IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0132

Scott Vinson and the Clarksburg City Police Dept.,
Defendants Below, Petitioners,

v.

Rosa Lee Butcher,
Plaintiff Below, Respondent.

Appeal from a final order
of the Circuit Court of Harrison
County (15-C-387-3)

PETITIONERS' BRIEF

Counsel for Petitioners,

Matthew D. Elshiaty, Esq. (WV Bar #12535)
Counsel of Record
Shannon P. Smith, Esq. (WV Bar #10300)
KAY CASTO & CHANEY PLLC
1085 Van Voorhis Road, Suite 100
Morgantown, WV 26505
Telephone: (304) 225-0970
melshiaty@kaycasto.com
ssmith@kaycasto.com

and

Luci Wellborn, Esq. (WV Bar #5531)
KAY CASTO & CHANEY PLLC
P.O. Box 2031
Charleston, WV 25327
Telephone: (304) 345-8900
lwellborn@kaycasto.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Secondary Sources

ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it denied the Petitioners' motions and renewed motions for judgment as a matter of law because neither a verdict nor judgment pursuant to a 42 U.S.C. § 1983 excessive force claim can be had against unidentified "John Doe(s)," claims made pursuant to § 1983 cannot attribute liability to a municipality under vicarious or *respondeat superior* liability, the Respondent should not have been permitted to exceed the applicable statute of limitations and through trial with her § 1983 claim against unidentified "John Doe(s)," and neither the City of Clarksburg nor its potential insurance carrier can be responsible for a judgment against "John Doe(s)."

2. The Circuit Court erred when it awarded attorney fees to the Respondent after she was permitted to improperly obtain a verdict and judgment pursuant to her 42 U.S.C. § 1983 claim against unidentified, uncollectable "John Doe(s)" and when the Circuit Court implied that the City of Clarksburg or its potential insurance carrier can be responsible for such fees assessed against "John Doe(s)."

STATEMENT OF THE CASE

The underlying civil action against the Petitioners, Scott Vinson, the City of Clarksburg[1], and other "John Doe(s)"[2], arose from an alleged incident following the Respondent's, Rosa Lee Butcher's, lawful arrest in Harrison County, West Virginia.

A. Factual Background

On the night of September 29, 2013, officers with the City of Clarksburg Police Department ("CPD") responded on two separate occasions to two 911 calls from Ms. Butcher's neighbors. (App. 46.) The first call was in response to Ms. Butcher having allegedly committed a disturbance with her neighbors at or about 10:45 pm. (*Id.*) After attempting to defuse the altercation between Ms. Butcher, her neighbors, and her adult son, officers instructed Ms. Butcher to return to her home

[1] The Petitioner, the City of Clarksburg, is inclusive of the Clarksburg City Police Department for purposes of this appeal. Pursuant to the Circuit Court's March 24, 2017, Order, the Clarksburg City Police Department, an original defendant in the matter below, was dismissed due to it being an agency within the City of Clarksburg. (App. 254-55.) Pursuant to W. Va. R.A.P. 38(b), the Clarksburg City Police Department remains on the style of the case.

[2] The Petitioners present their appeal on behalf of the dismissed parties (The City of Clarksburg), the party found not to be at fault at trial (Scott Vinson), and the unnamed and fictitious "John Doe(s)" to the extent necessary in order to protect the interests of all Petitioners potentially made responsible for the judgment and the award of attorney fees in the matter.

and not return to the street. (*Id.*) Subsequently, at or about 11:16 pm, officers were called back to the same location, again in response to allegations of Ms. Butcher committing a disturbance with her neighbors.[3] (*Id.*) Upon the officers responding for the second time, Ms. Butcher was placed under arrest, charging her with three counts of Assault, one count of Obstructing, one count of Disorderly Conduct, one count of Domestic Assault, and one count of Failure to Provide Finger Prints. (App. 46, 52, 65.)

Ms. Butcher was processed at the CPD. Following her arrest, Ms. Butcher alleged that a member of the CPD tased her while she was in police custody at the station. (App. 6, ¶ 13.) Ms. Butcher alleged that the use of the taser caused her to pass out, that she went into convulsions while passed out, and that she incurred bruising as a result. (App. 6, ¶ 14.) The Petitioners maintain that these acts never occurred.

CPD officers on duty on the night at issue were identified as Christopher Harris, Zachary Lantz, Scott Vinson, Walter Scott Williams, and Chris Willis. (App. 96.) These same officers were identified by the Petitioners during discovery (App. 96-97) and were identified by Ms. Butcher as potential witnesses for trial (App. 109-11, 112-14.)

Following the arrival of Ms. Butcher at the police department for processing, and following her refusal to provide fingerprints, Ms. Butcher was transported to the North Central Regional Jail. (App. 42.) Upon arrival at the Jail, Ms. Butcher was unable to respond coherently to jail staff's questioning, and it "appeared that she was heavily intoxicated." (App. 80-81.) Per protocol, she was transported to United Hospital Center ("UHC") in Clarksburg, West Virginia, where she was treated and where she was observed to have had a 0.349 blood alcohol content level. (App. 73-77.)

[3] Specifically, officers were called to respond to allegations that Ms. Butcher was outside of her residence pounding a shovel on the ground, allegedly attempting to strike her neighbors with the same, and seemingly talking to herself and threatening others at the location. (*Id.*)

CPD officers, including, at one point, arresting officer Scott Vinson, remained with Ms. Butcher at UHC until her release the following day, upon which she was transported by Scott Vinson to the Magistrate Court. (App. 42.)

Approximately one year later, in October 2014, Ms. Butcher filed a complaint with the CPD, alleging that she had been tased during her processing the year prior. (App. 83-90.) An internal investigation was performed by the CPD, which included an interview of Ms. Butcher, arresting officer Scott Vinson, and the remaining officers identified as being on duty at the station on the night of Ms. Butcher's arrest. (App. 83-85.) Importantly, the four officers identified for questioning during this pre-suit investigation were Scott Vinson, Christopher Harris, Zachary Lantz, and Walter Scott Williams. (*Id.*) All officers who were interviewed denied witnessing or participating in any "tasing" of Ms. Butcher. (*Id.*) An examination of all department-issued tasers showed that no deployment of any CPD officers' respective devices was recorded at the time Ms. Butcher alleged she was tased. (App. 86-89.)

During the investigation, Ms. Butcher was interviewed and identified Zachary Lantz or Christopher Harris as the individual officers she believed may have been responsible for using a taser on her. (App. 85-86.) The internal investigation concluded that Ms. Butcher's claims were unsubstantiated based upon the evidence. (App. 90.)

B. Procedural Background

Based upon these same allegations, Ms. Butcher filed suit in the Circuit Court of Harrison County on September 25, 2015, nearly two years from the date of her arrest, alleging State and Federal Constitutional violations, violations of 42 U.S.C. § 1983, and common law claims of Battery, Negligence, and "Other Torts." (App. 1-14.) Ms. Butcher brought these claims against the named arresting officer, Scott Vinson; the City of Clarksburg; the City of Clarksburg Police

Department[4]; and other "John Doe(s)." (App. 1-14.)

The Circuit Court entered a Scheduling Order for this matter on April 15, 2016, which set a July 1, 2016, deadline for the filing of all motions to amend pleadings. (App. 31-40.) No motions to amend the pleadings were ever filed by Ms. Butcher prior to trial, and "John Doe(s)" remained in the style of the case up to and throughout trial.

Before trial, Ms. Butcher conducted only limited discovery regarding the incident at issue itself. (App. 91-108.) In July 2016, the Petitioners responded to Ms. Butcher's Interrogatories and fully identified all officers on duty on the night of the alleged tasing incident. (App. 96-97.) Ms. Butcher chose to take only the deposition of the arresting officer, Scott Vinson, and only questioned the other officers and potential witnesses at the trial itself. (App. 343-594.) No follow-up discovery was conducted by Ms. Butcher as it related to the identity of "John Doe(s)."[5] However, during her deposition, Ms. Butcher repeatedly identified Patrolman Zachary Lantz as the individual she recalled tasing her. (App. 229, l. 20; 230, l. 7; 231, ll. 19-20; 233, ll. 11-16; 240, l. 17; 241, l. 24 – 242, l. 1; 243, l. 10.)

On April 10, 2017, a hearing addressing outstanding issues was conducted following Ms. Butcher's April 7, 2017, Motion to Continue the Trial. (App. 296-299.) Within the "Order from Hearing of April 10, 2017," it was established that

> At this time, counsel for the Plaintiff represented to the Court that the Plaintiff will withdraw her Negligence claims as originally alleged in her Complaint. The Plaintiff indicated that liability issue to be presented to the jury will be based solely on her Constitutional

[4] *See* FN 1, *supra*.

