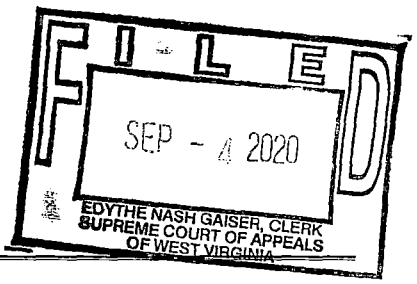
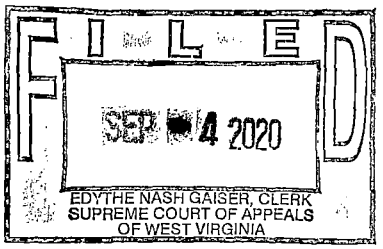
Docket No. 20-0311



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston



ASAD DAVARI,

Plaintiff Below, Petitioner

v.

THE WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

Defendant Below, Respondent

(Appeal from an Order in Kanawha County Civil Action No.: 14-C-263, consolidated with Kanawha County Civil Action No.: 15-C-838)

REPLY BRIEF OF THE PETITIONER

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ASSIGNMENTS OF ERROR

Based on the assignments of error identified below, the Circuit Court's entry of summary judgment in favor of the Respondent should be revered, and this action should be remanded to the Circuit Court for a jury trial on the merits.

I. The Circuit Court erred when granting summary judgement in favor of the Respondent on the issue of sovereign immunity because inconsistent provisions in the Respondent's insurance policy created the potential for coverage.

II. The Circuit Court erred when granting summary judgement in favor of the Respondent on the issue of sovereign immunity because of the application of the West Virginia Wage Payment and Collection Act.

III. The Circuit Court erred when granting summary judgement in favor of the Respondent because a jury could find from the evidence of record that a binding contract existed betwee0n the parties pertaining to the Petitioner's extra work as the Director of the Center for Research in on Advanced Control of Autonomous Systems and Manufacturing at the West Virginia University Institute of Technology.

IV. The Circuit Court erred when granting summary judgement in favor of the Respondent because it ignored evidence of record establishing the amount of the Petitioner's supplemental salary.

V. The Circuit Court erred when granting summary judgement in favor of the Respondent because the evidence does not establish as a matter of law the Petitioner has been compensate for his extra work as the Director of the Center; nor does the evidence establish as a matter of law that he has waived his right to a supplement salary for that work .

VI. The Circuit Court erred when granting summary judgement in favor of the Respondent because the doctrine of laches does not bar the Petitioner's alternative claims based on quantum meruit and unjust enrichment.

VII. Even if the doctrine of laches applies, the Circuit Court erred when granting summary judgement in favor of the Respondent because the question of whether laches bars the Petitioner's alternative claims is a factual question that on a jury can decide.t

VIII. The Circuit Court erred when granting summary judgement in favor of the Respondent when the Court made multiple improper and erroneous Findings of Fact and Conclusions of law.

PETITIONER'S ARGUMENTS IN REPLY TO THE RESPONSE

I. The Respondent's "Statement Of The Case" Contains Erroneous Statements Of Fact.

On page 1 of the Respondent's brief, it states that the Cabinet of West Virginia University Institute of Technology specifically rejected the part of the proposed plan concerning staff salaries. This statement is not correct. (Hereinafter, West Virginia University Institute of Technology will be referred to as "Tech" or the "university). During the December 2nd, 2003, meeting of Tech's Cabinet, the Cabinet expressly approved the creation and the budget for the Center for Research on Advanced Control of Autonomous Systems and Manufacturing ("Center").

Equally incorrect is the Respondent's assertion is the Respondent's "Statement of the Case" that Dr. Sathyamoorthy did not communicate a valid offer in such a specific amount to Petitioner." This incorrect statement concerning staff salaries ignores undisputed evidence from Muthukrishnan Sathyamoorthy, Ph.D., who was, at the time, the Dean of the Leonard C. Nelson College of Engineering at Tech. In Dr. Sathyamoorthy's letter to Dr. Davari on January 5, 2004, Dr. Sathyamoorthy writes that "I have attached a copy of the Center proposal and the **associated business plan approved by the WVU Tech's Cabinet on December 2, 2003**." (Emphasis added). (App. 263). The business plan included a budget for the Center. (*Id.*).

