not been "consistent with the Rules of Professional Conduct" (A.R. 48). After the Petitioner pointed out the extent of the factual fabrications in Mr. Bailey's preface, the Respondents shifted to their straw man argument.

The Petitioner needs to make one final point of clarification. The Respondents' straw man argument was based on the premise that the agreements referenced in it were unenforceable because all of them were oral. If this Court determines that the Respondents' employee-at-will argument is at all relevant, it should realize that not all of Mr. Bailey's statements were oral. At least three of them were made via e-mail. The Respondents are aware of this because the Petitioner produced copies of those e-mails, which were dated September 10, 2014, September 12, 2014, and March 3, 2016, in response to the Respondents' discovery requests. The first two e-mails were components of the discussions referenced in Complaint paragraph 21 (A.R. 7). The third e-mail communicated the agreement referenced in Complaint paragraph 58 (A.R. 19).

Waiver Issue (Petitioner's Brief pp. 17, 18, 21-25)

The Petitioner has considerable difficulty understanding the Respondents' argument on this issue (Respondents' Brief pp. 21-25). Consequently he will address directly the relevant portion of the underlying dismissal Order. That consists of Conclusions of Law 29 and 30 (A.R. 187-188). The Circuit Court referenced the fact that the Petitioner remained at B&W for 17 months after the Respondents had allegedly breached their agreements with him; and it reasoned that his continuation of employment constituted "conduct" that was "inconsistent' with his claim that the Respondents had breached their agreements with him. In other words, the Petitioner asserted that the Respondents had breached their agreements; and the Circuit Court replied, in essence, that this could not have happened because for 17 months the Petitioner had not acted as if it had happened. As discussed below, that reasoning might make sense in the abstract; however, it does not make sense when applied to the facts of this case.

The Petitioner's reasons for remaining at B&W for those 17 months are discussed below on pages 19 and 20. None of the actions that the Petitioner took during that period were at all inconsistent with his claim that the Respondents previously failed to keep promises that they had made. For example, the fact that the Petitioner worked without a salary after July 2017 indicates absolutely nothing about what salary-related agreement the Respondents made in September 2014 or whether the Respondents breached that agreement in July 2017.

In summary, the Respondents' waiver argument needed to do more than string together the terms "conduct", "continued employment", and "inconsistent". It needed to – but did not – explain why the Petitioner's conduct of remaining at B&W was inconsistent with his claims that the Respondents breached agreements with him. And it needed to do that at the summary-judgment stage, not at the motion-to-dismiss stage.

3. THE CIRCUIT COURT ERRED IN DISMISSING THE CONTRACT CLAIM, AS TO THE INDIVIDUAL RESPONDENT, IN COUNT II OF THE COMPLAINT.

The Petitioner's arguments on this issue are contained on pages 29 and 30 of his Brief. As discussed in the **three points** below, the Respondents have not refuted any of those arguments.

First, even if, as the Respondents assert, the "factual basis for this claim was and remains far from clear", that is not a basis for the claim's dismissal via a motion to dismiss. At this stage, the claim would survive such a motion even if it alleged nothing more specific than Mr. Bailey having made agreements that he failed to keep. The Complaint is more specific only because it includes a fraud claim, which must be pled with specificity.

Second, the fact that Mr. Bailey was acting "within the scope of his employment" in making those agreements is irrelevant. It means only that he was performing the type of function that a founder of, and shareholder in, a law firm would be expected to perform. It does not mean that he was necessarily authorized do what he did, even though it was within the scope of his employment. As the Petitioner's Brief states on page 34, *Holstein v. Norandex, Inc., and Michael Counts*, 461 S.E. 2d 473, 477 (W.Va. 1995) references the general law concept that "both an agent and his principal are liable for the agent's wrongful acts committed in furtherance of the principal's business."

Third, to the extent that Mr. Bailey's promises were oral, he actually was acting beyond the scope of his authority – while still acting within the scope of his employment – because, as a shareholder of the firm, he was not authorized to make oral employment-related promises (A.R. 127). Consequently if Mr. Bailey was not acting on behalf of B&W, he could only have been acting on behalf of himself.

4. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION EQUAL OPPORTUNITY CLAIM IN COUNT III OF THE COMPLAINT.

At the Circuit Court, the Respondents argued that this claim should be dismissed because the Complaint alleged that they had taken only five adverse employment actions against the Petitioner and that those actions had been so insignificant that allowing the Petitioner to "maintain an age discrimination suit" based on them would "create a dangerous precedent." The Circuit Count accepted that argument in its Conclusions of Law 33 and 34 (A.R. 188-190).

