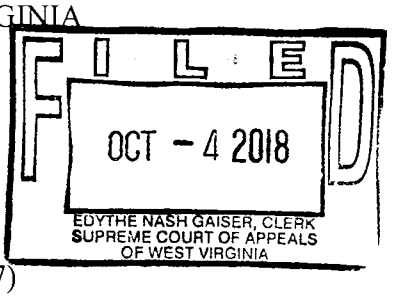
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



September 2018 Term

No. 18-0461
(Gilmer County Circuit Court Civil Action No.: 16-C-17)

JOHN R. ZSIGRAY,
Plaintiff Below,
Petitioner,

v.

CINDY LANGMAN; AND
J.W. EBERT CORPORATION, D/B/A "McDONALDS",
Defendants Below,
Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This case and its subsequent appeal to this Court center around an altercation at Respondent, J.W. Ebert Corporation's, McDonald's franchise in Gilmer County, West Virginia on May 8, 2015. Petitioner, having had from time to time patronized the McDonald's franchise operated by Respondent, J.W. Ebert Corporation, was known by Respondent and general manager, Ms. Cindy Langman, due to Petitioner's past inappropriate behavior at the restaurant. (Appendix at page 187). The pertinent facts are as follows: At approximately 10:30 a.m. on May 8, 2015, Petitioner ordered food at the drive through, received his order, then immediately returned and requested a refund for receiving an incorrect order. (Police Report, Appendix at page 85). At that point, Ms. Langman and Petitioner exchanged words, during which time Petitioner used foul and threatening language toward Ms. Langman. (Police Report, Appendix at pages 85, 87). Ms. Langman subsequently called the police, at which time West Virginia State Trooper K.J. Varner responded to investigate. (Police Report, Appendix at page 85; Varner Deposition, Appendix at page 160). Petitioner's behavior on May 8, 2015, is in line with his prior actions toward employees of the restaurant. For example, a previous encounter with Petitioner by one of Respondent's employees, Ms. Moorman, resulted in Petitioner calling Ms. Moorman a "fucking nigger." (Police Report, Appendix at pages 185, 189, 190). Based upon Trooper Varner's investigation, Magistrate Wolfe signed a warrant for Petitioner's arrest on May 8, 2015. (Arrest Warrant, Appendix at page 193). Petitioner turned himself in on the charge of criminal harassment and was subsequently tried and found not guilty by a jury on February 26, 2016.

Petitioner instituted a civil action in Gilmer Circuit Court on May 6, 2016. (Summons and Complaint, Appendix pages 1-9). Plaintiff subsequently filed an Amended Complaint. (Amended Complaint, Appendix at pages 10-14). Respondents filed their Answer on or about August 11,

2016. (Answer, Appendix at pages 15-20). Respondents filed a Motion to Dismiss the Slander/Libel claims on or about December 5, 2016. (Motion to Dismiss, Appendix at pages 21-26). The Court granted Respondents' Motion to Dismiss on April 21, 2017. (Order granting Motion to Dismiss, Appendix at pages 27-32). Respondents filed a Motion for Summary Judgment on the remaining claims of Intentional Infliction of Emotional Distress and Tort of Outrage on or about September 11, 2017.[1] The Court entered its Order granting Respondents' Motion for Summary Judgment on April 20, 2018. (Order granting Motion for Summary Judgment, Appendix at pages 234-241). Petitioner's instant appeal follows.

On June 6, 2018, this Court entered its Scheduling Order which required Petitioner to perfect his appeal on or before August 20, 2018, by filing his brief and appendix. Per the Scheduling Order, "[i]f the appeal is not perfected on or before August 20, 2018, the appeal will be dismissed." On August 16, 2018, Petitioner filed a "Motion to Extend Deadline to File Petitioner's Brief and Appendix." Respondents filed their Response and Motion to Dismiss the Appeal on August 21, 2018. Petitioner filed his brief on August 27, 2018. As of the filing of this Brief, the Court has yet to issue a ruling on Petitioner's Motion to Extend or Respondents' Motion to Dismiss.

