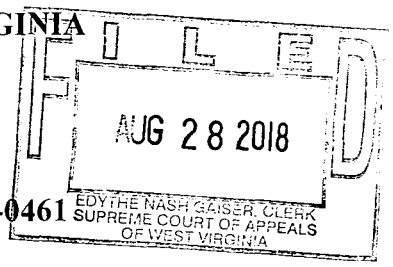
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**John R. Zsigray,**
**Petitioner**

**vs).** **Appeal No. 18-0461**

**Cindy Langman and**
**J.W. Ebert Corporation, D/B/A "McDonalds",**
**Respondents.**

# PETITIONER'S BRIEF

**WILLIAM B. SUMMERS**
**Counsel for Petitioner**
**3301 Dudley Avenue**
**Parkersburg, WV 26104**
**304-420-0975**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ASSIGNMENTS OF ERROR

**ASSIGNMENT ONE:**
DID THE LOWER COURT COMMIT REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S MOTION TO DISMISS ON THE ISSUE OF SLANDER/LIBEL?

**ASSIGMENT TWO:**
DID THE LOWER COURT COMMIT REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

## STATEMENT OF THE CASE

At all times pertinent hereto, the Petitioner, JOHN R. ZISGRAY resided at 737 Gluck Run Road, Glenville, WV, 26351, the Respondent Cindy Langman resided at 4302 West Virginia Highway 5, Glenville, WV 26351, in Gilmer County, WV, the Defendant J. W. Ebert Corporation, resided at 917 W. Main Street, Bridgeport, WV 26330, and owned and operated the McDonald's restaurant at 19 Fairground Road, Glenville, WV 26351.

On Friday, May 8, 2015 at approximately 11:30 State Trooper Varner responded to a report made by Respondent Langman, the General Manager of the Glenville McDonalds. At that time Respondent Langman lied to St. Trooper Varner and stated that the Petitioner, John Zisgray went through the drive through, came back and said "I want my fucking refund and shut the fuck up!" and the "I fucking do what I fucking want and if you don't like it, I can come in there and show you how I can fucking cuss" and that he "would do what he fucking wants" and "I can't stop him from coming in this store if I want to try he will make sure I will fucking know what he can and can't do." The Petitioner denied making any of the above statements, stating only that he received the wrong order, then went back through the drive through and asked for a refund, which prompted an argument about what he actually ordered between him and Respondent Langman. Upon leaving, he admitted he said "fucking bitch" and left. (Petitioner's deposition, Appendix at page 40).

Furthermore, Respondent Langman also apparently told Trooper Varner that she felt threatened by his actions and his behavior and that she did not feel safe with the Plaintiff. The Petitioner claims (and the Criminal Jury apparently believed) that the Respondent Langman lied to St. Trooper Varner and told him that he had previously harassed other workers at the store. (Varner's deposition, Appendix at page 155). In addition, Cindy Langman falsely told St. Trooper Varner that he called Neeva Moorman "a fucking nigger" and that he followed her to a "Family

Dollar" from work at "McDonalds" and that the police had been called before to address issues where the Petitioner had been at the location. Despite the Respondents' counsel being noticed for Neva Moorman's deposition, Neva Moorman was never made available to depose by the Respondents' Counsel and never gave testimony either at the Trial or at her scheduled deposition. The Petitioner denied all of the allegations (Petitioner's deposition, Appendix at pages 59-66).

Respondent Langman gave a written statement to the same effect that she gave to St. Trooper Varner which became part of the case file and materials in the case and viewed by numerus individuals. Based upon these materially false statements, St. Trooper Varner swore out an arrest warrant for the Petitioner and the Petitioner was arrested for criminal harassment.

