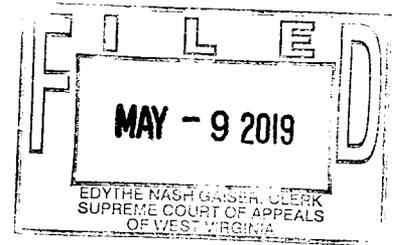


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**SCOTT VINSON and THE CLARKSBURG
CITY POLICE DEPARTMENT,**

Defendants Below, Petitioners

v.

Docket No.: 19-0132

ROSA LEE BUTCHER,

Plaintiff Below, Respondent

**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF
WEST VIRGINIA IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES.....2

II. STATEMENT OF INTEREST..... 3

III. ARGUMENT4

IV. CONCLUSION.....12

I. TABLE OF AUTHORITIES

W. Va. Code § 33-6-31 3

Meg Tomlinson, *Krupski and Relation Back for Claims Against John Doe Defendants*, 86 *Fordham L. Rev.* 2071 (2018)..... 4

Lee v. Saliga, 179 W. Va. 762 (1988)..... 4

Southgate v. Walker, 2 W. Va. 427 (1868) 5

Coal & Coke Ry. v. Taylor, 63 W. Va. 103 (1907).....5-6

W. Va. R. Civ. P. 15(c)(3)*passim*

Muto v. Scott, 224 W. Va. 350 (2008)7-8

W. Va. R. Civ. P. 27 9

Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)..... 10

Andrews v. Philadelphia, 895 F.2d 1469, 1487-88 (3d Cir. 1990)..... 11

II. STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia (DTCWV) is an organization of over 450 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 20,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. DTCWV's goals include elevating the standards of legal practice within the State of West Virginia, working for elimination of Court congestion and delays in civil and administrative litigation in West Virginia, promoting improvement of the administration of justice in West Virginia, and increasing the quality of legal services provided to our citizens.

Many DTCWV members represent political subdivisions and their personnel in civil rights and personal injury litigation. In addition, DTCWV seeks to prevent prejudice to real defendants in all civil actions that would be caused by a rule permitting phantom John Doe actors to be treated as real parties in interest at trial and/or proper parties against whom a judgment may be entered, with collection efforts then being directed at actual, real persons, the ultimate goal. With the exception of a specific statutory scheme (such as John Doe uninsured motorist claims under *W. Va. Code* § 33-6-31), John Doe parties are simply placeholders—not real parties in interest to any case—and no judgment order should be entered against any unknown defendant.

For these reasons, DTCWV submits this brief in support of Petitioners pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure.¹

¹ WVRAP Rule 30(e)(5) statement: This brief was not authored in whole or in part by counsel for any party. No monetary contribution was made by any party or counsel for any party specifically intended to fund the preparation or submission of this brief.

III. ARGUMENT

THE CIRCUIT COURT ERRED IN ALLOWING CLAIMS AGAINST UNKNOWN DEFENDANTS TO PROCEED TO TRIAL AND IN ENTERING JUDGMENT AGAINST UNKNOWN DEFENDANTS

A. Permitting John Does to Remain Parties Through Trial and Judgment Ignores the Fundamental Purpose of Permitting Claims Against John Does in the First Instance.

The use of so-called “John Doe” pleading can be traced back to English Common law, which permitted the use of fictional names in the absence of the identity of an actual party²:

Doe pleading has its roots in English common law, where plaintiffs used fictional characters to minimize the effects of writ pleading’s rigidity and to facilitate the pursuit of claims that did not fit into one of the predetermined categories that were the hallmark of that system. In the American system, John Doe pleading can be traced back to the Field Code—David Field’s transformative overhaul of New York’s Code of Civil Procedure. The Field Code allowed a plaintiff that did not know the defendant’s name to designate that defendant by any name and to amend the pleading once the name was discovered. Thus, the shift to code pleading marked John Doe’s transformation from a legal fiction into a stand-in for an actual but unidentified person. *In contemporary civil litigation, John Doe pleading refers to the practice of naming intended but yet unidentified defendants as “John Doe.”* This practice began in state courts, as many states adopted some form of the Field Code’s provision allowing unidentified defendants to be given fictitious names. The vast majority of states have adopted some provision for the use of fictitiously named defendants, whether by statute, in codes of civil procedure, or by judicial decree.

