IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 19-0132

Scott Vinson and the City of 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)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

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

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 10:45pm (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 and not return to her street (Id.) Subsequently, at or about 11:16pm, officers were called back to the same location, again in response to allegations of Ms. Butcher committing a disturbance with her neighbors. (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 after she allegedly refused to provide fingerprints at the station. (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 as they attempted to get her fingerprints. (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. A videotape of Ms. Butcher was provided by the Clarksburg Police Department

appearing to be in a zombie like state while being transported to jail after being booked. (App. 326-327.)

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, 112-114.)

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 in what appeared to be zombie like state. (App. 42, 315-316, 326-327.) Upon arrival at the jail, Ms. Butcher was unable to respond coherently to jail staff's questioning, and it "appeared 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 observed to have had a 0.349 blood alcohol content level. (App. 73-77.) 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.) A videotape of this transport was also provided by the Clarksburg Police. (App. 106.)

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 of Ms. Butcher alleged she was tased. (App. 86-89.) All videotapes of Ms. Butcher's alleged criminal behavior inside the police station namely her alleged refusal to provide fingerprints were never preserved. Only the videotapes of her transport were preserved and provided to Respondent. (App. 106, 323, 966.) Additionally, none of the officers on duty that evening claimed to have witnessed her refusing to provide fingerprints. (App. 315-320, 327-328, 966.) Officer Vinson testified at trial that he was told by Officer Harris that she refused to provide prints and that is why he included that in the criminal complaint. (App. 315, 327-328.)

Officer Harris' statement from the internal investigation is that he had no involvement in the arrest and processing which differs from Officer Vinson. (App. 315-316) At trial, Officer Harris testified that he doesn't know why Office Vinson would say that he told him to include it in the report. Additionally, Officer Harris' statement during the internal investigation was that Respondent was passed out chained to a bench and they charged her with refusing to provide prints because she was passed out and couldn't provide prints which is contrary to the sworn statements in the criminal complaint filed by Vinson. (App.315-316.) Officer Harris testified at trial consistent with his statement during the internal investigation. Chief Hilliard of the Clarksburg Police Department testified that in his entire 20 plus year police career he had never seen a case where they couldn't identify the officer that booked an arrestee until this one.

During the investigation, Ms. Butcher was interviewed and admitted that she didn't remember seeing a weapon and didn't know who attacked her, but did identify 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 and no further investigation neither external or internal was ordered. (App. 90.) The City of Clarksburg never retained an expert in this case to review the photographic evidence of the alleged taser burns to Respondent's torso to rebut the testimony from Respondent's expert, a retired Pennsylvania State Trooper, that the burns on Respondent's body could only come from a taser. (App. 313, 326.)

SUMMARY OF ARGUMENT

The Petitioners' assertion that the Circuit Court committed errors is without merit as Petitioners' failure take responsibility and culpability for the attack on Respondent, a 47 year old woman in handcuffs, is offensive. The Circuit Court weighed the evidence in the matter with regards to Respondent's attempts to identify John Doe and found Respondent's attempts to identify her attacker sufficient. The Circuit Court correctly held that the statute of limitations had been tolled by the filing of claims against John Doe as the inability to identify John Doe in the matter had more to do with the City of Clarksburg playing a shell game by first denying that the attack occurred, and then demanding that Respondent identify an attacker that Petitioner still wants to argue doesn't exist. Additionally, Petitioners failure to preserve videotape evidence of the alleged incident in the booking room where she was charged with a crime contributed to

the continued existence of John Doe throughout this entire litigation even up to the filing of this appeal.

The 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. The Circuit Court correctly ruled that Petitioner, City of Clarksburg, had a duty to preserve it as evidence in Respondent's underlying criminal case and that proceeding against John Doe was proper.

