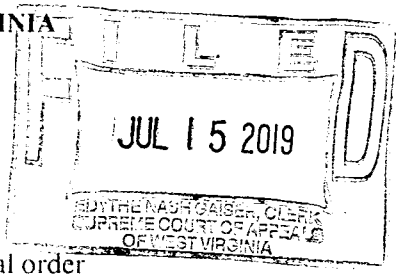
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

STATEMENT OF THE CASE

The Petitioners note that the majority of Ms. Butcher's Statement of the Case seems to directly mirror that of the Petitioners, with the limited inclusion of some additional statements. Clarification is warranted in response to some initial inaccurate statements:

Ms. Butcher repeatedly references and grossly mischaracterizes videotape evidence taken during the night of Ms. Butcher's arrest that she claims the Petitioners failed to preserve. (*See* Resp. Br. 4.) These assertions only act as a red herring. Following Ms. Butcher's September 29, 2013, arrest, she was ultimately charged with several criminal charges. Almost thirteen months later, after Ms. Butcher's criminal charges were plead and resolved, she filed a complaint with the City of Clarksburg alleging that she was the victim of excessive force while in police custody on the night of her arrest. (App. 83-90.)

As was thoroughly discussed prior to and during trial, video recorded at the City of Clarksburg Police Department was maintained for ninety days before automatically being overwritten on the Department's electronic storage system. (*See, e.g.*, App. 331, at ll. 5-14; App. 599, at ll. 1-11.) Importantly, the Circuit Court never found that the failure to preserve video (of an incident from which the Petitioners had no knowledge for over a year) constituted spoliation of evidence. (App. 599, at ll. 6-7.) However, Ms. Butcher asserts that "[t]he Circuit Court correctly held that Petitioners[']] failure to preserve the videotape of Respondent's alleged criminal behavior (refusing to provide fingerprints) in the booking room where the alleged taser attack took place prejudiced Respondent's ability to identify her attacker." (Resp. Br. 6.) This statement contains no citation to the record and is simply false.

In addition to the specific erroneous statements made within Ms. Butcher's factual summary, inaccurate and mischaracterized facts presented elsewhere within her response brief

are addressed within the Petitioners' arguments below.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE PETITIONERS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW BECAUSE CLAIMS MADE PURSUANT TO 42 U.S.C. § 1983 CANNOT ATTRIBUTE LIABILITY TO A MUNICIPALITY UNDER *RESPONDEAT SUPERIOR* LIABILITY, NEITHER A VERDICT NOR JUDGMENT PURSUANT TO A § 1983 EXCESSIVE FORCE CLAIM CAN BE HAD AGAINST UNIDENTIFIED "JOHN DOE(S)," AND MS. BUTCHER EXCEEDED THE APPLICABLE STATUTE OF LIMITATIONS PREVENTING ANY AMENDMENT OF HER § 1983 CLAIM AGAINST UNIDENTIFIED "JOHN DOE(S)."

Ms. Butcher repeatedly asserts that her failure to properly plead a 42 U.S.C. § 1983 claim against a named and identifiable government official was a conscious choice. Ms. Butcher attempts to excuse these shortcomings through contradictory arguments that misconstrue longstanding principles and legal authority. Further, her Response lacks adequate legal support and fails to address several of the Petitioners' arguments presented within its assignments of error and Petitioners' Brief.

A. Ms. Butcher cannot attribute liability to a municipality for a 42 U.S.C. § 1983 claim against "John Doe(s)" under *respondeat superior* theories of liability.

While not demonstrably clear, it appears that Ms. Butcher has offered no rebuttal or counterargument opposing the principle that there can be no liability for a municipality pursuant to 42 U.S.C. § 1983 on a *respondeat superior* theory. As previously articulated by the Petitioners, 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). Notwithstanding this narrowly defined liability, Ms. Butcher repeatedly attempts to inappropriately assert liability against the City of Clarksburg and circumvent the bar against *respondeat superior* liability. Ms. Butcher made her intent within her response:

> The honorable thing for a municipality like the City of Clarksburg to do would be take responsibility that one of their officers used excessive force on a 47 year old woman in handcuffs and pay the judgment in this matter, but nothing the Petitioners' have done so far has even been close to honorable.