Page 4 of the minutes of the Cabinet's meeting contains specific accounting line items, including authorization of $2,000.00 per month to be paid to the Director of the Center. The Cabinet's approval of the Plan for the Center, including approval of its budget, is indicated by the initials "OK," the term "approved," and notation of the date of approval, December 2, 2003, on each page of the minutes. (App. 265-268). The Respondent has ignored these salient facts.

The Respondent's assertion that Dr. Davari confirms that he was compensated through "outside sources" misconstrues the facts concerning the funding requirement for the Center.

Pursuant to the plan for the Center that was approved by Tech's Cabinet, as confirmed by Dr. Sathyamoorthy's January 5, 2004, letter to Dr. Davari, Dr. Davari's salary for his work as the Director of the Center, was required to be "fully derived from external sources." Indeed, if the Center had not received funds from external sources, Dr. Davari would not be entitled to the additional $2,000.00 per month as provided by the approved business plan for the Center.

Dr. Davari has never admitted that he has been compensated for his additional work as the Center's Director. Indeed, if the Center had not received funds from external sources as a result of Dr. Davari's work as the Center's Director, he would not be entitled to the additional $2,000.00 per month as provided by the approved business plan for the Center. In fact, Dr. Davari's efforts as the Director generated more than $5,495,539.58. Yet, the respondent has refused to pay him as it is obligated to do. A reference that Dr. Sathyamoorthy once made in an e-mail message about delay and mismanagement pertained to Tech, and not to the Center directed by Dr. Davari.

The Petitioner's evidence establishes the existence of a contract between the parties concerning Dr. Davari's extra work as the Director of the Center. The Respondent's reference to the breach of contract claim as a "back-door" to the West Virginia Wage Payment and Collection Act constitutes a mischaracterization of the evidence, which must be viewed in the light most favorable to the Petitioner.

II. The Amount Of Asad Davari's Salary For His Teaching Duties Is Not Relevant To His Claim For A Supplemental Salary For His Work As The Director Of The Center.

The Respondent states that the Petitioner is one of the highest paid faculty members at West Virginia University Technical Institute. Dr. Davari has been teaching at the school of engineering at Tech WVUIT since August, 1985. Due to Dr. Davari's tenure of thirty-five years, of course, his salary would be one of the highest salaries among the faculty members.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. *West Virginia Rule of Evidence* 401. The amount paid for Dr. Davari's performance of his teaching duties is irrelevant in this breach of contract action. His salary for teaching has nothing to do with his claim that he is entitled to a supplemental salary of $2,000.00 per month for his extra work as the Director of the Center. The payment of Dr. Davari's teaching salary does not excuse Tech's failure to pay a supplemental salary for that work, which Tech promised to do.

III. The Budget For The Center That Was "Proposed" Became The Actual Budget When Tech's Cabinet Approved It.

During the November 4, 2003, meeting of the University's Cabinet, Dr. Sathyamoorthy submitted a proposed budget for the Center. On December 2, 2003, there is no question that the Cabinet approved the budget. This action converted the proposed budget into an actual budget. The amount of discussion concerning the Center during the December, 2003, meeting does not alter the fact that the authoritative body of the University authorized the creation of the Center, authorized its budget, authorized the appointment of Dr. Davari as its Director, and authorized his supplemental salary of $2,000.00 per month.

IV. A Contract Was Formed When Dr. Davari Accepted His Appointment As Director Of The Center, Which Had Been Expressly Authorized By The University's Cabinet.

The lack of a start date in Dr. Sathyamoorthy's appointment letter to Dr. Davari does not prevent the formation of a contract. The letter of appointment constituted a definite offer, which Dr. Davari accepted when he began work as the Center's Director. Because Dr. Davari's supplemental Director's salary could only be "derived from external sources," inserting a start date would have ignored this provision of the parties' contract.

The Respondent does not dispute that the Center, due to Dr. Davari's work, received almost Five and One-Half Million dollars over a twelve year period. Obviously, the start date to which the Respondent refers would be the first date after the January 5, 2004, Dr. Davari's appointment that he began work as the Director of the Center.