Contrary to Petitioners' argument that Respondent's failure to amend her pleadings to name John Doe is a fatal flaw that merits an award of summary judgment and dismissal, the Circuit Court held that the naming of John Doe was proper under the circumstances as counsel for Respondent is bound by Rule 11 and naming anyone other than the arresting officer and John Doe without evidence to prove the other potential officers involved had "personal involvement" would have been improper and subject Respondent's counsel to sanctions. Petitioners' continued argument that "personal involvement" is a key criteria in naming an individual as a defendant in §1983 cases is not in dispute as Respondent's pleadings were carefully constructed to not run afoul of this requirement. Furthermore, the requirement of "personal involvement" is not unique to §1983 cases but can be found in almost all areas of litigation as to sue someone who has no "personal involvement" or culpability is a clear violation of the rules.

Respondent's pleadings were found to be in conformity with the law by the Circuit Court as Respondent did not take the shotgun approach and sue everyone on shift that night as Respondent recognized the negative implications of naming persons who

could not be identified as her attacker and named John Doe, a Clarksburg Police Officer, instead. While it is true that Respondent remember the faces of some of the officers identified as being involved in her arrest, she also admits that she was heavily intoxicated with a BAC at .349 nearly 2 hours after the alleged attack. 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.

Petitioners' argument that the Circuit Court erred in finding insurance coverage for John Doe, a Clarksburg City Police Officer, is also without merit as Petitioner stated on the record that insurance coverage would exist when pleading with the Circuit Court to dismiss the City of Clarksburg as a defendant while the insurance adjuster was present in the courtroom. The Petitioners cannot assure the Circuit Court that insurance coverage exists for the remaining defendants in order to assist in procuring a dismissal from the Circuit Court for their client then later claim the Circuit Court committed an error holding them to their word.

Petitioners assurance to the Court that insurance coverage existed for the remaining defendants after the City of Clarksburg was dismissed constitutes a waiver as to this issue. If counsel for Petitioners misrepresented to the Circuit Court that their client, the insurance company, was providing coverage with the insurance adjuster present in the courtroom when in fact they weren't, they had a duty to correct that timely and on the record but failed to do so until after the verdict. It would be improper to allow counsel for Petitioners to renege on their assertion to the Circuit Court that insurance

coverage existed for the remaining defendants as that would be contrary to well established rules of law and ethics including raising timely objections and the subsequent waivers when you fail to do so.

The Court should deny Petitioners' appeal and uphold the Circuit Court's rulings in this matter as the Circuit Court was very thorough in their analysis of the facts and application of the law with regards to John Doe and the statute of limitations in this matter. Furthermore, Petitioners have failed to take any responsibility for being unable to identify the officer that perpetrated the attack on Respondent who was a 47 year old female in handcuffs, but instead use the existence of John Doe as a sword and shield in litigation even attempting to renege on their promise that insurance coverage would remain after the Court dismissed the City of Clarksburg as a named Defendant.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes the issues in this case can be ruled upon without need for an oral argument but would be pleased to appear before the Court for an oral argument should the Court need further clarification on the issues.

STANDARD OF REVIEW

Respondent agrees with Petitioners that the standard of review is de novo.

ARGUMENT

I. The Circuit Court was correct to permit judgment against John Doe, a City of Clarksburg Police Officer, as it is both supported by the facts of this case and the law, including important public policy meant to curtail excessive force as the statute of limitations had not expired.

The Circuit Court performed a thorough analysis of the issues surrounding John Doe in this matter and after analyzing the facts in this matter determined that John Doe was the proper defendant as 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. Petitioners' reliance on the argument that Respondent failed to plead each Governmental-official defendant, through the official's own individual actions, who violated the constitution thus meriting her case to be dismissed is not supported by the facts or the law in this case.

