IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0311

ASAD DAVARI,

Petitioner herein;
Plaintiff below;

v.

Appeal from an Order of the
Circuit Court of Kanawha County
CIVIL ACTION NO. 14-C-263
(Consolidated with 14-C-838)
Honorable Tera L. Salango

THE WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

Respondent herein;
Defendant below.

BRIEF OF RESPONDENT WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS

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I. STATEMENT OF THE CASE

Petitioner Asad Davari is a professor at the West Virginia University Institute of Technology ("WVUIT"), which is a division of the Respondent West Virginia University Board of Governors ("WVUBOG"). In late 2003, the WVUIT Cabinet approved creation of a research center within WVUIT's College of Engineering; however, the Cabinet specifically rejected the part of the proposed plan concerning staff salaries. In early 2004, then-Dean Muthukrishnan Sathyamoorthy offered directorship of the research center to Petitioner. Petitioner claims that there exists an enforceable contract in the specific amount of $24,000 per year additional salary for his directorship. In reality, while Dr. Sathyamoorthy noted that Petitioner would be paid from funding from "outside sources," he did not communicate a valid offer in such a specific amount to Petitioner. And, indeed, Petitioner confirms that he was compensated through "outside sources."

As explained more fully below, WVUBOG is entitled to sovereign immunity from Petitioner's claims. The applicable insurance policy does not cover the claims or damages brought by Petitioner, nor can he use the West Virginia Wage Payment and Collection Act as a "back door" to circumvent immunity because he has not shown an "obvious legal debt." Indeed, in the alternative, there is no genuine issue of material fact that there was a meeting of the minds between WVUBOG and Petitioner as to directorship salary, if any. Moreover, Petitioner's quasi-contractual claims of unjust enrichment and *quantum meruit* are barred by the doctrine of laches, given his decade-long delay in asserting his rights (if any) to that compensation. For these reasons, and those further explained below, the circuit court was correct in granting WVUBOG's Motion for Summary Judgment, and this Court should affirm that decision.

A. BACKGROUND

1. Factual Background

The West Virginia University Board of Governors ("WVUBOG") is the entity tasked by statute with general control, supervision, and management over educational operations at West Virginia University ("WVU") and its divisions. W. VA. CODE §§ 18B-2A-1(b); 18B-2A-4(a). WVU assumed stewardship of the former West Virginia Institute of Technology in 1996. [Appx. 17 at ¶ 3]. In 2007, that school became a "fully integrated division" of WVU, and today, it operates under the name West Virginia University Institute of Technology ("WVUIT"). [*Id.* at ¶ 4]; W. VA. CODE § 18B-1C-2.

Petitioner Asad Davari began working at the former West Virginia Institute of Technology in August 1985 as an assistant professor of electrical engineering. Petitioner remains employed at WVUIT as a graduate faculty member and is one of the highest paid faculty members at WVUIT. [Appx. 96].

a. Appointment of Petitioner as Director of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing.

In late 2003, the WVUIT Cabinet approved creation of the Center for Research on Advanced Control of Autonomous Systems and Manufacturing (the "Center") at WVUIT's College of Engineering (the "College"). According to the minutes of the WVUIT Cabinet's November 4, 2003 meeting, the Cabinet discussed a written proposal by Dr. Muthukrishnan Sathyamoorthy, then-Dean of the College, and unanimously voted to approve the "Center concept." [Appx. 100-01]. Dr. Sathyamoorthy's handout included a business plan, which suggested Petitioner as the Director, and stated that the Director would be "paid a supplemental salary based on effort." [Appx. 103-04]. Also included was a section titled "Administration and Oversight," containing a proposed budget that suggested a $24,000 salary for its Director. [*Id.*].

Importantly, the Cabinet discussed and approved ***only*** the creation of the Center, "not the staffing and operating policies" and ***explicitly excluded*** "the section labeled Administration and Oversight," which contained the proposed budget and suggested salaries. [Appx. 100-01].

At its next meeting on December 2, 2003, the Cabinet discussed a resolution by Dean Sathyamoorthy pertaining to distribution of grant funds relating to the Center. [Appx. 106-07]. No other discussion concerning the Center was had – including on compensation (if any).

On January 5, 2004, Dr. Sathyamoorthy appointed Petitioner as the founding Director of the Center. [Appx. 109]. Dr. Sathyamoorthy's letter outlines that the Director would report to him (the Dean) and referred to the attached proposed business plan for the Center, as it had been presented to the WVUIT Cabinet, for further information. [*Id.*]. The letter does not provide a start date for the appointment as Director, nor does it establish any specific term or condition of that appointment. As to compensation, the letter states:

> As the Director, you will be paid a supplemental salary based on research effort fully derived from external sources by the Center. The supplemental salary will be in addition to the summer salary and others received from external funding sources. The supplemental salary will be paid over the nine month academic year period.