The Respondent asserts that the Director's supplemental salary of $24,000.00 per year was never guaranteed to Dr. Davari. This assertion ignores the following undisputed facts. First, because Dr. Davari's supplemental salary for work as the Director could only be derived from external funding sources, the supplemental salary could not be guaranteed like his regular teaching salary. Second, due to Davari's additional work as the Director of the Center, almost five and one-half million dollars was received by Tech over a twelve year period. Thus, there was ample money from external sources from which to pay Dr. Davari's supplemental salary each month.

The fact that the Director's supplemental salary was not guaranteed when the parties formed their contract does not prevent the contract's formation. A condition precedent is a condition that must occur or be performed before a right dependent on the condition accrues. *U.S. v. Schaffer*, 319 F.2d 907, 911 (9th Cir. 1963); *Martin v. Ohio River R. R.*, 37 W. Va. 349, 16 S. E. 589 (1892). A condition precedent requires the performance of some act after the terms of the contract have been agreed upon. *Sherman v. Metropolitan Life Ins. Co*, 297 Mass. 330, 8 N.E.2d 892 (1937).

The requirement that the Director's supplemental salary could only be derived from external sources was a condition precedent to the university's duty to pay Dr. Davari the supplemental salary for his work as the Director of the Center. Dr. Davari met this condition precedent in every year that he worked as Director of the Center. Because this condition precedent was met every year, Tech breached its duty to pay Dr. Davari a supplemental salary of $2,000.00

per month. The Respondent's assertion that the Dr. Sathyamoorthy's appointment of Dr. Davari as the Director the Center was an *ultra vires* act is without merit. This assertion ignores the evidence.

An *ultra vires* act is an "act performed without any authority to act on the subject." *Black's Law Dictionary*, 6th Ed., p. 1522. While Dr. Sathyamoorthy was the University Cabinet member who submitted the plan for the Center to the Cabinet, it was the Cabinet, at its December 2, 2003, meeting that approved and authorized the plan, not Dr. Sathyamoorthy alone. Because the Cabinet approved the creation of the plan for the Center, including the appointment of Dr. Davari as its Director, Dr. Sathyamoorthy's appointment of Dr. Davari as such was not an "act performed without any authority to act on the subject." Indeed, Dr. Sathyamoorthy's appointment makes it clear that the university's Cabinet approved the business plan, the budget for the plan, and the appointment of Dr. Davari as the Center's Director. (App. 263 & App.265-268).

The Respondent's statement that Tech's Cabinet rejected the payment of a $24,000.00 supplemental salary prior to Dr. Davari's appointment in January, 2004, is not correct. The minutes of the December, 2003 cabinet meeting, without doubt, on every page of the minutes, document the Cabinet's approval of the Center and the Director's supplemental salary of $24,000.00 per year. In Dr. Sathyamoorthy's January 5, 2004, appointment letter to Davari, Dr. Sathyamoorthy writes that "**I have attached a copy of the Center proposal and the associated business plan approved by the WVU Tech's Cabinet on December 2, 2003.** (Emphasis added). The Respondent's assertion that the promise to pay Dr. Davari a supplemental salary of $24,000.00 per year was an *ultra vires act* on the part of Dr. Sathyamoorthy ignores the undisputed evidence from Tech's Cabinet and Dr. Sathyamoorhty, and is clearly wrong.

V. The Circuit Court Committed Reversible Error When It Entered Summary Judgement In Tech's favor, And This Court Should Schedule Oral Argument.

Pursuant to *West Virginia Rule of Appellate Procedure 20(a)*, the Petitioner hereby reiterates his request for oral argument. This case involves the contractual obligation of one of this state's universities to one of its professors. Dr. Davari's work as the Director of the Center was extra work that was in addition to his normal teaching duties. The Respondent's failure to pay the Petitioner his supplemental salary as obligated by the Cabinet's approval on December 2, 2003, obviates the incentive to university professors in this state to assume the responsibility of extra-curricular work that benefits the university, its employees, and the sectors of society positively affected by the extra work. This case involves issues of fundamental public importance that are proper for consideration by oral argument.

Pursuant to *West Virginia Rule of Appellate Procedure* 20(e), oral argument should last at least twenty minutes per side. This amount of time is needed due to the number of contested issues in this case.

