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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

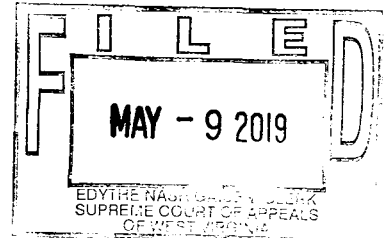
SCOTT VINSON AND THE CLARKSBURG CITY POLICE DEPT.,

Petitioners,

v.

ROSA LEE BUTCHER,

Respondent.



From the Circuit Court of Harrison County, West Virginia
Civil Action No. 15-C-387-3

**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS
SCOTT VINSON AND THE CLARKSBURG CITY POLICE DEPT.**

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I. Introduction

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the brief filed by Petitioners Scott Vinson and the Clarksburg Police Department (“Petitioners”) because the circuit court’s ruling improperly imputed liability to an unidentified party based exclusively on the existence of insurance coverage.¹ In so doing, the court misapplied well-established principles of law and imposed a judgment against an unidentified defendant who had never been served with a complaint or named in the action. Moreover, the circuit court made clear that its motivation for doing so was its belief that insurance coverage made any judgment rendered in the case collectible, a belief that was not only legally irrelevant to any issues of liability but also improperly formed because the court did not examine the applicable insurance policy.

Upholding the circuit court’s ruling would have significant consequences for insurers and insured defendants. Not only would it upend fundamental principles of due process and provide a means for future claimants to circumvent a statute of limitations, but permitting claims like this to reach a jury would effectively shift the burden of proof to insured defendants to *disprove* (1) that some unidentified party did not commit whatever tort they are accused of and (2) that they do not provide coverage for the unidentified party. Accordingly, the Federation submits this brief to encourage this Court to consider the serious legal and policy implications of upholding the judgment in this case and respectfully requests that this Court reverse the circuit court’s holding.

¹ Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, the undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. The Federation provided notice of its intent to file a brief as *amicus curiae* on May 2, 2019, pursuant to Rule 30(b).

II. Statement of Interest

The West Virginia Insurance Federation is the state trade association for property and casualty insurers doing business in West Virginia. Its members insure more than 80% of the automobiles insured in West Virginia, as well as approximately 70% of West Virginia's homes, and more than 80% of the workers' compensation policies insuring West Virginia workers. The Federation is widely regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market and ensuring that insurance coverage is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure in support of Petitioners because this Court's jurisprudence provides predictability and stability for the insurance market and, in turn, West Virginia policyholders.

III. Factual Background

The Federation relies on the Petitioners for a thorough discussion of the facts but provides the following as it relates to the Federation's interest before this Court.

Respondent Rosa Lee Butcher filed her complaint, alleging that while she was in police custody, an officer used an electroshock weapon to stun her, causing injuries and violating her constitutional rights. (A.R. 6.) Ms. Butcher brought claims against the City of Clarksburg, Officer Scott Vinson, and "John Doe(s), claimed to be officers of the Clarksburg police department." (A.R. 4.) Per the complaint, an unknown officer used a stun gun on her, causing her injuries. (A.R. 6.)

During the course of discovery, the City of Clarksburg provided the names of every officer on duty on the night in question. (A.R. 96.) Upon receiving this discovery, counsel for Ms. Butcher advised defense counsel that he would move to amend the complaint to name Officer Zach Lantz, whom Ms. Butcher identified as her assailant. (A.R. 229–33, 266–67.) Ms.

Butcher later testified that she “was Tased by Zach Lantz, but I—it is my understanding that there were legal reasons why Scott Vinson was—was named.”² Respondent Butcher, however, never amended the complaint to add Officer Lantz as a defendant.

Thus, as was apparent then, Ms. Butcher was aware of the identity of every police officer on duty the night in question and was aware of the identity of the alleged tortfeasor, Officer Lantz, well before the close of discovery in the case. Officer Lantz was never identified in the pleadings nor served with process. Notably, the discovery of Officer Lantz’s name came almost four years after the incident occurred.³ (A.R. 267.)