Krupski and Relation Back for Claims Against John Doe Defendants, 86 Fordham L. Rev. 2071 (2018) (emphasis added).

West Virginia’s first reported case involving an unknown defendant appears to be

²John Doe uninsured claims, although tort claims, are not true claims against unknown defendants and have no bearing on the analysis of the issues in this appeal. John Doe uninsured claims are permitted by a specific statutory scheme regulating automobile insurance, which is concerned with permitting an insured to pursue a contractual insurance claim against his/her own insurer based on injuries sustained as a result of an unknown motorist. This Court recognized: “It is perhaps more accurate to say that a ‘John Doe’ [uninsured] suit *simulates* a tort suit, since it is a *wholly artificial procedure* and ‘John Doe’ is merely a putative defendant.” *Lee v. Saliga*, 179 W. Va. 762 (1988) (emphasis added).

Southgate v. Walker, 2 W. Va. 427 (1868). That case involved a West Virginia Supreme Court appeal from a verdict rendered at trial in Greenbrier County, Virginia, in 1854, and involved a title dispute regarding 1,000 acres of land. While the complaint initially listed “Richard Roe” as the defendant, the suit was ultimately served on Hezekiah L. Walker, who was then the “admitted defendant in this suit in the room of Richard Roe.” In modern terms, the plaintiff amended the complaint to replace the unknown Richard Roe defendant with Hezekiah L. Walker, the known and real defendant.

In *Coal & Coke Ry. v. Taylor*, 63 W. Va. 103 (1907), this Court allowed a judgment against an unknown individual, described only as “Italian No. 37”, and permitted garnishment against wages owed to an employee of Coal & Coke Railyard, designated on that business’ records as “Italian No. 37.” While the Court noted that some cases suggested that fictitiously named parties or partially described parties could be named as parties in legal pleadings, many of those cases reflect that once the actual defendant’s name is discovered, the complaint must be amended to so reflect.

More importantly, the Court focused its analysis on the provisions of a then-existing state statute, W. Va. Code, Chapter 50, § 28, which provided:

When the name of a defendant is not known to the plaintiff, the summons may be issued against him by a fictitious name, or any description to designate the person intended, and shall not be set aside or dismissed for that cause, ***if served on the proper person***; and in any case in which a defendant shall be proceeded against by any other than his true name, ***it shall be the duty of the justice when his true name is ascertained, to amend the summons by inserting the same therein, and thereafter to proceed against him by his true name.***

(emphasis added). In permitting the judgment to stand, the *Taylor* Court chose to disregard the statutory requirements of service on the proper person as well as of amending the summons to reflect a defendant’s true name once it is discovered on the ground that it was

a remedial statute. Notably and not surprisingly, the *Taylor* decision has never been cited as authority in any reported case. Even with its relatively free-wheeling approach, however, the *Taylor* case is premised on the fact that the identity of Italian No. 37 could be squared up with a specific worker of the Railyard company that used the exact same designation to identify its worker.

Significant reforms came to civil practice in the mid-20th Century, and in 1960, the West Virginia Rules of Civil Procedure went into effect, which have been refined multiple times over the 60 years since first drafted.

The Rules, and this Court's interpretation of those Rules, have obviated the need for any case to proceed *to judgment* against an unknown defendant, particularly where, as here, there can be no vicarious liability on the part of another. This Court has formulated a balance between a plaintiff's knowledge and diligence in obtaining that knowledge; prejudice to a real defendant of being brought in to litigation late; and recognition of possible gamesmanship on either side.

Specifically, W. Va. R. Civ. P. 15(c)(3) provides:

(c) Relation back of amendments. An amendment of a pleading relates back to the date of the original pleading when:

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action; or
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or
- (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a

mistake concerning the identity of the proper party, the action would have brought against the party.

In *Muto v. Scott*, 224 W. Va. 350 (2008), the Court addressed the issue of whether a lack of knowledge of the identity of a fictionally-named defendant did or did not fall under the provision of Rule 15(c) that a complaint could be amended to add a new party due to mistake. At the time, the majority of Federal Courts addressing the issue under the Federal Rules of Civil Procedure did not permit amendment under such a theory, under the reasoning that a conscious decision is made to name a John Doe defendant. It did not happen by mistake. The *Muto* Court, however, held that the lack of knowledge of the true identity of a tortfeasor could satisfy the "mistake" requirement of Rule 15(c)(3) in certain circumstances.