VI. The Respondent Is Not Unequivocally Protected By Sovereign Immunity Because It Is Subject To The West Virginia Wage Payment And Collection Act.

The State's sovereign immunity does not bar the claim of a State employee for unpaid wages or salary asserted under the West Virginia Wage Payment and Collection Act. *West Virginia. Code* § 21-5-1 (1987), *et seq. Beichler v. W. Va. Univ.at Parkersburg*, 226 W. Va. 321, 325-326, 700 S. E. 2d 532, 536-537 (2010). "[T]he sovereign immunity doctrine is not implicated in the context of employee relations where the State, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary *Gribben v. Kirk*, 195 W.Va. 488, 495, 466 S. E. 2d 147, 154 (1995); *American Federation of State, County and Municipal Employees v. CSC of W. Va.*, 176 W. Va. 73, 79, 341 S.E.2d 693, 699 (1985). The Legislature intended its statutory wage payment and collection guidelines to apply to both governmental and

nongovernmental employers alike. *Ingram*, 208 W. Va. at 356, 540 S. E. 2d at 573. The Wage Payment and Collection Act "is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld." *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S. E. 2d 569 (2000); *Mullins v. Venable*, 171 W.Va. 92, 94, 297 S.E.2d at 866, 869 (1982). Where an act is clearly remedial in nature, it must be construed liberally in order to accomplish the purposes intended. *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S. E. 2d 841 (2003); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770 194 W. Va. 770, 461 S.E.2d 516 (1995).

Professor Beichler sued West Virginia University at Parkersburg because he was not paid for teaching an extra class. Professor Beichler's contract with the university was a Faculty Overload Contract that provided a means for professors at the University to earn additional compensation. When holding that the doctrine of sovereign immunity did not bar Professor Beichler's claim for additional compensation, this Court said that his action involved "accounting issues concerning unpaid wages," which was a matter squarely within the scope and reach of the Wage Payment and Collection Act." *Beichler.*

This Court's decision in *Beichler* is silent on the actual validity of the debt. The court in *Beichler* did not characterize Professor Beichler's claim in its decision. The *Beichler* Court's reference, in *dicta*, to an "obvious legal debt" was from *Gribbon.* However, in *Gribbon,* the plaintiffs sought recovery of unpaid wages by petitioning for a writ of mandamus. The first element of a mandamus action is the existence of a "clear right." *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981). Because Dr. Davari in this breach of contract action is not seeking relief through a writ of mandamus, the language in *Gribben* concerning an "obvious legal debt" is not controlling in this case.

The holding in *Beichler* was not limited to only uncontested claims for unpaid wages. Based on the actual holding in *Beichler*, sovereign immunity does not bar Dr. Davari's claim for his unpaid supplemental salary from the Respondent. Limiting the abrogation of sovereign immunity in claims for unpaid wages or salary to only cases where the state does not dispute the debt defies logic and common sense, and is not part of the holding in *Beichler*.

In this case, just as in *Beichler*, WVU Tech entered into a contract with Dr. Davari that provided compensation for work that was in addition to his regular teaching duties. A contract was created between Tech and Dr. Davari when, in response to the appointment letter from Dr. Sathyamoorthy dated January 5, 2004, Dr. Davari accepted the appointment and began performing extra work as Director of the Center. Just as in *Beichler*, Dr. Davri seeks payment of the university's debt to him.

However, if unpaid wage claims are limited to an "obvious legal debt," the decision in *Beichler* still applies to abrogate sovereign immunity in this case. Just like the contract between the university and Professor Beichler, the contract between Tech and Dr. Davari created a legal debt that the Respondent owes to Dr. Davari. The fact that the Respondent in this case disputes the validity of Dr. Davari's breach of contract claim is not a ground to distinguish the decision in *Beichler* from this case. Just as in *Beichler*, the contract between Tech and Dr. Davari created an "obvious legal debt" owed to Davari, which has never been paid.

