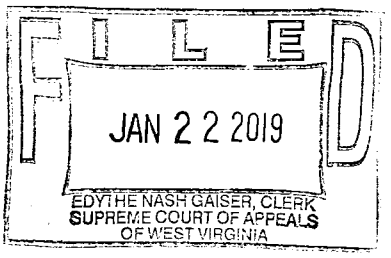
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



ESTATE OF WAYNE A. JONES
by Robert L. Jones,
Petitioner,

Vs.

No. 18-0927

THE CITY OF MARTINSBURG,
Respondent.

PETITIONER'S BRIEF

Paul G. Taylor
WV State Bar No. 5874
134 West Burke Street
Martinsburg, WV 25401
(304) 263-7900
E-mail: taylorpaulg@aol.com

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Statement of the Case

A. Factual Summary

This case arises from the March 13, 2013 homicide (App. Pg. 61, 124) of Wayne A. Jones at the hands of five (5) Martinsburg City Police Officers. Jones was shot approximately twenty-three (23) times, including approximately eleven (11) times in the back and buttocks (App. Pg. 110-119). Jones was initially stopped by police for jaywalking. What should have been a simple, brief encounter was escalated by the police officers into a foot chase, struggle and fatal shooting. Police officers claim Jones had a knife. However, no knife is seen on multiple videos of the shooting, nor has a knife been produced in this case or a related federal case. The same videos demonstrate that at the time of his homicide, Jones was laying prone on the ground, unmoving and posing no threat.[1]

There is related litigation pending in the U.S. Court of Appeals for the Fourth Circuit, Case No. 18-2142; the federal case having been appealed twice from the U.S. District Court for the Northern District of West Virginia, remanded twice, and now on appeal for the third time. The federal case contains various civil rights claims, negligence and a wrongful death claim. App. Pg. 39.

The case sub judice seeks the following relief: compensation for negligent management, nonfeasance, misfeasance, and negligence by the City of Martinsburg, constitutional violations, violations of statute, and wrongful death. The complaint also requests the

[1] None of the videos were made part of the circuit court record below, but they are a matter of public record, and were referenced several times in the proceedings below. The videos are a part of the record in parallel litigation pending before the U.S. Court of Appeals for the Fourth Circuit, Case No. 18-2142. The most useful videos are a disturbing record of what amounts to a public execution by "law enforcement" officers acting as judges, jurors and executioners by firing squad. The videos speak volumes about the injustice represented by this case. It says more than the hundreds of words that follow in this brief. The videos are the subject of a contemporaneously filed Motion to Supplement the Appendix.

appointment of a commissioner, appointment of a special prosecutor and appointment of a grand jury advocate. App. Pg. 15.

There has never been a public trial nor a public accounting, in state or federal court, of the facts underlying this homicide. As this case is on appeal in both state and federal court, there has never been a final decision on the merits.

B. Procedural History

Plaintiff filed the complaint on September 16, 2016. App. Pg. 1. After a delay in service of process, Plaintiff filed a First Amended Complaint on July 20, 2017. App. Pg. 15.

On August 21, 2017, shortly after service of process, Defendants filed a motion under Rule 12(b)(6), WV R. Civ. P., to dismiss Plaintiff's First Amended Complaint. The motion for dismissal claimed that Plaintiff's complaint failed to set forth claims for relief. App pg. 22-224. Defendants' motion raised the following arguments: 1) that the First Amended complaint was barred by the doctrine of res judicata; 2) that the complaint was barred by the doctrine of claim splitting; 3) that the complaint was barred by the doctrine of collateral estoppel; 4) that defendants had absolute and qualified immunity; 5) the complaint was barred by statutes of limitation; 6) that Plaintiff's "equitable" claims for mandamus, injunction and special appointments were not supported by "any" law; and 7) that Plaintiff's First Amended Complaint was barred because of untimely service.

Plaintiff filed a response in opposition to Defendants' Motion to Dismiss. App pg. 225-244. In summary, Plaintiff's opposition set forth the following points: 1) the Rule 12(b)(6) standard; 2) the Rule 56 summary judgment standard[2] 3) sufficient bases existed to deny

[2] Rule 56, WV R.Civ.P., has been interpreted to apply to motions to dismiss where, as in the case sub judice, matters outside the pleadings are considered on a motion to dismiss. Defendants attached numerous exhibits to their

Defendants' motion under both Rules 12(b)(6) and 56, WV R. Civ. P., and 4) addressed the substantive points raised in Defendants' motion.

The filing of a dispositive motion upon the joinder of the issues after service of process at the inception of the case without any discovery having been exchanged between the parties prompted the September 18, 2017 filing of Plaintiff's Motion Under Rule 56(f), WV R. Civ. P., for discovery necessary to respond to Defendants' motion. App pg. 245. Plaintiff also filed First and Second Sets of Interrogatories and Requests for Production of Documents on September 19, 2017 and September 21, 2017, respectively. App pgs. 250, 261. Thereafter, on September 19, 2017, Plaintiff filed a Petition for Disclosure of Grand Jury Proceedings.[3] App pg. 257.

On October 14, 2017, before Defendants' discovery responses were due, the circuit court entered an order staying proceedings pending the outcome of an appeal (the second appeal) of a related case before the U.S. Court of Appeals for the Fourth Circuit and denied without prejudice Plaintiff's request for grand jury proceedings.. App. pg. 285. The stay of proceedings was extended by order entered January 8, 2018. App. Pg. 289. By order entered March 27, 2018, the circuit court ordered Plaintiff to identify the claims being pursued in the state and federal cases. App. Pg. 291. The parties were also directed to update their briefs and proposed orders. App pg. 292. The same order reflects that the Court did not act on Plaintiff's request to permit discovery. App. Pg. 291-294.

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motion, essentially converting it to a Rule 56 motion for summary judgment. Chapman v. Kane Transfer Co., 236 SE 2d 207 (WV 1977)

[3] The issue of a prior presentation to a Berkeley County grand jury concerning the conduct of the police officers involved in this homicide is also the subject of a separate case pending before this court. See this Court's Docket No. 18-1045.

