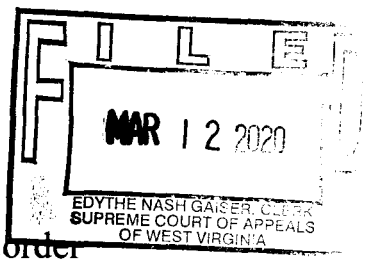
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0906



KIMBERLY A. BAKER
Petitioner

V.)

THE CHEMOURS COMPANY FC, LLC, a Delaware Limited Liability Company, SHAWN BUSCH and KEVIN CRISLIP,
Respondents

Appeal from a final order
of the Circuit Court of Wood County
(Civil Action No. 19-C-177)

Petitioner's Reply Brief

Counsel for Petitioner, Kimberly A. Baker

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Table of Contents

TABLE OF AUTHORITIES

I. The evidence rejected for consideration in Baker I gives rise to a new cause of action not barred by *res judicata*

Respondents argue that the claims raised in Baker II are barred due to claim preclusion by means of *res judicata* and/or claim splitting. That is not the case, for the reasons set forth below.

As both Petitioner and Respondents have identified, West Virginia uses the 'same-evidence' approach for determining whether two claims should be deemed to be the same for purposes of claim preclusion. Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 557 S.E.2d 883, 885 (2001). For purposes of res judicata, "a cause of action" is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. "The test to determine if the cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata." Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 472, 498 S.E.2d 41, 44 (1997). "For a second action to be a second vexation which the law will forbid, the two actions must have (1) substantially the same parties who sue and defend in each case in the same respective character, (2) the same cause of action, and (3) the same object." Beahm v. 7-Eleven, Inc., 223 W. Va. 269, 270, 672 S.E.2d 598, 599 (2008).

Petitioner's claims in Baker II raise the issue of retaliation for her first lawsuit. West Virginia has, as both sides have agreed, adopted a "same evidence" test to determine whether claim preclusion applies. Petitioner's amended complaint in Baker I sued for gender discrimination. APPENDIX 222. Petitioner's complaint in Baker II makes claims of disability discrimination, retaliation for bringing the Baker I lawsuit, and further gender discrimination beyond that alleged in Baker I. Each of these claims are based on different evidence than the claim made in Baker I.

The facts from the Baker I amended complaint do not appear in Baker II. Under this same evidence test, Petitioner is not barred from suing Respondents for gender discrimination in the future merely because she could have done so in the past.

However, as Respondents identify, there is the issue of Petitioner not including these claims in Baker I.

II. Respondents' position would penalize plaintiffs who choose to continue working for a defendant-employer rather than quit

What is unclear after reading Respondents' brief is when, if ever, will Petitioner be permitted to bring claims for gender discrimination, retaliation, and disability discrimination against Chemours? From Respondents' brief, the logical conclusion of their argument is that since Petitioner's claim of gender discrimination was dismissed once, that henceforth she is barred by *res judicata* from bringing any claim in that same ballpark, or even a claim for reprisal against her for bringing that claim. Apparently as Respondents see it, Petitioner is now **perpetually estopped** from suing Chemours for doing anything to her, as they will relate any and all future misconduct by Chemours back to her initial complaint in Baker I to bar it via *res judicata.*

Examining the instant case from the practical perspective of actually litigating claims, this Court will see that should Respondents' theories be adopted, any plaintiff who chooses to remain employed by a defendant will be thrust into a catch-22 situation. If the defendant engages in any further tortious conduct toward a plaintiff who is still working for them, that plaintiff-employee will then have to choose between two bad outcomes. That plaintiff could seek to amend the current complaint, kicking the trial date back for a year or so depending on the jurisdiction and potentially reopening the costly discovery process for both litigants. On the other hand, that plaintiff could choose not to amend the complaint to include new misconduct, thereby forfeiting the right to ever

raise that claim in a future case, even if the initial case is dismissed. Even worse, such an outcome would still take place if, as here, the initial case is dismissed because the facts underlying that potential second claim, were specifically excluded from consideration in the first case.

Thus Respondents would have this Court create an unwinnable situation for plaintiffs seeking to redress their grievances while remaining employed by defendants. Any plaintiff employed by a defendant would have to accept a potential ongoing series of amendments to extend the case to some indefinite time when the tortious conduct would cease, or accept that they would just have to lose some of their claims in order to reach the finish line on some of them. This state of affairs would, of course, encourage plaintiffs to separate from employment, often exacerbating their damages. This Court should reject the de facto implementation of a legal scheme whereby plaintiffs are punished for attempting to continue working; to do otherwise would be contrary to the public interest. Having people work and receive income, paying taxes and staying off unemployment all the while, is far preferable than having employment litigation create further public externalities to be borne by the state.