The Petitioner had to post bail, be processed, be under bond terms and conditions for the better part of a year that restricted his movements and his ability to drink and carry firearms. He had to hire counsel, and take the matter to trial. He sought professional counseling and expended large sums of money in his defense of this matter and treatment for issues relating the stress and anxiety of the case. (Deposition of Petitioner, Appendix at page 24-42)

The Petitioner was acquitted by a jury trial in Gilmer County, on February 24, 2016, at which time Cindy Langman repeated her statements under oath to a jury in a public setting. It is uncontroverted that at all times pertinent herein, Respondent Langman was an employee of Respondent J. W. Ebert Corporation, d/b/a McDonalds in Glenville, WV, that Respondent Langman was acting within the scope of her employment in dealing with a customer of McDonalds in Glenville, WV, and that Respondent. Langman was, as the manager of McDonalds in Glenville, acting on behalf of the Respondent J. W. Ebert Corporation.

The case was filed on May 6, 2016. The Petitioner filed an Amended Complaint on May 23, 2016. The Respondents Answered on August 11, 2016. The Respondents filed a motion to

dismiss on December 5, 2016. The Petitioner filed a reply on December 20, 2016. The Court granted the Respondent's motion to dismiss on April 21, 2017, and the Court granted the Respondent's motion for summary judgment on April 20, 2018.

## ARGUMENT

**ASSIGNMENT ONE:**

DID THE LOWER COURT COMMIT REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S MOTION TO DISMISS ON THE ISSUE OF SLANDER/LIBEL?

The Petitioner would initially point out that the Respondent's argument in its brief on this issue entirely assumed that the Respondent's statements and testimonies during the criminal trial of the Petitioner's actions were truthfully stated – notwithstanding the fact that the Petitioner was found NOT GUILTY. The Petitioner contends that the Court erred in granting the motion to dismiss since there are reasonable inferences to show that the statements and testimony given by the Respondent at the Plaintiff's criminal trial were at least in part, if not in whole, false. This, in and of itself, would make any dismissal of the case inappropriate as the trial court cannot draw inferences and conclusions in the light most favorable to the defendant in a motion to dismiss a plaintiff's complaint but, rathe, must draw the inferences in the light most favorable to the non-moving party – here the Petitioner. This Court has previously held that "'[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.' Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995)." Syl. Pt. 2, Hill v. Stowers, 224 W.Va. 51, 680 S.E.2d 66 (2009). Additionally, this Court has stated: "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

The criminal complaint – based fully on the false statements of Respondent Langman -- describing John Zsigray's alleged statements and actions at McDonald's on May 8, 2015, caused Mr. Zsigray to be criminally charged by the State of West Virginia with Harassment. (Appendix

at 191). During the criminal proceedings, the alleged statements, actions, and testimony from the Respondent were submitted before a jury, and the jury returned a verdict of "not guilty" for the now Plaintiff, John Zsigray. For the Harassment charge to have been successful, it would have been necessary to establish the factuality of Mr. Zsigray's actions and statements beyond a reasonable doubt. Since the jury returned a verdict of "not guilty," and returned this verdict with the knowledge of the statements and actions described by the Respondent in the original complaint and at trial (as acknowledged by the Respondent on Page 4 of the Motion to Dismiss, Appendix at page 21), at a bare minimum the statements should not be assumed to be in and of themselves, truthful and the statements of Respondent Langman likely false as per the Respondent's argument.

Because the Respondent's argument to dismiss concludes -- and relies on -- the statements as "actually stated" (Page 2, Appendix at page 22), "accurate representations" (Id., Appendix at page 22), and "not false" (Page 4. Appendix at page 24); and since we can show that the jury in the criminal proceeding found in favor of the Petitioner, any arguments regarding the truth of the statements and defamation should be taken in a light most favorable to the Petitioner and the factuality of those statements reserved to be proven at a trial by jury because they can be reasonably shown at this stage to be false. Most of the arguments that were in the Respondent's Motion to Dismiss, and that were adopted by the lower court, solely assume the factuality of the statements reported by the Respondents and, thus, do not address the elements of defamation, falsity, and negligence in a libel suit in a Motion to Dismiss.

Conversely, the lower court reasoned in its opinion the complete opposite of what it should have done, which was to deny the motion to dismiss as untimely and without merit. (Appendix at page 27).