By Order entered August 2, 2018, the circuit court granted Defendants' Motion to Dismiss. App. Pg. 394. On August 13, 2018, Plaintiff timely filed a Motion Under Rule 59(e) WV R. Civ. P., to Alter, Amend and Vacate the August 2, 2018 Order Granting Defendants' Motion to Dismiss and Plaintiff demanded a hearing on its motion. App. Pg. 411, 420.

On August 22, 2018, the circuit court issued a Trial Court Rule 22 Scheduling Order on Plaintiff's Rule 59(e) motion. App. Pg. 424. The scheduling order gave Defendants, as non-moving parties, fifteen (15) days to respond to Plaintiff's motion. Thereafter, Plaintiff, as moving party, had ten (10) days to file a rebuttal. By Agreed Order entered September 6, 2018, the parties extended Defendants' deadline for response to September 10, 2018. Thereafter, Plaintiff had until September 20, 2018 to file its reply / rebuttal. App. Pg. 427.

On September 10, 2018, Defendants filed their response to Plaintiff's 59(e) motion. App. Pg. 430. However, before the agreed upon and court ordered September 20, 2018 deadline for Plaintiff's to file its reply / rebuttal, on September 19, 2018, the circuit court entered its order Denying Plaintiff's Motion to Vacate Order Granting Motion to Dismiss. App. Pg. 478. This appeal followed.

Summary of Argument

In deciding a Rule 12(b)(6), WV R. Civ. P., motion to dismiss, the circuit court misapplied both Rules 12(b) (6) and 56 of the WV R. Civ. P. The Circuit Court committed additional error by refusing Petitioner's requests for discovery necessary to respond to the motion to dismiss. Further, the circuit court committed error by misapplying statutes of limitation, and statutes supporting several of Petitioner's causes of action by erroneously concluding those claims were not viable. It was also error for the circuit court to conclude that unresolved federal litigation arising from the police-involved homicide underlying this

matter barred Petitioner's unrelated circuit court claims.

Statement Regarding Oral Argument and Decision

This case is suitable for oral argument under Rule 20, WV R. App. Pro., because it involves the following: 1) assignments of error in the application of settled law; 2) an unsustainable exercise of discretion where the law governing that discretion is settled; 3) insufficient evidence to support the ruling below; 4) issues of first impression; and 5) issues of fundamental public importance.

Petitioner suggests to this Court that this case should be decided on the merits by the issuance of an opinion under Rule 20(g), WV R.Civ.P., for the following reasons: 1) emphasize the application of settled law; 2) correct an abuse of discretion resulting in rulings not supported by evidence; 3) address issues of first impression; and 4) address issues of fundamental public importance, i.e., police administration and function.

Argument

1. It Was Reversible and Prejudicial Error for the Circuit Court to Fail to Apply the Rule 12(b)(6), WV R. Civ, P., criteria in Ruling on Defendants' Motion to Dismiss

A. Standard of Review

The standard of review of the granting of a motion to dismiss under Rule 12 (b)(6)[4], WV R. Civ. P., is de novo. Posey v. City of Buckhannon, 723 SE2d 842 (WV 2012) See also, Syl. Pt. 2, State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc., 461 SE2d 516 (WV 1995).

On appeal of a dismissal based on granting a motion to dismiss pursuant to Rule 12(b)(6) the allegations of the complaint must be taken as true. Wiggins v. Eastern Associated Coal

[4] Failure to state a claim upon which relief can be granted.

Corp, 357 SE2d 745 (WV 1987).

B. Argument

(I) This court has developed the following criteria for deciding a motion under Rule 12(b)(6):

(a). "Any set of facts" doctrine

The trial court, in appraising the sufficiency of a complaint on a motion to dismiss for failure to state a claim, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief, *Chapman, supra*, followed in *Cantley v. Lincoln County Com'n*, 221 W Va 468, 655 SE2d 490 (2007) (Per Curiam). (Emphasis added).

(b) "Any legal theory" doctrine.

If the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss for failure to state a claim must be denied, John W. Lodge Distributing Co. v Texaco, Inc., 161 W Va 603, 245 SE2d 157 (1978), followed in *Cantley, supra.* (Emphasis added.)

(c) "Clarity, not detail" doctrine

A plaintiff is not required to set out all facts upon which the claim is based . Rule 8 requires clarity, not detail, *State Ex Rel. McGraw, supra.*

(d) "Plaintiff's burden on motion to dismiss is a light one."

The plaintiff's burden in resisting a motion to dismiss is a relatively light one, *McCormick v Wal-Mart Stores*, 215 W Va 679, 672 SE2d 606 (2008).

(e) "Motions to dismiss are viewed with disfavor."

Motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant

such motions, *Sturm v Board of Educ, of Kanawha County*, 223 W Va 277, 672 SE2d 606 (2008).

(f) Only matters contained in a pleading can be considered on Motion to Dismiss

Only matters contained in a pleading can be considered on a motion to dismiss. Wilfong v. Wilfong, 156 WV 754, 197 SE2d 96 (1973); Riffle v. C.J. Hughes Construction Co., 226 WV 581, 703 SE2d 552 (2010).

Defendants have attached to their motion numerous exhibits which are not pleadings. Chapman, supra.

When matters are considered outside of the pleadings, the motion shall be treated as a motion for summary judgment under Rule 56. Chapman, supra.[5] Rule 12(b)(7) WV R. Civ. P. Requires notice of such treatment.

(ii) It was error for the trial court to misapply the standards in deciding Defendants' 12(b)(6) Motion to Dismiss

The Defendants' Rule 12(b)(6) motion to dismiss[6] App Pg. 22-244, clearly includes

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[5] Rule 12(b)(7), WV R. Civ. P. reads in pertinent part ... "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis added)

The record below reflects that Petitioner was never given notice of the circuit court's intention to treat Defendants' Rule 12(b)(6) Motion to Dismiss as a Rule 56 motion for summary judgment, nor was Petitioner given any opportunity (through a course of discovery) to present all material made pertinent to such a motion by Rule 56.