SUMMARY OF THE ARGUMENT

At the outset, the Court need not and should not address the substance of Petitioner's Assignments of Error because Petitioner failed to perfect his appeal under this Court's Scheduling Order. As indicated by the record of this appeal and recounted in the Statement of the Case, *supra,*

[1] Upon further review of the Appendix, it appears that Respondents' Memorandum in Support of Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment were not included in the record produced for this appeal. Respondent, therefore, attaches their Memorandum of Law and Reply in a concurrently filed "Motion for Leave to File Respondents' Memorandum in Support of Motion Summary Judgment" as a proposed amendment to the Appendix.

the Court set the deadline for perfection as August 20, 2018. Even though Petitioner filed an eleventh-hour Motion to Extend deadlines for filing the brief and appendix, that alone, without an Order granting Petitioner's Motion, does not provide Petitioner relief from the requirements of the Scheduling Order. Nevertheless, Petitioner filed his brief on August 27, 2018, seven days after the deadline set forth in the Scheduling Order to perfect his appeal lapsed.[2] As such, Petitioner's appeal should be dismissed, in whole, for failure to abide by the Scheduling Order entered by this Court.

Petitioner's failure to perfect his appeal notwithstanding, the Petitioner's brief lists two errors at the trial court level in this case. First, Petitioner claims that the trial court erred in granting Respondents' Motion to Dismiss regarding the issues of Libel/Slander. Notably, Petitioner raises this alleged error for the first time in his brief rather than the Notice of Appeal. Indeed, despite consultation with undersigned counsel regarding preparation of the Appendix, not once did Petitioner's counsel raise the Slander/Libel issue as an assignment of error. The Court should not permit Petitioner to flout the Rules of Appellate Procedure and should, therefore, only consider the single Assignment of Error properly before this Court.

Assuming the Court deems the first error to be properly raised for appeal, Petitioner's claim still fails because the trial court correctly found the statements made to the investigating officer, Trooper Varner, during the course of his investigation and at Petitioner's criminal trial were absolutely privileged communications made during the institution of or during a judicial proceeding. (Appendix page 31). Given that the communications alleged were absolutely privileged, Petitioner could not succeed on the merits of his Slander/Libel claims and, therefore, the trial court properly granted Respondents' 12(b)(6) Motion to Dismiss.

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[2] Respondents note that the Scheduling Order also includes language for filing respondents' brief "on or before October 4, 2018, or within forty-five days of the date the appeal is perfected, if the appeal is perfected before **August 27, 2018**." (emphasis added).

Petitioner also argues that the statements made to Trooper Varner and during Petitioner's criminal trial cannot be considered qualified privileged communications. "A qualified privilege exists when a person publishes a statement in good faith about a subject in which [she] has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter; however, a bad motive will defeat a qualified privilege defense." *Belcher v. Wal-Mart Stores, Inc.*, 211 W.Va. 712, 568 S.E.2d 19, 27 (2002) (internal citation omitted). As discussed more fully below, § IV, A., *infra.*, Respondent Langman acted in good faith in calling the police to report an incident and provided the basis for her complaint to the responding officer. Under *Belcher*, contrary to Petitioner's statement to the contrary, those communications can also be afforded qualified privilege, thus shielding Respondents from liability for defamation.

Petitioner next argues that the trial court erred in granting Respondents' Motion for Summary Judgment on the intentional infliction of emotional distress claim. Petitioner's assignment of error fails because the trial court properly found that the alleged conduct of Cindy Langman "cannot reasonably be considered as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress." (Appendix page 239). As articulated in *Travis v. Alcon Laboratories, Inc.*, "the role of the trial court is to first determine whether the defendant's conduct may 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." Syl. Pt. 4, *Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 504 S.E.2d 419 (1998) (emphasis added). The lower court properly used its gatekeeping function under *Travis* and correctly determined that the alleged conduct cannot reasonably be considered intentional or reckless infliction of emotional distress, *as a matter of law.*

Lastly, even assuming the Court finds the lower court erred in its holding as a matter of law regarding the conduct in question, the Petitioner's claim would nonetheless fail because there is no genuine issue of fact as to the element of intent. In the context of Petitioner's claim, Petitioner failed to provide, and cannot provide, any evidence that Respondents acted "to inflict severe emotional distress" or "[knew] such distress is certain or substantially certain." *See Restatement of Torts* (2d.), §46, *comment i.* Petitioner relies exclusively on his subjective belief that Respondents acted with intent. Such evidence, without more, cannot guard against summary judgment on the element of intent.

