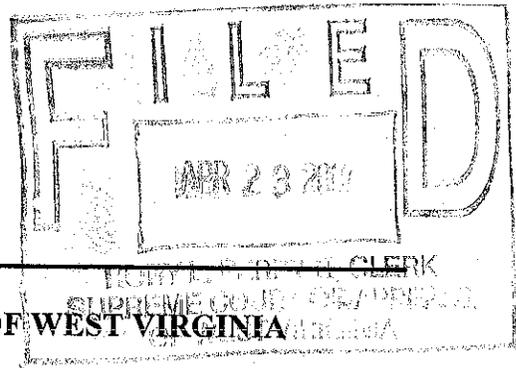


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S. Ct. No. ~~063006~~



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GRADY COLIN KELLEY II and FRIEDA CAROL KELLEY,
Appellants and Plaintiffs below,

v.

THE CITY OF WILLIAMSON, WEST VIRGINIA,
a municipal corporation, and
MICHAEL BARNES, individually and in his capacity
as a police officer employed by the City of Williamson
Appellees and Defendants below.

From the Circuit Court of Mingo County, West Virginia
Civil Action Nos. 02-C-226 and 02-C-227

Honorable Judge Roger L. Perry
Sitting after the voluntary recusal of the Honorable Judge Michael Thornsbury

BRIEF OF APPELLEE CITY OF WILLIAMSON

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S. Ct. No. 063006

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BRIEF OF APPELLEE CITY OF WILLIAMSON

TO: THE HONORABLE JUSTICES OF THE SUPREME
COURT OF APPEALS OF WEST VIRGINIA

The Appellee, City of Williamson, West Virginia [hereinafter referred to as "City of Williamson," "Williamson" and/or "City"], by and through counsel, Duane J. Ruggier II, Katherine MacCallum Nichols, C. Scott Applegate and the law firm of Pullin, Fowler & Flanagan, PLLC, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, hereby respectfully represent unto this Court that the Circuit Court of Mingo County, West Virginia, by and through the Honorable Judge Roger L. Perry sitting by

substitution, ruled appropriately and lawfully, and committed no reversible error in the granting of the City of Williamson's Motions for Summary Judgment. In support thereof, the Appellee City of Williamson states and avers as follows:

NATURE OF THE PROCEEDINGS

This appeal was filed by Plaintiffs Frieda Carol Kelley and Grady Colin Kelley II as a result of the Circuit Court of Mingo County's Orders granting the Motions for Summary Judgment filed by Appellees Michael Barnes and the City of Williamson to dismiss all causes of action alleged by the Appellants. The underlying civil actions were separately initiated by Appellant Frieda Kelley and Appellant Grady Kelley II mother and son, respectively, as a result of the issuance of a citation to Grady Kelley II and the arrest of Frieda Kelley in the early morning of July 23, 2000, in the City of Williamson.

The Appellants' Complaints alleged that the Defendants (1) acted with outrageous conduct, (2) acted in a manner that constitutes civil battery, (3) acted in a manner that constitutes false swearing, and (4) were negligent in regard to the Appellants' detention and/or issuance of a citation on July 23, 2000. Prior to the motions for summary judgment, the first three causes of action against the City of Williamson were dismissed. The Circuit Court of Mingo County granted Appellee Michael Barnes' Motion for Summary Judgment, as it relates to the Grady Kelley II matter, by Order dated January 10, 2006. Furthermore, the lower Court granted Appellee Michael Barnes' Motion for Summary Judgment, as it relates to Appellant Frieda Kelley, by Order dated March 20, 2006. Finally, the lower Court granted the City of Williamson's Motions for Summary Judgment, as they relate to Appellant Frieda Kelley and Appellant Grady Kelley II by Orders dated April 17, 2006 and April 21, 2006, respectively.

On August 10, 2006, Appellants Frieda Kelley and Grady Kelley II filed a Petition for Writ of Error with this Court. Subsequently, this Court granted the Petition for Appeal on February 14, 2007.

APPELLANT'S ASSIGNMENT OF ERROR

1. Whether the trial judge erred by filing to construe the evidence in the light most favorable to Plaintiff Grady Colin Kelley, II, the nonmoving party, in granting summary judgment to the Defendants; and whether the trial judge erred by failing to construe the evidence in the light most favorable to Plaintiff Frieda Carol Kelley, the nonmoving party, in granting summary judgment to the Defendants.
2. It is respectfully requested that the orders of the Circuit Court of Mingo County be reversed and that the Court hold, as a matter of law, that Plaintiffs-Appellants are entitled to a trial on all issues before a jury.