[*Id.*]. As of November 2004, the Center still did not have a budget. [Appx. 95].

b. *WVUIT's investigations into Petitioner's salary complaints.*

On May 19, 2006, Petitioner sent a letter to Dr. Sathyamoorthy alleging that he had not received a supplemental salary for his work as Director of the Center as set forth in the appointment letter. [Appx. 111]. Dr. Sathyamoorthy replied on May 31, 2006, noting that – as stated in the 2004 appointment letter – any supplemental salary was to come from external research grants and contracts. [Appx. 113]. Dr. Sathyamoorthy further explained that WVUIT had not received its share of costs from a research grant and, more broadly, noted that as a result

of numerous delays and mismanagement,[1] the Center had not possessed the resources needed to pursue its activities as originally planned. [*Id.*].

Between 2006 and 2012, Petitioner continued to sign off on his annual notices appointing him to faculty at WVUIT – which stated his total salary. [Appx. 115-22]. He also noted via memoranda to the Dean of the College that his salary was paid, in part, by external grants for projects on which the Center worked. [Appx. 124-34].

On October 29, 2012,[2] Petitioner again raised the issue of his alleged "supplemental salary" as Director with Carolyn Long, Campus President of WVUIT,[3] via email. [Appx. 136]. President Long launched an investigation, which included inviting Petitioner to provide documentation on grants that had been awarded through the Center. [Appx. 138]. Petitioner did so.

On December 17, 2013, President Long sent a letter advising Petitioner that she had reviewed the material and determined that he was not entitled to any further compensation. [Appx. 140]. As President Long explained, three independent factors led her to that determination: First, she was satisfied that Petitioner had already been compensated through grant funding from external sources.[4] Second, there was no contract or other document requiring WVUIT to pay Petitioner and/or the Center's Director a specific sum of $24,000.00. As President Long noted, although a sum of $24,000 had been suggested in the proposed business plan during the Center's creation, it was never guaranteed to Petitioner. Third, Petitioner waived

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[1] It is worth pausing here to note that Petitioner was the Director.

[2] Notably, this is after Petitioner was not selected for the position of Dean of the College, the subject of his now-abandoned claims under the West Virginia Human Rights Act.

[3] President Long became President of WVUIT (or at the time, Transitional Leader) in January 2012. She did not have any relationship with Plaintiff prior to becoming President.

[4] As noted, Petitioner himself confirmed this. [Appx.124-34].

his right to object to his salary because he had signed and approved the annual notices, which by WVUBOG policy stated the "total salary" for his appointment at WVUIT. As President Long's letter concluded, "[t]he Department cannot adjust a budget item from . . . years ago." [*Id.*].

2. Procedural History

Petitioner filed two separate civil actions against WVUBOG. The first, Civil Action No. 14-C-263, brought contractual and quasi-contractual claims based upon WVUIT's alleged failure to pay him a supplemental salary of $24,000 per year, along with a derivative claim under the West Virginia Wage Payment and Collection Act ("WPCA"). [Appx. 17-26; 27-34]. The second, Civil Action No. 14-C-838 [Appx. 467], brought claims under the West Virginia Human Rights Act ("WVHRA"), alleging that Petitioner was not selected for the Dean position in 2012 due to his national origin and in retaliation for a complaint he filed against the former West Virginia Institute of Technology in the West Virginia Human Rights Commission ("WVHRC") in 1993. The two cases were consolidated.

On September 30, 2019, Respondent filed its Motion for Summary Judgment as to all counts in the consolidated cases. [Appx. 35-241]. In his Response to that motion, Petitioner voluntarily dismissed his WVHRA claims. [Appx. 242-382]. Thus, the case was reduced to the contractual and quasi-contractual claims contained in Civil Action No. 14-C-263, as well as the derivative WPCA claim.

The circuit court held hearing on the summary judgment motion on October 15, 2019. Pursuant to the court's directive, both parties submitted proposed findings of fact and conclusions of law. The circuit court heard further argument at pre-trial conference on February 11, 2020. [Appx. 419-63]. By order dated February 28, 2020, the circuit court granted

Petitioner's Motion for Summary Judgment. [Appx. 1-16]. Petitioner subsequently filed his Notice of Appeal.