Because the Wage Payment and Collection Act is a remedial statute that should be construed liberally, this case should receive the same liberal application as Professor Beichler received. This Court should hold that Dr. Davari's claim for extra compensation is not barred by the doctrine of sovereign immunity, and should remand this case to the Circuit Court for a jury trial on the merits. *Beichler.*

VII. The Doctrine Of Sovereign Immunity Is Also Inapplicable Due To The Potential For Insurance Coverage.

Because an insurance policy is prepared exclusively by the insurer, any ambiguity in a policy is to be construed liberally in favor of the insured. *State Bancorp, Inc. v. United States Fide. & Guar. Ins. Co.*, 199 W. Va. 99, 483 S. E. 2d 228 (1997). A case against a state agency should proceed to trial if the state's liability insurance policy **potentially provides coverage.** *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S. E. 2d 814 (1991) (Emphasis added).

The parties' contract concerning Dr. Davari's compensation for his work as the Director of the Center is an incidental contract, for which the Respondent's insurance policy provides coverage. This potential for coverage obviates the defense of sovereign immunity, and supports a decision to proceed to trial. *Arnold.*

VIII. The Wage Payment And Collection Act Applies In This Case Because The Evidence Establishes The Existence Of A Contractual Debt That The Respondent Has Never Paid.

The Respondent contends that Dr. Davari is using the Wage Payment and Collection Act to create a "back-door" into an allegedly barred contract claim by "bootstrapping" his claim under the Act into a substantive claim for wages. This fallacious contention improperly reverses the substantive elements of Dr. Davari's claim, and ignores the evidence in support of Dr. Davari's claim.

On December 2, 2003, Tech's governing body, the Cabinet, approved the creation of the Center and appointment of the Petitioner as the Center's Director. On January 5, 2004, as approved and authorized by Tech's Cabinet, the Dean of the School of Engineering, Dr. Sathyamoorthy, offered, in writing, the positon of Director of the Center to Dr. Davari. Dr. Davari accepted Tech's

offer, and began performing the additional work required by that position. For the next twelve years, performed extra work in addition to his teaching duties, as the Director of the Center. During that time frame, Dr. Davari met the requirement of obtaining funds for the Center from external sources every year.

Totally separate from, and in addition to, the other work Dr. Davari performed as a professor at Tech, he performed the extra, supplemental work required of him as the Director of the Center. That extra work brought a total of $5,495,539.58 from external sources to the university. In consideration of Dr. Davari's work as the Center's Director, the university promised to pay him a supplemental salary of $2,000.00 per month. Thus, the parties' contract regarding the Center and its Director was supported by a "flow of consideration in both directions." *First Nat'l Bank v. Marietta Mfg. Co.*, 151 W. Va. 636, 153 S. E. 2d 172 (1967).

This evidence renders the Respondent's contention of creating a "back-door" and bootstrapping meritless. The Petitioner's claim for the payment of a supplemental salary for his work for the Center is enforceable pursuant to the Wage Payment and Collection Act. Dr. Davari's claim for this earned, supplemental compensation is not barred by the doctrine of sovereign immunity. *Beichler.*

IX. The Evidence In This Case Shows A "Meeting of the Minds" Between Dr. Davari And WVU Tech.

The Respondent has admitted that Dr. Davari was offered the appointment as founding Director of the Center on January 5, 2004. (Respondent's Brief, p. 14). The Respondent has also admitted that Dr. Davari accepted that offer. (*Id.*). However, the Respondent contends that there was never a meeting of the minds concerning Dr. Davari's supplemental salary as the Director of

the Center. Once again, when making this contention, WVU Tech has ignored the evidence, which must be viewed in the light most favorable to the Petitioner.

The more accurate, contemporary formulation of the phrase "meeting of the minds" is the parties' "manifestations of mutual assent to a bargained-for exchange of promises or performances." *Restatement (Second) of Contracts* §§ 19-23 (1981); *Charbonnages de France v. Smith*, 597 F. 2d 406 (4th Cir. 1979); *Conley v. Johnson*, 213 W. Va. 251, 580 S. E. 2d 865 (2003). The idea of "mutuality" of obligation is a better way of referring to what has been formerly called a "meeting of the minds." *Restatement (Second) of Contracts* § § 19, Comment c; *id.* § 21B; *Conley*, 213 W. Va. at 255, 580 S. E. 2d at 869; *Charbonnages de France*.