[5] A second set of discovery requests were served by Ms. Butcher in August 2016, but the inquiries therein requested information focused on the unrelated misconduct allegations of one of the officers. Because that information is not pertinent to this appeal, and because of the sensitive nature of the allegations upon which Ms. Butcher wished to discover, those materials have not been included in the Appendix. Limitations on the information gained as part of that discovery were ruled upon by the Circuit Court as evidenced within its March 24, 2017, pre-trial Order addressing Ms. Butcher's "Motion to Admit Testimony to Untruthfulness of Witness." (App. 248-49.)

> and 42 U.S.C. § 1983 claims concerning the allegation of Excessive Force. No objections to this request were raised by the Defendants. Therefore, the Court hereby ORDERS that only claims relating to the alleged Excessive Force employed by officers of the Clarksburg Police Department during the arrest and processing of the Plaintiff Rosa Lee Butcher on the night of September 29, 2013, will be tried in this matter and that all Negligence claims are hereby abandoned.

(App. 297, ¶ 4.) The Court further continued the trial. (App. 296.)

The Petitioners' Motion for Summary Judgment was partially considered during a March 24, 2017, pre-trial hearing, which sought the dismissal of all named parties. (App. 117-52.) Due to the continuation of the trial, the Circuit Court permitted a rehearing of the Petitioners' motion. (App. 298, ¶ 8.) On May 8, 2017, the Petitioners provided to the Court their reply to Ms. Butcher's response to the Petitioners' Motion for Summary Judgment, further arguing for the dismissal of "John Doe(s)," among other arguments. (App. 263-95.) During the May 15, 2017, re-hearing, the Court heard further arguments calling for the removal of "John Doe(s)" and the remaining parties. (App. 307-37.) The Petitioners' Motion was denied at that time. (App. 338-42.)

A jury trial in this case was conducted June 5, 2017, through June 9, 2017. (App. 343-1017.) Upon Ms. Butcher closing her case in chief on June 7, 2017, the Petitioners made a motion pursuant to W. Va. R. Civ. P. 50(a), moving for the dismissal of "John Doe(s)," Scott Vinson, and the City of Clarksburg as a matter of law. (App. 838-58.) The Court denied the Petitioner's motion, and upon the Petitioners resting their case in chief, the Petitioners again moved for the dismissal of the parties, including "John Doe(s)" pursuant to Rule 50(b). (App. 984-90.)

On the morning of June 8, 2017, the Circuit Court granted the Petitioners' Renewed Motion for Judgment as a Matter of Law in part and denied in part, and the City of Clarksburg was dismissed from the case in whole. (App. 996.) At the close of the trial on June 8, 2017, the jury was presented with several questions on the final verdict form. (App. 1049-50.) First, the Jury

was asked, "Do you find by a preponderance of the evidence that one or more of the Clarksburg Police Officers used excessive force on the Plaintiff, Rosa Lee Butcher, on the evening of September 29, 2013?" The jury indicated "Yes" in response to this inquiry. (App. 1049.) The jury then was asked, "Do you find by a preponderance of the evidence that the use of excessive force by any Clarksburg Police Officers proximately caused injury or damages to Ms. Butcher?" The jury indicated "Yes" in response to this inquiry. (*Id.*) The jury then was asked, "Please mark the name or names of the Clarksburg Police Officers who used excessive force on Ms. Butcher." (*Id.*) The jury was presented with two options in response to this inquiry: "Scott Vinson" or "John Doe(s)." (*Id.*) Only "John Doe(s)" was marked by the jury in response to this question. (*Id.*) The jury awarded $5,000.00 for compensatory damages for the alleged actions of "John Doe(s)." (App. 1050.)

On June 19, 2017, following the verdict, the Petitioners filed their Renewed Motion for Judgment as a Matter of Law Regarding Claims against "John Doe(s)." (App. 1059-66.) Ms. Butcher's initial response to that motion was filed on July 14, 2017 (App. 1067-74), and the Petitioners replied on July 31, 2017. (App. 1087-1251.) Ms. Butcher then responded to the Petitioners' reply on September 26, 2017. (App. 1252-57.)

During the time of these filings related to the Petitioners' Renewed Motion for Judgment as a Matter of Law, on July 14, 2017, the Petitioners received a copy of an invoice and an affidavit from Ms. Butcher's counsel, which provided a summary of his expenses and attorney fees. (App. 1084-85.) The Petitioners responded to that submission on July 24, 2017 (App. 1075-86) and subsequently filed an appeal with this Honorable Court but was advised that a final decision on the merits as to all issues and all parties had not been achieved. (App. 1282.) On September 26, 2017, Ms. Butcher submitted a response to the Petitioners' opposition to Ms. Butcher's submission

for an award of attorney fees. (App. 1258-81.)

On September 28, 2017, the Circuit Court conducted a hearing regarding both the issues of the Petitioners' renewed motion for judgment and Ms. Butcher's request for attorney fees, ultimately taking the Petitioners' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against "John Doe" under advisement and further instructing Ms. Butcher to submit additional documentation in support of her motion for attorney fees. (App. 1283-87.) Based upon the prior submissions and the additional materials, the Petitioners' filed their renewed opposition to Ms. Butcher's submission for award of attorney fees on November 27, 2017. (App. 1288-98.) On December 18, 2017, the Court issued its "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against 'John Doe(s)'" and instructing that the Order was "not a final order because this Court must still address the attorney fees issue." (App. 1299-1310.)

Ms. Butcher then submitted her Motion to Award Amended Attorney Fee Request and Response to Defendants' Renewed Opposition to Plaintiff's Submission for Award of Attorney Fees on February 27, 2018. (App. 1311-33). The Petitioners responded to the same on March 14, 2018 (App. 1334-49), and Ms. Butcher filed her rebuttal on March 21, 2018 (App. 1350-57), to which the Petitioners responded on March 29, 2018 (App. 1358-65). A second hearing on this issue of attorney fees was finally set for September 27, 2018, before which the Petitioners submitted a final supplemental filing prior to the hearing on the same. (App. 1366-93.)

On January 16, 2019, the Circuit Court issued its "Order Granting Plaintiff's Submission for Award of Attorney Fees," reducing the amount of claimed fees and costs, and acknowledging that all issues existing between the parties was decided, and that the Order was a "final appealable order." (App. 1394-1405). The Petitioners timely filed their Notice of Appeal on February 13,

2019. (App. 1409.)

SUMMARY OF ARGUMENT

The Petitioners' assignments of error center on the errors committed by the Circuit Court when it permitted unidentified John Doe defendants to remain as parties to the litigation past all applicable statute of limitations, past the Court's own deadlines for amending pleadings, past Summary Judgment, past the Petitioners repeated Motions for Judgment as a matter of law, and through to a jury verdict, where the jury found liability only against "John Doe(s)."

As a result of the Circuit Court's two-part post-trial orders, the Petitioners are being assessed an improper reallocation of liability, which is seemingly being shifted to the dismissed or non-liable parties and/or their insurance carrier. Because the only issue submitted to the jury was a 42 U.S.C. § 1983 claim of excessive force, the Petitioners appeal the Circuit Court's Orders to the extent they assert liability or attempt to assess damages against the City of Clarksburg, arresting officer Scott Vinson, and/or their respective insurance carrier, the latter of which was never part of the litigation below. Together, the two orders serve as the basis for the Petitioners' two assignments of error.

Despite being afforded all of the tools of the discovery process, Ms. Butcher never attempted to amend her pleadings at any time prior to trial in order to identify properly who "John Doe(s)" might have been. Because of this, Ms. Butcher pursued a 42 U.S.C. § 1983 claim of excessive force against unknown, unnamed, and unserved individuals who were never afforded an opportunity to defend their interests at trial. Permitting a complaining party to proceed with a claim against an unidentified individual in a 42 U.S.C § 1983 claim almost four years after an alleged incident occurred dishonors the clear purpose and intent of our statute of limitations and pleading requirements.

The City of Clarksburg was rightfully dismissed from this action, and the only claim that was before the jury was for a violation of 42 U.S.C. § 1983 for an alleged claim of excessive force. Neither the City of Clarksburg nor Scott Vinson can be liable to pay the judgment of $5,000.00 in compensatory damages for the alleged actions of "John Doe(s)" and, by correlation, cannot be made responsible for an award of attorney fees for an improperly tried claim of § 1983.

A judgment against the fictitious "John Doe(s)" for an alleged violation of 42 U.S.C. § 1983 is unsupported by our Rules and by precedent. Moreover, any effort to require that an employer be held responsible for a § 1983 claim that is brought against an unidentified employee only acts to improperly circumvent the clear bar against *respondeat superior* theories of liability. Public policy dictates that permitting a complaining party to proceed with a claim against an unidentified individual almost four years after an alleged incident occurred dishonors the clear purpose and intent of our statute of limitations and pleading requirements.