There is no error in the decisions made by the trial court, as will be shown more fully below.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has requested oral argument in this case without any additional justification as to why oral argument is necessary. The principle issues in this case have been authoritatively decided in the Court's decisions cited below, therefore, oral argument under W.Va. R. App. P. 19 is not necessary unless the Court determines that other issues arising upon the record should be addressed. Should the Court determine that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. Pt. 2., *State ex rel. McGraw v. Scott Runyan Pontiac-Buick,* 194 W.Va. 770, 461 S.E.2d 516 (1995). Regarding a Rule 12(b)(6) motion to dismiss, this Court has stated that, "[t]he trial court, in apprising 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., Inc.,* 160 W.Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957)).

Likewise, "[t]he standard review of a circuit court's entry of summary judgment is *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). The Court in *Painter* further stated that "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Lastly, "[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 law." *Minshall v. Healthcare & Retirement Corporation of America,* 208 W.Va. 4, 537 S.E.2d 320 (2000) (citing *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)). Where a moving party satisfies its burden in showing that there is no genuine issue of material fact, the burden of production shifts to the non-movant who must either "(1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995).

II. Petitioner's Appeal must be dismissed in full for failure to perfect his appeal by the date provided in this Court's Scheduling Order because Petitioner, *without leave of Court or good cause shown*, filed his Brief seven (7) days past the deadline to perfect.

Petitioner's appeal should be dismissed by this Court in full because Petitioner failed to perfect his appeal by August 20, 2018, as required under this Court's Scheduling Order entered on June 6, 2018. Respondents addressed this issue in their Response in Opposition to Petitioner's Motion to Extend and Respondents' Motion to Dismiss; therefore, Respondents will not belabor the point much further in their Brief. West Virginia Rule of Appellate Procedure 5(f) provides that a motion to extension of time filed with the Supreme Court "must comply with Rule 29 and must state with particularity the reasons why an extension is necessary." W. Va. R. App. P. 5(f). Petitioner's eleventh-hour attempt to extend the deadline to perfect his appeal on August 16, 2018, without good cause shown, and his failure to timely file his Brief and Appendix on August 20, 2018, without a Court Order allowing an extension of time to file constitute suitable grounds for a complete dismissal of Petitioner's appeal.

III. The Court should disregard Assignment One, as Petitioner did not properly raise this issue in his Notice of Appeal.

This Court should disregard what is presented as "Assignment of Error One" as Petitioner failed to properly raise the issue prior to its inclusion in Petitioner's Brief. On May 21, 2018, Petitioner filed his Notice of Appeal, in which he submitted a single assignment of error: that the Circuit Court erred in granting Defendants' Motion for Summary Judgment. Petitioner attached an addendum to the Notice of Appeal styled "Nature of Case, Relief Sought and Outcome" which set out a recitation of facts (albeit with Petitioner's commentary regarding the alleged falsity of statements made to Trooper Varner). Notably, the addendum specifically references entitlement to damages for the alleged intentional infliction of emotional distress without any reference to claims of slander/libel. Further illustrating Petitioner's lack of intent to appeal the circuit court's granting Defendants' Motion to Dismiss, Petitioner also references the date on which Judge Facemire granted Defendants' Motion for Summary Judgment, again, without any reference to the Motion

to Dismiss. Lastly, Petitioner's counsel certified that he performed a reasonable review of the case and that "the contents of the Notice of Appeal are **accurate and complete**." (Petitioner's Notice of Appeal at page 4) (emphasis added).

Petitioner, likewise, did not comply with Rule 7(e) of the Rules of Appellate Procedure by failing to explicitly state that he intended to also appeal the Motion to Dismiss after having failed to include it as an assignment of error in the Notice of Appeal. Petitioner's Rule 7(e) list, though including reference to the Motion to Dismiss, Order Granting Motion to Dismiss, and transcript of hearing on the Motion to Dismiss[3], in no way states that Petitioner intended to include it as an Assignment of Error. Indeed, based upon a July 23, 2018, teleconference with Petitioner's counsel, Respondents have been under the impression that the sole issue on appeal is the Motion for Summary Judgment. It is abundantly clear that Petitioner only appealed the Summary Judgment issue and is now attempting to raise an additional issue not properly before this Court on appeal.

IV. The Petitioner's Assignments of Error are without merit.

A. Because the allegedly defamatory/libelous statements were privileged communications made during the preliminary steps leading to official judicial action, the lower court did not err in granting Respondent's Motion to Dismiss on the issues of Libel/Slander.