[6] At the outset, it should be noted by the reader that the subject order entered by the circuit court was prepared by Defendants, persons with an obvious interest in the outcome of this matter, and was entered by the court with minimal changes. It does not appear the trial court checked the citations, nor substance of the order as represented by Defendants, before signing and entering the subject order.

numerous matters outside the pleadings,[7] to-wit: exhibits I, J, and K, App. Pgs. 203-223.

The subject circuit court order rejected Plaintiffs' Rule 56 argument and treated Defendants' motion as a Rule 12(b)(6) motion to dismiss without required notice and opportunity to be heard. App Pg. 394-410. The court cited Forshey v. Jackson, 671 SE2d 748, 752 (WV 2008) for the proposition that "Rule 12(b)(6) permits courts to consider matter that are susceptible to judicial notice." Id. at 752. (App Pg. 397-398) However, in submitting the subject order, Defendants led the circuit court down the path of error by omitting Syl. Pt. 1 of Forshey which indicates the case involved documents attached to the complaint, a Rule 7 "pleading," not, as here, a motion to dismiss. Forshey goes on to indicate that "...the facts set out below (in the Forshey opinion) are gleaned from the pleadings." (Emphasis added). Id, at 750. Forshey does not support the circuit court's ruling.

The subject order (prepared by Defendant/Respondent) then incompletely cites Syl. Pt. 11, Arnold Agency v. West Virginia Lottery Comm'n., 526 SE 2d 814 (WV 1999) for the proposition that "... 'a court may take judicial notice of the orders of another court' for the limited purpose of 'establishing facts of such litigation and related filings.' "[sic]. App pg. 398. However, the entire syllabus point reads as follows: "Syl. Pt. 11. While a court may take judicial notice of the orders of another court pursuant to W. Va. R. Evid. 201, such notice may not be for the truth of the matters asserted in the other litigation, but rather is limited

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[7] Rule 7(a), WV R. Civ. P., defines pleadings as "... there shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

By operation of Rule 7(a), Defendants' Rule 12(b)(6) Motion to Dismiss is not a pleading. Therefore, the trial court's consideration under Rule 12(b)(6) of matters raised in the subject motion to dismiss without prior notice to Plaintiff constitutes prejudicial and reversible error under Rule 12(b)(7).

to establishing the fact of such litigation and related filings." (Emphasis added).

Again, the Defendants have led the Circuit Court down the path of error. Arnold is distinguishable from the case sub judice for the following reasons: 1) it involved a motion for summary judgment not, as here, a Rule 12(b)(6) motion to dismiss; and 2) the judicial notice in the case sub judice did not follow the requirements of Rule 201, WV R. Evid.[8] In fact, the subject order doesn't mention Rule 201 at all.

Rule 201, WV R. Evid., permits judicial notice of facts not subject to reasonable dispute and requires an opportunity to be heard on the issue of judicial notice. In the case sub judice, the facts underlying this case are in great dispute- one need only look to the-still-unresolved appellate history of this case in federal court. Further, Plaintiff was never given notice by the trial court that the court intended to take notice of facts from the federal case, and was never given an opportunity to be heard upon such non-existent notice - all contrary to Rule 201.

Contrary to the circuit court's findings at pg. 5 of the subject order (App pg. 398) and

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[8] Rule 201, WV R. Evid., Judicial notice of adjudicative facts, reads as follows:
"(a) Scope - this rule governs only judicial notice of adjudicative facts.
(b) *Kinds of facts that may be judicially noticed.* - the court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) *Taking notice.* - The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
(d) *Timing* - The court may take judicial notice at any stage of the proceeding.
(e) *Opportunity to be heard.* - On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." (Emphasis added)

Petitioner's Rule 59(e) motion requested a hearing on the motion to dismiss. App. Pg. 411-415 . The circuit court ignored both the Rule 201(e), WV R. Evid. requirement for a hearing after taking judicial notice and Petitioner's request for such hearing.

Arnold, supra, exhibits I.,J.,K.,to Defendant's 12(b)(6) motion are not pleadings, orders, nor were they attachments to Rule 7 pleadings and the Court should not have taken judicial notice of these exhibits, and probably other exhibits, to Defendants' Motion to Dismiss. Such improper notice converted Defendants' 12(b)(6) motion to a Rule 56 motion for summary judgment without required notice to Petitioner.

Similarly, the trial court's reliance on Ballard v. Pomponio, No. 15-738 (memorandum decision) (WV Sept. 2, 2016) (App. Pg. 398) for the proposition that the trial court may take notice of documents extrinsic to a pleading without converting a 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment is misplaced. Ballard cites Forshey, supra, for the same inaccurate proposition, i.e; the court may take unrestricted notice of parallel or related proceedings without converting a Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment and without notice and opportunity to be heard. Ballard is also distinguishable from the case sub judice because Ballard involved judicial notice of a case that had been finally adjudicated on the merits, and it involved judicial notice of a pleading or order not, as here, miscellaneous attachments to a non-pleading motion to dismiss. Contrary to Ballard, the issue in the case sub judice is whether Plaintiff's complaint sets forth sufficient facts to survive a Rule 12(b)(6) motion to dismiss.

The trial court's reliance on Gulas v. Infocisional Mgmt. Corp., 599 SE 2d 648, 652, n. 4 (WV 2004) is similarly misplaced. (App. Pg. 398) Gulas is factually and procedurally distinguishable from the case at bar for the following reasons: 1) Gulas involved the denial of class action certification under Rule 23, WV R. Civ. P.; 2) Gulas involved a party that, after successfully litigating a claim, tried to pursue the same claim as a class action; 3) the same trial court had decided the issue about which Gulas complained; and 4) contrary to Gulas,

the issues in the case at bar are unresolved and contested.

