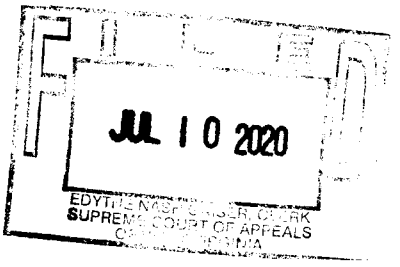
In the Supreme Court of Appeals of West Virginia

Docket No. 20-0349

William David Haught
Plaintiff below, Petitioners

v.

David Fletcher, individually and as Mayor of Town of Belle, West Virginia and Town of Belle, West Virginia, a municipal corporation
Defendants below, Respondents



Petitioner's Brief

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STATEMENT OF THE CASE

A citizen came to officials with the Town of Belle and alleged that his wife was having an affair with the Petitioner. The Petitioner was questioned about the "affair". The matter was investigated by the police department and others and the allegations were proven to be FALSE. The Defendant, David Fletcher, having been advised that the allegations were proven false, nevertheless, reported to council members after a council meeting that Petitioner was not granted a pay raise as all other employees because he had an affair with a married woman utilizing his cruiser and while on duty.

There had been other instances of harassment from the Defendant, David Fletcher, towards the Petitioner but Petitioner was not afforded the opportunity to further develop those in light of the Dismissal of the action below.

SUMMARY OF ARGUMENT

The Defendant, David Fletcher is not entitled to a qualified privilege defense in this matter because published or made a statement NOT in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter with a bad motive which will defeat a qualified privilege defense.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the record and briefs in this case will provide the Court with all necessary information needed to decide the issues, and therefore oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

1. The Kanawha County Circuit Court erred in Granting the Respondents' Motion to Dismiss Petitioner's claims as against David Fletcher, individually.

Dismissal was inappropriate in this case - extra pages in a brief notwithstanding. With no disrespect intended, Petitioner is certain this Honorable Court is quite well informed of the law governing dismissal and summary judgment and when it should be granted or denied. Even a cursory review of the egregious facts of record here demand a jury's scrutiny.

Obviously, this Court has "been there, done that" hundreds, if not thousands of times. In assessing motions for dismissal or summary judgment, the allegations in the Complaint must be taken as true, and the non-moving party is entitled to all reasonable inferences reasonably drawn therefrom in support of the claims for liability. *Cavender v. Fouty*, 195 W.Va. 94, 464 S.E.2d 736 (1995).

Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the Plaintiffs complaint should be read and construed liberally and in favor of the Plaintiff. Dismissal is proper only where the Complaint the complaint does not state sufficiently a valid claim. Closely akin to a Motion for Summary Judgment, the moving party must show that there is no genuine issue as

to any material fact and that it is entitled to judgment as a matter of law. *Painter v. Peary*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In Syllabus Point 1 of *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992), the West Virginia Supreme Court articulated the standard for granting motions for summary judgment:

> A Motion to summary judgment should be granted only when it is clear that there is *no genuine issue of fact* to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963) (emphasis added), *see also Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Further, the Court indicated that the circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). The Court must draw upon any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Masinter v. WEBCO Co.,* 164 W.Va. 241, 262 S.E.2d 433 (1980). *Andrick,* 187 W.Va. at 708, 421 S.E.2d at 249.

Additionally, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214. Summary judgment is appropriate where the *record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d

265 (1986) (emphasis added). Therefore, while the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must offer some " 'concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor' " or other " 'significant probative evidence tending to support the complaint.' " *Liberty Lobby,* 477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 593 (1968)); *Crain v. Lightner,* 178 W.Va. 765, 364 S.E.2d 778 (1987).

The standard is the same as it has always been. Simply stated, if there are genuine issues of material fact for a trial jury's resolution, a Motion to Dismiss must be refused. It is the same whether stated in five pages or one sentence. The defendant, David Fletcher, is not entitled to the relief afforded by Rule 12(b)(6) as a matter of law. Issues regarding David Fletcher's conduct, knowledge, good faith, motivation and whether the manner in which he acted was reasonable under the circumstances or was grossly negligent or oppressive are for the jury to decide.