To the extent that the Circuit Court's orders are deemed to establish that the dismissed and/or non-liable parties are responsible for payment of the award and fees, the Circuit Court erred when it permitted Ms. Butcher to proceed with her 42 U.S.C. § 1983 claim against unidentified "John Doe(s)" past the applicable statute of limitations and through trial to a jury verdict. Because Ms. Butcher failed to establish a proper claim under 42 U.S.C. § 1983 against an individual official, any finding of judgment or accompanying attorney fees against "John Doe(s)" is improper and erroneous. Therefore, this Court should reverse (1) the Circuit Court's "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against 'John Doe(s)'" and (2) to the extent it attempts to allocate liability or damages against any one or more of the Petitioners, the Circuit Court's "Order Granting Plaintiff's Submission for Award of Attorney Fees."

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because of the nature of the errors alleged and the fundamental public importance of the Circuit Court's errors, the Petitioners believe that this case presents an issue proper for consideration by oral argument pursuant to W. Va. R.A.P. 20.

ARGUMENT

I. Standard of Review

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is *de novo*." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16, 17 (2009).

II. THE CIRCUIT COURT ERRED IN DENYING THE PETITIONERS' MOTIONS AND RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW BECAUSE NEITHER A VERDICT NOR JUDGMENT PURSUANT TO A 42 U.S.C. § 1983 EXCESSIVE FORCE CLAIM CAN BE HAD AGAINST UNIDENTIFIED "JOHN DOE(S)," CLAIMS MADE PURSUANT TO § 1983 CANNOT ATTRIBUTE LIABILITY TO A MUNICIPALITY UNDER VICARIOUS OR *RESPONDEAT SUPERIOR* LIABILITY, THE RESPONDENT SHOULD NOT HAVE BEEN PERMITTED TO EXCEED THE APPLICABLE STATUTE OF LIMITATIONS AND THROUGH TRIAL WITH HER § 1983 CLAIM AGAINST UNIDENTIFIED "JOHN DOE(S)," AND NEITHER THE CITY OF CLARKSBURG NOR ITS POTENTIAL INSURANCE CARRIER CAN BE RESPONSIBLE FOR A JUDGMENT AGAINST "JOHN DOE(S)."

Within the Circuit Court's "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against 'John Doe(s)'" (App. 1299-1310), the Court sets forth several findings that erroneously attempt to find liability against a fictitious and unidentified "John Doe(s)" and/or the dismissed City of Clarksburg and/or Scott Vinson. The Circuit Court's conclusions are in error and ignore the underlying principle that "John Doe(s)" is not a proper party for a claim being pursued under 42 U.S.C. § 1983.

A. The Circuit Court erred in permitting the only remaining claim of a violation of 42 U.S.C. § 1983 to move forward through a liability determination and a judgment assessment against "John Doe(s)."

Submitting a 42 U.S.C. § 1983 claim against "John Doe(s)" to the jury is improper. At trial, Ms. Butcher's only remaining claim upon which the jury was ultimately instructed was a § 1983 claim of excessive force against Scott Vinson and "John Doe(s)." (App. 1025-48.) At the close of Ms. Butcher's case in chief, and later at the close of the Petitioners' case in chief, the Petitioners brought several motions, including W. Va. R. Civ. P. Rule 50 motions, addressing the § 1983 claim that remained (at the time) against the City of Clarksburg, Scott Vinson, and "John Doe(s)." (App. 838-58, 984-90.) On the morning of the final day of trial, the Circuit Court correctly dismissed the City of Clarksburg, finding that Ms. Butcher failed to establish an independent claim against the City. (App. 996.) However, the Court moved forward with closing arguments and jury deliberations with "John Doe(s)" still named as defendants in the case:

> The Court is going to grant a judgment as a matter of law in favor of the City of Clarksburg and dismiss the City of Clarksburg as a party defendant in this case. However, the Court, based upon the evidence that's been presented, is still going to allow Scott Vinson to remain in the case and the John Does.

(*Id.*)

The fallacy in the Circuit Court's decision on this issue is demonstrated within its "Order Denying Defendants' Renewed Motion as a Matter of Law in Regards to 'John Doe(s).'" (App. 1299-1310.) In it, the Court found as follows:

> 29. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830 (1992), citing *Carey v. Piphus,* 435 U.S. 247, 254-257, 98 S.Ct. 1042, 1047-1049 (1978).

> 30. The use of John Doe defendants to achieve these goals is significant in light of the fact that individual officers, rather than governmental entities, are liable under § 1983. *Monell v. Department of Social Services,* 436 U.S. 658, 691 (1978) (holding that there is no respondeat superior liability in § 1983 cases.)

(App. 1304-05, ¶¶ 29-30.) Despite acknowledging that there can be no *respondeat superior* liability in a § 1983 case, a principle which also led to the prior dismissal of the City of Clarksburg, the Court effectively ordered that exactly to occur.

The Circuit Court appears to have rationalized its findings by stating that, "In this case, without the use of John Doe defendants, the Plaintiff would be deprived of any remedy or opportunity to hold state actors responsible for their constitutional misconduct." (App. 1305, ¶ 31.) The Court further found 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.

(*Id.*, ¶ 33.) The Court's comments regarding insurance are discussed further below. The Circuit Court ultimately erred by attributing liability to the City of Clarksburg despite the bar against theories of *respondeat superior*; it erred by failing to dismiss an unidentified official in a § 1983 claim, known only as "John Doe(s)"; and it erred by ignoring the Petitioners' due process rights.

1. **Even if the City of Clarksburg were not dismissed as a matter of law, it cannot be held responsible for an award of damages against "John Doe(s)" because a municipality cannot be held liable under § 1983 on a *respondeat superior* theory when all prior negligence claims against the City were voluntarily dismissed prior to trial.**

The liability of a municipality in a § 1983 case is narrowly defined. The Supreme Court of the United States has reasoned that,

> the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978). "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

In the matter at hand, Ms. Butcher initially made claims against the City of Clarksburg and its police department for negligent supervision and training (App. 1-14) and later attempted to argue that its policies and procedures did rise to the level of violating Ms. Butcher's constitutional rights (App. 844-49, 985-88). However, Ms. Butcher voluntarily withdrew her negligence claims. (App. 297.) It was later established at trial that Ms. Butcher failed to present and establish any evidence in support of a § 1983 claim against the City of Clarksburg. (App. 997.) As a result, the City was dismissed pursuant to the Petitioners' renewed Rule 50 motion at the close of all evidence. (App. 997.)

Without regard to the City's complete dismissal from the case, within its "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims against 'John Does,'" the Court found that,

> 35. Therefore, this Court finds that amending the Plaintiff's complaint to name specific officers in this case is unnecessary because counsel, on behalf of the City of Clarksburg, represented to the Court that the John Doe Defendant(s) were alleged officers and the fact that the alleged officers were within the scope of employment was not at issue. Counsel went on to assure the Court that the City of Clarksburg's insurance would cover any award

granted to Plaintiff against John Doe Defendants.

(App. 1305, ¶ 35.) In doing so, the Court erroneously ignored Ms. Butcher's failure to timely amend her Complaint. The Court further erred by allocating liability against the City of Clarksburg or its insurer for a § 1983 claim against an individual officer. As stated in *Monell*, a decision the Circuit Court cited, "a municipality cannot be held liable solely because it employs a tortfeasor." *Monell*, 436 U.S. at 691 (emphasis in original). Here, the City's employment of the alleged "John Doe(s)" tortfeasors is the sole reason that the Court assessed liability against the City or its insurer. The Court continued by finding,

> 36. Had counsel for Defendants not made this representation, 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.

(App. 1300, ¶ 36.)

By determining that "John Doe(s)" were responsible for Ms. Butcher's sole remaining claim of a § 1983 violation, but determining that their lack of identification as real persons was unnecessary, the Circuit Court effectively declared that the dismissed City of Clarksburg is responsible for the judgment under a theory of *respondeat superior*. Such a conclusion is an error. Further, by stating that there was certainty of who would pay an award against John Doe(s), the Court ignored the ethical obligations of the Petitioners' counsel and the difference in their role from that of coverage counsel. The Court's findings also fail to acknowledge that it had previously reached this same erroneous conclusion prior to any representations of counsel and prior to trial itself. During the May 15, 2017, hearing on the Petitioners' Motion for Summary Judgment, the following hypothetical was proposed by defense counsel and discussed by the Court:

> Ms. Scudiere: Your Honor, 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.

(App. 333-34.)

The Petitioners argued for the dismissal of John Doe(s) within their Motion for Summary Judgment before trial for much of the reasons discussed herein. In denying that portion of their motion, the Circuit Court determined that a judgment against only "John Doe(s)" would leave the City "on the hook." (*Id.*) Upon whatever rationale for reaching that ultimate decision was based, the Court's conclusion was in error.

The Circuit Court's decision leaves the *Monell* decision, as well as decisions across the country, essentially meaningless. If municipalities and/or their insurers are ultimately responsible for "John Doe" employees, then there is no merit to finding that *respondeat superior* liability does not exist. The Circuit Court therefore erred in finding that there can be a judgment against only "John Doe(s)" defendants in a § 1983 claim and in finding that the City of Clarksburg is "on the hook" for such judgment.