STATEMENT OF THE FACTS

In the early morning of July 23, 2000, Officer Michael Barnes and Officer John Hall of the Williamson Police Department responded to the scene of an automobile accident on Route 119, near Borderland, involving a Mingo County Sheriff's Deputy and a suspect who had attempted to flee. *See Deposition of Officer Michael Barnes, Exhibit 1, p. 5.* After providing assistance to the deputies, Officer Barnes informed Officer Hall that he was going to return to downtown Williamson to ensure that the town was in order. *See Deposition of Officer Michael Barnes, Exhibit 1, p. 6.* At that time, Williamson had a number of bars and nightclubs throughout the town. Around closing time for those establishments, it was necessary to patrol the town to clear the streets of any intoxicated

citizens or assist with any problems. *Id.* Usually, a number of the bar patrons would walk to King's Restaurant, which was adjacent to "Collie's Club," the bar owned and operated by Appellant Grady Kelley II, to order food.

As Officer Barnes approached downtown Williamson, he noticed an acquaintance of his outside King's Restaurant and stopped to talk to him. *Id.* Shortly thereafter, Officer Barnes noticed an individual exiting Collie's Club after the established closing time for private clubs. *Id.* He asked that person if Grady Kelley II was inside the bar. When he responded in the affirmative, Officer Barnes asked the bar patron to go back inside to ask Appellant Grady Kelley II to come outside to talk to him. *Id.* When the Appellant came outside, Officer Barnes informed Grady Kelley II that it was against the law for him to be within the bar premises more than thirty (30) minutes after the closing time prescribed by the Code of State Rules. *Id at p. 7.* Grady Kelley II responded that he was not open for business, to which Officer Barnes explained that the liquor control regulation provided that no one, including owners or employees, could be within the bar after permitted operating hours. *Id.* At that time, several intoxicated individuals exited the establishment. *Id at p. 8.* Officer Barnes and Officer Hall, who had then arrived at the scene, transported the Appellant and several underage intoxicated patrons to the Williamson Police Department, so that the appropriate citations could be issued and to determine if any of the men needed to be transported to a facility for detoxification. *Id at p. 10.*

While at the Williamson Police Station, Officer Barnes issued Plaintiff Grady Kelley II a citation for violating ABCC regulations CSR §175-2-4.7 and §175-2-4.8, which require private clubs to be vacated no later than 3:30 a.m. on Sunday mornings. In

addition to the issuance of the ABCC citation, Plaintiff Grady Kelley II was issued a citation pursuant to West Virginia Code §60-7-12(a)(11), which provides that it is illegal for a licensee of a private club to “violate any reasonable rule of the commissioner.” W. Va. Code §60-7-12(a)(11).

During this time, Appellant Frieda Kelley was informed that her son and nephew were being taken to the Williamson Police Station. Shortly thereafter, Frieda and Colin Kelley, Sr. arrived at the police station. After entering the police station, the Appellant Frieda Kelley was informed of the nature of Grady Kelley’s citation and asked to leave. *See Deposition of Frieda Kelley, hereto attached as Exhibit 2, p. 59.* After some discussion, she told Officer Barnes that she was not leaving without her son and nephew. *See Deposition of Frieda Kelley, Exhibit 2, at p. 63.* Officers Barnes and Hall testified that Appellant Frieda Kelley was acting in an unruly and inappropriate manner. She directed racial slurs and profanities at Officer Barnes. *See Deposition of Michael Barnes, Exhibit 1, at p. 21.* Both officers advised the Appellant multiple times that if she did not leave the premises or if she continued to use such inappropriate language and act in an unruly manner, she would be placed under arrest for disorderly conduct. *See Deposition of John Hall, attached hereto as Exhibit 3, at p. 19.* However, the Appellant continued to act in a disruptive manner and as such, was placed under arrest. *See Deposition of Michael Barnes, Exhibit 1, at p. 21.*

The incidents giving rise to the Appellants’ alleged causes of action stem from substantially the same factual matters and include largely the same witnesses. As such, the parties agreed to combine the two matters for discovery and procedural purposes at trial. By motion of the Appellees, the Court ordered that the claims of the Appellants

proceed at a consolidated trial; however, it further ordered that the claims against Appellee Michael Barnes and the City of Williamson proceed in a bifurcated manner.