(Resp. Br. 17-18.)

Despite Ms. Butcher failing to identify an alleged tortfeasor in support of her § 1983 claim, despite the City of Clarksburg being dismissed from the civil action due to a lack of evidence demonstrating wrongdoing on its part, and despite the fact that a municipality cannot be held liable solely because it employs an alleged tortfeasor, Ms. Butcher persists in seeking that the City of Clarksburg be held liable under a theory of *respondeat superior*. The Circuit Court erred by ruling in a manner consistent with Ms. Butcher's flawed and unsupported arguments.

In support of her position, Ms. Butcher appears to make two generalized arguments. First, she repeatedly argues that the Petitioners made "no effort to find her attacker." (*See, e.g.*, Resp. Br. 18.) At other times, she argues that "Petitioners have never displayed any motivation to help Respondent identify her attacker." (Resp. Br. 15.) This rationale is both confusing and reflective of her lack of understanding of the Petitioners' position. The Petitioners were not responsible for making Ms. Butcher's case for her. The Petitioners provided Ms. Butcher with all available information in discovery, made witnesses available for deposition (despite Ms. Butcher never taking the initiative to depose any individuals aside from the arresting officer),

and further made all known witnesses available at trial. It is not contested that the Petitioners denied liability in this matter. Ms. Butcher had full knowledge of the Petitioners' position related to liability, and she was fully aware of the findings of the City of Clarksburg's own investigation. (App. 83-90.) If a defendant denies liability, a plaintiff must still properly plead and present its case in accordance with the laws governing her claims. Here, Ms. Butcher wants to use denial of liability as an excuse for the shortcomings in her case. It is an error to allow that legal fallacy to persist.

The second overarching argument articulated by Ms. Butcher reflects her conflation of properly pleading a claim against an individual responsible for the alleged § 1983 violation and, as she states, avoiding the "shotgun approach" of naming multiple individuals with limited support for doing so. (*See, e.g.*, Resp. Br. 14.) Ms. Butcher's arguments regarding her reluctance to name all suspected tortfeasors fail to recognize that utilizing fictitious "John Doe(s)" is not a cure for a lack of evidence to support a claim. (*See* Resp. Br. 13-14.) Ms. Butcher admits that she lacked sufficient evidence to support a claim against any of the individuals who she believed may have committed a tort against her yet argues that she should not be held accountable for these pleading requirements. (Resp. Br. 7, 9, 13-14.) This argument only serves to highlight the Circuit Court's errors in this matter. Further, Ms. Butcher's position, like many of her arguments, fails to cite to any legal authority.

In essence, Ms. Butcher's position requests that new law be established whereby a "John Doe" can meet the requirements of a § 1983 claim because it avoids "ethical issues" associated with her self-described "shotgun approach." Her only support of this contention is her reference to a vague citation from the Circuit Court's discussions. (Resp. Br. 13-14.) In those discussions at trial, the Circuit Court attempted to reference authority that was later rebutted by

the Petitioners:

> And actually, there is a case that says that John Does can continue in the case as named John Does. I don't know what I did with it, but with respect to the legal ethics issue that we had here this morning and was dealing with that. I happened to come across that in a case.

(App. 347 at ¶¶ 4–8.) This appears to be the case to which Ms. Butcher now attempts to cite in support of her own positions. However, Ms. Butcher has never used such law in support of her position in any written submissions.[1] Moreover, Ms. Butcher does not articulate any analysis in support of her position and does not offer any authority to rebut that of the Petitioners.