At the summary judgment stage, the City of Clarksburg moved to dismiss claims against the John Doe defendants, arguing that Ms. Butcher had not moved to amend her complaint or serve process on any unnamed defendants, despite being aware of their identities and specifically identifying the individual she claimed was her assailant. (A.R. 129–32.) In response, Ms. Butcher’s counsel contended that while Ms. Butcher “believes Officer Zach Lantz most resembles her attacker,” she “admittedly has no recollection of any of the events that occurred after the tasing . . .” (A.R. 209.) Ms. Butcher, without making a formal motion, asked the court for leave to amend “once the deposition of Defendant Scott Vinson is completed prior to trial or, if the Court deem proper, amend the complaint now to add Officer Zach Lantz as a named Defendant.” *Id.* When Ms. Butcher’s request was made, however, discovery had closed and the deadline the court had established for allowing the parties to amend their pleadings had passed. (A.R. 31–32, 268.)

² Ms. Butcher was consistent throughout her deposition that she believed Officer Lantz used a stun gun on her. (A.R. 236–44.)

³ The applicable statute of limitations is two years. Syl. Pt. 1, *Rodgers v. Corp. of Harpers Ferry*, 179 W. Va. 637, 371 S.E.2d 358 (1988).

Counsel for Ms. Butcher explained that he failed to name Officer Lantz in the initial complaint or an amended pleading because the evidence did not match his client's testimony. As counsel described, "Officer Lantz' testimony, which I find to be somewhat credible based upon everything I reviewed because he says he was watching two other detainees, and that he hardly had any contact with Ms. Butcher." (A.R. 320.) He explained, however, that despite the certainty of his client that Officer Lantz was the assailant and the credibility of Officer Lantz' denial, "that doesn't outrule that there was somebody else even present that we don't even know" (A.R. 323.)

This explanation led the circuit court to ask, "Well, but don't you have the obligation of proving your case?" (A.R. 328.) Counsel responded that the issue would simply be in the jury's hands to weigh the credibility of the witnesses. (A.R. 328-29.) Ms. Butcher presented no evidence at any point to support the theory that "somebody else" may have been present and eventually conceded that Ms. Butcher has no actual evidence supporting the theory that "someone else" used a stun gun on her. As her counsel advised the circuit court: "obviously, we have no admissions. We have them bringing taser logs in that say no one used a taser. And we have no footage of the booking room to identify the attacker." (A.R. 758.)

However, instead of granting summary judgment on grounds that no reasonable juror could find for Ms. Butcher based on the evidence in the record, the circuit court denied the motion, permitting Ms. Butcher's claim against John Doe to go forward. (A.R. 333.) Counsel for Petitioners then asked the question at the heart of the issue now before this Court:

Counsel: I would have a logistical question. Say the jury finds in favor of the city and finds in favor of Officer Vinson, can there be a judgment against John Does?

The Court: Well, I think if they find in favor—or find against the John Does I think the City of Clarksburg is on the hook for that.

Counsel: But if they haven't been served and have no chance to defend themselves—

The Court: I understand but —

Counsel: How does that work?

(A.R. 333–34.)

The circuit court responded by summarizing Ms. Butcher's theory of her claims against the City, stating "you know, there's—the fact that there was evidence of a video in the booking room whether there was a claim made or not I think the city had the obligation to keep that if a Taser was used." (A.R. 334.) But, the circuit court's response missed defense counsel's hypothetical—which assumed that the City was cleared of any wrongdoing or dismissed, but would still be "on the hook" because fault had been allocated to John Doe. In its written order, the circuit court gave no reasoning for its denial of summary judgment or its reasoning for permitting "John Doe" to remain as a defendant. (A.R. 338–40.)

During the course of the trial, Ms. Butcher moved to amend the Complaint to add three officers. Trial testimony reveals that despite her certainty during discovery that Officer Lantz was the officer who used the stun gun on her, Ms. Butcher no longer believed that to be the case. Ms. Butcher testified at trial,

Q: You can't say that Lantz tased you?

A: I can say that Lantz witnessed the attack.

Q: You have said two different things about Lantz; am I correct? One is that he tased you, may have tased you; one is that he may have witnessed it; am I correct?

A: That's correct. There have been pieces of information that have—that have become available that suggests to me that

Lantz witnessed the attack. And the reason I cannot identify my attacker is because they came from behind me.

Q: So, the phrases you've—you have used have been—one of them was "pieces of information"; is that correct?

A: Um—

Q: You just said "pieces of information."

A: Information that has become available to me through discovery and the testimony here at this trial.