II. SUMMARY OF ARGUMENT

The circuit court correctly found that Petitioner's contractual and quasi-contractual claims against WVUBOG are barred by sovereign immunity. There is no insurance coverage for such claims; thus, the *Pittsburgh Elevator* exception does not apply. Similarly, the derivative WPCA claim does not afford Petitioner a path around immunity because WVUBOG does not owe him an "obvious legal debt." Additionally, Petitioner's quasi-contractual common law claims are barred by the doctrine of laches. Indeed, even if not barred, Petitioner's claims would fail because the sole evidence he has proffered of a promise to pay him $24,000 per year – an alleged "offer" from Dean Sathyamoorthy – was, at best, an *ultra vires* act because it had previously been rejected by the WVUIT Cabinet.

It is readily apparent that the circuit court's decision was rendered in accordance with the well-established law of this State, as articulated by this Court, and should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The subject of sovereign immunity has been authoritatively decided by this Court. Thus, in accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

IV. ARGUMENT

A. STANDARD OF REVIEW

As this Court has repeatedly held, the "standards of review concerning summary judgments are well settled. Upon appeal, '[a] circuit court's entry of summary judgment is reviewed *de novo*.'" *Perrine v. E. I. DuPont De Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815, 839 (2010) (citations omitted). This Court has instructed that "'[t]he term '*de novo*' means ''[a]new; afresh; a second time.''" *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia*, 203 W. Va. 690, 510 S.E.2d 764, 775 (1998) (citations omitted). Thus, as this Court has recognized:

> In conducting our *de novo* review, we are mindful that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'

Perrine, 225 W. Va. At 506, 694 S.E.2d at 839 (citations omitted). "[A] grant of summary judgment may be sustained on any basis supported by the record. Thus, it is permissible for [the Court] to affirm the granting of summary judgment on bases different or grounds other than those relied upon by the circuit court." *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). It is readily apparent that the trial court's decision was rendered in accordance with the well-established law of this State and precedent of this Court. Accordingly, the underlying decision should be affirmed.

B. DISCUSSION

1. Petitioner's contractual and quasi-contractual claims are unequivocally barred by sovereign immunity.

a. Sovereign immunity applies in this matter.

Despite being one of the highest-paid faculty members of WVUIT, Petitioner alleges in his Complaint that there existed a "valid and enforceable contract between WVU and the [Petitioner]" and that he is entitled to an additional "$24,000 per year" supplemental salary as Director of the Center. [Appx. 27-34, at ¶¶ 12, 16]. Petitioner sued the State for breach of contract, with claims of unjust enrichment and *quantum meruit* serving as fallbacks. [*See generally id.*]. Any analysis of Petitioner's claims must begin with the immutable baseline truth that the State and its subdivisions – including WVUBOG – are constitutionally immune from state law claims for money damages in state courts:

> The Board of Governors of West Virginia University is a State agency, and, as such, is an arm of the State and, under Article VI, Section 35 of the Constitution of West Virginia, is immune from suit to enforce payment of a claim against such board.

Syl. pt. 1, *City of Morgantown v. Ducker*, 153 W. Va. 121, 168 S.E.2d 298 (1969)[5]; *see also* W. VA. CONST. Art. VI, § 35.[6] "This constitutional grant of immunity is absolute and . . . cannot be waived . . . ." *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987) (citations omitted); *see also Ohio Valley Contractors v. Bd. of Ed. of Wetzel County*, 170 W. Va. 240, 241, 293 S.E.2d 437, 438 (1982) ("The state and its agencies performing state functions statewide are entitled to this absolute immunity. It cannot be waived by the Legislature or the courts."). Thus, the circuit court below was correct in determining that WVUBOG was entitled to sovereign immunity for Petitioner's claims.

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[5] Indeed, the *Ducker* case involved a breach of contract claim against WVUBOG.

[6] Article VI, § 35 provides: "The state of West Virginia shall never be made defendant in any court of law or equity, except the state of West Virginia, including any subdivision thereof, or any municipality therein or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

b. The applicable insurance policy is not "inconsistent;" the plain language of the policy unequivocally excludes Petitioner's claims, and he therefore cannot avail himself of the* Pittsburgh Elevator *insurance exception to immunity.