(iii) Petitioner's First Amended Complaint Met the Rule 12(b)(6) standard.

Having addressed the circuit court's erroneous reasoning for deciding the case at bar under Rule 12(b)(6) rather than Rule 56, despite the fact that the trial court considered matters extrinsic to the pleadings, Petitioner turns to the trial court's error in applying the criteria necessary to resolve a Rule 12(b)(6) motion.

Plaintiff has set forth in the First Amended Complaint sufficient facts to put Defendant on notice of the nature of Plaintiff's claims. It is plausible Plaintiff can prove these facts.

Plaintiff has set forth sufficient legal support for the theories upon which its claims are based.

Plaintiff has provided sufficient clarity so that Defendant can understand the nature of Plaintiff's factual claims and legal theories of the action. This is evident, alone, by the detail of Defendant's exposition in its Motion to Dismiss under Rule 12(b)(6) App. Pgs. 22-224.

It is axiomatic, black-letter law, needing no citation, in every state jurisdiction which has adopted Rule 12(b)(6) from the federal rules that:

> "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's, motion to dismiss."

In the trial court's Order, pages 3 and 4, (App Pgs. 396-397) the Court (or by the defendants' counsel's version of the order adopted by the Court) [9], exhibits a chart showing the claims of the plaintiffs in circuit court (on the left-hand) and claims in U.S. District Court (on the right-hand.)

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[9] It appears that nearly all of the content of the Order was the version prepared by counsel for the defendants and the Court made minimal changes even though the Order on page 1 asserts that it was made "upon mature consideration" by the court.

The claims shown (on the chart) to be in circuit court side are specifically new, distinct claims to those shown in the District Court chart. Those separate claims [(1) violation of special duty, (2) negligent management, nonfeasance, misfeasance, (3) negligence of Mayor and City Council, and (4) violation of statute, (5) "equitable" relief [10],] could allow the plaintiffs to recover in this action. These claims are not connected with the wrongful death issue raised in both the state and federal actions.

Therefore, the Court erred by not noticing the additional set of facts set forth in the first amended complaint that would allow a recovery. That specific set of facts would thereby negate a dismissal under Rule 12(b)(6). The trial court therefore erred by granting Rule 12(b)(6) dismissal.

(iv) The circuit court was incorrect in ruling that Petitioner's negligence and wrongful death claims are barred by any statute of limitation.

The circuit court's finding that the statute of limitation has expired on the claims sub judice is erroneous. App. Pg. 399-404. The statute of limitations was tolled by the filing of the federal action. Litten v. Peer, 197 SE2d 322 (WV 1973). Because there has never been a final adjudication on the merits in the federal case,[11] the statute of limitations remains tolled to this day.

The Court recently set forth the criteria for whether a cause of action is time-barred. See Syl. Pt. 1, *Richards v Walker*, 813 SE2d 923 WV (2018).

A five-step analysis should be applied to determine whether a cause of action is time-

[10] The term "equitable" is a misnomer. It should be titled "statutory" relief.

[11] See, Estate of Wayne A. Jones v. City of Martinsburg, WV, U.S. Court of Appeals for the Fourth Circuit, Docket No. 18-2142. This case is the currently pending THIRD appeal from District Court.

barred.

First, the court should identify the applicable statute of limitations for each cause of action.

Second, the court should identify when the requisite elements of the cause of action occurred.

Third, the discovery rule should be applied to determine when the statute of limitations began to run to determine when the plaintiff knew or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action.

Fifth, the court or the jury should determine if the statute of limitations was arrested by some other tolling doctrine. (Emphasis supplied.)

Only the first step is a question of law. Steps two through five will involve questions of material fact precluding summary judgment.

The circuit court never applied these criteria to the statute of limitations issue.

(v) The trial court was incorrect in ruling there is no private right of action for statutory and constitutional claims.

The circuit court's conclusion at pgs. 12-13 of its Order (App Pgs. 405-406) that there is no private right of action for Plaintiff's statutory and constitutional claims is incorrect. WV Code §61-6-21(b) criminalizes the violation of an individuals civil and constitutional rights.[12]

[12] WV Code §61-6-21(b): If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the Constitution or laws of the United States, because of such other

WV Code §55-7-9 authorizes a private right of action for statutory violations.[13]

The circuit court has again been led down the path of error and allowed itself to be used by signing an order prepared by Defendant/Respondent, which order was basically a regurgitation of the motion to dismiss of a party with a pecuniary and biased intent in the outcome of this matter.

The circuit court's reliance on Bridgeport v. Marks, 759 SE 2d 192 (WV2014) (finding that violation of a vehicle towing statute did not created private right of action) to extrapolate and compare a vehicle towing statute with constitutional and civil rights violations resulting in death is misplaced. (App. Pg. 405). See Syl. Pt. 2, Bridgeport, citing Syl. Pt. 1 of Hutchinson v. Huntington, 479 SE2d 649 (WV 1996) finding no immunity for city officials that violate constitutional rights.

This court has recently held that "constitutional torts", as the name implies, seek recovery of money damages for constitutional wrong. See West Virginia Lottery v. A-1 Amusement, 807 SE2d 760, 774 (WV 2017).

Petitioner is left with no recourse but to seek the aid of this Court to correct and address not only the egregious acts depicted on video,[14] but what amounts to a second violation of petitioner's rights by being denied its day in court in violation of Art. III, §§ 10, 13, and 17,

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person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

[13] WV Code §55-7-9: Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages. (Emphasis added)

[14] The video is the subject of a contemporaneously filed Motion to Supplement the Appendix.

Constitution of WV.[15]

(vi) Claim splitting is inapplicable to the facts and procedural posture of this case

The doctorine of "claim splitting" appears to be either an issue of first impression or little developed in West Virginia.