Thus, the practice of naming an unknown defendant can provide the plaintiff the opportunity to amend the complaint to name the actual person once that defendant's identity is learned. The *Muto* Court's syllabi address the competing concerns of the repose of potential real defendants and fairness to plaintiffs who were not able to reasonably ascertain the identities of certain tortfeasors before filing suit:

1. "Under Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure* [1998], an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint." Syllabus Point 4, *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003).

2. "Under the 1998 amendments to Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure*, before a plaintiff may amend a complaint to add a new defendant, it must be established that the newly-added defendant (1) received notice of the original action and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for service of the summons and complaint, whichever is greater. To the extent that the Syllabus of *Maxwell v. Eastern Associated Coal Corp.*, 183 W.Va. 70, 394 S.E.2d 54 (1990) conflicts with this holding, it is hereby modified." Syllabus Point 9, *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003).

3. "The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W.Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syllabus Point 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973).

4. "While Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure* [1998] requires that a party to be brought in by amendment receive notice of the institution of the original action, the form of the notice may be either formal or informal, and does not require service of the original complaint or summons upon the party affected by the amendment." Syllabus Point 6, *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003).

5. "Under Rule 15(c)(3)(B) of the *West Virginia Rules of Civil Procedure* [1998], a "mistake concerning the identity of the proper party" can include a mistake by a plaintiff of either law or fact, so long as the plaintiff's mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy." Syllabus Point 7, *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003).

6. Under Rule 15(c)(3)(B) of the West Virginia Rules of Civil Procedure, a "mistake concerning the identity of the proper party" may include the circumstance where the complaint names a "**John Doe**" defendant due to the plaintiff's lack of knowledge of the proper defendant where the filing of the "**John Doe**" complaint is not part of a deliberate strategy to achieve an advantage and the plaintiff's lack of knowledge is not due to the plaintiff's dilatory conduct in identifying the proper defendant prior to the expiration of the applicable statute of limitations.

Muto v. Scott, 224 W. Va. 350 (2008).

The procedural history of this case shows the incident allegedly happened shortly after plaintiff's arrest on September 28, 2013. Suit was not filed, however, until September 25, 2015, and there is nothing in the record to suggest the plaintiff had served any Freedom of Information Act requests about the incident or sought to take depositions of any individuals before the action was filed as permitted by W. Va. R. Civ. P. 27. The record also reveals that the Police Department disclosed the names of all officers on duty at the time of the incident, but the plaintiff did not seek to depose any of them in order to narrow down who John Doe(s) may have been. While the plaintiff ultimately narrowed down who she thought acted wrongly, she still never sought to amend her complaint to substitute real persons in place of the John Doe(s) fictional placeholder until in the midst of trial in June 2017—nearly 4 years after the incident and nearly two years after the expiration of the statute of limitations.

The Circuit Court, upon the motion to substitute John Doe for certain real persons, properly denied the motion, because the plaintiff had not met the requirements of Rule 15(c)(3) that allowed for the relation back of her proposed amendment. Regardless of the trial court's specific rationale, however, the plaintiff, under the procedural history above, simply cannot overcome Syllabus Point 6 of *Muto, supra*: "... a "mistake" concerning the identity of the proper party" may include the circumstance where the complaint names a "John Doe" defendant due to the plaintiff's lack of knowledge of the proper defendant where the filing of the "John Doe" complaint is not part of a deliberate strategy to achieve an advantage and the plaintiff's lack of knowledge is not due to the plaintiff's dilatory conduct in identifying the proper defendant prior to the expiration of the applicable statute of limitations.

Put simply, the plaintiff either intentionally or negligently failed to identify the true identity of the fictional defendant. Once she, by *reasonable diligence*, ascertained the identities of all the officers present, she could have, and should have, timely brought them into the case so that the jury could determine who was actually responsible.