To maintain his substantive contractual and quasi-contractual claims, Petitioner must find a path around sovereign immunity. One notable exception to immunity is that the legislature requires State agencies to secure insurance, *see* W. VA. CODE § 29-12-5, and it prevents those agencies' insurer from asserting the State's sovereign immunity as a defense to a claim otherwise within the scope of the applicable policy. W. VA. CODE § 29-12-5(a)(4); *accord* Syl. pt. 1, *Eggleston v. W. Va. Dept. of Highways*, 189 W. Va. 230, 429 S.E.2d 636 (1993). As this Court has made clear, a claim against the State but within the limits of its insurance coverage is allowable because it is not a claim against the State, but instead is, "in essence, a suit against a state agency's insurance carrier." *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 757, 310 S.E.2d 675, 689 (1983). As the Code makes clear, however, "the State is still constitutionally immune from claims arising out of any activity or responsibility that is not covered under its policy." *Wrenn v. W. Va. Dept. of Transp., Div. of Highways*, 224 W. Va. 424, 428, 686 S.E.2d 75, 79 (2009); *see also Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996); *Blessing v. Nat'l Eng'g & Contracting Co.*, 222 W. Va. 267, 664 S.E.2d 152 (2008); *W. Va. Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 807 S.E.2d 760 (2017).

The applicable provision of the State's insurance coverage could not be clearer. It unequivocally states that:

> This insurance does not apply to:
>
> . . . .
>
> H. To any claim(s) made against the **"insured"** for damages attributable to wages, salaries and benefits.

> I. To any claim(s) based upon or attributable to any allegations or claims that the **"insured"** breached the terms of any type or any form of contract, either express or implied, written or oral.

[Appx. 193-94]. Petitioner's claim is of breach of contract to recover an alleged salary. His quasi-contractual equitable claims are merely backups to attempt to recoup those same wages. Petitioner's substantive claims are thus explicitly excluded by ***two separate*** exclusions in the insurance contract. Because there is no insurance coverage for Petitioner's claim, the circuit court below was correct that WVUBOG is entitled to sovereign immunity.

In this appeal, Petitioner asserts that the State's policy is "inconsistent." That assertion is nothing more, however, than smoke and mirrors. The allegedly "inconsistent" provision of the policy to which Petitioner points is the State's Comprehensive General Liability ("CGL") coverage. [Pet. Brief at 12-13]. Petitioner's misunderstanding of the scope of the CGL coverage, as well as this Court's opinion in *Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999) has no merit; indeed, *Arnold* actually supports WVUBOG.

In *Arnold*, this Court ***theorized*** (but did not hold) that coverage could arise for damages under an "Incidental Contract" via the state's CGL coverage. However, as it also clearly noted, "the CGL section extends only to claims of bodily injury and property damage. Arnold has never alleged such damages. Consequently, under the clear language of the CGL section of the State's insurance policy, there is no coverage for the breach of contract claim." *Id.* at 594, 526 S.E.2d at 825; [*see also* Appx. 179-82].

To be clear: completely contrary to Petitioner's argument, this Court ***actually*** held in *Arnold* that there was ***no*** coverage under the "incidental contract" language of the CGL policy because there was no allegation of bodily injury or property damage. While the Court did reverse summary judgment, it was under language of a different part of the policy relating to

coverage for fraud. *Id.* at 596, 526 S.E.2d at 827. Here, as in *Arnold*, Petitioner's claims allege no bodily injury or property damage; thus, he cannot find coverage under the CGL policy, and his reliance on *Arnold* has no merit.

In sum, there is no "inconsistency" in the State's insurance policy. The CGL coverage unambiguously does not apply at all. The language of the applicable coverage is abundantly clear that there is no coverage for Petitioner's contractual and quasi-contractual claims or damages therefrom. Accordingly, the insurance exception to sovereign immunity does not apply, and the circuit court was correct in determining, consistent with the overwhelming weight of this Court's jurisprudence, that WVUBOG is entitled to sovereign immunity. Petitioner's Assignment of Error I has no merit.

c. Petitioner cannot use the remedial WPCA to create a "back door" into a clearly barred contractual claim.

It was essentially undisputed below that Petitioner's WPCA claim rises and falls with his breach of contract claim. What he cannot do, however, is "bootstrap" his WPCA claim into an independent substantive claim to wages in order to evade the sovereign immunity bar as his Assignment of Error II suggests – a tactic the circuit court rightly rejected.

WVUBOG does not dispute that public entities are subject to the WPCA – ***if*** a plaintiff can show an "obvious legal debt" of wrongfully withheld wages. That is not the case here. Petitioner's flawed reliance on *Beichler v. W. Va. Univ. at Parkersburg*, 226 W. Va. 321, 706 S.E.2d 532 (2010)[7] to evade sovereign immunity by "bootstrapping" his substantive claims to the

[7] Plaintiff characterizes the *Beichler* case as a wage dispute involving a plaintiff who, as he describes, "taught physics for West Virginia University at its campus in Parkersburg." [Pet. Brief at 14]. While it was once a regional campus of WVU, WVU-Parkersburg has been an independent institution with a completely separate Board of Governors since 2008 (prior to *Beichler*), and merely uses the trademarks of WVU under a long-term licensing arrangement. W. VA. CODE § 18B-2A-1(b).