Respondent didn't name any individual by name other her arresting officer and John Doe, a Clarksburg Police Officer. Respondent plead that John Doe acted within his scope of employment as a Clarksburg Police Officer when he violated Respondent's constitutional rights by deploying a taser on her while in handcuffs. Consistent with the principles in Ashcroft v. Iqbal, Respondent did plead that only one governmental official deprived her of her rights by deploying the taser on her while in handcuffs for refusing to provide fingerprints. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

Contrary to this case, in Iqbal, the plaintiff sued everyone from John Ashcroft, acting Attorney General at the time, and Robert Mueller, Director of the FBI, to others within the government alleging they violated his individual constitutional rights without showing any of these parties individually deprived him of his constitutional rights. The Courts ruled that Plaintiff needed to make allegations against the individuals who did this to him not the agency heads who promulgated the rules to be followed which is what Respondent did by naming John Doe, a Clarksburg Police Officer, as the named defendant.

This principal was tested again in Jutrowski and Colbert where complaints were filed against two different groups of officers alleging violations of constitutional rights when the Plaintiff in both cases was unable to identify which named officers had "personal involvement" in the actions that led to the alleged violation but named them anyway. This is very much different that the case at hand as Respondent named John Doe as the person that deprived her of her constitutional rights and not all five officers who were on duty that night as Respondent would have been unable to meet the criteria to avoid having the named officers dismissed as occurred in Jutrowski and Colbert cited by Petitioners. 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)

The Circuit Court citing Cruz v. City of New York and Coward v. Town & Vill. of Harrison agreed with Respondent's argument that the inability to identify John Doe was at no fault of Respondent and that the statute was tolled so the case could proceed against John Doe since he was still a named defendant. Cruz v. City of New York, 232 F.Supp.3d 438 (S.D.N.Y. 2017) quoting Coward v. Town & Vill. of Harrison, 665 F.Supp.2d 281, 300 (S.D.N.Y. 2009)(internal quotation marks and citation omitted).

50. Nonetheless, "[w]here a plaintiff has had ample time to identify a John Doe Defendant but gives no indication that he has made any effort to discover the {defendant's} name, ...the plaintiff simply cannot continue to maintain a suit against the John Doe defendant."

51. In Cruz, the court found that there was no indication that the plaintiff made any effort to discover the Doe defendants' true names. Therefore, plaintiff could not continue to maintain a suit against the defendants.

52. In the case at issue, however, the Plaintiff made several efforts to discover the Doe Defendant(s)' true names(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

Hilliard, 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 Plaintiff during discovery, all testified at trial and none of them had any information as to who tased the Plaintiff or even who's custody Plaintiff was in when her injuries occurred.

54. Therefore, this Court finds that Defendants' argument that Plaintiff failed to make reasonable efforts to indentify the John Doe Defendant(s) is without merit because even the additional discovery efforts by the Plaintiff to discovery the identities of the unknown officers would have been futile. (App. 1308.)

Additionally, the Fourth Circuit in Nourison Rug Corp. v. Parvizian held that Federal Rules of Civil Procedure allow for amending of the pleadings past scheduled deadlines including amending to name unknown parties provided the petitioner can show good cause exists for failing to know the identity of the John Doe defendant. Nourison Rug Corp. v. Parvizian, 535 F.3d 295, 298 (4th Cir. 2008) Contrary to this case, the Court in Nourison held that Plaintiffs provided no good reason for their failure to ascertain the identity of the John Doe trooper earlier and dismissed the case, but acknowledged there are fact scenarios where amendment is proper. (id.)