2. Without ever identifying "John Doe(s)," there can be no finding of personal involvement sufficient to merit a § 1983 liability holding, and the Circuit Court erred in submitting "John Doe(s)" to the jury.

At the heart of a 42 U.S.C. § 1983 claim is the principle that an individual must be shown to have personal involvement in the deprivation of the claimant's constitutional rights. It stands to reason that a plaintiff cannot demonstrate personal involvement without identifying the actual tortfeasor. For many of the reasons identified above, Federal Courts have consistently found that "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the

Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The justification behind this requirement is based upon the principle that "[i]n order for an individual to be liable under § 1983, it must be affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights. The doctrine of *respondeat superior* has no application under this section." *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (internal citations omitted).

In addition to the Fourth Circuit, other Federal Courts examining § 1983 claims have held that "[l]iability under § 1983 is personal, and each defendant's conduct must be independently assessed." *Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 945 (D. Minn. 2011) (citing *Wilson v. Northcutt,* 441 F.3d 586, 591 (8th Cir. 2006)); *see also Jutrowski v. Twp. of Riverdale*, 904 F.3d 280 (3d Cir. 2018), and *Colbert v. City of Chicago*, 851 F.3d 649 (7th Cir. 2017), *cert. denied sub nom., Colbert v. City of Chicago, Ill.*, 138 S. Ct. 657, 199 L. Ed. 2d 532 (2018).

Recently, these principles were examined in *Jutrowski*, wherein the plaintiff brought claims of excessive force pursuant to 42 U.S.C. § 1983 and conspiracy against four individual defendants. *Jutrowski*, 904 F.3d at 284. The excessive force itself – the kicking of the plaintiff's face during arrest – was not denied by the employer police department. *Id.* It was established that one of the individual officers taking part in the plaintiff's arrest kicked the plaintiff in his face, causing him to suffer a broken nose and broken eye socket. *Id.* at 286. However, none of the individually identified defendant officers admitted to using such force, and the plaintiff was unable to identify the specific individual who committed the act. *Id.* at 284. The lower court granted summary judgment to the defendants based upon the "personal involvement" required in a § 1983 claim. *Id.* at 285. On appeal, the United States Court of Appeals, Third Circuit, upheld the lower court's dismissal of the § 1983 claim against the individual officers. *Id.* at 292-93. In reaching its affirmation, the Third Circuit held that "a § 1983 plaintiff must produce evidence supporting each

individual defendant's personal involvement in the alleged violation to bring that defendant to trial." *Id.* at 291.

Similarly, in a decision out of the Seventh Circuit (and as relied upon by the *Jutrowski* Court), similar analysis was conducted by that court on the issue of "personal involvement" in the context of a § 1983 claim. *Colbert*, 851 F.3d at 656. In *Colbert,* the plaintiff made a claim against four out of a potential ten officers because of property damage he alleged to have suffered after officers unreasonably searched his residence. *Id.* at 657. Summary judgment was granted to the officers in the lower court because the plaintiff was unable to identify which of the named officers violated his rights. *Id.* On appeal, the plaintiff's lack of identification of the tortfeasor for the alleged § 1983 violation was examined by the court. *Id.* at 657-59. The Seventh Circuit examined the plaintiff's failure to satisfy the personal-involvement requirement of the § 1983 claim and reasoned in part that,

> [I]n light of § 1983's individual-responsibility requirement, the plaintiff opposing summary judgment in this context must at a minimum have (1) pled a claim that plausibly forms a causal connection between the official sued and some alleged misconduct, and (2) introduced facts that give rise to a genuine dispute regarding that connection. Suing four of ten officers for alleged property damage and then acknowledging the inability to identify those actually responsible for the damage, as Colbert did, does not satisfy that requirement—especially when the sued officials deny having caused that damage.

Id. at 658 (emphasis in original).

As these two illustrations show, the "personal involvement" requirement in a 42 U.S.C. § 1983 claim and the prohibition against *respondeat superior* liability for the same demonstrate why it was improper for the Circuit Court to permit "John Doe(s)" to remain in this matter. Like *Jutrowski*, Ms. Butcher alleged at various times that she could not identify the officer who committed the excessive force against her. While on many occasions she did in fact identify the

officer or officers she believed to be responsible, that theory shifted and morphed throughout litigation. (*Cf.* App. 229, l. 20; 230, l. 7; 231, ll. 19-20; 233, ll. 11-16; 240, l. 17; 241, l. 24 – 242, l. 1; and 243, l. 10 *with* App. 794-95.) Instead of meeting her burden requiring that she provide evidence of a specific individual's involvement in the tort that she pled, Ms. Butcher was permitted to shift that burden to the Petitioners to disprove personal involvement of everyone.

Most striking in the *Jutrowski* matter is the fact that the act itself, the excessive force, was acknowledged by that police department. *Jutrowski*, 904 F.3d at 284. However, because no one could identify the individual actor, the elements of the plaintiff's claim could not be met. *Id.* at 285. Here, all officers on duty at the station denied any wrongdoing. (App. 405, 453, 497, 532.)

Within the Court's "Order Denying Defendants' Renewed Judgment as a Matter of Law Regarding 'John Doe(s),'" and in response to an additional argument regarding Ms. Butcher's failure to make efforts to identify the individual responsible for the alleged tort, the Court rebuffs the Petitioners' arguments as follows:

> 52. In the case at issue, however, the Plaintiff made several efforts to discover the Doe "Defendant(s)' true name(s).
>
> 53. Further, there is no indication that continued or additional efforts in discovering the Doe defendants' identities would have, in fact, produced their identities because Chief Robbie Hillard, Deputy Chief Chamberlain, Officers Williams, Lantz, Harris, and Vinson, and Sergeants Reed and Quinn of, or formerly of, the Clarksburg Police Department, while they were not deposed by the Plaintiff during discovery, all testified at trial and none of them had any information as to who tased the Plaintiff or even who's [sic] custody Plaintiff was in when her injuries occurred.
>
> 54. Therefore, this Court finds that Defendants' argument that Plaintiff failed to make reasonable efforts to identify the John Doe Defendant(s) is without merit because even additional discovery efforts by the Plaintiff to discover the identities of the unknown officers would have been futile.

(App. 1308.)

Petitioners disagree with the Court's findings in many regards, not the least of which is the characterization of Ms. Butcher's efforts during the discovery process in this matter. The Court's conclusions, however, demonstrate the error it committed in permitting "John Doe(s)" to remain in the case in lieu of Ms. Butcher's general lack of evidence. For clarification, no individual accused or questioned regarding the alleged excessive force in this matter admitted to committing the act, seeing the act, or having any knowledge that the act occurred. In many regards, Ms. Butcher's own poor recollection of the events (mostly attributable to her 0.349 blood alcohol level at the time) seems inconsequential to the Circuit Court in its Order; however, the Petitioners were not responsible for identifying who committed an act – and more broadly – the Petitioners are within their rights to deny committing any wrongdoing.

The Circuit Court erred by permitting "John Doe(s)" to proceed through trial where Ms. Butcher could not, as a matter of law, establish the necessary elements to hold the alleged tortfeasor responsible for his or her personal involvement in the tort. With that error reaffirmed by the verdict itself, the Court further erred by establishing vicarious or *respondeat superior* liability against the employer of the alleged "John Doe(s)."

3. By permitting vague, noncommittal, and broad claims to be made against unnamed parties, the Petitioners' have been unduly prejudiced, and such tactics fly in the face of the fundamental principles of our justice system.

As a result of Ms. Butcher's own dilatory conduct in the discovery phase of this matter, the Petitioners were made to defend a claim against an unnamed individual or, as revealed during trial, potentially multiple unnamed individuals. Many portions of the Circuit Court's findings in response to the Petitioners' motions for Judgment as a Matter of law demonstrate the public policy pitfalls created by the Court's decisions in this matter.

i. By ignoring the need for identification of an individual official responsible for a § 1983 claim, the Circuit Court effectively opened the door to any undeveloped claim to continue to verdict without requiring a plaintiff to effect proper service or meet the basic elements of her claim.

When a "John Doe" is made responsible for a judgment despite no actual individual being served and provided an opportunity to defend himself or herself, significant due process concerns arise. In response to the Petitioners' concerns, the Court made the following observation in its "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding John Doe(s)": "Because no answer was filed on behalf of the John Doe(s) defendant(s), Plaintiff was entitled to a Default as to the John Doe(s); however, Plaintiff never filed a motion for default." (App. 1300, ¶ 4.)

As accurately recounted by the Court, Ms. Butcher only moved to amend her complaint after resting her case in chief on the third day of trial. (App. 757-61.) Prior to this oral motion, Ms. Butcher's legal counsel made mention of their intentions to name actual individuals but never acted to do so. (App. 280.) In response, the Petitioners objected to this improper and late attempt to add individuals who had no opportunity to participate in the litigation or trial of this matter. (App.758-60.) Without ever identifying "John Doe(s)" as actual individuals until Ms. Butcher's final attempts during trial, finding "John Doe(s)" in default would not have been permitted because "default judgments entered upon defective service of process are void." *Beane v. Dailey*, 226 W. Va. 445, 451-52, 701 S.E.2d 848, 854-55 (2010) (citing Syl. Pt. 4, *Jones v. Crim*, 66 W. Va. 301, 66 S.E. 367 (1909)).