WPCA turns the well-established WPCA analysis structure on its head. As this Court has observed, "the WPCA does not create a right to compensation; rather it merely provides a statutory vehicle for employees to recover agreed-upon, earned wages from an employer." *Grim v. Eastern Electric, LLC*, 234 W. Va. 557, 572, 767 S.E.2d 267, 282 (2014); *see also* Syl. pt. 5, *Adkins v. Am. Mine Research, Inc.*, 234 W. Va. 328, 765 S.E.2d 217 (2014) (determination of whether "wages" under WPCA are payable "is governed by the terms of the employment agreement"). In other words, the WPCA does ***not*** create any substantive rights – it is merely a derivative claim.

Rather, as a remedial enforcement statute, the WPCA requires that Petitioner ***first*** establish that there is a governing agreement with his employer which guarantees him wages; ***then*** the WPCA protections and cause of action attach. Such was the case in *Beichler*, where there was no dispute that a contract existed between that plaintiff and the public employer to be enforced. Indeed, this Court's holding in *Beichler* is based upon the premise that sovereign immunity is not implicated "where a State employee, hired on particular terms and entitled to be paid according to certain criteria, seeks to collect such an 'obvious legal debt." *Beichler,* 226 W. Va. at 326, 700 S.E.2d at 237 (citing *Gribben v. Kirk,* 195 W. Va. 488, 466 S.E.2d 147 (1995)).

Here, strain as he might, Petitioner has not established the existence of any "obvious legal debt" – *i.e.,* an employment agreement with WVUBOG guaranteeing him $24,000 in extra annual salary. Instead, he erroneously puts the proverbial cart before the horse – by ***first*** claiming that WPCA is applicable to short-circuit sovereign immunity to ***then*** unlock the door so he may argue a substantive right to alleged compensation (*i.e.*, circle back to his breach of contract claim after-the-fact). Petitioner's circular analysis is simply not how remedial legislation, such as the WPCA, works. Syl. pt. 5, *Adkins,* 224 W. Va. 328, 765 S.E.2d 217

Because Petitioner has not established any "employment agreement" outlining "particular terms . . . entitl[ing him] to be paid according to a certain criteria" sufficient to create an "obvious legal debt" in the amount of $24,000 per year (nor can he), the WPCA is not triggered. Petitioner cannot use the remedial WPCA to "bootstrap" his way past the sovereign immunity, which clearly bars his substantive contractual and quasi-contractual claims, and the circuit court was correct in not allowing him to do so.

2. In the alternative to sovereign immunity, there was no genuine issue of material fact concerning whether there was an enforceable contract between WVUBOG and Petitioner in the specific amount of $24,000 per year.

Petitioner's Assignments of Error III and IV cover similar ground – basically, that disputes of fact should have precluded summary judgment. As this Court has held, "[t]he mere existence of ***some*** alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact." *Williams v. Precision Coil, Inc.*, 194 W. Va 52, 61, 459 S.E.2d 329, 338 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–8 (1986) (emphasis in original)). "Facts are 'material' when they might affect the outcome of the case, and a 'genuine issue' exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *The News & Observer Publ. Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010).

a. There is no "genuine" issue of "material" fact that no enforceable contract exists between WVUBOG and Petitioner.

Here, the only material fact necessary to resolve Petitioner's breach of contract claim is ***undisputed*** and, indeed, could not be clearer cut – Petitioner specifically alleges that the written business plan for the Center, attached to the January 5, 2003 letter from Dr. Sathyamoorthy "for [Petitioner's] information," [Appx. 109], but previously rejected in part by the WVUIT Cabinet

(including the specific section containing the proposed director's salary), constitutes a binding and enforceable contract between Petitioner and WVUBOG. [Appx. 93; 100-01; 243; Pet. Brief at 3, 18]. As a matter of law, it simply does not, nor could a jury reasonably conclude that it does.

Petitioner was offered appointment as the founding Director of the Center on January 5, 2004. Petitioner accepted that offer.[8] However, there was never a meeting of the minds between Petitioner and WVUBOG as to the salary, if any. Petitioner contends that, as Director, he was to be paid a supplemental salary of $24,000.00 per year in addition to his summer salary and other incentive payments. The January 5, 2004 letter appointing Petitioner as Director states the following with respect to compensation:

> As the Director, you will be paid a supplemental salary based on research effort fully derived from external sources by the Center. The supplemental salary will be in addition to the summer salary and others received from external funding sources. The supplemental salary will be paid over the nine-month academic year period.