STANDARD OF REVIEW

Rule 56(c) of the West Virginia Rules of Civil Procedure allows a motion for summary judgment to be granted to the defendant if the pleadings, depositions, answers to interrogatories, and any admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. See also Angelucci v. Fairmont General Hosp., Inc., 217 W. Va. 364, 618 S.E.2d 373 (2005). The essence of the court's inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Wilson v. Daily Gazette Co., 214 W. Va. 208, 588 S.E.2d 197 (2003). The dispute about a material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial was identical to the record compiled in the summary judgment proceedings. Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996).

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co., 206 W. Va. 458, 525 S.E.2d 649 (1999); Parkette, Inc. v. Micro Outdoors

Advertising, LLC, 217 W. Va. 151, 617 S.E. 2d 501 (2005). To meet its burden, the nonmoving party on a motion for summary judgment must offer **more than a mere scintilla of evidence** and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Chafin v. Gibson, 213 W. Va. 167, 578 S.E.2d 361 (2003).

On motion for summary judgment, the nonmoving party must present evidence which contradicts the showing of the moving party, by pointing to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact. Moreover, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial. Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996); Miller v. City Hosp., Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996).

LEGAL ANALYSIS AND DISCUSSION

SUMMARY OF THE ARGUMENT

The Circuit Court of Mingo County properly found that the arrest of Grady Kelley II was lawful. Therefore, it also held that there could be no negligent supervision by the

City of Williamson for this lawful arrest. The lower court correctly concluded that if the evidence was taken in the light most favorable to Appellant Grady Kelley II, there was insufficient evidence to dispute that Grady Kelley II and his bar employees and patrons were inside the private club after 3:30 a.m. At no time has Grady Kelley II provided testimony or evidence that he, or his patrons and employees, cleared the bar prior to 3:30 a.m. Grady Kelley II was aware that under the Code of State Rules, he was required to ensure that the premises were clear no later than 3:30 a.m. on Sunday, July 23, 2000. However, Officer Barnes observed one person leaving the bar at approximately 3:30 a.m. and subsequently discovered that Grady Kelley II and others were inside the facility. He properly investigated the matter and issued citations pursuant to CSR §175-2-4.7 and 4.8 and W.Va. Code § 60-7-12. Therefore, this Court should affirm the Circuit Court of Mingo County's finding that summary judgment is proper for Appellee City of Williamson in the suit filed by Appellant Grady Kelley II.

This Court should uphold the grant of summary judgment of the Circuit Court of Mingo County in regard to the arrest of Frieda Kelley. The Circuit Court of Mingo County correctly granted Appellee City of Williamson's motion for summary judgment after it determined that Appellant Frieda Kelley was properly arrested for disorderly conduct at the Williamson Police Department during the early morning of July 23, 2000.

In the case at bar, Appellant Frieda Kelley admitted that she was asked to leave the police station or she would be arrested. She repeatedly insisted that she would not leave without her son and nephew. Ultimately, the two police officers were confronted with controlling multiple offenders and completing citation paperwork and were then forced to cope with an unrelenting mother obstructing the performance of their duties.

When the evidence is construed in a light most favorable to the Appellant, the aforementioned facts do not change and summary judgment was appropriate.

ARGUMENT

I. This appeal should be dismissed because the Appellants failed to file their brief in accordance with Rule 10 of the of the West Virginia Rules of Appellate Procedure.

Rule 10(a) of the West Virginia Rules of Appellate Procedure states that “[w]ithin thirty days of the date of the notice of the filing of the appellate record, or within thirty days of the receipt of the granting order establishing a briefing schedule, the appellant shall file an original and nine copies of a brief with the Clerk of the Supreme Court.” Rule 10(e) goes on to state that “failure to file a brief in accordance with this rule may result in the Supreme Court imposing the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Supreme Court may deem appropriate.” *Id.* Rule 18 allows a party to move this Court “to dismiss the appeal on any of the following grounds: (1) failure to properly perfect the appeal; (2) failure to obey an order of the Court; (3) failure to comply with these rules; (4) lack of an appealable order, ruling, or judgment; or (5) lack of jurisdiction. Such motion shall be filed and served in accordance with Rule 17, together with a memorandum of authorities.”