Disputes about whether a contract has or has not been formed as a result of words and conduct over a period of time are quintessentially disputes about "states of mind," since they involve not only the subjective intentions held by the parties but what "states of mind," what understandings, their manifestations of intention may have induced in others. *Id.* These subjective states and objective manifestations of intent present interpretive issues that should normally be decided by the trier of fact. *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967). Ordinarily in such cases, the issue of whether there has, at any time, been the requisite manifestation of mutual assent to a bargained exchange will be one of fact in genuine dispute, which precludes summary judgment. *Conley*; *Cram,* 375 F.2d at 674.

Summary judgement is rarely appropriate when there are questions about a meeting of the minds and mutuality of assent to obligations. *Conley*; *Charbonnages de France*.

The *Conley* case arose from a contract for the purchase of real estate. The plaintiffs alleged that the defendants had agreed to sell their land to the plaintiffs. The seller-defendants had signed a written memorandum of the agreement, while the buyer-plaintiffs had not. The trial court granted summary judgment in the seller-defendants' favor despite the fact that they had signed the memorandum. Summary judgment in favor of the seller-defendants, in effect, constituted a finding that the parties had not reached a meeting of the minds, with sufficient mutuality between them. *Conley*.

On appeal, this Court in *Conley* said that the "questions of whether parties have reached a meeting of the minds in an agreement situation, and whether their undertakings have involved mutuality, are ordinarily ones of fact. Because the trier of fact should decide whether there was a meeting of the minds and mutuality, the trial court's summary judgment constituted reversible error. *Conley*.

In this case, even more persuasively than in *Conley*, Davari's evidence has established a meeting of the minds and mutuality of assent. When addressing this issue, the Respondent incorrectly states that Dr. Sathyamoorthy's letter of appointment to Dr. Davari does not contain any information about compensation other than the requirement that the Director's supplemental salary be derived from external sources. This statement is blatantly wrong. In the first paragraph of Dr. Sathyamoorthy's appointment letter to Dr. Davari, Dr. Sathyamoorthy writes that "I have attached a copy of the Center proposal and associated business plan approved by WVU Tech's

Cabinet on December 2, 2003." The proposal for the Center is documented by the minutes of that December, 2003, meeting. On page 4 of the minutes, the salary for the Director of the Center is specified as $24,000.00 per year.

Despite the assertion of the Respondent, there is ample evidence of Tech's and Dr. Davari's manifestations of mutual assent. Just like the sellers in *Conley* who signed a memorandum of agreement, WVU Tech, by its authorized agent, Dr. Sathyamoorthy, manifested its assent to the parties' contract by providing Dr. Davari with a written offer, which included the Cabinet's written approval of the Director's $24,000.00 annual salary. Dr. Davari accepted Tech's offer, with a manifestation of assent by performing work as the Director of the Center for the next twelve years.

The parties' meeting of the minds and mutuality of assent has been subsequently confirmed by Dr. Sathyamoorthy. After Dr. Davari's request for payment of his supplemental salary was denied on the December 17, 2013, Dr. Davari sent an e-mail message to Dr. Sathyamoorthy on December 23, 2013. (App. 381). In that message, Dr. Davari asked Dr. Sathyamoorthy to clarify the intention of the 2004 agreement, that 1) the amount of the supplemental salary to be paid Dr. Davari as Director was $24,000 per year and 2) that the salary was to come from the generated overhead money. Dr. Sathyamoorthy responded on December 25, 2013, stating, "I am pleased to say YES to both of your questions. That was my intention when I appointed you as the Director." (App. 381).

In *Conley*, the question of whether there was mutuality was for the jury to decide despite the fact that the buyers had not signed the memorandum of agreement. In this case, the evidence of mutuality is stronger than the evidence in C*onley*. In response to Tech's offer, which included in writing a specified yearly salary, Dr. Davari manifested his assent by working as the Center's Director for the next twelve years, and bringing to the university $5,495,539.58 it otherwise would

not have received. If determining whether there was mutuality and a meeting of the minds was for a jury in *Conley*, then likewise in this case, the trial court committed reversible when it entered summary judgment in favor of the Respondent.