The trial court's order concludes at section E, pg. 12 (App. Pg. 405-406) that Petitioner's negligence, wrongful death and statutory and constitutional violation claims in the circuit court are barred by the doctrine of claim splitting which is essentially a form of res judicata or claim preclusion. Dan Ryan Bldrs. Inc. v. Crystal Ridge Development, Inc., 803 SE2d 519 (WV 2017) See pgs. 12-13 of the order (App Pgs. 405-406) Use of the term "claim splitting" is dicta. Dan Ryan dealt with res judicata.

However, Dan Ryan is distinguished from the case at bar because: 1) there has been no final adjudication on the merits in the case at bar in either state or federal court; 2) different causes of action are asserted in the case at bar from those causes of action asserted in the federal case: (See pg. App pgs. 396-397; and 3) Petitioner has not abandoned claims in the federal case to pursue them in the case at bar.

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[15] Art III §10, Constitution of WV:
No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.
Art III §13, Constitution of WV:
In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six person. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law. (Emphasis added)
Art III §17, Constitution of WV:
The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay. (Emphasis added)

Ample facts exist which demonstrate claims in the case at bar are separate and distinct from the federal case. Different causes of action asserted between the two law suits are not claim splitting. Virginia and West Virginia Digest, Actions, §53 Splitting Causes of Action.

The inapplicability of "claim splitting" to the case sub judice is discussed in further detail at pg. 26 of this brief, infra.

(vii) The First Amended Complaint makes no claims for equitable relief.

Section F of the trial court's order is perhaps one of the clearest examples of how it was led down the path of error when it signed a final order prepared by Defendants which dismissed this matter under Rule 12(b)(6) and, in effect, found Plaintiff's complaint set forth no set of facts upon which Plaintiff could prevail. App. Pgs. 407-408.

The trial court incorrectly concludes that Plaintiff's claims for the appointment of a commissioner, appointment of a special prosecutor and for an injunction are equitable claims for relief with no legal basis (App Pg. 407-408). Read: Both incorrectly applied Rule 56 summary judgment standards (no genuine issue of material fact) and incorrectly applied Rule 12(b)(6) standard (no set of facts asserted which would allow Plaintiff to recover under any legal theory).

In fact and law, an injunction is a "civil action" under Rule 2, WV R.Civ.P.[16] created by statute (WV Code §53-5-1, et seq.) and guided by rule of procedure (Rule 65, WV R. Civ. P.) Defendants' motion to dismiss on the basis that it was an equitable claim should have been denied.

In fact and law, a request for the appointment of a commissioner is a civil action created

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[16] Rule 2 abolished the distinction between actions at law and actions in equity. "There shall be one form of action to be known as a 'civil action' "

by statute (WV Code §51-5-1, et seq.) and guided by both statutes (WV Code §56-7-1, et seq.) and rule of procedure (Rule 53, WV R. Civ. P.). Defendant's Motion to Dismiss on the basis that it was an equitable claim should have been denied.

In fact and law, the appointment of special prosecutor is permitted by statute, to-wit: "If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case." WV Code §7-7-8. (Emphasis added).

It should be clear to the reader that Petitioner has met the Rule 12(b)(6) standard of stating claims for relief under these statutes based on sufficient facts set forth in the complaint. The circuit court's order finding otherwise is erroneous and should be reversed.

2. It was Reversible and Prejudicial Error for the Circuit Court to Apply Rule 56, WV R. Civ. P. Criteria to Defendant's Rule 12(b)(6) Motion to Dismiss.

A. Standard of Review

A circuit court's entry of summary judgment is reviewed de novo. Jividen v. Law, 461 SE2d 451 (WV 1995).

B. Argument

As previously mentioned, Respondent's inclusion of documents outside the pleadings with its Rule 12(b)(6) Motion to Dismiss converted the Rule 12(b)(6) Motion to Dismiss to a Rule 56 motion for summary judgment. Chapman, supra.

The parameters for granting Rule 56 summary judgment are as follows:

1. A motion for 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.

2. 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.

3. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but there is dispute as to the conclusions to be drawn therefrom.

4. A material fact, the existence of which precludes summary judgment, is one that has the capacity to sway the outcome of the litigation under the applicable law.

5. The circuit court, on a motion for summary judgment, must grant the nonmoving party the benefit of inferences, but credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions. Maston v. Wagner, 781 SE2d 936 (WV 2015).

Although the Supreme Court of Appeals' standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review; findings of fact, by necessity, include those facts that the court finds relevant, determinative of the issues, and undisputed. Poole v. Berkeley County Planning Comm'n., 488 S.E.2d 349 (WV 1997).

A review of the "Findings of Fact" section of the subject August 2, 2018 Order Granting Motion to Dismiss at pgs. 1 - 3 of the order (App. Pgs. 394-396), demonstrates that it is merely a recitation of the procedural history of both the case sub judice and the parallel federal case. There is no demonstration by the circuit court to conclude there is no genuine issue of material fact.

In fact, the order itself contains the seeds of its own destruction. At paragraph 6, page 2 of the subject order (App. Pg. 395), the circuit court acknowledges that the US Court of

Appeals for the Fourth Circuit, in reversing the District Court, found "genuine issues of material fact which underlie the determination of whether the force [Defendants] used was excessive" and, therefore, summary judgment was improper..." (Emphasis added).

This raises a critical question: if sufficient facts exist to warrant the Fourth Circuit's reversal of the granting of a motion for summary judgment, how can the circuit court find an insufficient factual basis necessary to grant a Rule 12(b)(6) Motion to Dismiss? This is another fundamental inconsistency in the circuit court's order demonstrating that the order is erroneous, flawed, and should be reversed. The matter should be remanded for trial on the merits.

Furthermore, even at this early stage of the litigation, without benefit of discovery, numerous genuine issues of material fact exist which preclude summary judgment, to-wit:

1. Was there a violation of Wayne Jones' constitutional rights to be free from unlawful arrest, seizure, injury and death from excessive force?

2. Did the Defendant officers abuse their authority under the circumstances presented?

3. What crime, if any, had been committed to justify the arrest and seizure of Jones.

4. Could a reasonable fact finder conclude that unreasonable and excessive force was used by the Defendant officers under the circumstances presented? The US Court of Appeals for the Fourth Circuit says, "yes".[17] App. Pg. 395

5. "Reasonableness is always an exceptionally fact specific inquiry." Maston, supra, at 954.