On page 29 of their Brief, the Respondents appear to have abandoned that argument and are now opposing this claim via an entirely new argument, which they never asserted before the Circuit Court. They now contend that the Complaint does not allege any adverse actions that "occurred during the relevant limitations period." They contend that, because the Petitioner filed suit on July 11, 2019, the two-year statute of limitations limited his claim to "adverse employment actions occurring on or after July 11, 2017."

There are **two** problems with the Respondents' new argument. The **first** is that they never made that argument to the Circuit Court. The **second** is discussed below.

On July 13, 2017, Mr. Bailey sent the Petitioner an e-mail that notified him that (1) he would be placed in the same employee category that was occupied solely by the only other attorney in the firm who was close to him in age and (2) that his salary would be terminated (A.R. 24). Consequently July 13, 2017 was the point at which the Petitioner (1) was damaged and (2) realized that this was because of his age. Those two July 13, 2017 actions – as well as multiple subsequent adverse actions – conform to the Respondents' contention that the Petitioner's claims had to be based on adverse actions "occurring on or after July 11, 2017." Phrased more simply, July 13, 2017 was "after" July 11, 2017.

5. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION EQUAL OPPORTUNITY CLAIM, AS TO THE INDIVIDUAL RESPONDENT, IN COUNT III OF THE COMPLAINT.

The Petitioner renews his argument (Petitioner's Brief pp. 33-34) that, based on *Holstein v. Norandex, Inc., and Michael Counts*, 461 S.E. 2d 473 (W.Va. 1995), he can assert a W.Va. Code § 5-11-9(1) claim against Mr. Bailey as a co-employee.

The Respondents' Brief (pp. 30-34) argues, based on *Pack v. S&S Firestone, Inc,,* No. 5:14-CV-17286, 2014 WL 12625463 (S.D. W.Va. Aug. 27, 2014), that a § 5-11-9(1) claim cannot be asserted against a co-employee because such a defendant would not fit within that subsection's definition of "employer". The Petitioner replies that this issue should not be governed by *Pack* but, rather, by the more recent case of *Aldridge v, Marion Cnty. Coal Com.,* No. 1:17-CV-79, 2017 WL 3446530 (N.D. W.Va. Aug. 10, 2017). In her *Aldridge* opinion, Judge Keeley analyzed a number of cases, including *Pack* and *Holstein.* Based on that analysis, she ruled that a plaintiff can assert a § 5-11-9(1) claim against a co-employee.

The Petitioner contends that *Aldridge* confirms that the Circuit Court's dismissal of this claim was erroneous. At the very least, *Aldridge* confirms that it would be judicially helpful if this Court opined definitively on the aspect of W.Va. Code § 5-11-9(1) that is at issue here.

6. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION THREAT-OF-ECONOMIC-LOSS CLAIM IN COUNT IV OF THE COMPLAINT.

The Petitioner renews his argument (Petitioner's Brief pp. 34-36) that, based on (1) the clear reading of W.Va Code § 5-11-9(7) and (2) the case of *McDowell v. Town of Sophia, et al.* No. 5:12-CV-01340, 212 WL 3778837 (S.D. W.Va. 2012), he can assert a § 5-11-9(7) claim against the Respondents based on Mr. Bailey's threat to terminate his employment if he did not agree to the termination of his salary and to other conditions that the Respondents had previously applied exclusively to the only other firm attorney who was close to the Petitioner in age.

The Respondents' Brief (pp. 34-37) argues that, based on *McDowell,* Mr. Bailey's threat was not significant enough to be prohibited by W.Va Code § 5-11-9(7). Supposedly this is because

the *McDowell* defendants threatened to terminate the plaintiff's employment and also to arrest him; however, Mr. Bailey only threatened to terminate the Petitioner's employment. In the interest of complete candor, the Petitioner admits that, when Mr. Bailey informed him that his employment would be terminated if he did not agree to having his salary terminated, the Petitioner had no basis for believing that, if he did not agree to the termination of his salary, Mr. Bailey would also have him arrested.

Furthermore, the economic loss that Mr. Bailey threatened to cause was not limited to the loss of the Petitioner's basic employment. The termination of the Petitioner's employment would have resulted in the termination of his employee-paid health insurance at a time when he had cancer attributable to his wartime military service. The Petitioner suggests that all this should earn B&W a very special place among West Virginia employers. There cannot be many that have threatened to terminate the health insurance of a disabled veteran and claimed – as the Respondents did in their Motion to Dismiss – that this was justified because the veteran-employee was "at the brink of retirement", in "the late stage of his professional life", and "writing the final chapter of his professional life" (A.R. 48).