(A.R. 795.) Later in the trial, Ms. Butcher then moved to amend the complaint to name Officer Lantz and three other officers whom Ms. Butcher's counsel identified as "potential attackers."

(A.R. 757.) The circuit court ruled that it would not allow the officers to be named at that point, but, the court again did not dismiss the John Doe defendants. (A.R. 761.)

The City of Clarksburg again asked to dismiss the John Doe Defendants prior to closing argument, in which counsel and the court had the following exchange:

Petitioners: . . . I would say that's the responsibility of the Plaintiff to put names to who's responsible for the injuries alleged.

The Court: They have, John Does.

(A.R. 984.) The court then asked this:

The Court: So, let me ask you from a practical stance —

Petitioners: Yes, sir.

The Court: City of Clarksburg has no respondeat superior liability in a 1983 case. So does that leave the named Defendant or the various John Does, does that leave them holding the bag in this case, so to speak? Or is there insurance coverage that —

Petitioners: The—there would—they would not be holding the bag, Judge. No, I think that they would still be covered. They were acting within—we've never argued that Scott Vinson or the named individuals were outside the scope of their employment. So,

no, that's not an issue at all. And for those reasons,
Judge we would ask for dismissal.

(A.R. 985.) Importantly, counsel for the City was not coverage counsel and made no representation that he had read the City's policy, nor was it ever determined that coverage was based on whether the officer was acting in the scope of his employment.

The following day, the circuit court granted judgment as a matter of law in favor of the City of Clarksburg, but not as to Officer Vinson or the John Doe defendants. (A.R. 996.) Ultimately, the possibility that was hypothesized by defense counsel at the summary judgment stage came true: the jury returned a verdict finding that only John Doe was liable to Ms. Butcher for using excessive force, and it awarded \$5,000.00 in compensatory damages. (A.R. 1049–50.)

In the court's Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law Regarding Claims Against "John Doe(s)," the subject of this appeal, the court held that

the policy motivating such holdings is to ensure that a tangible individual or entity will be held responsible for an award of damages if the plaintiff in such case were to win at trial. Such a concern is not relevant in this case because counsel for Defendants made a representation at trial that the City of Clarksburg's insurance would pay if the John Doe Defendant(s) were found guilty at trial.

(A.R. 1305 (emphasis added).) The court further stated that had counsel not represented that the City's insurance policy would cover a verdict, "the analysis and outcome of this Motion may be different; however taking into consideration the policy underlying § 1983 and the certainty of who would cover an award against the John Doe(s) in this case, the Court finds that judgment against John Doe(s) was properly entered in this case." (A.R. 1306.) The court's decision effectively left the City of Clarksburg "on the hook" for the judgment, despite it already having been dismissed from the case.

The Federation submits this brief primarily because the court (1) misstated the policy with respect to permitting John Doe claims in § 1983 actions; (2) improperly considered the existence of insurance coverage when determining whether a party should appear on a verdict form; and (3) improperly determined that insurance coverage existed without any reference to the policy itself. Moreover, as explained below, the Federation urges this Court to consider the policy implications that upholding the circuit court's order would entail. Permitting a judgment to stand against unidentified defendants simply because it is believed that the unidentified defendant has insurance coverage not only circumvents any applicable statute of limitations and ignores due process, but it effectively reverses the burden of proof and illogically requires the allegedly insured party to disprove that some unknown entity committed a tortious act, rather than requiring a plaintiff to identify a specific tortfeasor and produce evidence sufficient to support her claim.

IV. Argument

The circuit court's decision is both legally and logically flawed. If permitted to stand, the decision would alter fundamental concepts of statutes of limitations, due process, and the consideration of overly prejudicial information in determining liability.

A. The circuit court misunderstood the policy behind permitting the filing of claims against John Doe defendants, causing it to enter a judgment against a party that had never been served with process well after the statute of limitations had run.

The circuit court erred by permitting a verdict against John Doe defendants, evidencing its misunderstanding of the use of John Does in civil complaints. Specifically, the circuit court believed that the only reason claims against a John Doe are not permitted is that they cannot be enforced, a problem the court believed was rendered moot if insurance coverage was available to cover any verdict against a John Doe. The court's reasoning, however, is flawed on many levels.