IX. The Evidence Shows That WVU Tech's Cabinet Approved the Business Plan for the Center, Including Its Budget.

Dr. Sathyamoorthy, Dean of the School of Engineering at Tech, submitted the proposal for the creation of the Center during the Cabinet's November meeting. As the written evidence shows without doubt, that same Cabinet approved the business plan for the Center and its budget on December 2, 2003. The Center's business plan included a salary for the Center's Director of $24,000.00. On every page of the minutes from the December meeting, the Cabinet's approval is documented with the initials "OK," along with the date of December 2, 2003.

Also, Dr. Sathyamoorthy confirmed the Cabinet's approval for the Center when he notified Dr. Davari of his appointment as the Center's Director on January 5, 2004. The Respondent's assertion that the Cabinet never approved the plan for the Center ignores this evidence, and is blatantly wrong.

XI. The Appointment Of Dr. Davari As The Director Of The Center Was Not An *Ultra Vires* Act.

At the time of the Cabinet's approval of the Center, and when Dr. Davari was appointed as the Director of the Center, Dr. Sathyamoorthy was the Dean of the School of Engineering at Tech. As Dr. Sathymoorthy stated in his letter of January 5, 2004, to Dr. Davari, the Cabinet of WVU Tech approved the creation of the Center and its business plan and budget, during the Cabinet's December, 2003, meeting. Once again, when the Respondent asserts that Dr. Sathyamoorthy did not have the authority to appoint Dr. Davari as the Center's Director, the Respondent is ignoring the evidence from the Cabinet itself, and from Dr. Sathyamoorthy. The Respondent's assertion

that Dr. Sathyamoorthy's appointment of Dr. Davari as the Center's Director was an *ultra vires* act is, once again, blatantly incorrect.

Equally incorrect is the statement that the Cabinet rejected the Director's salary. During the Cabinet's meeting on December 2, 2003, the Cabinet of Tech approved the Center and its associated business plan, which included a designated salary for the Director of the Center totaling $24,000.00 per year.

XII. In This Case, A Jury Should Decide Whether The Doctrine of Laches Bars The Petitioner's Alternative Claims of Unjust Enrichment And *Quantum Meruit*.

Whether the elements of laches have been established is a question of fact. *Keller Cattle Co. v. Allison* 55 P. 3d 257 (Colo. App. 2002); *Geibel v. Clark*, 185 W. Va. 505, 408 S. E. 2d 84 (1991). In *Geibel*, even though the cause of action involved a claim of adverse possession, summary judgment was also inappropriate for the defense of laches. When reversing the trial court's entry of summary judgment, the *Geibel* Court held that "the trial court improperly granted summary judgment on the **laches**/adverse possession issue." (Emphasis added).

In this case, after accepting the appointment as Director of the Center from Dr. Sathyamoorthy, began performing the extra work required of the Director of the Center. Dr. Davari first inquired about his supplemental pay for his work as Center's Director to Dr. Sathyamoorthy and Dr. Janeksela, by e-mail, on November 2, 2004. On May 19, 2006, Dr. Davari wrote to Dr. Sathyamoorthy, again asking about the supplemental salary.

Dr. Davari made additional inquiries and requests about his supplemental salary beginning in the spring of 2012, after Carolyn Long became the new President of WVU Tech. The university took over one year to investigate Dr. Davari's requests for payment of the supplemental salary. In light of the numerous inquiries and requests that Dr. Davari made over the course of several

years, and the length of time that it took for Tech to investigate, just as in *Geibel,* a jury should decide whether laches bars Dr. Davari's claims.

XIII. There is Ample Evidence Of Record That Dr. Davari Has Never Been Paid The Director's Supplemental Salary Of $24,000.00 Per Year.

The Petitioner has alleged non-payment of the Director's supplemental salary in his *Complaint* and in his *Amended Complaint.* He has reiterated this allegation in his responses to the Respondent's discovery requests. He has also testified under oath in depositions that he has never been paid his Director's supplemental salary.