As an additional point of clarification, any discussion of sanctions pursuant to W. Va. R. Civ. P. 11 or other ethical obligations was wholly the product of Ms. Butcher's counsel's own arguments and unfounded conjecture. The Petitioners argued that amending the Complaint to name individuals would have been improper pursuant to the statute of limitations; however, no Rule 11 arguments were made or threatened by the Petitioners, nor did the Circuit Court raise that issue.

In short, Ms. Butcher seeks for this Court, as she did at the Circuit Court level, to establish new law absolving her of any responsibility in properly setting forth her claims. If Ms. Butcher so readily admits that she lacked a good-faith basis for naming individual officers responsible for the alleged attack, then it is an error to allow her to circumvent the bar against *respondeat superior* liability by pursuing a § 1983 claim against "John Doe(s)" and seeking a

[1] At trial, the Circuit Court identified a matter in which it believed demonstrated that John Does would be permitted, but only initially identified the case as *State v. Keenan*. Through later discussions and research, it is believed that the Court was referencing *State ex rel. Clifford v. W. Virginia Office of Disciplinary Counsel*, 231 W. Va. 334, 745 S.E.2d 225 (2013). In response, the Petitioners further researched the underlying suit and submitted the pertinent filings of that case for the Circuit Court's consideration. (App. 1108-1193.) The matters were distinguishable because the plaintiff in the referenced case had not exceeded the statute of limitation, which would have allowed the substitution of "John Does" for real parties. (App. 1101.)

recoverable judgment against the City of Clarksburg.

B. Ms. Butcher admits that she had no evidence to name an individual official with "personal involvement" in the alleged § 1983 violation.

Ms. Butcher states that the principle that establishes that "'personal involvement' is a key criteria in naming an individual as a defendant in § 1983 cases is not in dispute." (Resp. Br. 6.) However, she fails to address the full rationale behind this criteria. 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 response, Ms. Butcher attempts to distinguish the circumstances in the present matter from those presented in *Ashcroft v. Iqbal*. (*See* Resp. Br. 9.) While it is true that Ms. Butcher did not name the "agency heads" in this matter, she also failed to name the individuals responsible for the alleged § 1983 violation. Ms. Butcher appears to argue that her lack of adequate evidence in support of her claims excuses her from meeting her pleading requirements. She goes as far as to state that "Petitioners have attacked Respondent's credibility throughout due to her admitted level of intoxication and any amendment to name her attacker would have been met with fierce opposition from Petitioners since Respondent lacked sufficient evidence under the circumstances to name John Doe." (Resp. Br. 7.) Ms. Butcher further admits that "there was no evidence adduced either pre-trial or at trial that would enable Respondent to amend her pleadings to

provide the true identity of John Doe." (Resp. Br. 9.)

These admissions demonstrate the fallacy in much of Ms. Butcher's arguments and further reflect the Circuit Court's own errors. The Petitioners are within their rights to deny liability for the alleged torts in this matter, and it is Ms. Butcher's burden to make a proper claim and support that claim with evidence. As Ms. Butcher's admissions demonstrate, she lacked the evidence to establish any 42 U.S.C. § 1983 claim against an individual government official for the alleged excessive force. Through the Circuit Court's errors, however, Ms. Butcher's burden was all but eliminated and then shifted to the Petitioners to disprove that someone performed the alleged violation.

The fallacy in Ms. Butcher's position further is demonstrated in her erroneous analysis of the holdings in *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280 (3d Cir. 2018). Ms. Butcher attempts to distinguish *Jutrowski*, and presumably the remainder of the authority cited by the Petitioners, on two grounds: (1) the Petitioners herein denied liability for the alleged tort and (2) the plaintiff in *Jutrowski* was permitted to proceed on one of its remaining claims despite the dismissal of his § 1983 claim against those he could not identify as having personal involvement.