It is well-settled that although they are highly disfavored, claims against unnamed defendants are “appropriate *only* when the identity of the alleged defendant is not known at the time the complaint is filed and the plaintiff is likely to be able to identify the defendant after further discovery.” *Njoku v. Unknown Special Unit Staff*, No. 99-7644, 2000 U.S. App. LEXIS 15695, at *2 (4th Cir. July 7, 2000) (emphasis added); *see also Am. Online, Inc. v. Nam Tai Elecs., Inc.*, 264 Va. 583, 592, 571 S.E.2d 128, 133 (Va. 2002) (“it is not uncommon for a plaintiff to use the ‘John Doe’ pleading style to initiate a lawsuit against a defendant whose identity is unknown at the time the lawsuit is filed for the purpose of subsequently using discovery to learn the identity of the defendant so that proper service of process on the defendant can be obtained”). But, courts require that the plaintiff go beyond merely identifying the defendant’s name during the course of discovery. *See Beutler v. Doe*, 94 Va. Cir. 154, 160, 2016 Va. Cir. LEXIS 137, at *12 (Va. Cir. Ct. 2016) (“While Virginia trial courts certainly have discretion to allow actual, identified parties to proceed pseudonymously . . . that discretion has never been extended to cases involving defendants who remain unidentified after pre-trial discovery has been concluded.”).

To sustain his or her claim, a plaintiff must be granted leave to amend the complaint to name the proper defendant, and a plaintiff must serve the defendant with process, just as any plaintiff would in any civil action. Courts routinely dismiss claims against anonymous defendants when a plaintiff fails to properly serve the defendant once he or she has been identified, and courts routinely deny leave to amend a complaint when the applicable statute of limitations renders such an amendment futile. *See, e.g., King v. Mansfield Univ. of Pa.*, No. 1:11-cv-1112, 2014 U.S. Dist. LEXIS 127612, at *29, 2014 WL 4546524 (M.D. Pa. Sept. 12, 2014) (“If reasonable discovery does not unveil the proper identities, however, the John Doe

defendants must be dismissed.”); *Pilgrim v. LaValley*, No. 9:11-cv-1311, 2016 U.S. Dist. LEXIS 44766, at *15 (N.D.N.Y. March 30, 2016) (granting summary judgment against John Doe defendant because plaintiff failed to identify and serve John Doe defendant before the close of discovery); *Swann v. City of New London*, No. KNLCV146019784S, 2014 Conn. Super. LEXIS 1644, 2014 WL 3907030 (Conn. Super. Ct. July 11, 2014) (dismissing action against John Doe defendant and explaining that a plaintiff may add a defendant at a later date, subject to the statute of limitations, but that the unidentified party must be served with process).

Courts also have widely held that “Plaintiffs in civil rights actions are expected to conduct some preliminary investigation to determine the legal basis, if any, for an action against *a particular person or entity.*” *Douglas v. Hartford*, 542 F. Supp. 1267 (D. Conn. 1982) (emphasis added) (holding that claims against John Doe defendants must be dismissed unless “plaintiffs have identified and served the actual police officers, who they claim were responsible for the violation of their civil rights”). Where a plaintiff fails to identify a specific defendant after discovery, those claims must be dismissed. *Weichman v. Clarke*, 434 Fed. App’x 545 (7th Cir. 2011) (“First, the parties that Weichman has named in this litigation limit his ability to recover. Because he declined to use their actual names after discovering them, Weichman’s ‘John Doe’ defendants cannot survive.”).

Regarding due process, the “most fundamental protections are notice and an opportunity to be heard.” Syl. Pt. 1, *Norfolk & W. R.R. Co.*, 183 W. Va. 283, 395 S.E.2d 527 (1990). Clearly, an unidentified party has no opportunity for notice of the claims and has no opportunity to be heard regarding those claims. Thus, judgments against unidentified parties violate due process.