In this case, pursuant to this Court’s February 14, 2007 order granting the petition for appeal, the Appellant had 30 days from the receipt of the order to file their brief. The Appellees have not been made aware of the time of receipt of the order by the Appellant, but it seems unlikely that the Appellants did not receive the order until six days after it was entered. Ultimately, the Appellants did not file their brief until March 22, 2007.

Appellants' failure to timely file their brief is a violation of Rule 10 and a failure to obey the order of this Court. Rule 10(e) provides this Court the ability to dismiss the appeal in such instances. *Id.* The Appellants were given adequate time to file their brief but failed to do so in accordance with this Court's order. In addition, the Appellants have not shown good cause that would permit or excuse their late filing. For those reasons, this Court should take notice of the Appellants' disregard for the Rules of Appellate Procedure and this Court's February 14, 2007 Order and dismiss their appeal.

However, this Court has previously ruled that a "[w]hen one party to an appeal files a brief and the other party does not, the party in compliance with Rule VI obtains control of the case under Section 6, Rule VI, and he may have the case submitted or continued at his option." Parkway Fuel Serv., Inc. v. Pauley, 159 W.Va. 216, 220 S.E.2d 439, 441 (W. Va. 1975). "A dismissal may be effected in these circumstances only when no briefs have been filed by either party and the case has been continued under Section 7 of Rule VI for four successive regular terms." *Id.* In the alternative, the City of Williamson would argue that it should be given control of this case and that this Court should deny oral argument to the Appellants pursuant to Rule 10(e). *Id.*

Wherefore, based upon the foregoing, the Appellee City of Williamson requests that this Honorable Court grant its Motion to Dismiss; award them the equivalent of all fees and costs expended by them in having this appeal dismissed; and grant the Appellee any other and further relief which the Court deems appropriate.

II. The Citation of Appellant Grady Colin Kelley II

Even when the facts are construed in a light most favorable to the Appellant, Grady Kelley II has failed to present evidence, which contradicts

the showing of the City of Williamson that his citation was proper; thus, summary judgment by the lower court was appropriate and should be upheld.

In his Complaint, Grady Kelley II states that he was arrested by Officer Barnes "for being in his tavern after 4:00 a.m." While he did not dispute in the Complaint that he was in his tavern after the 3:30 a.m. time prescribed by law, he erroneously claims he was arrested, as opposed to cited for violating W.Va. CSR §175-2-4.7 and 4.8. Grady Kelley II further alleged that the City of Williamson caused, contributed to and/or acquiesced in Officer Barnes' actions and conduct by sanctioning what he alleged to be his unlawful arrest and incarceration. However, it is unquestionable that without an arrest, there can be no unlawful arrest. In addition, he admits that he was never taken to jail and did not spend any time in jail for this offense. *See Deposition of Grady Kelley II, Exhibit 4, pp. 105-116.* Officer Barnes testified that he informed Frieda Kelley and her husband that their son was not being arrested and that he was simply cited for an ABCC violation. *Id. at 21.* Absent an unlawful arrest, the City of Williamson could not be found guilty of negligent supervision for such arrest.

Although the City bears the burden in a criminal proceeding, Grady Kelley II bears the burden in this case to prove by a preponderance of the evidence that he and his patrons were not inside his bar at or after 3:30 a.m. However, he has failed to present a scintilla of evidence that disputes his appearance with six (6) to seven (7) others inside his bar at or after 3:30 a.m. on the Sunday morning in question.

Pursuant to W.Va. CSR §175-2-4.7, Grady Kelley II was not permitted to sell alcohol, permit the consumption of alcoholic beverages or dispense alcoholic beverages at his private club between the hours of 3:00 a.m. and 1:00 p.m. on Sunday. In addition,

W.Va. CSR §175-2-4.8 requires that all private clubs be closed for operation and cleared of all persons, including employees, thirty (30) minutes after the hours of sale of alcoholic liquors and non-intoxicating beer have expired. Therefore, Grady Kelley II and all of the other individuals who exited Grady Kelley's bar in Officer Barnes' presence after 3:30 a.m. on Sunday morning were in violation of CSR § 175-2-4.7 and 4.8, regardless of their reason for being inside the main doors of the bar.