Under the Respondent's argument for dismissal on a defamation claim (Pages1-2, Appendix at 22), the Respondent makes the claim that a defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the: community or to deter third persons from associating or dealing with him." Crump v. Beckley Newspapers, Inc., 320 S.E.2d 77, citing Restatement (Second) of Torts §559 (1977). The Respondent then proceeds to conclude that since the Respondent was "just regurgitating" what she witnessed the Petitioner say in "the context in which [the statements] were made," there is no cause of action for a defamation claim. This legal conclusion does not logically follow from the Respondent's cited source for showing that no defamatory statement was made. In addition, and without warrant, the Respondent claimed that the Respondent's statements "must be assumed to be in and of themselves defamatory." Page 2. (Appendix at page 22).

Here, the Respondent cited no legal precedent for why such statements "must" automatically be assumed as in and of themselves, defamatory. Since the Respondent had failed to show that Petitioner's reputation was not harmed or show that third persons still associated with Petitioner pursuant to their own rule that they cited, and since they failed to show why the Court must assume the statements to be in and of themselves defamatory, the Respondent failed to show why the libel claim should be dismissed on a defamation ground. Under the Respondent's falsity claim (Page 4, Appendix at page 27), the Respondent fails to prove that the statements were not false. The Respondent alludes to the conclusion that since the Respondent was present and was a witness to the event, such statements "given as to the best of her memory" are not false. The Motion to Dismiss should not be granted on this ground, because such a conclusion cannot logically follow from a claim that since someone was a witness and gave a report, what they said is not false. Eyewitness testimony is not inherently reliable and the motives and the reliability of the witness

are jury questions – not questions for a court to decide in a Motion to Dismiss. Here, the Respondent assumes, and the lower court apparently accepted, that statements are "not false" without providing a rational basis. Since in the criminal case the Petitioner was acquitted, there should already be at least some doubt as to the entire truthfulness of the Respondent's statements.

Under the negligence claim in the Motion to Dismiss, the Respondent claimed that "[t]he fact that the Plaintiff was later acquitted does not mean that the [Respondent] was negligent in her recitation of the facts as she remembered them." (Page 4. Appendix at 24). Such a claim inaccurately assumes that negligence could not even be a possibility for the Respondent's statements against the Petitioner. As such, this claim does not actually address the negligence issue itself, but rather creates a conclusion that does not necessarily have to be true. In addition, the Respondent claims that there was no negligence because the statements "were accurate representations of the events from [the Respondent's] point of view. . ." (Page 4. Appendix at 24). This claim does not address negligence, nor can such a conclusion show that there was absolutely no negligence since there is no basis that stating something from someone's point of view means that they were automatically not negligent in giving it. For a failure to show with certainty that there was absolutely no negligence on the part of the Respondent, the Respondent's Motion to Dismiss should not have been granted.

Perhaps most importantly is that the lower court relied heavily on the arguments of counsel that the statements given by the Respondent Langman to the officer were "privileged" communications. The Respondent's argues that such statements were "absolute[ly] privilege[d]" if it was made before a judicial proceeding pursuant to a judicial proceeding. The case that the Respondents cite, Collins v. Red Roof Inns, Inc., 566 S.E.2d 595 (W.Va. 2002), seeks to answer the following legal question:

> Is a party to a dispute absolutely privileged to publish to the opposing party involved in the dispute defamatory matter regarding a *third* person where no judicial action is presently pending, but where a judicial action is contemplated in good faith and is under serious consideration, and where the defamatory statement is related to the proposed judicial proceeding?
>
> Id. at 598 (emphasis added). The court held, and established the following rule:
>
> Based upon our discussion above, we hold that prior to the filing of a prospective judicial proceeding, a party to a dispute is absolutely privileged to publish defamatory matter about a third person who is not a party to the dispute only when (1) the prospective judicial action is contemplated in *good faith* and is under serious consideration; (2) the defamatory statement is related to the prospective judicial proceeding; and (3) the defamatory matter is published only to persons with an interest in the prospective judicial proceeding.
>
> Id. at 603 (emphasis added). The Respondent's argument cites the following quote on Page 2 of the Motion to Dismiss using this exact same case: "[T]he absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, *including preliminary steps leading to judicial action of any official nature* provided those steps bear reasonable relation to it." 566 S.E.2d 595 at 600. (Appendix at 2). Since the court used this statement when looking at third parties, and since the Petitioner was not a third party to the criminal proceedings—since it was the Respondent's statements that directly caused the Petitioner to be arrested—this rule should not apply to the Petitioner's case and the lower court improperly applied the privilege argument in this matter. Also, since the statements made by the Respondent were false in nature, the rule for an absolutely privileged statement should not applied because there was no good faith effort in giving a truthful statement to the officer.