Courts also consistently hold that naming a John Doe does not toll a statute of limitations. *Sweat v. West Virginia*, No. 3:16-5252, 2016 U.S. Dist. LEXIS 177405, 2016 WL 7422678 (S.D.W. Va. Dec. 22, 2016) (quoting *Bruce v. Smith*, 581 F. Supp. 902, 905 (W.D. Va. 1984)) (“Naming unknown, fictitious, or ‘John Doe’ defendants in a complaint does not toll the statute of limitations until such time as the names of these parties can be secured.”). Further, courts “around the country have likewise determined that naming John Doe defendants does not constitute a mistake within the meaning of Rule 15(c),” thus precluding a plaintiff from amending a complaint after the statute of limitations has run. *Id.* at *12. Courts holding as such make it clear that simply filing a claim against a John Doe does not permit a plaintiff to circumvent the statute of limitations. *See id.* (explaining that if “John Doe” claims related back under Rule 15(c), “a plaintiff with no knowledge of the proper defendant could file a timely complaint against any entity as a defendant and then amend the complaint to add the proper defendant after the statute of limitations had run”).

As the above cases indicate, the reason for not permitting judgments against John Doe defendants is not simply enforceability of a judgment. There are significant due process concerns that arise from permitting claims against unserved defendants. Plus, a statute of limitations may preclude a claim against an individual defendant once they have been identified. The court here failed to consider those issues.

The circuit court also failed to consider that judgments against unidentified defendants are a purely statutory creation, and they exist in this state in the insurance context only via the state’s uninsured motorist statutes. *See Collins v. Heaster*, 217 W. Va. 652, 657, 619 S.E.2d 165, 170 (2005) (“the Legislature has demonstrated an intent to limit the ability to assert a claim

against a John Doe defendant arising from a motor vehicle accident to claims against an injured party's own uninsured motorist policy of insurance").

The issue here is not that the court permitted the plaintiff to amend improperly. Rather, the problem results from the court's failure to consider the key reasons for not permitting John Doe claims. In addition to the Legislature's intent to limit such awards to uninsured motorist claims, if judgments against John Doe are permitted, it provides a simple workaround for any plaintiff who wishes to assert a claim after the statute of limitations has run and creates serious due process concerns.

B. The circuit court was clearly motivated by its belief that insurance coverage existed, which is highly improper when determining whether liability should be imposed.

The circuit court's order, coupled with its questions of counsel, expose its motivation for imposing liability on John Doe. On two occasions, the court asked who would be "holding the bag" or would be "on the hook" should John Doe be deemed the only liable party. Ultimately, the court outright asked whether insurance coverage was available, and as the court expressly acknowledged, the court based its decision to impose liability on John Doe on the presence of insurance coverage.

Just as jurors cannot consider whether a defendant has liability insurance when determining fault, a court cannot consider the existence of liability coverage to determine whether a party is properly considered on a verdict form. As this Court has explained, evidence of insurance coverage is inadmissible at trial because "jurors who are informed about the insurance status of a party may find that party liable only because the liability will be cost-free to the party." *Reed v. Wimmer*, 195 W. Va. 199, 205, 465 S.E.2d 199, 205 (1995). The same applies here. The circuit court should not have allowed the case to proceed against the unnamed John Doe simply because it believed that party had liability insurance.

Even assuming *arguendo* that the policy covers John Doe, whether a party is covered by insurance is totally irrelevant to the central issue to be determined—whether the defendant committed the alleged tort. In short, collectability has no bearing on liability. The existence of insurance has no relevance to whether a party should remain in a case, particularly when ample precedent, due process, and the statute of limitations all demand dismissal.

Here, the circuit court dismissed the City of Clarksburg, and the jury acquitted the only named officer, Scott Vinson, of any wrongdoing. Thus, both the policyholder and the only identifiable employee who may have been covered under the policy were both found not to be liable. The circuit court nonetheless imposed liability on the insurer *because* it believed the policy covered John Doe.

Even if the circuit court was permitted to consider the presence of insurance, the court's decision that the policy covered unidentified officers was not based on any examination of the actual policy but, instead, on an off-the-cuff remark of counsel who stated, "I think they would still be covered" because "we've never argued that Scott Vinson or the named individuals were outside the scope of their employment." (A.R. 985.) Nothing in the record indicates that counsel was even aware of the language of the policy before the circuit court asked about the policy, and nothing in the record indicates that the circuit court or the parties examined the policy at any point. As a result, the circuit court's reliance on counsel's representation that the policy at issue would cover whatever damages were assessed was misplaced and based on insufficient information and an incomplete analysis.

In sum, the court was wrong in both its idea and its execution. The court should not have based its decision to keep John Doe in the case based on its belief that it was covered by insurance. Further, the court should not have relied on the representation of counsel in

determining that coverage existed. The Federation asks that this Court reverse the circuit court's decision and make clear the impropriety of the circuit court's actions in this case.