Yet, Ms. Butcher was never required to serve "John Doe(s)" by the Circuit Court. Within her Complaint, Ms. Butcher brings forth certain factual and legal allegations against unnamed "John Doe(s)" but only broadly defines the term:

> 6. Defendant John Doe(s) ("John Doe(s)"), upon information and belief are or may be law enforcement officials, agencies and departments which are or may be responsible for Rosa Lee Butcher's injuries which information will be developed during discovery. It is believed that Defendant John Doe(s) is a member of the Clarksburg City Police Department. At all times alleged herein, Defendant John Doe(s) was acting under color of law and within the scope of his employment.

(App. 5, ¶ 6.) "John Doe(s)" was a fictitious placeholder in this matter, and as such, no one can be held responsible to pay a judgment or attorney fees in the name of "John Doe(s)" in this matter. Further, if "John Doe(s)" were never identified, and, as a result, never served notice of this suit, no judgment can be rendered against them, whether in default or through the actions of the jury.

The public policy concerns of the Court's holdings are only multiplied when considering the implications of the Court's decision on similar claims in the future. By permitting a judgment to stand against an unidentified "John Doe," who was never served pursuant to W. Va. R. Civ. P. 4, and stating that such judgment be payable by the alleged employer, or, even more striking, the insurance carrier of John Doe's alleged employer – without coverage ever being an issue formally brought before the Court – then a § 1983 claim can be brought and litigated with the most threadbare of evidence, to the complete windfall of a plaintiff and detriment to any defendant. That is not the intent of 42 U.S.C. § 1983 and proceeds against all manner of the idea of justice.

ii. The Circuit Court erred by finding that Ms. Butcher's failure to identify and serve the real "John Doe" tortfeasors was excusable due to certain arguments made by defense counsel in support of that party's dismissal.

The Circuit Court exceeded its authority and overlooked the Petitioners' special appearance when it reasoned that, "If [defense counsel] were not representing John Doe Defendant(s), counsel would have no standing to file this Renewed Motion for Judgment as a Matter of Law on behalf of the John Does, nor would they have standing to appeal this case to the

West Virginia Supreme Court of Appeals." (App. 1307, ¶ 45; *see also, generally,* App. 1307, ¶¶ 43-47.) In order to have proper standing, this Court requires the following:

> First, the party attempting to establish standing must have suffered an "injury-in-fact"— an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017).

In the event that Petitioners City of Clarksburg or Scott Vinson are considered responsible for the erroneous judgment and attorney fees awarded against "John Doe(s)," the elements of proper standing are met. The Petitioners acknowledge the confusing relationship between the identified Petitioners and the arguments made in support of "John Doe(s)" in this manner. That confusion, however, stems from several acts and representations of Ms. Butcher and from the findings and rulings of the Circuit Court.

First, Ms. Butcher continued to represent to the Petitioners throughout litigation that the true identity of "John Doe(s)" would be identified through discovery and, worse, was known to Ms. Butcher all along. Ms. Butcher not only pled that "John Doe(s)" would be identified through discovery (App. 5, ¶ 6), but her counsel represented as much throughout the litigation, at one point stating, "I am going to move to amend the complaint to identify Zach Lantz as the person who applied the taser." (*see* App. 280.) Ms. Butcher herself made similar representations during her multi-day deposition. (App. 229, l. 20; 230, l. 7; 231, ll. 19-20; 233, ll. 11-16; 240, l. 17; 241, l. 24 – 242, l. 1; 243, l. 10.)

During the March 24, 2017, pre-trial hearing in this matter, the Circuit Court made inconsistent findings pertaining to the existence and identities of "John Doe(s)." The Petitioners

raised the issue of "John Doe(s)" remaining as parties to the litigation as discussed in their Motion for Summary Judgment. (App. 255.) Despite being deemed untimely at that time,[6] portions of the Petitioners' motion were considered, including issues related to "John Doe(s)." To that point, the Court concluded in its "Order from Pre-Trial Hearing of March 24, 2017":

> The Plaintiff has not moved to amend her Complaint since its original filing. The Plaintiff's allegations against "John Does" represent a finite group of individuals who can be fairly identified by both parties. The Court will permit "John Does" to remain named Defendants in this matter. Their continued presence as Defendants in this matter may be subject to appropriate motions as the trial progresses.

(App. 255, ¶ 14.C.)

Yet, when the Court revisited the Petitioners' Motion for Summary Judgment, the Court's own questioning acknowledged Ms. Butcher's identification of "John Doe(s)," but excused the lack of amendment to the complaint:

> The Court: Okay, there has been somebody that's been identified as being one of the John Does; correct?
>
> Ms. Scudiere: No.
>
> The Court: I thought there was –
>
> Ms. Scudiere: There have been names floated round as maybe it was Lantz; maybe it was Harris, maybe it was somebody else, but at this late date, and with the statute of limitations already having been past a long time ago, there is no way that a case could be maintained against any of those individuals.
>
> The Court: Doesn't naming them as a John Doe toll that statute?
>
> Ms. Scudiere: No, you have to actually name them, because say he

[6] As presented by the Petitioners below in March 2017, counsel for both parties had agreed to seek a continuance in this matter prior to the February 1, 2017, discovery deadline. However, because the Petitioners failed to secure the continuance in writing, Ms. Butcher's subsequent recanting of that agreement left the Petitioners' memorandum in support of their motion untimely. Ultimately, because of Ms. Butcher's later request for a continuance, the Petitioners' motion was ultimately heard by the Court in its entirety.

> names them tomorrow. Say he names Officer Jones tomorrow, my goodness, that person has not been served before this, has not been a part of the discovery, the statute of limitations has past as to him personally, and to expect him as an individual to come in front of a jury and defend himself. We don't even know, literally, we don't even know whether we would be the attorneys for that person.

(App. 311, ll. 23-24 – 312, ll. 1-17).

The Petitioners' motion was ultimately denied without further findings reached by the Circuit Court, except to note that the objections of the parties were preserved. (App. 340.) The cited exchange above, as well as Ms. Butcher's and her counsel's prior representations, are important to consider in the context of the Court's ultimate rulings. While the Court concluded that the Petitioners could have no standing to raise issues on behalf of "John Doe(s)" unless they represented those individuals, the Court entirely neglected to address the issue that "John Doe(s)," if known or if not known, were never properly identified, never served, and never afforded an opportunity to defend themselves in the litigation.

Moreover, the Circuit Court itself has thrust standing upon the Petitioners through its own findings and opinions. By informing the Petitioners that one of the named parties, the City of Clarksburg, would "be on the hook" for any judgment rendered by a jury against "John Doe(s)" (App. 344, l. 2-4) and by subsequently finding in both portions of its final order that the City's insurance carrier would be responsible for a judgment and attorney fees (App. 1305, ¶ 35; 1405), the Court has forced the Petitioners into a difficult position.

The Court concluded that "John Doe(s)" were either the officers on duty as provided in discovery (who were called to testify at trial) or their identification was inconsequential because judgment against them would ultimately make the City and/or its insurance carrier responsible. Despite arguing that it was an error for the Circuit Court to accept "John Doe(s)" in this matter on numerous occasions, each of the Court's theories established standing for the Petitioners, as well

as a responsibility to move for the dismissal of "John Doe(s)" and to bring forth a properly preserved appeal attempting to remedy the errors committed by the Circuit Court.

iii. The Circuit Court erroneously found that the Petitioners waived their right to object to a judgment against "John Doe(s)" by failing to object to the jury verdict form at trial because the Petitioners moved and objected on at least five separate occasions for the removal of "John Doe(s)."

The Circuit Court's assertions that the Petitioners failed to object to the mentions of "John Doe(s)" within Jury Instruction No. 13 (App. 1038-39) or with Question No. 3 of the verdict form (App. 1049; *see also* App. 1306, ¶ 42), which called for the jury to determine if the individual who committed the alleged 42 U.S.C. § 1983 violation was Scott Vinson or "John Doe(s)" fail to acknowledge the procedural steps the Petitioners made at every other step leading to the jury instructions and the verdict form. Prior to issuing the instructions and the verdict form, the Petitioners had moved on several occasions to remove "John Doe(s)" from the case in its entirety. On March 24, 2017, the Petitioners presented these arguments in their Motion for Summary Judgment. (App. 117-152.) On May 8, 2017, "Defendants Reply to "Plaintiff's Response to Defendants' Motion for Summary Judgment'" was filed with the Court, further arguing for the dismissal of "John Doe(s)." (App. 263-95.) During the May 15, 2017, re-hearing on the Petitioners' Motion for Summary Judgment, the Court heard further arguments calling for the removal of "John Doe(s)." (App. 307-37.) Upon Ms. Butcher closing her case in chief on June 7, 2017, the Petitioners moved for the dismissal of John Doe(s) as a matter of law. (App. 838-58.) Subsequently, on June 7, 2017, upon the Petitioners resting their case in chief, they renewed their motion for the dismissal of "John Doe(s)" as a matter of law. (App. 984-90.)