Assuming, *arguendo*, that the Court finds Petitioner's Assignment One as properly before this Court, the Petitioner's argument still lacks any merit because the circuit court properly found that the communications made to Trooper Varner in the course of his investigation and at Petitioner's criminal trial were privileged to which no civil remedy exists. Respondent Langman provided her statement to Trooper Varner regarding the events that occurred on May 8, 2015, as

[3] It is worth noting that Petitioner also indicated on the Notice of Appeal that transcripts were not necessary for this appeal and, therefore, did not complete the "Supreme Court of Appeals of West Virginia Appellate Transcript Request Form" as required.

well as prior incidents involving Petitioner. (Answer to Complaint, Appendix at page 16; Motion to Dismiss, Appendix at page 22; Police Report, Appendix at pages 85, 87). "An absolute privileged communication is one in which, by reason of the occasion on which, or the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously." *Crump v. Beckley Newspapers, Inc.,* 320 S.E.2d 70, 78 (W.Va. 1983). (Order Granting Motion to Dismiss, Appendix at page 29, paragraph 11).

It is undisputed that the statements with which Petitioner takes issue were made to Trooper Varner during his investigation and at Petitioner's criminal trial. (Petitioner's Brief at page 7-8; Order Granting Motion to Dismiss, Appendix at page 31, para. 18-19). This Court has applied the absolute privilege "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." *Collins v. Red Roof Inns, Inc.,* 566 S.E.2d 595, 600 (W.Va. 2002) (quoting *Cromwell v. Herring,* 301 S.C. 424, 392 S.E.2d 424 (1990)). (Order Granting Motion to Dismiss, Appendix at page 30, para. 16). Further citing the *Cromwell* case, the Court of Appeals stated that, "[t]he threat of a civil action in slander or libel would undoubtedly have a chilling effect on those tempted to initiate legitimate investigations or inquires into others' supposed wrongdoings. The legitimacy of the investigation and inquires mentioned above could then be challenged in a suit for *malicious prosecution*..." *Collins v. Red Roof Inns, Inc.,* 566 S.E.2d at 600 (emphasis added). (Motion to Dismiss, Appendix at page 23).

Petitioner's argument on this Assignment of Error consists of mostly rhetorical sleight of hand. First, Petitioner mischaracterizes the lower court's reliance upon the *Collins* case in its Order Granting the Motion to Dismiss. In its Order, the Gilmer County Circuit Court explicitly states

that the third party application in *Collins* "is not precisely the issue that is present in this case." (Order Granting Motion to Dismiss, Appendix at page 29, para. 14). Rather, the Court "reviewed the law regarding the absolute privilege for statements made in connection with judicial proceedings." (Order Granting Motion to Dismiss, Appendix at page 29, para. 14). In addition to the case law cited, the circuit court appropriately consulted the Restatement (Second) of Torts regarding the application of absolute privileged communications. Specifically, the Court relied extensively on Restatement (Second) of Torts § 587, which outlines the protections afforded to individuals during a criminal prosecution and those steps preliminary to it. (Order Granting Motion to Dismiss, Appendix at pages 29-30, para. 15-16).

Second, Petitioner makes a blanket assertion with no argument that the statements "are additionally not qualified privileges since the statement was not made in good faith due to the lying." (Petitioner's Brief at 12). Contrary to Petitioner's blanket assertion, and since he has put it in issue, the statements can also be considered qualified privileges, as well. "A qualified privilege exists when a person publishes a statement in good faith about a subject in which [she] has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter; however, a bad motive will defeat a qualified privilege defense." *Belcher v. Wal-Mart Stores, Inc.,* 148 W.Va. 712, 568 S.E.2d at 27 (2002) (quoting *Dzinglski v. Weirton Steel Corp.,* 191 W.Va. 278, 445 S.E.2d 219 (1994)).

In *Belcher*, the Appellant filed suit for defamation (among other claims) against Wal-Mart Stores, Inc. after Wal-Mart employees/managers contacted the Nitro Police Department to assist their investigation into a possible fraudulent receipt Appellant used in an attempted computer return. The employees based their investigation upon seeing similarities in Appellant's receipt to a reported theft at a Pennsylvania, using a receipt which had been stolen from the Nitro store two

days prior. While the date and computer type on the receipt matched, the serial number was not checked. The Appellant was subsequently questioned by a Nitro Police Officer after being separated into the main aisle separating the customer service area from the main part of the store. The Appellant testified that the managers, who were nearby during Appellant's questioning, told him they thought the receipt was "a fake, felonious receipt." The investigation proceeded away from the Appellant. When they returned, Appellant's refund was processed, and his account was credited. *See generally Belcher v. Wal-Mart Stores, Inc.,* 568 S.E.2d at 23-24 (W.Va. 2002).