C. Permitting claims against unidentified defendants to go forward because a co-defendant has insurance effectively shifts the burden of proof to insured defendants to disprove that some unknown person may have committed a tort, rather than requiring a plaintiff to prove the elements of their claim.

By permitting this claim against a John Doe individual to go forward, and compounding that error by determining that the City of Clarksburg was “on the hook” for John Doe’s liability, the court effectively shifted the burden of proof to the City of Clarksburg to disprove that *any unidentified person* could have committed some wrongful act against the plaintiff. Permitting claims against John Doe to go forward, and presuming that an insured co-defendant is responsible for any liability against John Doe, *even when the insured co-defendant is dismissed from the case*, creates an impossible burden for insured parties to bear: not only must they defend themselves, but they must defend against the possibility that some unknown person might be held liable, and that they, in turn, might be responsible for whatever verdict is rendered.

This case exemplifies the burden placed on insured defendants when John Doe claims are permitted. The circuit court’s decision to permit the case to go forward essentially required the City of Clarksburg not only to defend Officer Vinson—the officer actually named in the complaint—but to essentially disprove that *any unidentified person* could have used *any unidentified weapon* against Ms. Butcher. This dilemma is particularly clear when looking at the evidence in the record.

The City of Clarksburg gave Ms. Butcher the names of every police officer on duty in discovery, and she had the opportunity to depose each one, but failed to do so. (A.R. 96.) The City gave Ms. Butcher usage logs for every stun gun in the department, which showed that no stun gun was used on the night in question. (A.R. 268.) Although Ms. Butcher claimed that

those logs were incomplete, she presented no support for that theory beyond testimony of her own expert witness. (A.R. 321.) Also, according to Ms. Butcher, the lack of evidence obtained from the stun gun logs “doesn’t rule out somebody carrying an unauthorized device,” yet she failed to present any evidence supporting that theory. *Id.* In fact, the only evidence counsel acknowledged at the summary judgment hearing beyond Ms. Butcher’s testimony was the testimony of her expert witness, explaining that “[the expert] believes the way they presented this case that a jury is going to look at them as they’re liars, and that they’re going to punish them for lying.” (A.R. 328.)

Given the absence of supporting evidence, the City of Clarksburg was put in an impossible position: it was required to disprove that any of its officers could have injured Ms. Butcher, and disprove that some unknown person could have used some “unauthorized device.” Compounding this dilemma, neither the City nor the City’s insurer had the opportunity to prove that they were not responsible for the conduct of the unidentified person because no one had identified the specific individual who allegedly committed the tortious act. Moreover, the circuit court had already stated that it intended to hold the insurer liable for any verdict despite not reviewing the policy at issue.

Assuming that the jury believed that an officer used an unapproved weapon to injure Ms. Butcher, a theory she suggests was possible, such conduct may fall outside the limits of the applicable insurance policy. But, by not requiring the jury to determine the fault of any specific officer, neither the City nor the City’s insurer would be able prove they are not liable.

If claims such as this are permissible, this same dilemma can extend to virtually any employer and create an untenable situation for any insured defendant. Almost every pleading would be supported by theoretical allegations that some unknown “John Doe” may have

committed the tort, and, even if the evidence in the record acquits all known individuals that are covered by the applicable policy, it could never be ruled out that “John Doe” is at fault. Since the insurer would not be able to prove that “John Doe” was not covered—since it cannot identify who John Doe is—it would thus be liable, even if the defendant it insured had been dismissed from the case.

Permitting claims against John Doe individuals and entities to move forward would thus have disastrous consequences for insurers. It would make evaluating claims almost impossible, because, even if the evidence strongly suggests that no identifiable insured party was at fault, an insured defendant could not know whether some unidentified entity might be held liable. Moreover, it upends due process, statutes of limitation, and well-settled law with respect to unidentified parties. The Federation respectfully requests that this Court consider the implications that upholding the circuit court’s decision would have, and respectfully requests that this Court overturn the decision.

V. Conclusion

For the foregoing reasons, and any other reasons apparent to the Court, the West Virginia Insurance Federation, filing this brief as *amicus curiae*, respectfully requests that this Court reverse the decision of the Circuit Court of Harrison County.

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