The Petitioners' denial of liability does not alter the requirements and burdens that Ms. Butcher must still meet in order to bring her § 1983 claim for excessive force. As was unsuccessfully attempted by the plaintiff in *Jutrowski*, Ms. Butcher is attempting to require that the fact-finder of a § 1983 excessive force claim determine the individual personally responsible for the tort without adequate evidence of any personal involvement by any particular government official. As explained by the Third Circuit in *Jutrowski*, direct and personal involvement must exist:

> As Jutrowski would have it, so long as a plaintiff can show that some officer used excessive force, he may haul before a jury all

> officers who were 'in the immediate vicinity of where excessive force occurred' without any proof of their personal involvement. That is simply not the law. Instead, the tenet that a defendant's § 1983 liability must be predicated on his direct and personal involvement in the alleged violation has deep historical roots in tort law principles, is manifest in our excessive force jurisprudence, and is reinforced by persuasive authority from our Sister Circuits.

Jutrowski v. Twp. of Riverdale, 904 F.3d at 289 (internal citations omitted).

Whether or not the Petitioners deny that the alleged attack occurred is irrelevant. Ms. Butcher still "must plead that each Government-official defendant, through his own individual actions, has violated the Constitution." *Ashcroft*, 556 U.S. at 676. Merely identifying "John Doe(s)" is not enough to satisfy the basic tenets of a § 1983 claim. Ms. Butcher's misguided application of the law is best summarized by one of her own concluding remarks: "[t]he use of John Doe in this matter was essential to hold the John Doe actors accountable." (Resp. Br. 19.) "John Doe" is not held accountable when "John Doe" is unknown, unidentified, and only acts as a fictitious placeholder. The need to identify the government official who was personally involved in the § 1983 deprivation was at the heart of the *Jutrowski* decision, and it is now at the heart of the Circuit Court's errors in this present matter.

Ms. Butcher also attempts to distinguish *Jutrowski* by relying on the fact that the case in *Jutrowski* was remanded to proceed on one of the remaining charges (conspiracy in violation of § 1983). *See Jutrowski*, 904 F.3d at 297-98. However, Ms. Butcher never brought a conspiracy claim, and she voluntarily withdrew all of her claims except the § 1983 claim for excessive force in this matter. (App. 297.) Now, she argues that "[m]uch like the cause of action cited in Jutrowski, Respondent believes she has the option to file another case against the City of Clarksburg for violating her right to due process." (Resp. Br. 18.) First, the plaintiff in *Jutrowski* had made his conspiracy claim from the onset, not post-trial and post-appeal. *Jutrowski*, 904 F.3d

280 at fn. 8. Second, the plaintiff's conspiracy claim in *Jutrowski* was permitted to proceed because he put forth evidence in support of his conspiracy claim against the individual defendants. *Id.* at 298.

Ms. Butcher has not made a conspiracy claim, and she has not named any individual defendants responsible for the alleged § 1983 violation. Her attempts to distinguish the present matter from those cited by the Petitioners is misguided. The Circuit Court's error(s) in its repeated denial of the Petitioners' motions regarding John Doe are only highlighted by the arguments now made by Ms. Butcher, whereby it is apparent that she failed to adequately name individual officials responsible for the alleged tort.

C. Ms. Butcher lacked support to identify individual officials responsible for the alleged tort within the statute of limitations.

Ms. Butcher inaccurately states that, "at the close of evidence and prior to the case being sent to the jury, counsel for Respondent offered by oral motion to include all three potential defendants (Vinson, Lantz, Harris) on the verdict form for the jury to consider in place of John Doe." (Resp. Br. 14.) It appears that Ms. Butcher is referencing her oral motion to amend the complaint, wherein her counsel moved to amend the complaint after resting Ms. Butcher's case in chief on the third day of trial. (App. 757-61.) At that time, Ms. Butcher attempted to argue that that all four officers identified from the very onset of the internal investigation in the matter should be named, despite having not been served, permitted to obtain counsel, or permitted to participate in trial. (*Id.*)