In this case, it is clear that even the Petitioners' investigation into who attacked Respondent was futile as they claimed there was no evidence that an attack even occurred. When asked if the Petitioners had a duty to investigate who attacked Respondent, they answered in the affirmative but then stated the following in response:

> Ms. Scudiere: Right. At one point it was Lantz. So is that fair to Officer Lantz? I mean that certainly would not be appropriate for them to change that. And we've also had talks, Attorney Gentilozzi and I, in fact right before this hearing, and he shared with me that he didn't think, and I don't mean to talk for him, but he didn't think it would be fair to name them. I'll let him explain that to you in his own words, of course.
> The Court: Well, let me ask you, when the expert was deposed, because I think this was an issue at the last – when the expert was disclosed and you

deposed him, was there not something about him identifying the marks on Ms. Butcher's body as being made by a Taser?
Ms. Scudiere: He did say that.
The Court: Okay. And was there any wavering by him during the course of the deposition on that?
Ms. Scudiere: Well, I will hsare with the Court that to be very diplomatic, his testimony was puzzling to me, because I know that the Court has seen the photographs of the bruise where the plaintiff says she was tased, and he said it was a square.
The Court: He said it was?
Ms. Scudiere: A square.
The Court: What does that mean?
Ms. Scudiere: That it was in the shape of a Taser. I didn't see the shape of a square in that photograph.
The Court: But that, obviously, creates a question of fact?
Ms. Scudiere: But against whom? That's what I – there's nobody left. If Vinson did not tase her and we don't know who these John Does are and they can't defend themselves –
The Court: Well, but don't you have an obligation to try to investigate the case too, and find out who was on duty and, you know, who was --
Ms. Scudiere: We did.
The Court: -- was the one that was booking her.
Ms. Scudiere: But we don't have an obligation to prove his case for him.
(App. 312 ¶3 – 314 ¶12)

Petitioners failed to identify Respondent's attacker by conducting a shoddy investigation according to Respondent's expert testimony provided at trial. It can be argued that Petitioners never wanted to find Respondent's attacker which is further supported by this last statement from counsel for Petitioners regarding not having an obligation to prove Respondent's case for her.

Respondent's counsel detailed his concerns with moving to identify John Doe solely utilizing Respondent's memory that evening which created Rule 11 concerns for Counsel.

A. Respondent was bound by Rule 11 and faced potential sanctions including an attorney fee award for naming anyone other than John Doe as her attacker.

Rule 11 of the WV Rules of Civil Procedure mandates that any pleading, motion

or representation to the Court in this case must be presented for a proper purpose, be supported by existing law, contain allegations that have evidentiary support and contain denials that are warranted by the evidence. Rule 11 of W.Va Rules of Civil Procedure

Respondent admitted to being heavily intoxicated the night of the incident and did admittedly did not know the true identity of her attacker as she admitted both in her formal complaint to the police department that she did not remember seeing anyone with any weapons. Respondent claimed to have a recollection of Officer Lantz but could never put the weapon in his hand making an amendment to name him unethical. Counsel for Respondent had concerns with Respondent's level of intoxication and how that could cause confusion when identifying faces as both Lantz and Harris were very similar and the statement Lantz provided discovery appeared to plausible to Respondent's attorney which he conveyed to the Circuit Court when explaining why no amendment was made naming Lantz or Harris as Respondent's attacker. Additionally, Respondent's expert had concerns about the recollection of Respondent which was also disclosed to the Circuit Court supporting why Respondent did not move to identify John Doe as either Lantz or Harris. (App. 315 ¶5 – App. 329)

Additionally, Counsel for Respondent when faced with this fact pattern knew it would be improper to take a shotgun approach and name everyone involved that evening without being able to show "personal involvement" in deploying the taser by anyone one of them. All three officers who had the most contact with Respondent denied deploying a taser on Respondent in the pre-suit investigation and, according to the taser data provided in discovery, none of their tasers had been fired the night in question bolstering their argument that no one had tased Respondent. Filing suit against John Doe was proper

according to the Circuit Court as stated by the Court due to possible ethical issues with utilizing a shotgun approach. The Circuit Court cited a recent case in support of the Circuit Court's position that pleading John Doe in this case was proper. (App. 347.)

B. Respondent offered by oral motion to amend the verdict form to provide the additional names of officers Lantz and Harris in order to give jurors the ability to chose who they believed tased Respondent but Petitioner objected.