During his deposition testimony, Grady Kelley II could not dispute that he and six (6) to seven (7) others were inside the doors of his private club at or after 3:30 a.m. on the date in question. According to Grady Kelley's testimony, he was aware that the last time he could have customers in the bar on the morning in question was 3:30 a.m. *Id. at 19-20.* He also admits that he instructed his employees and bar patrons who were allegedly traveling with him to enter the bar he claims was closed sometime after 3:00 a.m. *Id. at 38-39.* When Officer Barnes confronted Grady Kelley II, he instructed Grady Kelley II to bring everyone out of the bar that was inside. *Id. at 50.* At that time, Grady Kelley II did not dispute that it was after hours but did dispute that he was open for business. *Id.* However, as discussed above, the Code of State Rules requires that all persons be cleared from the premises no later than 3:30 a.m. Grady Kelley II confirmed his understanding of this rule during his deposition testimony. *Id. at 78.* When questioned about the time as to when he returned to the bar, the following occurred:

Q: (David Mincer) Okay. Would that have been after 3:30?

A: (Grady Kelley) It was probably – yeah, it was close because I closed a few minutes early, I tried to close a few minutes early...

Id. at 81. Grady Kelley II admits that his return to the establishment was after 3:30 a.m., or at best, “was close”. In either regard, Grady Kelley II cannot affirmatively dispute that he, and several others, were in the establishment after the lawful hours. At best, he can offer only the speculative testimony that “it was close.”

Grady Kelley’s own testimony establishes a timeline that puts him in his bar, with at least six (6) others, at or after 3:30 a.m. on the Sunday morning in question. Grady Kelley’s sister left the bar at 3:00 a.m. and called him approximately five (5) minutes later to warn him about the vehicle accident on Route 119. Grady Kelley II left his bar approximately ten (10) to fifteen (15) minutes after that call, which means he left the bar between 3:15 and 3:20 a.m. *Id. at 20-24.* He then traveled to the accident scene where he pulled off to the side of the road to talk to a friend for five (5) to ten (10) minutes, which makes it impossible for Grady Kelley II to leave the accident scene earlier than 3:20 a.m., which does not include any travel time to the accident scene. It was sometime after 3:20 a.m. that Grady Kelley II left the accident scene, turned around and returned to his bar, where he claims he made the intoxicated patrons riding with him re-enter the bar. *Id. at 146.*

Although Grady Kelley II was unsure of the exact time that he encountered Officer Barnes outside of his private club, his testimony established that it is typically a five (5) minute drive during the late night hours from his bar to his place of residence at that time; he also testified that the accident was near his home. Therefore, it is fair to assume that Grady Kelley II spent at least ten (10) minutes traveling to and from the accident scene, parking his car, unlocking the club doors, getting his friends inside the bar and walking up the flight of stairs to the office to retrieve the money bag. As such,

even if the testimony is taken in the light most favorable to the Plaintiff, his testimony reveals a chain of events corroborating Officer Barnes' testimony and citation.

According to Frieda Kelley's testimony, when her daughter left Grady Kelley II's bar at 3:00 a.m. on the morning in question, she took one of the bar tenders home before going to her parents' home to wake her mother and inform her of the accident on Route 119. *See Deposition of Frieda Kelley, Exhibit 2, pp. 50- 52.* Frieda Kelley then took the time to get dressed and travel with her daughter to the accident scene where she saw Officer Barnes directing traffic. *Id.* She remained at that scene for twenty (20) to thirty (30) minutes before returning to her home. *Id. at 53.* She was, however, unable to provide definite testimony concerning the time she received a call from Grady Kelley II about the citation. When asked about the time of the call, she testified:

A: (Frieda Kelley) Around 4:00 maybe.

Q: (David Mincer) Okay.

A: (Frieda Kelley) It might have been later, it might have been earlier. I don't know. I mean I just don't remember.

Id. This testimony is insufficient to be considered more than a scintilla of evidence to dispute that the citation was issued for Grady Kelley II's conduct at 3:30 a.m. or later.

The lower court correctly found, after fully considering the evidence presented, that, as Grady Kelley II admits, Grady Kelley II was required to have all persons outside of the bar no later than 3:30 a.m. on the Sunday morning in question. *See Judge Perry's Order Granting Summary Judgment to Defendant Michael Barnes attached hereto as Exhibit 5.* The court went on to find that Grady Kelley II was required to submit "more than a scintilla of evidence" establishing that Officer Barnes did not have probable cause to issue a citation for the ABCC violations but had failed to point to any evidence that

suggested that the conduct described in the citation occurred prior to 3:30 a.m. As fully discussed above, Grady Kelley II's own testimony does not dispute the 3:30 a.m. time as prescribed by CSR §175-2-4.7 and 4.8.