[Appx. 109]. The letter does not contain any other information about compensation. Indeed, there is no documentation ***anywhere*** that promises Petitioner a supplemental salary of $24,000 -- or any other specific amount. Without a meeting of the minds on the specific amount of the salary,[9] there is simply no basis for Petitioner to claim that WVUBOG breached any contract in which it promised him $24,000 per year.

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[8] "An express contract and an implied contract, relating to the same subject matter, cannot co-exist." *Case v. Shepherd*, 140 W. Va. 305, 311, 84 S.E.2d 140, 144 (1954) (citation omitted). Thus, to the extent Petitioner alleges that an enforceable contract exists, the written offer letter that Petitioner asserts was the "offer" is the guiding light to the terms and conditions of his position as Director.

[9] This Court has long held that "the parties must enter into a meeting of the minds in order to form an enforceable contract." *Chesapeake Appalachia, LLC v. Hickman,* 236 W. Va. 421, 439, 781 S.E.2d 198, 216, (2015); *see also* Syl. pt. 1, *Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (1932) ("A meeting of the minds of the parties is a *sine qua non* of all contracts.").

Petitioner obtains his figure of $24,000 per year from the proposed budgetary handout for the Center distributed to the WVUIT Cabinet at a December 2003 meeting. [Appx. 103; 92-93] ("Q: . . . Is there any other documentation that you contend promises you a supplemental salary of 24,000 dollars a year beyond what is in [Appx. 103-04]?" A: I am not aware of . . . ."). Pointing to nothing more than handwritten notes by an unknown party on the business plan [Appx. 103-04],[10] Petitioner asserts that the WVUIT's discussion of the Center plan at the December 2003 meeting constituted approval of the Director's salary. [Pet. Brief at 18]. This is wholly contrary to evidence in the case.

As a governing board, it is well-established that the WVUIT Cabinet "'can only act as a body, and its act must be evidenced by an entry on the minutes.'" *Tompson v. Jones Comm. Hosp.*, 352 So.2d 795, 796 (Miss. 1977) (quoting *Smith v. Bd. of Supervisors*, 124 Miss. 36, 86 So. 707 (1920)). The minutes of the WVUIT Cabinet's November 2003 meeting reflect that the Cabinet voted to adopt the business plan for the "Center concept . . .. ***with the exception of the section labeled Administration and Oversight.***" [Appx. 100] (emphasis added). That rejected section is the sole reference in this entire case to the Director's salary as $24,000 per year. [Appx. 104; 92-93]. At the December 2, 2003 meeting, the WVUIT Cabinet did have further discussion about the Center and apportion grant funding, but did not revisit the issue of staff salaries. [Appx. 106-107]. To put a finer point on it, ***at no point did the WVUIT Cabinet vote to adopt a salary of $24,000 for the Director of the Center.*** Thus, Petitioner's Assignments of Error III, IV, and VIII are meritless.

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[10] It should be noted that Petitioner incorrectly refers to the business plan contained in Appx. pp. 103-04 and 265-268 as "the minutes of the December 2, 2003, Cabinet meeting." [Pet. Brief at 18, 19, 20]. They are not. The December 2, 2003 WVUIT Cabinet Minutes are provided to the Court as Appx. pp. 106-107. To the extent that Petitioner may be implying that handwritten notes of "OK" by an unknown party evidence an adoption vote, that is also incorrect. As noted above, the Cabinet speaks only through votes recorded in its minutes.

The *Geibel* and *Hines* cases cited by Petitioner are entirely inapposite to this case. Both involved alleged ***oral*** contracts in which at least one of the parties to the alleged contract were long since dead or incapacitated. *Geibel v. Clark*, 185 W. Va. 505, 508, 408 S.E.2d 84, 87 (1981); *Hines v. Hoover*, 156 W. Va. 242, 245, 192 S.E.2d 485, 487 (1972). Differing versions of what may have been said (or not said) by a dead man creating or assenting to the terms of an oral contract is admittedly the essence of a disputed "material fact." That is not the case here.

The case of *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 153 S.E.2d 172 (1967), discussed by Petitioner at length, is similarly inapplicable. In *First Nat'l Bank*, there was an "unequivocal statement that [Marietta] would pay a certain sum of money." *Id.* at Syl. pt. 1. Here, there was no unequivocal statement by WVUBOG that Petitioner would be paid any sum certain, much less the specific figure of $24,000 per year. [Appx. 109]

b. If Dr. Sathyamoorthy offered Petitioner $24,000 per year, that offer was* ultra vires *and unenforceable against WVUBOG as a matter of law.