Part of the Circuit Court's reasoning in permitting the case to go to verdict against John Doe(s) was because the identified officers who could have committed the tort all denied the alleged conduct, and so the case had to proceed against John Doe(s) to achieve a fair result. That reasoning is poor, and it is unjust to the Police Department. A clearer expression of the Circuit Court's reasoning is that the case had to proceed against a John Doe fictional defendant – who, by its very nature could not testify on its own behalf – because there was no frank admission of wrongdoing by any of the real individuals who could have committed the assault. That puts the Police Department in the position of having to defend a phantom officer before a jury rather than letting the jury serve its purpose of hearing all the testimony and resolving the conflicts.

The Circuit Court ultimately properly dismissed the City and the Police Department, because there is no respondeat superior liability in § 1983 claims. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). The jury absolved defendant Vinson of wrongdoing.

Moreover, permitting the judgment against the John Doe(s) to be recoverable from the City's insurer operates as an end run around the prohibition of respondeat superior in § 1983 cases. A judgment against a John Doe is unrecoverable as a practical matter, if not also as a procedural and constitutional matter. Thus, according to the Court's final order awarding attorney fees against John Doe(s) to be paid by the City, the City is nonetheless

liable for the conduct of the John Doe(s). *See Andrews v. Philadelphia*, 895 F.2d 1469, 1487-88 (3d Cir. 1990).

What the Circuit Court missed conceptually is that once it became too late under Rule 15(c) for the plaintiff to substitute real persons in place of John Doe(s), either because of deliberate strategy or dilatory conduct, the John Doe(s) should have immediately been dismissed because they no longer served any purpose. If the real individuals that could have engaged in the wrongful conduct were no longer subject to suit, then John Doe(s), who represent those real individuals, must be subject to the same analysis.

The policy issues apparent in this particular case are magnified in many other circumstances. In this case, the City, as a local governmental entity, cannot be held vicariously liable for the actions of John Doe(s). But there are innumerable entities which do not share such an immunity. From manufacturers to employers, retail shops to warehouses, and all manner of private organizations consisting of multiple individuals, having to defend the actions of an alleged John Doe—even once it is clear that no real individual could properly be added to the case—would cause unnecessary factual confusion, unfair strategic complexity, and exposure to compromise verdicts by the jury. In other words, it would become quite inviting for a jury to place blame on a fictional person with no ability to defend oneself. Such a procedure would implicitly shift the burden of proof from the plaintiff to prove his or her claims by a preponderance of the evidence to the defense to somehow disprove the actions of an unknown phantom employee or agent.

It is proper and fair for the rules to permit the naming of fictional defendants as placeholders in order to provide a plaintiff with a full and fair opportunity to discover the true identity of the person(s) who may have caused them harm. That is why our rules are

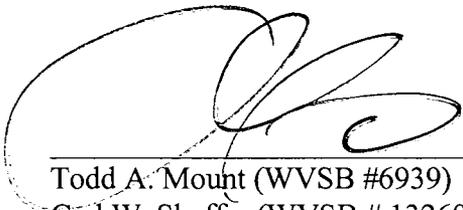
designed as they are. However, it is improper, unnecessary and offensive to public policy to permit a plaintiff who, after such appropriate opportunity, cannot prove his or her case to proceed against a phantom, fictional party to obtain a judgment for the sole purpose of enforcing it against another. That is why our rules should be interpreted to require the dismissal of a John Doe defendant prior to any trial or judgment.

IV. CONCLUSION

For all of these reasons, DTCWV asks this Court to reverse the Circuit Court's Trial Order, Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against John Doe(s), and its Order Granting Plaintiff's Submission for Award of Attorney's Fees; to direct the Circuit Court to dismiss the unknown John Doe defendants, with prejudice; and to direct entry of judgment in favor of the known defendants.

Respectfully submitted,

**DEFENSE TRIAL COUNSEL
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CERTIFICATE OF SERVICE

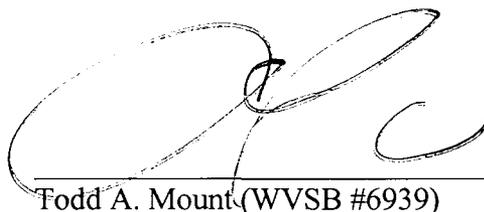
I, Todd A. Mount, hereby certify that on the 9th day of May, 2019, a copy of the foregoing “**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONERS**” was mailed, postage prepaid, by First Class Mail to the following:

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A handwritten signature in black ink, appearing to be 'T. Mount', is written over a horizontal line. The signature is stylized and cursive.

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