The West Virginia Supreme Court of Appeals held that the statements, in this context, were afforded qualified privilege. The Court found that the "employees recognized a legitimate need to investigate a suspicious receipt in the context of the ongoing investigation into the theft of a similar computer from a Pennsylvania store by the use of a falsified receipt obtained from the Nitro store." *Belcher* at 27. Under the circumstances, the store sought assistance from the local police department. The Court found that the communication to the officer was privileged and such communication shielded Wal-Mart from liability for defamation. *Id.*

The situation in *Belcher* is directly analogous to the factual circumstances at bar. Respondents had previous difficult interactions with Petitioner involving foul language. Due to the incident on May 8, 2015, Respondent Langman acted no differently than the employees in *Belcher*: she called the police and provided the basis for her complaint to the responding officer. Under *Belcher*, those communications are, as a matter of law, afforded qualified privilege, thus also shielding Respondents from liability for defamation.

B. Because the underlying behavior alleged in Petitioner's Complaint did not constitute outrageous or atrocious conduct *as a matter of law*, the lower court did not err in granting Respondent's Motion for Summary Judgment.

The lower court did not err in granting the Motion for Summary Judgment because the court properly found that the alleged conduct did not constitute outrageous or atrocious conduct *as a matter of law*. As he did in the briefing on the Motion for Summary Judgment, Petitioner's brief consistently and conveniently downplays the Court's initial role as gatekeeper for claims of outrage and intentional infliction of emotional distress. Most importantly, the trial court must first examine the proof presented by Plaintiff to determine if Defendants' conduct may *legally* be considered "extreme and outrageous." *Restatement of Torts* (2d.), §46, *comment h*. In this action, Petitioner alleges a claim for the tort of outrage without underlying physical injury. Given this lack of physical injury, the Court's oversight role in this matter is even more critical. "Especially where no physical injury accompanies the wrong, tort of outrage is a slippery beast, which can easily get out of hand without firm judicial oversight." *Keyes v. Keyes,* 182 W.Va. 802, 805 (1990). Under this metric, it is clear that the lower court correctly found that the conduct alleged cannot be considered "extreme and outrageous" as a matter of law.

Petitioner's argument on this point focuses more on his own subjective beliefs over objective facts. However, in the context of the lower court evaluating whether, as a matter of law, the conduct alleged is outrageous or atrocious, Petitioner's subjective belief is irrelevant. Specifically, Petitioner references that he "had given his deposition indicating his reasons he believes Cindy Langman and McDonalds have intentionally inflicted emotional distress upon the [Petitioner]..." (Petitioner's brief at page 14). Curiously, Petitioner fails to provide citations to those portions of his deposition transcript. However, a review of Petitioner's deposition reveals an admission to calling Respondent Langman a "stupid fucking bitch" on the date in question. (Deposition of John Zsigray, Appendix at page 43, deposition page 39-40). He admits that Respondent Langman did not use foul language "to his knowledge." (Deposition of John Zsigray,

Appendix at page 43, deposition page 39-40). Upon being asked which part of a letter sent by Respondent to Petitioner barring him from the premises, citing his conduct as "threatening to the safety and welfare of the employees and customers," Petitioner says he thinks that is a false statement. (Deposition of John Zsigray, Appendix at page 45, deposition page 47). When asked how the statement is false, Petitioner responded, "I don't know how it's false, but I find it being false." (Deposition of John Zsigray, Appendix at page 45, deposition page 47).

Petitioner also mischaracterizes the lower court's rationale in granting Respondents' Motion for Summary Judgment by claiming that "it concluded improperly that a reasonably jury could not conclude that the Respondents' conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." (Petitioner's brief at page 14). Indeed, Petitioner even goes further, dismissively stating that "[w]hile the court felt it acted as a 'gatekeeper', this was a question best left for a jury to decide." (Petitioner's brief at page 14). It is quite telling that Petitioner has never substantively addressed or rebutted the initial, and most pertinent, part of the rule outlined in the *Travis* case that explicitly states the gatekeeping role of the trial court. In Syllabus point 4, cited in full by Petitioner in his brief, the West Virginia Supreme Court of Appeals held 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 the conduct may reasonably be considered outrageous is a legal question**, and whether the conduct is in fact outrageous is a question for jury determination.