It was at the conclusion of that final attempt to dismiss the improper "John Doe(s)" that the Court indicated that "John Doe(s)" remained on the verdict form along with the names of three

individual officers who were never made part of the suit. (App. 989, ll. 4-18). As a first point of rebuttal to the Circuit Court's findings, the Petitioners' maintain that their repeated motions and arguments calling for the dismissal of John Doe(s) pursuant to W. Va. R. Civ. P. 50(a) and 50(b) preserved their right to raise this appeal.

In addition, at the conclusion of trial, the Circuit Court denied the Petitioners' articulated arguments regarding the claim against "John Doe(s)." Importantly, no instructions were given to the jury regarding the City's culpability, no instructions were given on a failure-to-protect claim against the only named officer, and no instruction or special interrogatory was given requiring the jury to make a determination of who John Doe(s) were in this case. The only instructions given related to the sole remaining 42 U.S.C. § 1983 claim. (App. 1025-48.)

However, at the close of trial, the Court, through its own rulings, held that Scott Vinson and "John Doe(s)" would remain in the case and the claim to be decided by the jury was a 42 U.S.C. § 1983 claim for excessive force. The instructions and verdict form in this matter reflected the erroneous inclusion of "John Doe(s)" as potentially responsible parties to Ms. Butcher's claim contrary to the Petitioners' repeated attempts at removing "John Doe(s)" from the case, and as a result of the Court's errors, the jury was allowed to indicate that "John Doe(s)" were responsible for the alleged § 1983 violation.

B. Ms. Butcher exceeded her statute of limitations on any claims that she would have been entitled to bring against any other party, and the Circuit Court erred in denying the Petitioners' motions and renewed motions for judgment as a matter of law and should have dismissed "John Doe(s)" prior to submission to the jury.

Ms. Butcher had a responsibility to specifically identify and name "John Doe(s)" within the applicable statute of limitations and failed to do so, thus disregarding her responsibility to properly name and serve the individuals allegedly responsible for her injuries. Ms. Butcher brought civil claims based on alleged State and Federal Constitutional violations, violations of 42

U.S.C. § 1983, Battery, Negligence, and "Other Torts," for alleged violations of her rights. (App. 1-14.) For each of her claims of Constitutional violations, Battery, Negligence, and "Other Torts," the limitations set forth in W. Va. Code § 55-2-12 apply:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

W. Va. Code § 55-2-12. Because § 1983 lacks its own limitations period, this Court must incorporate the limitations period for personal injury actions in the state in which the alleged violation occurred. *Wallace v. Kato*, 549 U.S. 1091, 1094 (2007) (the statute of limitations for § 1983 claims "is that which the State provides for personal-injury torts"). In West Virginia, the personal injury period set forth in W. Va. Code § 55-2-12 provides for a two-year limitations period for such claims. *McCausland v. Mason County Bd. of Educ.*, 649 F.2d 278 (4th Cir. 1981); *Rodgers v. Corporation of Harpers Ferry*, 179 W. Va. 637, 371 S.E.2d 358 (1988), *overruled, in part, on other grounds by Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993).

The purpose of statutes of limitations is to

> protect a range of interests inuring primarily to potential defendants. A defendant has an interest in not being put to the burden of defending against stale claims in lawsuits occurring so far after the event that witnesses may have become unavailable, memories may have faded, and evidence may have been lost.

Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 Cardozo L. Rev. 793, 813-14 (2003). Only in certain circumstances may a plaintiff circumvent the statute of limitations by seeking amendment to a pleading that relates back to the

original complaint. *Cartwright v. McComas*, 223 W. Va. 161, 166, 672 S.E.2d 297, 302 (2008) (citing Syl. Pt. 4, *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003)) ("amendments filed after a statute of limitations period has expired require courts to consider additional factors when determining whether the amendments relate back to the original filing date"). Specifically, a plaintiff's amendment of a pleading, if granted,

> 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.

W. Va. R. Civ. P. 15.

In the present case, the alleged tasing occurred during the night and/or morning hours of September 29-30, 2013. (App. 46.) Not until the third day of trial on June 7, 2017, more than three years and eight months later, did Ms. Butcher, for the first time, move to amend her complaint to replace "John Doe(s)" with named individuals. (App. 757-61.) The Court correctly denied such motion but erroneously permitted the case to continue with the "John Doe(s)." (App. 761.)

"John Doe" Defendants must be dismissed when a plaintiff fails to amend the complaint to replace the unnamed defendants before the statute of limitations expired. *Sweat v. W. Virginia*, No. CV 3:16-5252, 2016 WL 7422678, at *4 (S.D. W. Va. Dec. 22, 2016) (memorandum decision). The Southern District of West Virginia considered the meaning of "mistake" in Federal Rule 15(c), which is equivalent to West Virginia Rule 15(c)(3)(B), in a § 1983 claim and found that the term

"does not embrace a mistake for lack of knowledge." *Id.* (citing *Lockler v. Bergman & Beving AB*, 457 F.3d 363, 366 (4th Cir. 2006)). "[A]llowing for relation back in such circumstance 'would produce a paradoxical result wherein a plaintiff with no knowledge of the proper defendant could file a timely complaint naming any entity as a defendant and then amend the complaint to add the proper defendant after the statute of limitations had run.'" *Id.* (quoting *Lockler*, 457 F.3d at 367).

In *Sweat*, "Unknown Officers" were named as defendants following the shooting of the plaintiffs' dog. *Id.* at *1. The plaintiffs filed suit, alleging § 1983 violations against a named defendant, "Unknown Officers," the State of West Virginia, and the West Virginia State Police ("WVSP"); negligent training, supervision, and retention against the WVSP; and other negligence and torts against all of the defendants. *Id.* at *2. The court found that the plaintiffs' original complaint was filed two weeks prior to the expiration of the statute of limitations, and any amendment based upon lack of knowledge of the proper parties would be futile. *Id.* at *4. "Unknown Officers," like "John Doe(s)," are "placeholders" in a civil action until, within the applicable statute of limitations, their designation within the case can be changed to a real person who has appropriate notice of the suit and can defend himself with the same vigor as any other defendant in a lawsuit. Therefore, permitting Ms. Butcher to amend her complaint to replace "John Doe(s)" with named individuals after the applicable statute of limitations would not have related back to the date of the original complaint and would not satisfy the two-year limitations period. Although such motion for amendment was denied, the "John Doe" Defendants remained in the case.

In discussing a plaintiff's failure to identify a party previously designated as "John Doe" in relation to an appeal under Rule 15(c)(3)(B) of the West Virginia Rules of Civil Procedure, this Court found that, in order to have a proper relation back, a plaintiff's actions cannot be considered

a "mistake" under the Rule if the delay in amending is "due to the plaintiff's dilatory conduct in identifying the proper defendant prior to the expiration of the applicable statute of limitations." Syl. Pt. 6, *Muto v. Scott*, 224 W. Va. 350, 686 S.E.2d 1 (2008). In *Muto*, the plaintiff's original "John Doe" complaint was filed within the applicable statute of limitations, but the plaintiff did not amend her complaint until more than two months after the statute of limitations expired.[7] *Id.*, 224 W. Va. at 353, 686 S.E.2d at 4. The sole issue on appeal in that case was whether the complaint properly related back pursuant to Rule 15. *Id.*, 224 W. Va. at 354, 686 S.E.2d at 5. In its discussion, this Court recognized that dilatory conduct is inexcusable even when an amendment is requested prior to trial and prior to the applicable statute of limitations expiring. *Id.*, 224 W. Va. at 357, 686 S.E.2d at 8.[8] Thus, in this case, "John Doe(s)" were improperly presented to the jury, and even if the court had permitted Mr. Butcher to replace "John Doe(s)," such amendment would have been improper as a matter of law.

Similarly, the Southern District of West Virginia discussed a plaintiff's untimely amendment and various discovery delays in a § 1983 claim related to the replacement of unidentified parties. *Price v. Marsh*, No. 2:12-CV-05442, 2013 WL 5409811, *2 (S.D. W. Va. Sept. 25, 2013). There, the court reiterated that "a judgment may not be entered against a John Doe defendant." *Id.* at *5 (citing *Chidi Njoku v. Unknown Special Unit Staff*, No. 99-7644, 2000 WL 903896 (4th Cir., July 7, 2000) (unpublished table opinion)). Likewise, in this case, a specifically-named "John Doe" has never been served and has never been afforded an opportunity

[7] It is notable that, in *Muto*, the plaintiff properly served her named, replacement defendants within the 120-day service period for service of the original complaint pursuant to Rule 4(k) of the West Virginia Rules of Civil Procedure. *Id.*, 224 W. Va. at 356, 686 S.E.2d at 7.