Ms. Butcher now argues that, "[o]nce counsel for Respondent moved to name officers Lantz and Harris [and Williams], counsel for Petitioner would have objected and sought sanctions including attorney fees." (Resp. Br. 14.) The Petitioners reiterate that sanctions were never sought, discussed, or threatened in this matter, and the record reflects the same. The

Petitioners agree, however, that, based on Ms. Butcher's own rationale, they would have moved for dismissal of any late amendment to name any individual officers so far past the statute of limitations, as they did at trial. (App. 757-61.) "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. *See Sweat v. W. Virginia*, No. CV 3:16-5252, 2016 WL 7422678, at *4 (S.D. W. Va. Dec. 22, 2016) (memorandum decision) ("allowing 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.'") (quoting *Locklear v. Bergman & Beving AB*, 457 F.3d 363, 367 (4th Cir. 2006)). One of the key elements to making such an amendments, is a showing of "mistake" by the plaintiff in failing to initially name the proper parties. *See* W. Va. R. Civ. P. 15 (a plaintiff's amendment of a pleading "relates back to the date of the original pleading when . . . the party to be brought in . . . (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") (emphasis added). In this case, Ms. Butcher failed to meet the requirements and/or exceptions found within Rule 15.

This Court has previously found that, in order to have a proper relation back of an amended pleading, 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). Thus, in this case, "John Doe(s)" were improperly presented to the jury, and even if the court had permitted Ms. Butcher to replace "John Doe(s)," such

amendment would have been improper as a matter of law. *See also Price v. Marsh*, No. 2:12-CV-05442, 2013 WL 5409811, *2, 5 (S.D. W. Va. Sept. 25, 2013) (stating that "a judgment may not be entered against a John Doe defendant," specifically when a plaintiff's untimely amendment and various discovery delays in a § 1983 claim related to the replacement of unidentified parties) (citing *Chidi Njoku v. Unknown Special Unit Staff*, No. 99-7644, 2000 WL 903896 (4th Cir., July 7, 2000) (unpublished table opinion)).

The "paradoxical result" hypothesized by the Fourth Circuit in *Sweat* is demonstrated within Ms. Butcher's misguided arguments now, as well as her actions at trial. *See Sweat v. W. Virginia*, No. CV 3:16-5252, 2016 WL 7422678, at *4. Absent any kind of limitation on a plaintiff's use, or misuse, of "John Doe(s)" in his or her civil complaints, a plaintiff is given the opportunity to ignore statutes of limitations and due process requirements.

In her response, Ms. Butcher offers no rebuttal to the authority relied upon by the Petitioners that provides that her naming of "John Doe(s)" did not toll any statute of limitations and that utilizing "John Doe(s)" does not overcome her failure to properly bring a claim in the requisite time. Ms. Butcher had the 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.

Moreover, Ms. Butcher's use of *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295 (4th Cir. 2008), is not relevant to the issues presented within the present appeal. In *Nourison*, the issue before the Court centered on the defendant's motion to amend its answer to include a new defense that the defendant failed to raise during initial pleading periods. *Id.* at 297. The issue presented did not involve the naming of individual defendants at the close of evidence at trial in response to the Petitioners' Motion for Judgment as a Matter of Law as it does here.

In the matter at hand, Ms. Butcher was permitted to proceed through trial with a 42 U.S.C. § 1983 claim against "John Doe(s)" despite failing to establish any theory of liability against the City of Clarksburg, despite failing to establish personal involvement on the part of any individual, and despite failing to meet her burden in identifying the alleged tortfeasors within the applicable statute of limitations. The Circuit Court erred when it permitted these actions to continue. 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."

II. THE CIRCUIT COURT ERRED 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 "JOHN DOE(S)," THE CITY OF CLARKSBURG, OR ITS INSURANCE CARRIER, AS THE CITY OF CLARKSBURG'S INSURANCE CARRIER IS NOT RESPONSIBLE FOR ANY JUDGMENT OR ATTORNEY FEES.