On page 37 of their Brief, the Respondents characterize this situation as having been nothing more than one in which an employer explains "in response to a question from an employee" its "position should the two be unable to reach a mutually-acceptable agreement." That is not an accurate characterization of what happened. In response to the Petitioner's inquiry as to what would happen if he did not agree to the terms of Mr. Bailey's July 13, 2017 e-mail, Mr. Bailey could have indicated that the next step would be for him and the Petitioner to attempt "to reach a mutually-acceptable agreement". Instead, Mr. Bailey skipped right over that

option and explained, very directly, that the next step would be the termination of the Petitioner's employment.

7. THE CIRCUIT COURT ERRED IN DISMISSING THE AGE DISCRIMINATION CONSTRUCTIVE DISCHARGE CLAIM IN COUNT V OF THE COMPLAINT.

The Respondents' Brief (pp. 37-40) does not dispute that a necessary element of a constructive discharge claim is an allegation of working conditions that would have been "intolerable" to a "reasonable employee." Syl. Pt. 6, *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 188 W.Va. 144, 423 S.E.2d 547 (1992). Nor do the Respondents argue that this claim does not contain that necessary element. Instead, they argue that the claim was required to – but did not – include "sufficient information to outline" that element. That phrase is nothing more than a euphemism for requiring the Petitioner to make an offer of proof at the motion-to-dismiss stage. The supposedly missing "information" was an explanation of why, if the working conditions at B&W became intolerable in July 2017, did the Petitioner remain at the firm until the end of 2018.

The Respondents' "sufficient information" argument might be valid in either of the following **two** situations: **First**, if this case were not at the motion-to-dismiss stage but, rather, at the summary-judgment stage, where some showing of proof would be necessary. **Second**, if this particular claim were one – such as fraud – in which a heightened standard of pleading is required. This claim is in neither of those two categories. Consequently, there is no basis for the Respondents' argument that, in order to survive a motion to dismiss, this claim had

to supplement its allegation of "intolerable" conditions with an explanation of why those conditions were "intolerable."

The concept discussed in the preceding paragraph is completely consistent with the authorities that were cited by the Respondents themselves. At the Circuit Court, the Respondents based their "sufficient information" argument primarily on *Burns v. W. Virginia Dep't of Edu. & Arts*, 836 S.E.2d 43 (W.Va. 2019). However that case involved a motion for summary judgment, not a motion to dismiss. On appeal, the Respondents are basing their argument primarily on *Slack v. Kanawha Cty. Hous. & Redevelopment Auth.*, 188 W.Va. 144, 423 S.E.2d 547 (1992) and on *W.Va. Reg'l Jail & Corr, Facility Auth. v. Estate of Grove*, 244 W.Va. 273, ___, 852 S.E 2d 773, 780 (2020). However the former case involved proof at trial, not a motion to dismiss. The latter case did involve motions to dismiss; however, because qualified immunity was an issue, a heightened pleading standard applied to those motions.

In summary, this is another instance of the Respondents pursuing what might be called a "nothing is ever enough" strategy. In spite of the fact that the statement of a claim included all of its necessary elements, they argue – with complete success at the Circuit Court – that the claim should still be dismissed because of something that – based on nothing more than their own opinion – really should have been included but was not.

All of the above having been said, if this claim had been subject to a heightened pleading requirement or if we were now at the summary judgment stage, the Petitioner would have explained that his final 17 months at B&W were divided among the following **three** segments: **First**, the Petitioner spent six months attempting, unsuccessfully, to determine what his future role at B&W would be, undergoing treatment for cancer, obtaining his own health insurance in

anticipation of having his employment terminated, while he still had cancer, at the end of 2017, and obtaining a 100% disability rating from the U.S. Department of Veterans Affairs. **Second**, he spent the next nine months performing – without pay -- the single work assignment that he received as a result of his inconclusive January 31, 2018 meeting (A.R. 27-28). He considered that assignment to be significant because it was the only assignment that he ever received, during his entire six years at B&W, that did not consist of acting as Mr. Bailey's assistant. **Third**, the Petitioner hoped that the preceding assignment would result in additional assignments; however when it became apparent that this would not occur, he spent his final two months at B&W determining what causes of action he might have against the Respondents. None of those activities were at all inconsistent with the working conditions at B&W being "intolerable". They were reasonable responses to the intolerability of those conditions.

CONCLUSION

This Court should reverse the December 10, 2020 Order of the Circuit Court in its entirety and remand this case so that the parties can proceed to the summary-judgment stage, at which point it will be appropriate for the Respondents to make the exact same arguments that they prematurely made at the motion-to-dismiss stage.

Signed: Jay M. Potter

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Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0009

JAY M. POTTER,
Plaintiff Below, Petitioner

v.

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BAILEY & SLOTNICK, P.L.L.C. and CHARLES R. "CHUCK" BAILEY,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true copy of **PETITIONER'S REPLY BRIEF** this 19th Day of July 2021, *via* electronic mail and U. S. Mail, postage prepaid, upon the following counsel:

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