The Respondent has characterized Dr. Davari's allegations as "self-serving." The gravamen of Dr. Davari's breach of contract claim against the Board of Governors is the fact that Dr. Davari has never been paid the supplemental salary that Tech promised him for his extra work as the Director of the Center. The Respondent's characterization does not render the allegations in their various forms inadmissible as evidence; nor unworthy of belief. Indeed, when deciding the Respondent's motion for summary judgment, the evidence must be viewed in the light most favorable to the Petitioner, the non-moving party. The Respondent has not met its burden to show that there are no genuine issues of material fact, and that is it entitled to judgment as a matter of law.

XIV. The Fact That Dr. Davari Did Not Make Constant Requests For The Payment Of His Supplemental Salary Is Not Relevant to His Claim for Breach of Contract.

The time frame to file an action to recover on a written contract signed by the party to be charged is ten years. *West Virginia Code* § 55-2-6. Thus, this action for breach of contract has been timely filed. The fact that Dr. Davari did not complain about the Respondent's failure to pay Dr. Davari his supplemental salary is not relevant.

Also, more inquiries and requests from Dr. Davari about his supplemental salary would have been in vain. After a lengthy investigation, the Respondent ultimately denied Dr. Davari's request for payment for his extra work as Director of the Center.

CONCLUSION

A summary judgment proceeding is not a substitute for a trial on an issue of fact. *George v. Blosser*, 157 W. Va. 811, 204 S. E. 2d 567 (19745). The entry of summary judgment is a determination that, as a matter of law, there is no issue of fact to be tried. *Id.* In this case, the Respondent is not entitled to judgment as a matter of law. Genuine issues of material fact abound in this case.

In the majority of cases arising from a breach of contract, such as this one, there are factual issues that a jury should decide. Petitioner Asad Davari has submitted evidence from which a jury could find that a contract existed between the parties that obligated the Respondent to pay Dr. Davari a supplemental salary for his extra work as the Director of the Center if he obtained money from external sources.

Dr. Davari has established that he complied with his contractual obligation to obtain funds for the Center from external sources. For the twelve years that the Center was in operation, Dr. Dasari's efforts obtained for the university a total of $5,495,539.58. The Respondent's refusal to pay Dr. Davari his supplemental salary of $24,000.00 per year constitutes breach of contract. The evidence supports this conclusion, and the trial court should not have entered summary judgment against the Petitioner on his breach of contract. Pursuant to the West Virginia Wage Payment and Collection Act, the Respondent is not immune from suit for its failure to pay Dr. Davari his supplemental salary. Because the Respondent is not entitled to judgement as a matter, a jury should decide Dr. Davari's breach of contract claim.

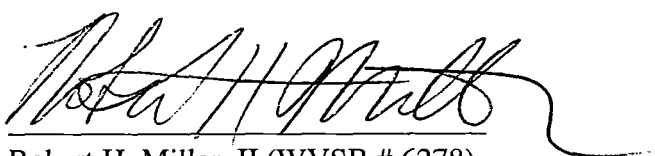
In the alternative, a jury should also decide whether the university is liable to pay Dr. Davari based on theories of unjust enrichment and *quantum meruit*. Based on the facts of this, the doctrine of laches does not bar Dr. Davari's claims as a matter of law.

The trial court committed reversal error when it entered summary judgment in favor of the Respondent. For the reasons discussed in this reply, for the reasons discussed in the *Petitioner's Brief*, and for any other reason appearing in the Petitioner Asad Davari requests that this Honorable Court reverse the summary judgment entered by the trail court, and remand this case for a trial before a jury.

Respectfully submitted,

ASAD DAVARI, Petitioner,

By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASAD DAVARI,

Plaintiff,

v.

Civil Action No. 14-C-263
Judge Tera L. Salango
Consolidated w/14-C-838

THE WEST VIRGINIA UNIVERSITY BOARD of GOVERNORS,

Defendant.

CERTIFICATE OF SERVICE

I, Robert H. Miller, II, counsel for the Plaintiffs, hereby certify that, on this 4th day of September, 2020, I served a true copy of the foregoing "***Reply Brief of Petitioner***" by placing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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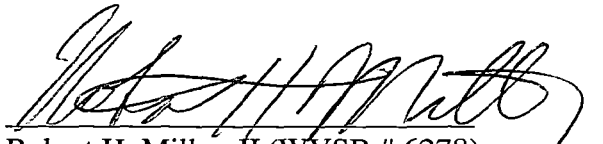

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