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[17] The US Court of Appeals for the Fourth Circuit has twice reviewed the operative facts of this case and has twice remanded the federal case for further proceedings. It is difficult to understand how the circuit court has reviewed the same operative facts and found both insufficient facts to support Petitioner's claims and no genuine issue of material fact. The only answer to this question is that the circuit court has committed reversible error.

6. What conclusions can a reasonable fact finder draw from the circumstances presented in this case?

7. What inferences can a reasonable fact finder draw from the circumstances presented in this case?

8. Are Defendant officers' various versions of events credible?

9. How will a reasonable fact finder weigh the evidence to be presented?

10. How will a reasonable fact finder view Jones' alleged demeanor at the time of his encounter with the Defendant officers?

11. How will a reasonable fact finder view the Defendant officers' demeanor both at the time of the encounter with Jones and at trial? If demeanor evidence at trial could affect the result, summary judgment should be denied Maston, supra, at 946.

12. Was the police encounter with Jones otherwise justified?

13. Were the police properly trained to recognize and deal with mentally ill persons?

14. Was there some other failure or omission of training?

15. Was the knife allegedly found on Jones (which knife has never been produced) "planted" by the police?

16. Was there more than one (1) knife allegedly found on or near Jones?

17. What conclusions/inferences can a jury draw from five (5) police officers shooting Jones twenty-three (23) times, including eleven (11) times in the back or buttocks?

18. What, if any, threat was posed by Jones when he was shot in the back 11 times?

19. What conclusions/inferences can be drawn by a jury from the facts of this case as a whole?

20. Because this case hasn't been fully developed through discovery, numerous other

bases to preclude summary judgment may exist.

The Court should also be mindful that summary judgment is appropriate only after the opposing party has adequate time for discovery. Williams v. Precision Coil, Inc., 459 SE 2d 329 (WV 1995). Virtually no discovery has taken place at this point in the litigation, despite Petitioner's requests for discovery.

3. It was Reversible and Prejudicial Error for the Circuit Court to apply Rule 56 Summary Judgment criteria to a Rule 12(b)(6) Motion to Dismiss without Prior Notice to the Parties.

The reader will note at Pgs. 4 - 6 (App. Pgs. 397-399) of the subject August 2, 2018 Order Granting Rule 12(b)(6) Motion to Dismiss that the circuit court cites both the Rule 12 and Rule 56 criteria. It is unclear which criteria (or whether both) are being used. To the extent Rule 56 summary judgment criteria are used, this took place without circuit court notice to the parties. Riffle, infra. See also notice requirement of Rule 12(b)(7), WV R. Civ. P.

For meaningful appellate review, the circuit court's order must provide clear notice to all parties, and the reviewing court, of the rationale applied in granting or denying summary judgment. Cherrington v. Erie Ins. Property and Casualty, 745 SE2d 508 (WV 2013).

When a motion to dismiss under Rule 12(b)(6) is converted to a Rule 56 motion for summary judgment, the court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material that is pertinent to such a motion under Rule 56. Riffle v. CJ Hughes Const. Co., 703 SE2d 552 (WV 2010).

The order dismissing the case must show which rule of civil procedure was used to effect the dismissal. Rhododendron Furniture and Design v. Marshall, 590 SE2d 656 (WV 2003) (Per curiam). Because the circuit court failed to identify the criteria it used in granting Defendants' motion to dismiss, the order must be reversed to allow meaningful review.

4. It was reversible and prejudicial error for the Circuit Court to fail to address and/or grant Plaintiff's Motion under Rule 56(f), WV R. Civ. P., for additional discovery.

When it became apparent that Defendants/Respondent had converted its Rule 12(b)(6) Motion to Dismiss to a Rule 56 motion for summary judgment by including with the motion documents extraneous to the pleadings, Chapman, supra, Plaintiff moved for additional discovery under Rule 56(f), WV R. Civ. P.[18] App. Pg. 245. The reader should note that no discovery had been exchanged at this point, or at any other point in this case. Plaintiff's motion for discovery was necessary in order to both permit the parties to develop the issues before the court and, more importantly, attempt to put the circuit court in the best position possible to facilitate a fully informed ruling by the court.

Where a Plaintiff opposes a motion to dismiss under Rule 12(b)(6) and claims that discovery would enable it to oppose such a motion, the Plaintiff may request a continuance for further discovery pursuant to Rule 56(f). Harrison v. Davis, 478 SE 2d 104 (WV 1996).

In addition to its Rule 56(f) Motion for Additional Discovery, Plaintiff also filed two sets of interrogatories and requests for production of documents. App. Pg. 250, 261.

Rather than permit discovery and place itself (and place this reviewing court) in the best position to make a fully informed ruling on the issues, the trial court stayed proceedings by order entered January 17, 2018 (App. Pg. 285) to await the ruling of the Fourth Circuit on

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[18] Rule 56(f), WV R. Civ. P., *When affidavits are unavailable.* - "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

the second federal appeal.[19]Later, inexplicably, the circuit court ruled without the benefit of any discovery ever taking place and dismissed the case sub judice. See order entered August 2, 2018. App. Pg. 394.

5. It was reversible and prejudicial error for the circuit court to fail to address and/or grant Plaintiff's petition for the grand jury transcript underlying this matter.

The criteria for considering the disclosure in a civil matter of grand jury proceedings appears to be an issue of first impression before this Court.

As mentioned previously, the conduct of the police officers involved in the Jones homicide was the subject of a grand jury presentation after which no true bill was returned. Defendant/Respondent made the failure of the grand jury to return a true bill an issue in the case sub judice by repeatedly mentioning it in the proceedings and attempting to use it as a shield from further civil or criminal prosecution.