The Court ruled that the Defendant, David Fletcher, individually, was entitled to a dismissal as a matter of law as a result of a qualified privilege. On the subject of qualified privilege this Court has previously stated as follows:

> "In syllabus point six of Crump [v. Beckley Newspapers, Inc., 173 W.Va. 699, 320 S.E.2d 70 (1984)], this Court held that "'[t]he existence or nonexistence of a qualifiedly privileged occasion . . . in the absence of controversy as to the facts, [is a] question [ ] of law for the court.' Syl. pt. 3, Swearingen v. Parkersburg Sentinel Co., 125 W.Va. 731, 26 S.E.2d 209 (1943)." 173 W.Va. at 703, 320 S.E.2d at 74.
>
> This Court further explained as follows in syllabus point four of Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219 (1994):

> Qualified privileges are based upon the public policy that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons or certain interests of the public. A qualified privilege exists when a person ***publishes a statement in good faith*** about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter; however, ***a bad motive will defeat a qualified privilege defense***."Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 720, 568 S.E.2d 19, 27 (2002). (emphasis added)

Upon argument of the parties, there was no real disagreement as to certain issues, e.g. the claim of the plaintiff against the Town of Belle was ORDERED dismissed, as the City is not liable, as a matter of law, for the intentional acts of the "employee".

Second, the claim of the plaintiff for violation of the plaintiff's police civil service rights, as codified by the West Virginia Code, is dismissed as there was no reduction in rank or penalty to the plaintiff.

The only remaining issue is whether plaintiff has a bona fide cause of action for slander per se against David Fletcher, in his individual capacity. The standard for ruling on a Rule 12(B)(6) motion is whether the complaint states any cause of action upon which relief may be granted.

It is well established that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45–46[, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84] (1957)." Syl. pt. 3, Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977). R.K. v. St. Mary's Med. Ctr., Inc., 735 S.E.2d 715, 229 W.Va. 712 (W. Va. 2012) (emphasis added).

Plaintiff alleged in his complaint, inter alia:

6. Following the meeting, Mayor Fletcher stated, published and declared that plaintiff was not getting a pay raise as a patrolman and that the reason for the same was that plaintiff was having an extramarital affair with the citizen's wife while he was on duty. He further advised that this had been discussed at the Finance Committee either on that date or at some prior date that was not noticed pursuant to State law or the City ordinances, and that, because of this alleged affair, the Finance Committee had not recommended a pay increase for plaintiff.

7. At the time(s) of the statements by Defendant Fletcher, defendant Fletcher knew that his statements as to the plaintiff having an extramarital affair were false, were published as being defamatory, imputing criminal conduct to said plaintiff, and with the intent to cause harm to the plaintiff's reputation and otherwise.

8. Said statements made by Defendant Fletcher are and were at the time made, in fact, false

COUNT I SLANDER/DEFAMATION OF CHARACTER

9. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 8, supra, as if restated herein verbatim.

10. Defendant's statements as aforesaid were slander per se, published with knowledge of their falsity and with the intent to cause harm to the plaintiff's reputation and otherwise, were malicious and intentional. Moreover, said statements, by stating that the alleged affair occurred while on duty, accused that the plaintiff was depriving the town of his honest services, a criminal act.

Defendants allege that the communications were "qualified privileges" and, because of the same, even if the facts alleged are true, plaintiff may not recover. However, a qualified privilege only exists when a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter. Swearingen v. Parkersburg Sentinel Co., 125 W.Va. 731, 744, 26 S.E. 2d 209, 215 (1943).

Plaintiff's complaint alleges, inter alia, that "defendant Fletcher knew that his statements as to the plaintiff having an extramarital affair were false, were published as being defamatory, imputing criminal conduct to said plaintiff, and with the intent to cause harm to the plaintiff's

reputation and otherwise", i.e. Further, the defendant Fletcher knew at the time of making the statements that the statements were false.

Petitioners have asserted sufficient facts to allow a jury to decide if the conduct of the Defendants was ***slander per se*** and thereby actionable.

CONCLUSION

Based upon the above and the evidence in this case, the Circuit Court erred when it GRANTED the Defendant's Motion to Dismiss as to David Fletcher, individually, as there are clearly demonstrated genuine issues of material fact in this case and David Fletcher is not immune from liability under any statutory provision. Therefore, the Plaintiff respectfully requests that this Honorable Court reverse the ruling of the Circuit Court of Kanawha County of Dismissal as to David Fletcher, individually and and allow this case be tried before the province of the jury in the interests of justice and equity.

Signed: _____
Michael T. Clifford (WV Bar #750)
Counsel of Record for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2020, a true and accurate copy of the foregoing **Petitioner's Brief and Appendix** was deposited in the U.S. Mail in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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Signed: _____
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