Travis v. Alcon Laboratories, Inc., 202 W.Va. 369, 504 S.E.2d 419 (W.Va. 1998) (emphasis added). (Petitioner's brief at page 15). The reason Petitioner fails to address this point is because the law is clear and absolutely refutes his central argument that the lower court

improperly invaded the province of the jury. The Petitioner's consistent misunderstanding of the nature of the Court's role in cases of intentional infliction of emotional distress under *Travis* is not grounds for overturning the appropriate granting of Respondents' Motion for Summary Judgment.

C. Even assuming the Court finds such conduct to be outrageous as a matter of law, Plaintiff still could not survive a Motion for Summary Judgment because there are no genuine issues of material fact as to intent.

Petitioner's claims of outrage and intentional infliction of emotional distress fail upon even the most superficial application of logic and reason. In essence, the Petitioner's entire case centers around the lofty claim that Respondent Langman intentionally and miraculously caused Petitioner to be arrested, charged, and tried for his conduct at the McDonald's in Gilmer County, West Virginia, and is also responsible for "his arrest, his temporary incarceration, his bonding out on the charges, his having to hire an attorney and going through the stress of trial and acquittal, interfered with his employment, and the stress and emotional trauma that the incident and its aftermath caused." (Petitioner's Brief at page 14). Thus, to prevail on his claim Petitioner must provide proof that Respondent Langman was apparently in cahoots with State Trooper Varner, Magistrate Wolfe, and the prosecuting attorney of Gilmer County, West Virginia, who prosecuted Petitioner. Unsurprisingly, Petitioner has not provided any such evidence.

Petitioner did not provide a scintilla of proof that Respondent Langman acted with intent in the manner Petitioner claims. According to the Restatement of Torts, intent in this context requires an actor to desiring "to inflict severe emotional distress or where he knows such distress is certain or substantially certain" and for reckless conduct in deliberate disregard of a high degree of probability that such emotional distress will occur. *See Restatement of Torts* (2d.), §46, *comment i*. Petitioner never took Respondent Langman's deposition, which would have provided Petitioner ample opportunity to discover information and evidence related to the element of intent. Instead,

Petitioner chose not to obtain that information and evidence. As Petitioner admits in his own brief, Petitioner's only "proof" for his claims against Defendants is his "belief" that Defendants acted with such intent. (Petitioner's Brief at page 14). Mere belief is in no way sufficient proof of intent. Without more, even when viewing the evidence, or lack thereof, in light most favorable to Petitioner, no genuine issue of material fact exists as to intent.

Petitioner did not provide sufficient evidence to escape summary judgment beyond his "belief" that Defendants committed the alleged intentional torts. Therefore, as recognized by the Kentucky Supreme Court:

> The curtain must fall at some point upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief...that something will "turn up," cannot be made basis for showing that a genuine issue of material fact exists."

Neal v. Welker, 426 S.W.2d 476, 479-480 (Ky. 1968) (internal citation omitted).

As there. So here.

CONCLUSION

The Petitioner's Assignments of Error are without merit. Preliminarily, and perhaps most importantly, Petitioner improperly raises Assignment One for the first time in his Brief after failing to properly raise the issue in his Notice of Appeal. As such, the Court need not and should not address this Assignment of Error. However, even assuming the Court finds that Petitioner properly raised Assignment One, the lower court did not err in granting Respondent's Motion to Dismiss o the issues of Libel/Slander because the statements made by Respondent's employees to the investigating officer during the course of an investigation constitute privileged communications made during the preliminary steps leading to official judicial action. Likewise, the conduct alleged in the Complaint (and Amended Complaint) below did not rise to the level of being outrageous or

atrocious conduct *as a matter of law*. Thus, in keeping with the Court's initial gatekeeping function for claims of Intentional Infliction of Emotional Distress, the lower court did not err in granting Respondent's Motion to Dismiss. Therefore, and based upon the foregoing, the ruling(s) of the lower court should be affirmed.

Respectfully submitted,

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