In addition, if the Respondents argue that such a rule did apply making all statements to law enforcement officers privileged if they were used in the course prior to litigation, there would be no cause of action for pursuing libel claims in cases that lead to false arrests, nor would there be any deterrence from filing false reports against anyone. This would completely shut down all avenues for a plaintiff to have any recourse when falsely arrested. A plaintiff cannot sue a police

officer when the officer is relying in good faith on false information. And, if this case stands, a plaintiff cannot sue the individual who made false statements to the police officer that led to arrest, incarceration and the stress and travails of trial. (Petitioner's Appendix at page 29-31).

The statements are additionally not qualified privileges since the statement was not made in good faith due to the lying.

The lower court reasoned in its Order that "the absolute privilege" arises out of "the judicial proceeding" equating reports to the police with statements in a judicial proceeding. (Petitioner's Appendix page 30).

As was argued previously in the brief in opposition to the motion to dismiss, the Petitioner met all of the actions of a liable or slander claim. The Petitioner could show (1) that such statements against him by the Respondent were defamatory since the Respondent lied to a police officer about the Petitioner, (2) that such false statements to a police officer show that there was not made in good faith, (3) that the statements were false based on the conclusions in the criminal proceedings, (4) that the statements made to officer did involve the Petitioner (5) that the Respondent was negligent or intentional in knowingly making a false statement against the Petitioner, and (6) that the Petitioner suffered actual damages in the form of being arrested, posting bail, being processed, and suffering stress because of the false statements. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 173 W.Va. 699 (W. Va., 1983) For the foregoing reasons, the Court committed error when granting the Respondent's motion to dismiss.

**ASSIGMENT TWO:**

DID THE LOWER COURT COMMIT REVERSIBLE ERROR BY GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

In Williams v. Precision Coil, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995), the West Virgina Supreme Court of appeals reasoned that the circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, on appeal, an appellate court would draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. When looking at the factual record, the appellate court must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. Likewise, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied. *See also* Pritt v. Republican Nat'l Comm., 210 W. Va. 446, 557 S.E.2d 853 (2001) and Maston v. Wagner, 236 W. Va. 488, 781 S.E.2d 936 (2015).

The standard for summary judgment is high. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the *conclusions* to be drawn therefrom. The trial court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Harris v. Jones, 209 W. Va. 557, 559, 550 S.E.2d 93, 95 (2001) and Poling v. Pre-Paid Legal Servs., 212 W. Va. 589, 575 S.E.2d 199 (2002).

"[A] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). Furthermore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, Aetna Cas. &

Sur. Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

In the current proceeding, the Petitioner had given his deposition indicating his reasons he believes that Cindy Langman and McDonalds have intentionally inflicted emotional distress upon the Plaintiff by her making false reports to the State Police regarding his statements and actions on the date in question when he went through the drive through at McDonalds in Gilmer County, West Virginia. In addition, it is uncontroverted, those statements led to his arrest, his temoporary incarecration, his bonding out on the charges, his having to hire an attorney and going through the stress of trial and aquittal, interfered with his employment, and the stress and emotional trauma that the incident and its aftermath caused. (See appendix at pages 85-87). In addition, his own medical experts were deposed and testified as to how these incidents have affected his health and added stress to his life. (See appendix at pages 117-126) The issue of whether the Plaintiff can meet the elements of intentional inflection of emotional distress, along with the should have been be brought before the jury as he has met at least a *prima facie* case for intentional inflection of emotional distress. The lower court committed reverssable error in dismissing the Petitioner's case on the grounds argued by the Respondents on their motion for summary judgment. The lower court's mistake is that it councluded improperly that a a reasonable jory could not conclude that the Respondents' conduct was atrocious, intolerable and so extreme and outrageous as to exceed the bounds of decency. While the court felt that it acted as a "gatekeeper", this was a question that was best left for a jury to decide.