Petitioners claimed throughout the litigation that Respondent's belief that she was tased was either the result of her being extremely intoxicated or being malicious and wanting to get back at the police for being arrested, and that Respondent had no evidence that any of the officers involved deployed a taser on her that night. After 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. Counsel for Petitioners objected stating that it would be improper to name them arguing they weren't served properly even though they had been known potential targets since the inception of the litigation and arguing there wasn't enough evidence to name them as defendants.

This argument by Petitioners support Respondent's argument that the statute of limitations had not expired in this matter under Rule 15 because the identity of John Doe was not known with enough factual certainty to survive a motion to dismiss had Respondent amended her complaint to name all three them like in Jutrowski. Once counsel for Respondent moved to name officers Lantz and Harris, counsel for Petitioner would have objected and sought sanctions including attorney fees.

Respondent was left with no alternative but to proceed against John Doe and when Petitioners were offered the chance to substitute the additional officers name in

place of John Doe, they objected. This left us with a verdict form that contained the arresting officer Scott Vinson and John Doe, a Clarksburg City Police Officer which was never objected to by Petitioners. Petitioners wanted the verdict form to contain Scott Vinson and John Doe, but now complain that the verdict against John Doe is improper.

C. Petitioners had no incentive to identify John Doe throughout this five year process, both pre and post trial, as identifying John Doe would only subject Petitioners, including the City of Clarksburg and their insurer, to legal liability including paying monetary damages including statutory attorney fees to Respondent.

Petitioners have never displayed any motivation to help Respondent identify her attacker. The Circuit Court deemed the Petitioners to be playing a "shell game" throughout the litigation as they have continually denied the event ever occurred, which is contrary to many of the cited cases in their brief, but then argue that Respondent has missed the statute of limitations for failing to name John Doe.

Petitioners cited Respondent's inability to name her attacker during the trial was a direct result of her gross intoxication claiming the event never occurred as Respondent had claimed and that no officer tased her. Now post verdict, Petitioners are arguing that the identity of Respondent's attacker was discoverable and that she failed to conduct enough discovery to locate someone Petitioner contends doesn't exist.

Petitioners, namely the City of Clarksburg, failed to call in an outside agency namely the WV State Police as they had done in the recent past to investigate other officers on the force including Vinson[1], but instead kept the investigation internal when investigating Respondent's formal claim she made to the Clarksburg Police Department one year before her statute of limitations expired.

[1] The investigation into Officer Vinson on an unrelated matter lead to him being no longer employed by the Clarksburg Police Department by the time the case was tried but the jury was precluded from learning about it due to rulings from the Circuit Court prior to trial.

Petitioner, the City of Clarksburg, through its internal investigation team spent nearly 3 times interviewing Respondent than all four police officers on duty that night combined. It became apparent during the trial that not much effort went into investigating who may have been responsible for attacking Respondent as no experts were retained by Petitioners to examine the photographs of the taser injury sustained by Respondent.

Respondent's expert, a retired Pennsylvania State Seargent, testified by through deposition and at trial that he believed the injuries sustained by Respondent were caused by a taser which was never rebutted by Petitioners through any qualified expert testimony. (App. 326 ¶3-12, 329 ¶6-20.)

D. Respondent asserts the Circuit Court was correct that the failure of the City of Clarksburg to preserve key videotape evidence in this matter contributed to Respondent's inability to name her attacker thus prejudicing her in this matter.