Respondents repeatedly cite to Rule 15 as if the rule contains a of mandate or responsibility binding on Petitioner, but that rule is one of enablement, not proscription. They do this in support of their contention that if Petitioner had only asked for amendment of her claim, this entire episode would never have come to pass. This is misleading, however. Respondents would have fought tooth and nail to prevent Petitioner from amending her complaint after the time period, claiming that they were suffering unconscionable prejudices. Assuming amendment were permitted, additonal discovery would have then been allowed inevitably causing Petitioner's trial date to disappear inot an ever receeding, never reached horizon. Thus continuing bad acts by Respondent would – at best - effectively be de facto continuances, as Petitioner would be required to amend

her complaint again and again to include them lest they be lost to her forever under Respondents' suggested legal scheme.

III. Claim splitting prohibitions do not bar Petitioner's current claim

West Virginia's law on claim splitting is enumerated in the much-discussed Dan Ryan Builders case thusly:

> Like res judicata, claim splitting prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action. Were courts to focus on the claims asserted in each suit, they would allow parties to frustrate the goals of res judicata through artful pleading and claim splitting given that a single cause of action can manifest itself into an outpouring of different claims, based variously on federal statutes, state statutes, and the common law. Especially in cases where a party voluntarily drops a claim in a first action, and then later seeks to maintain a separate second action on the abandoned claim, the rule against splitting causes of action applies to preclude that party from maintaining the separate second suit on the abandoned claim.
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> Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W. Va. 549, 551, 803 S.E.2d 519, 521 (2017)

Now let us apply this standard to the instant case. Clearly the case was never voluntarily dismissed, so the additional scrutiny regarding cases where such has occurred may not be applied to Petitioner's case. Claim splitting seeks to promote the prosecution of "all claims arising out of a single wrong." As the Court can see from its examination of the Amended Complaint from Baker I and the complaint put forth in Baker II, found at APPENDIX 222 and APPENDIX 181 respectively, claim splitting would not apply to the pleadings in those cases. Furthermore, a review of the dismissal order in Baker II, found at APPENDIX 482, makes no analysis of claim splitting other than to mention its existence in passing before diving into the *res judicata* issues that are the real battleground in this appeal.

Nonetheless, to address footnote, Petitioner raised retaliation as a cause of action in Baker II which was never plead in Baker I. Numerous factual allegations differ between the two complaints,

as do the causes of action alleged. For the purposes of claim splitting concerns, the only real similarity between Baker I and II is that the Respondents are being sued for the same kind of conduct, and the Respondents are more or less the same. This Court will no doubt see that the claim preclusion argument made by Respondents and the Circuit Court fails on its face from a perusal of the complaints. Claim splitting concerns arise where a plaintiff is litigating one incident in multiple cases, not where a plaintiff is litigating a succession of torts with similar proof schemes but born of differing circumstances. As such, claim splitting is not a valid concern here.

The Circuit Court was as wrong in raising claim preclusion as Respondents are in sustaining the indefensible notion that its strictures would in any way bar Petitioner from bringing this second claim. Petitioner acknowledges that there are legitimate concerns which must be addressed with regard to *res judicata*, but as to claim preclusion, that issue simply does not arise with Petitioner's claims in this matter.

IV. Judicial notice has no bearing on the proper standard for deciding a motion to dismiss

Respondents try to undermine the Petitioner's argument that the Baker II court decided this matter under a standard for summary judgment rather than the standard for a motion to dismiss by stating that judicial notice allows the Baker II court to do so. Nothing about judicial notice allows the Baker II court to evaluate a motion to dismiss under a motion for summary judgment standard of proof. Rule 12(b)(6) describes only the standard of proof by which a judge must assess a motion to dismiss; it makes no mention of substituting a different standard if the judge is able to take judicial notice of some other complaint in a different matter.

CONCLUSION

The Circuit Court's ruling is in error and should be reversed by this Court. This Court should order reinstatement of Petitioner's complaint to the active docket of the Circuit Court of Wood County, West Virginia.

Signed 

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2020, true and accurate copies of the foregoing **Petitioner's Reply Brief** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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