Without a transcript of the grand jury proceedings, neither the trial court nor the parties could make a fully informed response as to the legitimacy of the grand jury presentation. Thus, Plaintiff's request for a transcript of the proceedings. App. Pg. 257.

By order entered January 17, 2018, (App. Pg. 285), the circuit court stayed proceedings including discovery, and denied Plaintiff's petition for disclosure of grand jury proceedings without prejudice, citing Cruse v. Blackburn, Case No. CV 3:17-00485, 2017 WL 306547 at *1 (SD WV, July 19, 2017), as instructive on the standard for disclosure of grand jury proceedings.[20] However, the trial court never applied the Cruse standards to the issue before

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[19] That Fourth Circuit ruling found genuine issues of material fact, reversed the district court ruling granting summary judgment, and remanded the case for further proceedings. (App Pg. 334-347)

[20] The Cruse court indicated that the party requesting disclosure of confidential grand jury material must establish a strong showing of particularized need before any disclosure will be permitted. To

dismissing the request..

Petitioner suggests to this Court that the trial court's failure to require production of the grand jury transcripts, not to mention even apply standards to its consideration of the issues, has left both the trial court and this appellate Court in a less than fully informed position to make a ruling on the issues sub judice.

6. It was reversible and prejudicial error for the Circuit Court to conclude that the savings provision of WV Code §55-2-18 does not apply to wrongful death actions.

Setting aside the fact that the general two (2) year statute of limitations (WV Code §55-2-12) was tolled by the timely filing of the parallel action in federal court (which action remains undecided on the merits and pending to this day),[21] it is equally clear that the two (2) year wrongful death statute of limitations (WV Code §55-7-6(d)) is also tolled and also subject to the one (1) year savings statute (WV Code §55-2-18).

The line of cases cited by the circuit court in the subject order in support of the proposition that the savings statute does not apply to wrongful death actions have been overruled.[22] (App. Pg. 402) Defendant/Respondent omitted this crucial fact from the order it submitted to the circuit court.

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demonstrate particularized need, a party must establish that:
a) the material is needed to avoid a possible injustice in another judicial proceeding,
b) the need for disclosure is greater than the need for continued secrecy, and
c) the request is structured to cover only material so needed. (Citations omitted).

The issue of production of the transcripts and empaneling a second grand jury are more fully explored in a companion case pending before this Court. See Docket No. 18-1049.

[21] See Litten, supra.

[22] Rosier v. Garron, Inc., 199 SE 2d 50 (WV 1973), and Huggins v. Hospital Board of Monongalia Co., 270 SE 2d 160 (WV 1980), cited by the circuit court in support of its order finding the savings statute does not apply to wrongful death actions, have been overruled by Bradshaw, infra.

The wrongful death statute (WV Code §55-7-6(d)) is remedial and entitled to liberal construction. Bradshaw v. Soulsby, 558 SE 2d 681 (WV 2001). Furthermore, such remedial and liberal construction is in keeping with the "open court" provision of Art. III §17 of the Constitution of West Virginia.

7. It was reversible and prejudicial error for the Circuit Court to find that state statutes and constitutional provisions have no private right of action.

This erroneous finding of fact and conclusion of law which Defendant/Respondent slipped by the circuit court's attention in the order prepared for the circuit court is directly contradicted by WV Code §55-7-9 as previously discussed on pg. 14 of this brief, supra. See also Bridgeport, Hutchinson and West Virginia Lottery, supra.

8. It was reversible and prejudicial error for the Circuit Court to consider and apply the principle of "claim splitting" to certain causes of action asserted by Plaintiff in the case sub judice when those causes of action were not asserted in a parallel federal action.

The trial court cites "claim splitting" at section E, pg. 12 of its order (App pg. 405) in support for its conclusion that Plaintiff's claims should be dismissed.

The doctrine of "claim splitting" is mentioned in dicta contained in Dan Ryan Builders, Inc. V. Crystal Ridge Dev., Inc., 803 SE2d 519 (WV 2017). While it does not appear West Virginia has formally adopted the doctrine of "claim splitting," Dan Ryan, supra, appears to discuss both res judicata and claim splitting as synonymous. They will be treated as synonymous here.

The preclusive effects of res judicata and claim splitting require the following elements to be met: 1) a prior final adjudication on the merits; 2) privity of parties in both actions; 3) the cause of action identified for resolution in the subsequent proceeding either must be

identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented in the prior action. Syl. pt.2, Dan Ryan, supra, citing Syl. Pt. 4, Blake v. Charleston Area Medical Center, 498 SE2d 41 (WV 1997).

Dan Ryan, supra, goes further to mention "the test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata." Syl. Pt.3, Dan Ryan, supra, citing Syl. Pt. 4., Slider v. State Farm Mutual Auto Ins. Co., 557 SE2d 883 (WV 2001).

Defendants' arguments that the instant action should be dismissed under the doctrines of res judicata and/or claim splitting fail for several reasons.

First, there has been no final adjudication on the merits in the parallel federal case. The matter remains pending on appeal in the Fourth Circuit.

Second, in Dan Ryan, supra, there was an actual trial. There has been no trial in the parallel federal case.

Third, Plaintiffs' statutory causes of action were not presented in the federal case because they weren't ripe at the time. Events subsequent to the initial district court filing serve as the bases for these additional claims, to-wit: a) a one sided, biased grand jury presentation by the former Berkeley County Prosecuting Attorney; b) a white wash "investigation" into the Jones homicide by the U.S. Attorney for the Northern District of West Virginia; c) subsequent training of the individual Defendants by the City of Martinsburg to recognize and appropriately deal with citizens suffering from mental health issues, etc. suggests an omission or failure of their prior training. These post-homicide events lead to the statutory

causes of action. These post-homicide causes of action were not, and could not be, presented in the parallel federal case. Further, they require different elements of proof.

As the two cases require different evidence, res judicata and/or claim splitting don't preclude the second case generally, nor the statutory causes of action, specifically. Syl. Pt. 3, Dan Ryan, supra.