Respondent asserts in her complaint that she was tased by an unidentified Clarksburg City Police Officer in the booking room when she refused to provide fingerprints. Respondent, due to being heavily intoxicated and being attacked with a taser, has vague recollections of the events that occurred in that room but remembers being threatened and then tased. Petitioners charged Respondent with crimes including refusing to provide prints as contained in the criminal complaint in this matter where they describe Respondent has highly combative and refusing to provide prints. Petitioners admit that videotape of the events that led to her being charged with obstruction and refusing to provide fingerprints existed as these areas in the station are under surveillance but instead only preserved the videotape of Respondent's transport to the North Central Regional Jail. (App. 106, 323) The Circuit Court and Respondent's expert asserted that

the videotapes of the Respondent's behavior at the station was the "best evidence" of her alleged criminal behavior and should have been preserved for use in her criminal trial. (App. 334). The Circuit Court noted that Petitioners' failure to preserve those videos have contributed to Respondent's inability to name her attacker, and the Circuit Court's ruling allowing the case to proceed against John Doe was proper under these circumstances.

E. Petitioners should not be rewarded for playing what the Circuit Court termed a "shell game" as Petitioners' argument that Respondent loses because of her inability to name her attacker is extremely self serving. Additionally, as in Jutrowski, Respondent may have an additional cause of action against the City of Clarksburg and unnamed John Does under 42 U.S.C. §1983 for violating her right to due process through what Respondent believes is an ongoing conspiracy to conceal the identity of John Doe post verdict in an attempt to prevent her from collecting on her judgment.

Respondent is asking the Court to deny Petitioners request to prevent her from collecting the judgment in this matter as Petitioners played a "shell game" throughout this litigation and should not be rewarded. Petitioners, including the City of Clarksburg and their insurer, have taken no responsibility after the verdict for the attack perpetrated on Respondent, but instead choose to use the existence of John Doe as a shield against paying the verdict and award of attorney fees in this matter. Instead of calling in the WV State Police to assist in finding the identity of John Doe in this matter, Petitioners have taken the extremely self serving position that Respondent's inability to name her attacker means she loses and will never collect on the judgment. 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. Respondent asserts that these self serving actions by Petitioners, including making no effort to find her attacker after the verdict was rendered, is further evidence of a conspiracy conceal the identity of John Doe for purposes of preventing Respondent from collecting on the judgment. Much 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.

Petitioners use of Jutrowski and other similar cases to show that John Doe defendants are never allowed as defendants in §1983 is misguided. There are serious factual differences that differentiate this case from Jutrowski and the lineage of cases cited by Petitioners. First, Petitioners denied that the event Respondent alleges ever occurred. In Jutrowski, the municipality acknowledged that the event did occur and admitted to excessive force, but denied knowing which of the four officers attacked the Plaintiff causing him to break his nose and fracture his eye socket. The court in that case in dismissing the claims against the four officers cited the "personal involvement" doctrine holding that if Plaintiff can't show "personal involvement" by detailing which officer committed excessive force then its improper to name all four of them individually in a shotgun approach as only one of them could be responsible for the injury to Mr. Jutrowski. The Court in Jutrowski dismissed the claims against the officers individually but remanded the case back to proceed on the conspiracy count under §1983 which still in effect kept the case alive. The ruling by the Court in Jutrowski did not affect the Plaintiff's ability to proceed other than not being able to name the four potential targets as defendants. Petitioners cite the case as if the ruling by the Court ended Jutrowski's case which is not accurate as counsel for Jutrowski was able to go back and prove there

was a conspiracy to conceal the identity of John Doe to deny Mr. Jutrowski access to the Courts.

In this case, Respondent made an informed choice not to utilize the shotgun approach utilized in Jutrowski but instead focus solely on a claim against the arresting officer and John Doe, a Clarksburg City Police Officer. Through discovery, the Circuit Court learned that a key video of the event was not preserved by the City of Clarksburg and failure to preserve the video resulted in Respondent being unable to identify her attacker. This fact scenario makes this case different from all the cases cited by Petitioners in their brief which renders their analysis to be irrelevant as the facts involved in this case make it unique. Additionally, the position taken by Petitioners that the event in question never occurred also make it unique from all the other cases cited in Petitioners' brief as none of those cases involve the defense that the Plaintiff made up her story due to extreme intoxication or malicious intent.