Even assuming Dr. Sathyamoorthy's February 2004 letter attaching the partially adopted business plan[11] did constitute a promise of payment of the certain sum of $24,000 per year (which it plainly did not), Dr. Sathyamoorthy had no authority to make such an offer because that salary had previously been rejected by the WVUIT Cabinet. Therefore, Dr. Sathyamoorthy's offer (if any) was an *ultra vires* act as a matter of law and is accordingly unenforceable against WVUBOG. Syl. pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hops. Serv., Inc.*, 174 W. Va. 605, 328 S.E.2d 356 (1985) ("A state or one of its political

[11] Petitioner also contends that Dr. Sathyamoorthy's representations in the January 5, 2004 letter that the business plan was "approved" is "undisputed" evidence that the WVUIT Cabinet approved the Center business plan "in all aspects." [Pet. Brief at 20]. Petitioner's clever bait and switch contradicts the actual facts. The letter does ***not*** say it the plan was approved in "all aspects." And as noted, the Cabinet speaks only through its minutes. Even if Dr. Sathyamoorthy ***had*** said that, his unilateral letter does ***not*** speak for the Cabinet and, to the extent any of his representations are inconsistent with Cabinet minutes, they are *ultra vires* and cannot bind WVUBOG as a matter of law.

subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority") (citing *Cunningham v. Cnty. Court of Wood Cnty.*, 148 W. Va. 303, 310, 134 S.E.2d 725, 729 (1964)); *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985) (*ultra vires* promises by public officials are nonbinding).

3. The circuit court did not err in awarding summary judgment on Petitioner's unjust enrichment and *quantum meruit* claims.

a. Summary judgment is appropriate on a laches defense.

Petitioner's Assignment of Error VII incorrectly asserts that a decision on a laches defense is one that "***only*** a jury can decide." [Pet. Brief at 23] (emphasis added). This is simply not the law, even according to the case cited by Petitioner. In *Geibel*, this Court explicitly evaluated a laches defense under Rule 56, but found genuine issues of material fact regarding knowledge of acquisition in an adverse possession claim. *Geibel*, 185 W. Va. at 511, 408 S.E.2d at 90. Indeed, this Court recently affirmed a grant of summary judgment on a laches defense on a 4-0 vote. *White by and through Hutchinson v. White*, No. 16-0577, 2017 WL 3821900 (Sept. 1, 2017). There is no precept of law in West Virginia standing for the proposition that summary judgment is inappropriate on a laches defense.

b. The circuit court correctly decided, in the alternative to sovereign immunity, that the doctrine of laches barred Petitioner's claims.

In his Assignment of Error VI, Petitioner argues that WVUBOG did not suffer prejudice by his admitted delay in asserting his alleged right to supplemental salary. It should be noted that Petitioner ***does not dispute the element of delay***. [Pet. Brief at 21-23]. Petitioner was appointed as Director of the Center in January 2004, and asked Dr. Sathyamoorthy about the supplemental salary three times in the roughly 2 ½ years between then and June 2006. [*Id.* at 4-

5]. Petitioner admits that he then fell silent, only resuming his complaints in Spring 2012 to then-new President Carolyn Long, [*Id.* at 5], and continued complaining, [*Id.* at 5-7], culminating in filing of Civil Action No. 14-C-263 in 2014. [Appx. at 27-34]. However, at no point in the proceedings below did Petitioner proffer ***any explanation whatsoever for the considerable gap between 2006 and 2012***. During that time, he had ceased raising the issue with administration; he did not file a grievance; and even continued signing the annual appointment notices stating his total salary. [Appx. 115-22]. "A court of equity will not assist one who has slept on his rights, and shows no excuse for his laches in asserting them." *Phillips v. Piney Coal & Coke Co.*, 53 W. Va. 543, 44 S.E.2d 774, 776 (1903).