[8] *See also Garvin v. City of Philadelphia*, 354 F.3d 215 (3d Cir. 2003) (holding that the district court properly refused to allow amendment of complaint to substitute four police officers for Doe defendants, where plaintiff did not diligently seek identity of officers and notice of filing of complaint could not be imputed to officers under either shared attorney or identity of interests methods under Rule 15(c)).

to defend his or her interests.

Throughout the discovery phase of this case, including pre-suit investigations, there were numerous incidents of Ms. Butcher identifying her alleged assailant with certainty. During the CPD's pre-suit investigation, Ms. Butcher identified Zachary Lantz or Christopher Harris as the individual officers she believed may have been responsible for using a taser on her. (App. 86.) Later, during her deposition, Ms. Butcher repeatedly identified Zachary Lantz as the individual she recalled "tasing" her. (App. 229, l. 20; 230, l. 7; 231, ll. 19-20; 233, ll. 11-16; 240, l. 17; 241, l. 24 – 242, l. 1; 243, l. 10.) Nevertheless, Ms. Butcher never requested the deposition of Zachary Lantz or Christopher Harris. At no time prior to trial did Ms. Butcher move to amend her complaint to include Zachary Lantz or Christopher Harris as a defendant.

As the case progressed to trial, Ms. Butcher changed her recount and argued that she was unclear as to who allegedly tased her. (App. 794-95.) However, once she learned of the identities of each officer working that night, Ms. Butcher still made no effort to amend her complaint prior to trial or to serve any one of them with notice of any claims against which a judgment could lie. On July 15, 2016, within the Petitioners' discovery responses, the Petitioners identified all officers on duty on the night of Ms. Butcher's September 29, 2013, arrest: Walter Scott Williams, Christopher Harris, Scott Vinson, Chris Willis, and Zachary Lantz. (App. 96.) Ms. Butcher never moved to amend her complaint prior to trial to include any of the five known individuals as defendants, and she made no effort to develop during discovery the knowledge or information each on-duty officer may have had.

Furthermore, the hundreds of pages of taser records for every individual officer in the entire department were provided to Ms. Butcher, as were their inclusion in the pre-suit investigation conducted by the CPD. (App. 86-89.) In short, Ms. Butcher knew the identity of every officer of

the CPD, knew the officers who were on duty on the night of her arrest, and purported to know the identity of the officer or officers allegedly responsible for the alleged tasing. Ms. Butcher's failure to amend her Complaint prior to trial reflected dilatory conduct on her part. While the Petitioners identified all of the CPD officers who were on duty on the night of her arrest, Ms. Butcher noticed the deposition of just one, Petitioner Scott Vinson. Ms. Butcher never explored – until testimony during the trial itself – what knowledge the other known individuals had as to whom "John Doe(s)" were, if they existed at all.

Subsequently, Ms. Butcher's own sworn testimony at trial claimed – for the first time – that she believed her "attacker" was possibly both Zachary Lantz and Christopher Harris. (App. 794-95). Soon thereafter, during the trial itself, and in response to the Petitioners' oral Motion for Judgment as a Matter of Law on the issue, Ms. Butcher moved to amend her Complaint, seeking to name three (3) individuals: Christopher Harris, Zachary Lantz, and a former CPD employee, Scott Williams. (App. 757-61). These tactics fully demonstrate the logistical and practical problems in allowing a plaintiff to keep pursuing claims against "John Doe(s)" long after the statute of limitations for bringing in additional parties and claims has run. It further demonstrates the prejudicial effects on defendants when a plaintiff's refusal to identify a putative defendant is allowed. Our jurisprudence does not allow for trial by ambush. Moreover, such dilatory conduct is inexcusable as a matter of law. *See Muto*, 224 W. Va. at 357, 686 S.E.2d at 8.

Despite Ms. Butcher's identification from an early date of who she believes "John Doe(s)" to be, she never moved to amend her pleadings prior to trial, never requested a change in the deadlines set forth in the Court's Scheduling Order, and, most importantly, never meaningfully followed up on any inquiries that would have permitted, through the most basic of discovery efforts, the proper naming of a real replacement for "John Doe(s)." By having no known individual

to rebut her claims, Ms. Butcher was permitted to present new theories of her alleged tasing to fit whatever holes she needed to fill in the moment. By doing so, the named Petitioners were forced to defend themselves, as well as some unknown parties, to avoid the wide net of suspicion Ms. Butcher was being permitted to throw to potentially include anyone related to the City or the CPD. These actions do not equate to a sense of justice. Nevertheless, the Circuit Court permitted the trial to continue with "John Doe(s)."

Based upon the evidence presented in this case and upon Ms. Butcher having adequate time and opportunity to properly name and notice all specific parties, Ms. Butcher's claims against "John Doe(s)" should have been dismissed as exceeding the applicable statute of limitations. Thus, this Court should reverse the Order of the Circuit Court denying the Petitioners' motions and renewed motions for judgment as a matter of law as to the "John Doe(s)" Defendants.

C. Because the City of Clarksburg was dismissed from the case prior to verdict and because the only party the jury found to be liable and against whom damages were awarded was against "John Doe(s)," no liability or damages award can be assessed against the named, known Petitioners.

Trial in this matter concluded on June 9, 2017. (App. 1023.) The only claim remaining upon the close of all of the evidence was a claim of excessive force (i.e., a violation of 42 U.S.C. § 1983) against Scott Vinson and "John Does." (App. 1049-50). The jury then returned its verdict, finding that "John Doe(s)" were the "name or names of the Clarksburg Police Officers who used excessive force on Ms. Butcher" and awarding a judgment of $5,000 in compensatory damages to Ms. Butcher. (*Id.*) The only finding of liability in this case by the jury was that against "John Doe(s)." (*Id.*) Nevertheless, and as discussed previously, the Circuit Court purported that the City or its insurer will be responsible for costs and the payment of the award of attorney fees assessed in this case although no findings of liability were made against any of the named Petitioners.

Neither courts nor juries have the ability to enter judgment and award damages against an

unidentified party such as "John Doe(s)." *See Myers v. DuBrueler*, No. 3:15-CV-56, 2016 WL 3162063, at *2 (N.D. W. Va., June 3, 2016) (citing *Chidi Njoku*, 2000 WL 903896, at *1) (finding that, "because the Plaintiff has been unable to identify Doe after full completion of discovery, the Plaintiff's claim against Doe must be dismissed"). Simply stated, "a judgment may not be entered against a John Doe defendant." *Price*, 2013 WL 5409811, at *5 (citing *Chidi Njoku*, 2000 WL 903896, at *2-3). Further, there is no authority to permit a court to assess damages against nonparties, specifically against parties who were otherwise dismissed from the relevant case.

Additionally, because only one party was found by the jury to be liable, joint and several liability and collectability apportionment do not apply here. As of the time of the relevant facts in this case, West Virginia followed a joint and several liability scheme within tort claims. W. Va. Code §§ 55-7-13 and 55-7-24 (repealed May 25, 2015). Such joint and several liability was based upon graduated levels of liability as found by a jury in any case involving the tortious conduct of more than one defendant. *Id.* Within the joint and several construct, a plaintiff had the ability to seek collection and move for reallocation of any uncollectable amount but only against the parties against whom a verdict had been rendered. *Id.* In the present case, the jury found only one defendant at fault – "John Doe(s)" – and awarded damages accordingly. Therefore, no other parties, either those previously dismissed or found to be not liable by the jury, can be assessed any part of the damages awarded against "John Doe(s)."

Similarly, although no *per se* ban on the "empty chair" argument existed at the times relevant to the facts of this case, no "empty chair" argument would apply here because the "empty chair" argument necessarily applies to a known, but absent, party. *See Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (W. Va. 2001); *see also Rowe v. Sisters of the Pallottine Missionary Soc'y*, 211 W. Va. 16, 560 S.E.2d 491 (2001) (clarifying the availability of the "empty

chair" argument in cases where issues of plaintiff's comparative negligence and joint tortfeasors converge). Additionally, an absent party's liability must be fully developed before being argued to the jury. *Groves v. Compton*, 167 W.Va. 873, 879, 280 S.E.2d 708, 712 (1981). There is no evidence, nor is it an issue in this appeal, that Ms. Butcher fully developed the liability of any of the known, identifiable officers who were on duty the night of September 29-30, 2013. There further is no indication or authority that "John Doe(s)" have the ability to attempt apportionment without the possibility of contributory negligence of Ms. Butcher. *See Rowe*, 211 W. Va. at 24, 560 S.E.2d at 499 ("without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor").