In its "Opinion Order Granting Defendant City of Williamson's Motion for Summary Judgment", the lower court stated that all claims had been dismissed against the City of Williamson, with the exception of the negligent supervision claim. *See Judge Perry's Opinion Orders Granting Defendant City of Williamson's Motion for Summary Judgment attached hereto as Exhibit 6.* The court further stated in the Order that the arrest of Grady Kelley II by Officer Barnes was a lawful arrest; therefore, it concluded that there could be no negligent supervision for such lawful arrest.

As fully discussed above, Grady Kelley II's testimony does not dispute that he was in his private club with six (6) to seven (7) others at or after 3:30 a.m. He was aware that CSR § 175-2-4.7 and 4.8 required that the establishment be cleared of all persons, including employees, no later than 3:30 a.m. However, according to his own timeline, it was approximately 3:30 a.m. when he re-entered the bar, along with six (6) to seven (7) others who entered the building at his direction. Grady Kelley II was never transported to jail or arraigned for his conduct during the early morning hours of July 23, 2000. The lower court found that Officer Barnes' arrest of Grady Kelley II was lawful, and even when the testimony and evidence is taken in the light most favorable to Grady Kelley II, the lower court's finding on this matter is correct. Without an unlawful arrest, there can be no negligent supervision by the City of Williamson for such arrest. Therefore, the lower court's finding of summary judgment in favor of the City of Williamson should be upheld.

III. The Arrest of Appellant Frieda Carol Kelley

Even when the facts are construed in a light most favorable to the Appellant, Frieda Kelley has failed to present evidence, which contradicts the showing of the City of Williamson that her arrest was proper; thus, summary judgment by the lower court was appropriate and should be upheld.

The City of Williamson has presented specific evidence that demonstrates that the arrest of the Appellant was proper and lawful. West Virginia Code §61-6-1(b), provides that:

any person who, in a public place, any office or office building in the State of West Virginia...or on any property owned, leased, occupied, or controlled by the State of West Virginia...disturbs the peace of others by violent, profane, indecent or boisterous conduct or language...and who persist in such conduct after being requested to desist by a law enforcement officer acting in his lawful capacity, is guilty of disorderly conduct, a misdemeanor...

West Virginia Code § 61-6-19 states “[i]f any person willfully interrupts or molests the orderly and peaceful process of any department, division, agency or branch of state government or of its political subdivisions, he or she is guilty of a misdemeanor....”

In the case at bar, the Appellant entered the Williamson police station while Officer Barnes was writing a citation to Appellant Grady Kelley II for violating ABCC regulations. Immediately upon entering the police station, Appellant Frieda Kelley began ranting in an uncontrolled manner. She stated to the officers that “this is f-----g harassment, you’re just harassing me.” *See Deposition of Michael Barnes, Exhibit 1, at p. 21.* Appellant went on to belittle Officer Barnes about his race stating, several times, that he was an “Uncle Tom and a n----r”. *Id.*

Officer Barnes’ account of the racially motivated outburst of Appellant Frieda Kelley is supported by the testimony of Officer John Hall. Officer Hall recalled that Ms.

Kelley came into the police station and immediately began calling Defendant Barnes a "n----r" and said "I'll have your f-ing job. You will be on the back of a trash truck before this week is out." *See Deposition of John Hall, attached hereto as Exhibit 3, at p. 17.* Officer Hall went on to say that both he and Officer Barnes advised the Appellant that she needed to refrain from using such language and to leave the premises, or she would be placed under arrest for disorderly conduct. Specifically, Officer Hall testified that he told the Appellant that if she did not leave he was going to arrest her. *Id. at p. 19.* In response thereto, the Appellant stated "well, you'll have to arrest me." *Id.* After Officer Hall tried to place the Appellant under arrest, in an apparent attempt to flee the Appellant attempted to run outside. *Id.*