Ms. Butcher, without citing to any legal principles or authority, has demonstrated a fundamental lack of understanding of the roles and relationships between and among insurers, insureds, and retained counsel. She has responded with confusing opinions and incorrect facts. This issue on appeal is simply that 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, and a dispositive ruling regarding coverage should not flow from any such comment. The rights and obligations of the City's insurance carrier, Ms. Butcher, and any "John Doe" putative insureds is the proper subject of, and may only be determined within the context of, a declaratory judgment action, which was never brought. Thus, the City's insurer cannot be responsible for payment of a judgment against "John Doe(s)." Similarly, an award of attorney

fees against the City, as a dismissed party, or its insurer is error.

A. 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 without being a "prevailing party," Ms. Butcher should not have been awarded attorney fees and costs.

Although it is not patently clear, it appears that Ms. Butcher failed to respond to the Petitioners' arguments that Ms. Butcher was not a "prevailing party" and thus could not be awarded attorney fees and costs. As a result, pursuant to W. Va. R. App. P. 10(d), this Court should assume that Ms. Butcher agrees with the Petitioners' view that the Circuit Court erred when it awarded attorney fees to Ms. Butcher 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)." *See* W. Va. R. App. P. 10(d) ("If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.).

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. Ms. Butcher was not a prevailing party at trial because she failed to establish the necessary elements of her § 1983 claim, as "John Doe(s)" were an improper party. *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("the plaintiff must obtain some relief on the merits of his or her claim through an enforceable judgment"). To the extent Ms. Butcher addressed this issue in her Response, she failed to provide support for her claim as a prevailing party. As previously discussed, her § 1983 claim fails as a matter of law because she failed to identify any individual official responsible for the alleged violation of her rights. Without an identified individual, Ms. Butcher is not entitled to enforce a judgment. *See id.* at 112-13 (internal citations omitted) ("[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. . . . No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment . . . against the defendant.").

Additionally, the only response Ms. Butcher filed as it related to attorney fees was an improper disclosure of prior settlement communications. (*See* Resp. Br. 22-23.) The Petitioners are unsure of the purpose of this disclosure, as it is well-settled law that settlement discussions are not admissible to prove liability. *See* W. Va. R. Evid. 408(a) (offering "valuable consideration in compromising or attempting to compromise the claim" is "not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim); *see also* Syl. Pts. 3-5, *State ex rel. Franklin v. Tatterson*, 241 W. Va. 241, 821 S.E.2d 330 (2018). Further, Ms. Butcher cites no authority or apparent intent to argue that the settlement communications presented or revealed some type of evidence that fall within Rule 408's exclusions. *See* W. Va. R. Evid. 408(b). Without such authority, Ms. Butcher has failed to rebut the Petitioners' argument that 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. Accordingly, Ms. Butcher is not entitled to enforce a judgment against an unidentified "John Doe" party in her 42 U.S.C. § 1983 claim, and she has not prevailed to the degree necessary to warrant an award of fees. Therefore, this Court should vacate the award of attorney fees erroneously granted by the Circuit Court.

B. The Circuit Court cannot instruct a dismissed party's insurance carrier to pay an award when the insurance carrier was not made a party to the case, it had not presented itself as having representation as to coverage, and its policy of coverage was never put before the Court.

Throughout her Response, Ms. Butcher misidentifies (1) the Petitioners' insurer as a

Petitioner and/or defendant below[2], and (2) the Petitioners' counsel as representing the Petitioners' insurer.[3] (*See generally* Resp. Br. 7, 19-22, 23.) At no time during the almost four-year pendency of this case, or during the nearly six years since the incident at issue, has any counsel for any insurance company made an appearance. Nor, during this time, has the Petitioners' counsel made any indication, implicitly or explicitly, that they represented anyone other than the specifically named Petitioners. 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). So although Ms. Butcher may not have understood fully that the Petitioners' counsel were acting solely in the City's best interests and not on behalf of the City's insurer, the Court should have.