In the instant matter, it is the position of the Petitioner that the disagreement between the Petitioner and the Respondent Langman (who was acting in her capacity as a manager at the time) was completely blown out of proportion in a way that was not only atrocious but outrageous.

Langman called the police over an incident were the wrong order was given to a customer at a McDonalds window, the Petitioner who drove through a drive through window and had words with the manager. There is a genuine issue of fact as to whether the Petitioner ever entered the McDonald's as was claimed by the Respondents and ever did anything that rose to the level that warranted the outrageous conduct of calling the police over a sandwich. But even so, an argument over a sandwich that Respondent Langman turned into criminal charges, trial, acquittal, stress, numerous and regular trips to counseling, higher blood pressure and loss of income from employment. (See, Appendix at pages 117-126).

In addition, there was no threat to any employees of McDonalds. Nowhere in any deposition does the Petitioner admit to threatening any employee. (See Appendix at pages 34-58) In fact, the Petitioner was acquitted of the charges in a criminal court. By alleging this fact in and of itself creates a material issue of fact as to wherever or not there was a threat that warranted the outrageous and intentional behavior of Respondent Langman.

Furthermore, again whether or not the Plaintiff suffered as a result of the stress of his freedom being jeopardized and him possibly spending time in jail is a question for the jury not for the court. In the case of Travis v. Alcon Laboratories, Inc. 202 W. Va.. 369, 504 S.E.2d 419 (W. Va., 1998), the West Virginia Supreme Court of Appeals, in syllabus point 4, stated as follows:

> In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

Thus, as stated previously, the Court should, based upon the above referenced arguments find that a reasonable jury could conclude that the Defendants conduct was outrageous because she turned a customer's disagreement regarding a sandwich into an arrest for a crime he did not

commit. Thereafter, it should be left to the jury in the instant case to decide in fact whether or not it *was* actually outrageous. Consequently, the lower Court committed reversable error when it ruled that there were no issues of material fact and that the Respondent was entitled to summary judgment as a matter of law.

## STATEMENT REGARDING ARGUMENT AND DECISION

The Plaintiff requests ORAL ARGUMENT.

## STANDARD OF REVIEW

This Court has previously held that "'[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is ***de novo***.' Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995)." Syl. Pt. 2, Hill v. Stowers, 224 W.Va. 51, 680 S.E.2d 66 (2009). Additionally, this Court has stated: "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

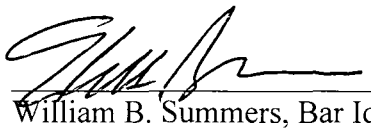
Likewise, this Court has previously held that the standard of review of motions for summary judgment is well-established: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). Furthermore, "[a] party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Id. at Syl. Pt. 6. Review of such motions is ***de novo***. Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

## CONCLUSION/RELIEF REQUESTED

Here, the Court should never have dismissed the slander/libel part of the case at the initial stages of the proceeding under a motion to dismiss standard, and the matter should be REVERSED and REMANDED for trial. In addition, the court erred when it granted the Defendant's' motion for summary judgment on the issue of intentional infliction of emotional distress as there was a material issue of fact in dispute that precluded any grant or a motion for summary judgment, and therefore the matter should be REVERSED and REMANDED for trial.

JOHN R. ZSIGRAY,

By counsel,



William B. Summers, Bar Id No. 7239
3301 Dudley Avenue
Parkersburg, WV 26104
(304) 420-0975

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

**John R. Zsigray,**
**Petitioner**

**vs).** **Appeal No. 18-0461**

**Cindy Langman and**
**J.W. Ebert Corporation, D/B/A "McDonalds",**
**Respondents.**

## VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF WOOD, TO-WIT:

William B. Summers, being first duly sworn, says that the statements made in the Statement of Facts, are accurate to the best of counsel's ability.

William B. Summers
Counsel for Petitioner