Appellant's own deposition testimony provides that she was afforded the opportunity to avoid arrest numerous times but neglected to do so. Appellant testified that "[Officer Barnes] told me to leave and I told him no, I wasn't going to leave, not until - I had a nephew there and my son. I said I'm not going to leave until they leave." *See Deposition of Frieda Kelley, Exhibit 2, at p. 62.* Officer Barnes then told her to leave because her son and nephew were free to leave as soon as he was finished writing out the citation. *See Deposition of Michael Barnes, Exhibit 1, at p.21.* However, the Appellant still refused to leave the police station after Officer Barnes repeatedly told her "leave, leave, leave," but "I (Frieda Kelley) didn't leave." *See Deposition of Frieda Kelley, Exhibit 2, at pp. 61-62.* Finally, Officer Barnes told her to leave or she would be arrested, again the Appellant refused. *Id. at 63.* Appellant's utter refusal to refrain from obstructing the issuance of citations to her son and other bar patrons, coupled with the disorder caused by her, resulted in the Appellant's arrest. For those reasons, the

Appellant was arrested for disorderly conduct, willful disruption of governmental processes and obstructing. *See Deposition of Michael Barnes, Exhibit 1, at p. 26, and See Criminal Complaint in the Magistrate Court of Mingo County, number 00M-1200-1202, attached hereto as Exhibit 7.*

Even after her arrest, the Appellant's conduct was boisterous and unruly. She told the Officers to take her to the bathroom or she would "s--t" and they would have to clean it up. *See Deposition of Frieda Kelley, Exhibit 2, at p.68.* When being transported to the regional jail, she refused to ride with Officer Barnes, forcing him to call his off-duty supervisor for assistance. *See Deposition of Michael Barnes, Exhibit 1, pp. 27-28.*

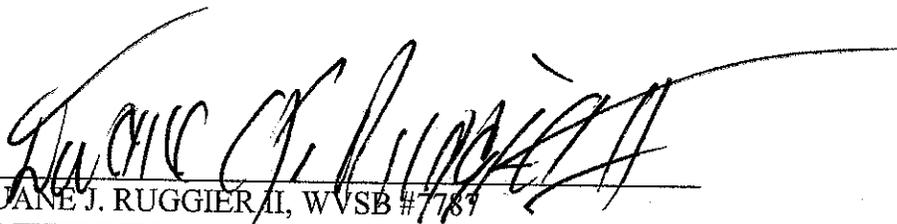
To support this arrest, the City has provided evidence that the Appellant was disturbing the job performance of Officers Barnes and Hall through her boisterous behavior at the Williamson Police Station. Appellant Frieda Kelley failed to leave the police station after repeated requests from Officers Barnes and Hall to do so. Finally, she was warned to leave or she would face arrest. As such, the City of Williamson police officers had probable cause to place Appellant Frieda Kelley under arrest for disorderly conduct. Thus, the Appellant has not demonstrated a "trial-worthy" issue, and the grant of summary judgment should remain undisturbed.

CONCLUSION

Appellants have not presented more than a scintilla of evidence that contradicts the City of Williamson's showing that the citations and arrest were proper. Grady Kelley II has failed to prove that he was not inside of his bar after 3:30 a.m. Frieda Kelley's presence and demeanor at the police station on that morning caused a disturbance to an

official governmental process. She admits that she refused to leave when asked, and was consequently arrested. Therefore, when construing the facts in a light most favorable to the Appellants, it is clear that no genuine issue of fact exists. Consequently, this Court should uphold the grants of summary judgment by the Circuit Court of Mingo County with respect to Appellants' claims.

Respectfully Submitted,
CITY OF WILLIAMSON,
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GRADY COLIN KELLEY, II and FRIEDA CAROL KELLEY,
Petitioners and Plaintiffs below,

v.

THE CITY OF WILLIAMSON, WEST VIRGINIA,
a municipal corporation, and
MICHAEL BARNES, individually and in his capacity
as a police officer employed by the City of Williamson
Respondents and defendants below.

From the Circuit Court of Mingo County, West Virginia
Civil Action Nos. 02-C-226 and 02-C-227
Honorable Judge Roger L. Perry
Sitting after the recusal of the Honorable Judge Michael Thornsbury

CERTIFICATE OF SERVICE

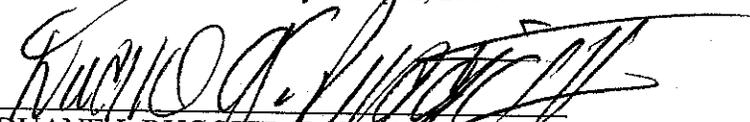
The undersigned counsel does hereby certify that the foregoing "**BRIEF OF APPELLE CITY OF WILLIAMSON**" has been served upon the following counsel of record:

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by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the 23rd day of April, 2007.


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