Ms. Butcher further misstates how insurance coverage determinations are resolved, again without any authority, by stating that a Circuit Court can determine insurance coverage simply by discussing the issue on the record. (*See* Resp. Br. 20-21.) The issue of insurance coverage was never put before the Circuit Court in this matter, and the availability of insurance coverage was never determined. For a court to properly adjudicate insurance coverage, our legislature and this Court have provided guidance of the process:

> 2. The purpose of the Uniform Declaratory Judgments Act is set forth in W.Va.Code, 55-13-12: "This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other

[2] *See* Resp. Br. 20 (discussing the "Petitioners' argument . . . [and] . . . a continued pattern of not taking responsibility for the damages caused by their insured").

[3] *See* Resp. Br. 7 ("If counsel for Petitioners misrepresented to the Circuit Court that their client, the insurance company . . . .") and 21 ("counsel for the insurance company").

> legal relations: and is to be liberally construed and administered."
>
> 3. An injured plaintiff may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage.
>
> 4. A declaratory judgment claim with regard to the defendant's insurance coverage may be brought in the original personal injury suit rather than by way of a separate action.

Syl. Pts. 2-4. *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989). No such claims were plead or otherwise brought in this case.

Here, instead of offering an analysis of why an insurance policy, which the Circuit Court never received or read, should apply, the Circuit Court found that it "is not a requirement" for the insurance company to have been named as a party in order for it to have an obligation to pay. (App. 1045.) In making this conclusion, the Circuit Court relied upon the Supreme Court of New Jersey in a case involving the interplay between New Jersey's allocation of fault statute and John Doe parties as it related to an Uninsured Motorist claim. (*See* App. 1405, fn.8, citing *Krykalski v. Tindall*, 232 N.J. 525 (2018).) The New Jersey Court in *Krykalski* had to examine the potential conflict that arises with an unidentified third-party "John Doe" in an uninsured matter (as permitted by statute) and the allocation of fault statute. *Krykalski*, 232 N.J. at 541-44. In West Virginia, judgments against unidentified parties are statutory creations only within the state's uninsured and underinsured motorist statutes. *See* W. Va. Code § 33-6-31; *see also 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").[4] The Circuit Court here used the analogy to force coverage instead. What the Circuit Court failed to recognize, however, is that this case was a § 1983 claim of excessive fault against an unidentified official and that no similar statutory scheme exists for such claims.

Finally, Ms. Butcher misstates and misunderstands the issues in this case by arguing that the Circuit Court's dismissal of the City of Clarksburg was based upon the Petitioners' counsel's response to the Circuit Court from an inappropriate question (*see* Resp. Br. 20-23) and by subsequently making personal accusations to this Court that counsel for the Petitioners intentionally deceived the Circuit Court with such response (*see* Resp. Br. 21-23). The Circuit Court did not rely upon whether insurance coverage existed for "John Doe(s)" in its dismissal of the City of Clarksburg, and if it did, then it erred in doing so. Similarly, the Petitioners and their counsel did not make any such statement for the purpose of persuasion or inducement in getting the City's dismissal.

The Circuit Court's dismissal of the City of Clarksburg was based upon the law: there can be no *respondeat superior* liability against the City from a 42 U.S.C. § 1983 claim. *See Monell*, 436 U.S. at 690 (1978) ("a municipality cannot be held liable under § 1983 on a *respondeat superior* theory"); *see also* App. 985. To provide better context, the exchange between the Court and counsel should be more thoroughly reviewed. Prior to closing, the following exchange occurred:

> Counsel: Your Honor, we would like to renew our Motion for Judgement [sic] as a Matter of Law at this time. I don't think any information has come forward as far as a policy, trainings or anything that would show indifference on the part of the City in a policy or a municipal ordinance of any kind that directly caused or proximately caused Ms. Butcher's alleged constitutional violation. And I would, again, ask that John Does be dismissed, Your Honor. We have heard testimony about Chris Harris and Zack Lantz and,

[4] *See also* W. Va. Code § 55-7-13, which addresses West Virginia's allocation of fault statute.

pursuant to the rules, we think that they should've been named prior to this point.