At issue here, the Court erred in its statements and implication that damages can be assessed against the City of Clarksburg. Although the City was dismissed from the case prior to submission of the case to the jury, the court took the position that it could be liable for the damages assessed against "John Doe(s)," as Ms. Butcher's original pleading identified, upon her belief, that "John Does" included "a member of the Clarksburg City Police Department. . . [,] acting under color of state law and within the scope of his employment." (App. 5, ¶ 6). However, as more fully discussed above, "local government entities are not subject to damages on vicarious or *respondeat superior* liability based solely on the existence of an employment relationship between the government and the individual wrongdoer." Wasserman, *supra*, at 823 (citing *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403-04 (1997); *Monell*, 436 U.S. at 691; Michael J. Gerhardt, *Institutional Analysis of Municipal Liability under Section 1983*, 48 DePaul L. Rev. 669, 674 (1999)). Without additional findings of policy or custom violation, the City of Clarksburg cannot be held accountable for an erroneous damages award against unidentified "John Does." *See Brown*,

520 U.S. at 403. Ms. Butcher presented no evidence at trial, nor did the jury make any such findings of violation or other fault against any party other than "John Doe(s)." Therefore, no damages can be assessed against the City of Clarksburg, or its insurer, in this case.

III. THE CIRCUIT COURT ERRED WHEN IT AWARDED ATTORNEY FEES TO THE RESPONDENT AFTER SHE WAS PERMITTED TO IMPROPERLY OBTAIN A VERDICT AND JUDGMENT PURSUANT TO HER 42 U.S.C. § 1983 CLAIM AGAINST UNIDENTIFIED, UNCOLLECTABLE "JOHN DOE(S)" AND WHEN THE CIRCUIT COURT IMPLIED THAT THE CITY OF CLARKSBURG OR ITS POTENTIAL INSURANCE CARRIER CAN BE RESPONSIBLE FOR SUCH FEES ASSESSED AGAINST "JOHN DOE(S)."

The Circuit Court erred in its "Order Granting Plaintiff's Submission for Award of Attorney Fees" (App. 1394-1405) to the extent that it attempts to award attorney fees and costs to Ms. Butcher and to the extent those fees are ordered to be payable by fictitious "Joh Doe(s)," the City of Clarksburg, or its insurance carrier. Such a ruling is in error for two reasons: (1) Ms. Butcher cannot be deemed to be a "prevailing party" when she failed to establish the necessary elements of her 42 U.S.C. § 1983 claim because "John Doe(s)" were an improper party and (2) The Circuit Court cannot instruct a dismissed party or its insurance carrier to pay such an award.

A. Ms. Butcher was not a prevailing party at trial because she failed to establish the necessary elements of her 42 U.S.C. § 1983 claim, as "John Doe(s)" were an improper party, and the Circuit Court therefore erred in awarding damages and attorney fees.

Attorney fees may be sought in a claim for 42 U.S.C. § 1983 pursuant to the provisions of 42 U.S.C. § 1988. In pertinent part, § 1988 provides, "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988 (2018) (emphasis added). A threshold question that must be addressed is whether or not the plaintiff in such a case is a "prevailing party."

The Supreme Court of the United States set forth the following test in making such a

determination: "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978)). The Supreme Court further emphasized that "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Farrar v. Hobby,* 506 U.S. 103, 111 (1992) (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792-93 (1989)). For matters involving civil rights claims, it has been established that "the plaintiff must obtain some relief on the merits of his or her claim through an enforceable judgment." *Id.* at 112.

A further underlying issue to consider is that the § 1988 "statute was never intended to produce windfalls for parties." *See Fox v. Vice*, 563 U.S. 826, 837 (2011) (quoting *Farrar,* 506 U.S. at 115 (internal quotation marks omitted)). In the matter at hand, upholding the Circuit Court's orders would create an unjust windfall for a non-prevailing party.

For many of the reasons articulated above, Ms. Butcher cannot be deemed to be a prevailing party. Ms. Butcher's 42 U.S.C. § 1983 claim fails as a matter of law because she failed to identify any individual official responsible for the alleged violation of her rights. Because of that underlying failure, her claim simply was not successful. Moreover, it has been held that more than the mere erroneous findings of the Circuit Court would be required in order for Ms. Butcher to be determined to be a "prevailing party." As held by the Supreme Court of the United States,

> [A] judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, the moral satisfaction [that] results from any favorable statement of law cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

Farrar, 506 U.S. at 112-13 (internal citations omitted).

Based upon all of the foregoing, Ms. Butcher is not entitled to enforce a judgment against an unidentified "John Doe" party in her 42 U.S.C. § 1983 claim. It must be concluded, therefore, that she has not prevailed to the degree necessary to warrant an award of fees. The jury in this matter ultimately affirmed Ms. Butcher's failure to meet her burden by finding against "John Doe(s)" and only "John Doe(s)." Because of this, this Court should find that Ms. Butcher has not prevailed as required by 42 U.S.C. § 1983 and should vacate the award of attorney fees erroneously granted by the Circuit Court.

B. The City of Clarksburg's insurance carrier is not responsible for any judgment or attorney fees, and the Circuit Court therefore erred in its attempts to assess damages or fees against the City ordered to be payable by "John Doe(s)."

The final point of error that must be addressed stems from the Circuit Court's error in finding that the City of Clarksburg's insurance provider would be responsible for paying attorney fees against the unidentified "John Doe(s)." Requiring a payment of any costs by the City's insurance carrier is akin to requiring the City to pay a judgment through *respondeat superior* theories of liability. In addition to those arguments presented above, the Circuit Court's apparent decision regarding insurance – or even the inquiry from which it stems – was inappropriate.

Within its "Order Granting Plaintiff's Submission for Award of Attorney Fees," the Circuit Court stated,

> Defendants have taken inconsistent positions as to whether the John Doe Defendants are covered by the City of Clarksburg's insurance policy. At the September 28, 2017 hearing, defense counsel argued that because the insurance company had not been named as a party in the suit, it has no obligation to pay; however, this is not a requirement for such a verdict.[9] Additionally, as the Court reminded Defendants at the September 28, 2017 hearing, defense counsel stated on the record that such a verdict would indeed be covered by

[9] The Circuit Court cites to *Krykalski v. Tindall*, 232 N.J. 525, 542 (2018), a New Jersey uninsured motorist matter, for this assertion.

the City's policy.

(App. 1405.) The Court's quoted language mirrors findings made within the first part of its final order when discussing the Petitioners' Renewed Motion for Judgment as a Matter of Law. (App. 1305, ¶ 35.)

The issue of insurance coverage was never put before the Circuit Court in this matter, and the availability of insurance coverage was never determined in this present matter. The Petitioners' counsel were defense counsel retained by the City's insurance carrier to represent and defend the City under the subject policy of liability insurance. In West Virginia, "[w]hen an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney's ethical obligations are owed to the insured and not to the insurance company that pays for the attorney's services." Syl. Pt. 7, *Barefield v. DPIC Companies, Inc.*, 215 W. Va. 544, 600 S.E.2d 256 (2004). In *Barefield*, this Court closely examined the West Virginia Rules of Professional Conduct and further explained "that there are at least three applicable provisions in the Rules which preclude an attorney paid by an insurance company from jointly representing both the insurance company and the insured in a liability matter: Rules 1.7, 1.8(f) and 5.4(c)." *Id.*, 215 W. Va. at 557, 600 S.E.2d at 268.

As such, insurance-retained defense counsel should not engage in any conduct that could jeopardize their client's (i.e., the insured's) defense and indemnity under the subject policy of liability insurance. In that vein, the Petitioners' counsel should not have been asked to comment on coverage issues or the status of defense and indemnity under the subject policy of insurance in the middle of a trial on liability and damages, and a dispositive ruling regarding coverage should not flow from any such comment. Put simply, the Circuit Court's question placed the Petitioners' counsel in an untenable position. The rights and obligations of the City's insurance carrier, Ms.

Butcher, and any "John Doe" putative insureds is the proper subject, and may only be determined within the context, of a declaratory judgment action, which has heretofore not been brought.

CONCLUSION

The Respondent, Rosa Lee Butcher, was afforded all of the tools of the discovery process but never attempted to amend her pleadings in a timely way in order to identify properly "John Doe(s)." Because of this, Ms. Butcher pursued a 42 U.S.C. § 1983 claim of excessive force against unknown, unnamed, and unserved individuals who were never afforded an opportunity to defend their interests at trial. Permitting a complaining party to proceed with a claim against an unidentified individual official in a 42 U.S.C § 1983 case dishonors the clear purpose and intent of § 1983, legal precedent, the statute of limitations, and public policy. Therefore, this Court should reverse (1) the Circuit Court's "Order Denying Defendants' Renewed Motion for Judgment as a Matter of Law Regarding Claims Against 'John Doe(s)'" and (2) to the extent it attempts to allocate liability or damages against any one or more of the Petitioners, the Circuit Court's "Order Granting Plaintiff's Submission for Award of Attorney Fees."

Respectfully submitted,

Matthew D. Elshiaty, Esq. (WV Bar #12535)
Counsel of Record for Petitioners
Shannon P. Smith, Esq. (WV Bar #10300)
Luci Wellborn, Esq. (WV Bar #5531)