Dan Ryan, supra, is also instructive insofar as 1) the federal court indicates a willingness to stay potentially overlapping/duplicative claims until resolution in another court (at page 11); and 2) the Supreme Court of Appeals of West Virginia recognized that Plaintiffs have the option "...to split the federal and state claims and wait to see which court decides first." Dan Ryan, supra, at 27, citing 18 Moore's Federal Practice §133.13.

The doctrine of claim-splitting is inapplicable when there are (1) new theories presented in an action, (2) where there separate distinct cause of action, and (3) where are several distinct parts of an action. See 2 Am Jur 2d Actions.

It is an accepted rule of pleading that a plaintiff can raise alternative theories of recovery in the event that one theory is not accepted by the trial court. See Rule 8(a) and 18(a) WV R. Civ. P.

The doctrine of "claim splitting" turns the doctrine of alternate theories of relief in Rule 8(a) WV R. Civ. P.[23] and Rule 18(a)[24] joinder of claims on their head and should be refused by this Court.

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[23] Rule 8(a) WV R. Civ. P. *Claims for relief.* - A pleading which sets forth a claim for relief... Relief in the alternative or of several types may be demanded.

[24] Rule 18(a) WV R. Civ. P. *Joinder of claims.* - A party asserting a claim to relief... may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party.

9. It was reversible and prejudicial error for the Circuit Court to find that certain claims asserted by Plaintiff were equitable and not actionable.

As previously discussed in further detail at page 8, supra, it was erroneous for the Circuit Court at section F, pg. 14 of its order (App page. 407) to find that plaintiff's requests for an injunction, the appointment of a commissioner and the appointment of a special prosecutor were requests for equitable relief. The reader need only consult West Virginia Code §§ 53-5-1, et seq.; 51-5-1, et seq. ;and 7-7-8, respectively, to confirm these are actionable statutory claims for relief. The trial court's order granting defendant's motion to dismiss on the basis that these claims are equitable is erroneous and should be reversed.

10. It was reversible and prejudicial error for the Circuit Court to deny plaintiff a hearing on its Rule 59(e) motion and a jury trial on issues of fact.

Petitioner's Rule 59(e) motion requested a hearing before the Circuit Court for the following reasons:

1. To consider an alteration, amendment or vacation of its August 2, 2018 Order to sort out the conflation of Rule 12(b)(6) and Rule 56 facts and conclusions;

2. Reconsider the facts negated by this motion that would now be applicable to constitute a denial of a Rule 12(b)(6) dismissal; and

3. Reconcile and untangle, considering application of the saving provision of West Virginia Code §55-2-18, the timing between this court case, the federal court case, its decisions and subsequent reversals.

Based on further review of this matter, a hearing was also required by Rule 201(e), West Virginia Rules Evid., and possibly by Rule 12(b)(7), WVR Civ. P. Rule 56(c) also implies a hearing. Art VIII, §17, Const. of WV requires the court to be open to parties seeking

redress. This Court should also consider Rule 12(d), WV R. Civil P., which reads as follows:

> *Preliminary hearings.* - The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion... shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial. (Emphasis added)

It should be clear to the reader that the policy of the law in West Virginia is to have the merits of a claim addressed by the court. This has never taken place and Petitioner prays this Court reverse the order of the Circuit Court and remand this case for trial on the merits.

11. It was reversible and prejudicial error for the Circuit Court to ignore the time frames contained in its own order setting a briefing schedule on Petitioner's Rule 59(e) motion.

At Respondent's request, the parties entered into an agreed order modifying the briefing schedule on Plaintiff's Rule 59(e) motion. The Circuit Court entered that order on September 6, 2018, which allowed Plaintiffs until September 20, 2018 to file its reply (App. Pg. 427). However, contrary to its own order, the Circuit Court entered an order (again prepared by defendants, a party with an interest in the outcome of this matter) denying Plaintiff's Rule 59(e) motion on September 19, 2018, one day prior to Plaintiff's response deadline. Petitioner was effectively "short sheeted" by the Circuit Court and denied an opportunity to reply to Defendant's response to Plaintiff's motion. Even the order prepared by Respondent and signed by the Court notes (erroneously) on page 1 that plaintiff filed its reply on September 20, 2018, as previously agreed between the parties and ordered by the Circuit Court. App. pg. 478.

The Circuit Court order denying Plaintiff's Rule 59(e) motion was in derogation of the Circuit Court's own scheduling order on the motion and has prejudiced Plaintiff by denying Plaintiff an opportunity to exercise its right to file a reply brief. The September 19, 2018

order should be reversed and the matter remanded for trial on the merits.

12. The Circuit Court's September 19, 2018 order denying Plaintiff's Motion to Vacate under Rule 59(e) is erroneous on its face in that it reflects Plaintiff filed its reply on September 20, 2018 when the Court ruled on the matter before Plaintiff could reply.

Compare September 6, 2018 order modifying briefing schedule and granting Plaintiff until September 20, 2018 to reply (App. Pg. 427) with September 19, 2018 order indicating Plaintiff replied on September 20, 2018. App. Pg. 478.

Conclusion

Petitioner prays this Honorable Court reverse the Order of the Circuit Court which granted Respondent's motion to dismiss and remand this case for trial on the merits.

Suppressio veri expressio falsi - A suppression of truth is equivalent to an expression of falsehood.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ESTATE OF WAYNE A. JONES
by Robert L. Jones,

Petitioner,

Vs. **No. 18-0927**

THE CITY OF MARTINSBURG,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2019 a true and accurate copy of the foregoing PETITIONER'S BRIEF was deposited in the United States first class mail, postage pre-paid envelope addressed as follows:

Berkeley County Circuit Clerk
Berkeley County Judicial Center
380 West South Street,
Martinsburg, WV 25401

Joseph Caltrider, Esq.
101 South Queen Street
Martinsburg, WV 25401

Signed: Paul G. Taylor

Paul G. Taylor
(WV State Bar No. 5874)
Counsel for Petitioner