The Court: Well, we also heard testimony that another shift was coming in. No one's given us any names as to who came in on that shift.

Counsel: No, Judge, and it -- to respond to that, I would say that that's the responsibility of the Plaintiff to put names to who's responsible for the injuries alleged. And –

The Court: They have. John Does.

Counsel: And we would say that if it is those individuals who are unnamed, they have not been given a fair opportunity to present their case in this. They have not been given an opportunity to consult legal counsel. They have not been given an opportunity to hear the allegations made against them during these three days of trial, and including –

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

Counsel: 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 –

Counsel: 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 of the scope of their employment. So, no, that's not an issue at all. And for those reasons, Judge, we would ask for dismissal.

(App. 984-85 (emphasis added).) It is clear from the Circuit Court's statements that the City was dismissed because it "has no *respondeat superior* liability in a 1983 case." (*Id.*) The Petitioners' renewed motion was based upon the law and facts as presented at trial, and as a result, the Circuit Court granted judgment as a matter of law in favor of the City. (App. 996.) There was no point in time when the Petitioners believed that the comment, "I think that they would still be

covered," established coverage or had any bearing on the legitimate factual and legal issues before the Circuit Court, nor should counsel had ever been asked such a question. Similarly, counsel's final statement and request for relief – "for those reasons, Judge, we would ask for dismissal" – refer to the legal arguments as presented in the Petitioners' prior motions and to counsel's initial arguments, none of which included a reliance of insurance applicability.

Not until the written Order was entered, more than six months after trial had concluded, did it appear that the Circuit Court was improperly considering the existence of insurance coverage as part of its rulings. (*See* App. 1299-1309.) In its Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law Regarding Claims Against "John Doe(s)," the Circuit Court indicated that the City's insurance policy would cover an award against "John Doe(s)" because the Petitioners' counsel "made a representation at trial." (App. 1305-06.) However, the Circuit Court's finding related to keeping "John Doe(s)" in the case and not to its prior dismissal of the City of Clarksburg. (*See* App. 1304-06.) In discussing its reasoning, the Circuit Court points to "policy" disallowing a plaintiff's deprivation of a remedy. (App. 1305.)

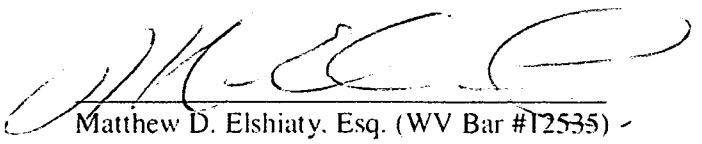
If, in fact, the Circuit Court relied upon counsel's statement in dismissing the City (rather than upon the law of *respondeat superior* as previously indicated), it erred in doing so. Additionally, the Petitioners never considered that collectability determined liability; whether any of the City or "John Doe(s)" had insurance coverage is completely irrelevant to the issues that were before the Circuit Court. Further, the Circuit Court had incomplete and insufficient information as to whether coverage could exist and erred making any conclusions or findings based upon the possible existence of Petitioners' insurance coverage. 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. Therefore, this Court should reverse the Circuit Court

and hold that the Circuit Court erred to the extent that it attempted to award attorney fees and costs to Ms. Butcher and to the extent those fees and any judgment awards are ordered to be payable by fictitious "Joh Doe(s)," the City of Clarksburg, or its insurance carrier.

CONCLUSION

As demonstrated within her brief, 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 "John Doe(s)." The Circuit Court permitted Ms. Butcher to pursue her sole remaining claim, 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 § 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,



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