Finally, the Circuit Court detailed, in a court order denying Petitioners Motion for Summary Judgment, the criteria they used to find that John Doe was a proper party and that Respondent had provided enough evidence to the jury to prove John Doe was a Clarksburg City Police Officers acting in his official role when he deprived Respondent of her constitutional rights. The use of John Doe in this matter was essential to hold the John Doe actors accountable and to fulfill the purpose of §1983 litigation which is to deter state actors from using badges to deprive people like Respondent of her rights. Additionally, the Court found the testimony of the individual police officers at trial to be inconsistent further supporting the jury's verdict. (App. 1299-1305)

II. The Circuit Court did not err when it ruled that insurance coverage exists to pay the judgment including statutory

attorney fees

Petitioners' argument that the Circuit Court erred by ruling that insurance coverage exists to cover the verdict in this matter is part of a continued pattern of not taking responsibility for the damages caused by their insured, the City of Clarksburg, and one of their employees, John Doe. The continual refusal by Petitioner to take any accountability or responsibility for the attack that occurred on Respondent is mind boggling. The attack occurred in September 2013 nearly six years ago and the Petitioners, namely the City of Clarksburg and their insurance company, have failed to take any reasonable steps to resolve this case prior to trial and now are asking relief from the Court to prevent Respondent from collecting on her judgment. The Circuit Court properly balanced the interest of all involved within the bounds of the law.

A. Counsel for Petitioners assured the Circuit Court that insurance coverage would remain for the remaining defendants when counsel pleaded with the Circuit Court to dismiss the City of Clarksburg as a party.

The Circuit Court relied on the representations of counsel for Petitioners that insurance coverage would remain to cover any verdicts in the matter when the Circuit Court dismissed the City of Clarksburg as party prior to the conclusion of the trial. (App. 1305.) Respondent argues the Circuit Court acted reasonably and that Petitioners objection post verdict as to this issue of insurance coverage is without merit. The Circuit Court can weigh many factors when deciding to dismiss a party especially one that has been found to be playing a shell game and failing to preserve key videotape evidence in the matter. To ensure that the other defendants namely City of Clarksburg Police Officers have insurance coverage before dismissing the City of Clarksburg is not a shock to the conscious or an abuse of power by the Circuit Court. One would expect that

insurance would exist to cover any potential verdicts against a Clarksburg City Police Officer especially when counsel for the insurance company assures the Circuit Court they have coverage in response to concerns from the Circuit Court that defendant officers would be left "holding the bag" if no insurance existed after the City of Clarksburg was dismissed. (App. 1301-1305.)

B. Petitioners' repeated claim that the issue of insurance coverage was never before the Circuit Court is not correct as the Circuit Court relied on Counsel for Petitoners' affirmation that coverage would remain when dismissing the City of Clarksburg as a named defendant

In continuing with the theme of taking no responsibility, Petitioners are taking on responsibility for assuring the Circuit Court that insurance coverage would exist for the remaining defendants as if they didn't say it in the middle of a hearing on their motion to dismiss the City of Clarksburg as a named defendant. (App. 1301-1305.)

When the Circuit Court raised the issue of insurance coverage during Petitioners' motion to dismiss the City of Clarksburg, that issue is then before the Court especially one as important as insurance coverage for police officers accused of wrongdoing. Respondent argues that Petitioners lack credibility for perpetuating such a frivolous argument.

C. Petitioners' reversal on the issue of insurance coverage for the remaining defendants raises serious ethical issues involving dishonesty and candor with the tribunal

There is an old saying that your word should stand for something and Petitioners' word to the Circuit Court that insurance coverage would remain for the remaining defendants after the City of Clarksburg was dismissed should carry significant weight. Respondent argues that Petitioners' reversal on this most important issue after procuring

the dismissal for their client, the City of Clarksburg, creates serious ethical issues involving honesty and candor with the tribunal. Respondent asserts that Petitioners reversal on this key issue undermines the entire judicial process. It also calls into question their integrity and their motives in assuring the Circuit Court insurance would remain just to procure the dismissal of their client as a named defendant. Once they achieved their stated goal of having their client, the City of Clarksburg, dismissed, they want to renege on their promise that insurance coverage would remain. Again, Respondent argues that the Court should deny Petitioners attempts to deny Respondent the ability to collect on the judgment by finding that insurance coverage does exist to pay the verdict and corresponding attorney fees in this matter.