In *Maynard v. Bd. of Educ. of Wayne Cnty.*, 178 W. Va. 53, 61, 357 S.E.2d 246, 255 (1987), this Court cited with approval *Lavin v. Board of Education*, 90 N.J. 145, 447 A.2d 516 (1982). In *Lavin*, a schoolteacher, nine years after her employment commenced, filed a claim for military service credit to be applied both retroactively and prospectively in computing her salary. While upholding prospective relief, the Supreme Court of New Jersey ruled that the doctrine of laches barred ***all*** retroactive monetary relief. *Lavin*, 90 N.J. at 155, 447 A.2d at 521. Ultimately, this Court determined in *Maynard* that a suit for alleged unpaid wages by a public employee was barred by the doctrine of laches, noting that a delay of five years after the last fiscal year in question and nine years after the first fiscal year in question was unreasonable. *Maynard*, 178 W. Va. at 62, 357 S.E.2d at 256. Like the plaintiffs in *Lavin* and *Maynard*, Petitioner here waited for a ***full decade*** after his appointment to file his equitable claims seeking to recover alleged "compensation" for that role. Clearly, the circuit court did not err in holding in the alternative to sovereign immunity, and in accordance with the law as announced by this Court, that laches barred Petitioner's common-law claims against his public-entity employer.

In this appeal, Petitioner notably does not dispute that he delayed in asserting his rights. [Pet. Brief at 21-23]. His sole focus is on the element of "prejudice," arguing that WVUBOG cannot be prejudiced by his delay because the funding source for his supplemental salary was to be derived from "external sources," rather than "solely state funds." [Pet. Brief at 22-23]. This is a distinction without any legal difference. Whatever the bygone source(s) of income into the Center over fifteen years ago,[12] Petitioner is still asking in this lawsuit to be paid hundreds of thousands of dollars in back pay and interest out of the coffers of WVUBOG – a public entity – in 2020. *See Maynard*, 175 W. Va. at 61, 357 W. Va. at 255 ("Generally, courts have been reluctant to award retroactive monetary relief to public employees who have filed actions after a lengthy delay, where to afford such relief would cause substantial prejudice to the public's fiscal affairs.").

Indeed, Petitioner admits that he fell silent in 2006, only resuming his complaints once President Long came to WVUIT in 2012 – culminating in filing this lawsuit in 2014. As this Court has noted, "[i]t would also be inequitable to charge the current group of public administrators [here, President Long's administration] with the administrative responsibility for rectifying the large, lump-sum financial burden created many years ago." *Maynard*, 175 W. Va. at 61, 357 S.E.2d at 255. Petitioner's misapplication of *Maynard* in his Assignment of Error VI is meritless.

4. There is no basis in the record below to conclude that Petitioner was paid anything other than what he was promised.

Petitioner's Assignments of Error IV and V also cover similar ground, in that Petitioner claims that the circuit court improperly disregarded evidence on the record establishing his alleged supplemental salary. Irrelevant as these Assignments are in light of sovereign immunity

[12] Indeed, Petitioner admits that the Center has ceased to exist altogether. [Appx. at 94].

and laches bars, they are also incorrect. As to Assignment of Error IV, Petitioner repeats his argument that the business plan proposal[13] provided to him by Dr. Sathyamoorthy "for [Petitioner's]" information," [Appx. 109], constituted an unequivocal promise to pay Petitioner $24,000 per year. As established above, this is incorrect – even if Dr. Sathyamoorthy's vague provision of the plan to Petitioner "for [his] information" constituted an definite offer to pay the sum certain of $24,000 per year (which it did not), it would have been an *ultra vires* act by Dr. Sathyamoorthy, which is unenforceable against WVUBOG.

In Assignment of Error V, Petitioner complains that he was "not compensated for his work as the director." Again, Dr. Sathyamoorthy's offer letter promises that Petitioner would be paid on funds "derived from external sources by the Center." [Appx. 109]. During his time as Director, Petitioner repeatedly noted in memoranda to the Dean that portions of his salary were being paid from external grants for projects on which the Center worked. [Appx. 124-34]. Thus, even assuming Dr. Sathyamoorthy's letter constituted an offer of a salary (which it did not) Petitioner was paid exactly what he was promised in that letter – from funds derived from external sources. Just as President Long determined in 2013. [Appx. 140]. Beyond Petitioner's own self-serving allegations, there is no genuine issue of material fact on the record to indicate otherwise, and Petitioner's Assignments of Error IV and V have no merit.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent West Virginia University Board of Governors respectfully requests that this Court **AFFIRM** the circuit court's Order granting WVBOG's Motion for Summary Judgment, and dismiss this case from the Court's docket.

[13] *See* n.9, *supra.*

Respectfully submitted this 17th day of August, 2020.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0311

ASAD DAVARI,

Petitioner herein;
Plaintiff below;

v.

Appeal from an Order of the Circuit Court of Kanawha County CIVIL ACTION NO. 14-C-263 (Consolidated with 14-C-838) Honorable Tera L. Salango

THE WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

Respondent herein;
Defendant below.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "**Brief of Respondent West Virginia University Board of Governors**" was served on all the parties hereto via hand delivery, this 17th day of August, 2020, to counsel as follows:

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