D. The Circuit Court warned Petitioners of the impending statutory attorney fee award associated with a possible verdict in this matter. Petitioners failed to mitigate their risk by only offering $2000 to resolve the matter at trial while the jury was deliberating when Respondent had incurred approximately $8000 in litigation costs bringing the case to trial

The costs being imposed upon Petitioners as part of jury's verdict should come as no surprise to them as the Circuit Court was clear in their warnings to Petitioners that any verdict against them would trigger statutory attorney fees, but they ignored all warnings and proceeded to trial. Petitioners were extremely willing to take these risks even after being warned by the Court on multiple occasions. Respondent engaged in multiple mediations in this matter in good faith attempt to resolve the issues prior to trial including proper compensation. After two mediations, the best offer Petitioners made to Respondent to resolve the case was $2000 and no money for her attorney fees. At trial,

Petitioners never increased their offer above $2000 knowing that Respondent had incurred significant expense including $4500 in expert witness fees. (App. 334-335.)

E. The insurance adjuster was present at key hearings in this matter including at trial where Counsel for Petitioners in the underlying case assured the Circuit Court that insurance coverage would exist for the remaining defendants. At no time did anyone associated with the Petitioners object or correct on the record that there would be no insurance coverage until after the verdict was rendered which Respondent argues is a waiver as to this issue

Respondent is asking the Court to find that Petitioners have waived any objection they may have to the Circuit Court holding them to their word that insurance coverage would be available for any defendants who may be found liable by the jury. Petitioners' argument that insurance coverage was never before the Circuit Court has been shown to be a gross distortion of the facts. Their nonsensical argument is that yes the Circuit Court inquired if there would be insurance and we answered in the affirmative, but "technically" the issue was not before the Circuit Court so you can't enforce it. The worst part of their argument is the insurance adjuster was present during the trial and is presumed to have heard counsel inform the Circuit Court that insurance coverage would remain after the City of Clarkburg was dismissed as the Court required the insurance adjuster to be there at all critical hearings in the matter. (App. 309.)

At no time did anyone associated with Petitioners correct the record or rescind that statement prior to the Circuit Court dismissing the City of Clarksburg and the jury verdict being rendered. Petitioners waited to late to raise the issue and Respondents assert that the delay in raising on objection or correcting the record constitutes a waiver for purposes of this appeal. The Court should find that Petitioners waived this issue and uphold the Circuit Court's ruling.

CONCLUSION

The Court should deny Petitioners' appeal and uphold the Circuit Court's rulings in this matter as the Circuit Court was very thorough in their analysis of the facts and application of the law with regards to John Doe and the statute of limitations in this matter. Furthermore, Petitioners have failed to take any responsibility for being unable to identify the officer that perpetrated the attack on Respondent who was a 47 year old female in handcuffs, but instead use the existence of John Doe as a sword and shield in litigation even attempting to renege on their promise that insurance coverage would remain after the Court dismissed the City of Clarksburg as a named Defendant. If anyone should be penalized for failing to identify John Doe, a City of Clarksburg Police Officer, it should be Petitioners as they had all the tools necessary to conduct a thorough investigation including utilizing the services of outside agencies such as the WV State Police, but chose not to seek any outside help either pre or post verdict. Instead, Petitioners have chose to hide behind the existence of John Doe in their attempt to prevent Respondent from collecting on her judgment. For these reasons alone, the Court should deny Petitioners appeal.

Respectfully Submitted,

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