

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 33311

GRADY COLIN KELLEY, II,

Appellant, Plaintiff-Below,

vs.

**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, Defendants-Below

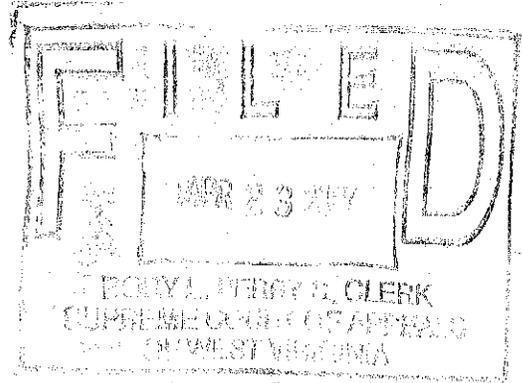
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RESPONSE TO BRIEF OF APPELLEE MICHAEL BARNES

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RESPONSE TO BRIEF OF APPELLEE MICHAEL BARNES

NOW COMES Appellee, Michael Barnes, by counsel, David J. Mincer, Vaughn T. Sizemore, and the law firm of Bailey & Wyant, P.L.L.C., and, pursuant to West Virginia Rules of Appellate Procedure, Rule 10(b), files his Appellee Brief as follows:

SUMMARY OF FACTS

This is an appeal from three rulings from the Circuit Court of Mingo County, West Virginia granting summary judgment to Appellees Michael Barnes and the City of Williamson. Only two of these Orders apply to Appellee Michael Barnes. He responds as follows:

The claims alleged in the Complaint filed by Grady Kelley arose from the July 23, 2000, issuance of a citation to Appellant Grady Colin Kelley II by Appellee Michael Barnes, then an Officer with the City of Williamson Police Department, for an ABCC violation as the owner of a bar who permitted people to remain inside the bar after 3:30 a.m. on a Saturday night, the time legally required to have persons out of the bar. Appellant Frieda Kelley's Complaint is based on events that occurred later that morning while Appellee Barnes was issuing the citation to Appellant Grady Kelley. Appellant Grady Kelley alleges that Barnes unlawfully arrested him for allowing people in his tavern after the time that he is legally permitted to have persons in his bar.¹ However, Appellant's own deposition testimony supports Appellee Barnes' decision to cite Plaintiff.

As the Appellant asserted in his Brief, he testified that he had closed the bar down in accordance with the ABCC regulation that requires all persons to be out of a bar by 3:30 a.m. on a Sunday morning and then packed six or seven customers and/or employees into his vehicle to take them home and stopped on the way at a vehicular accident that had occurred on Route 119. *See* Deposition of Grady Colin Kelley, II at 17:18-18:1, 26:14-20, and 32:14-19.² After going to the

¹Appellant Grady Kelley actually was not arrested, but Defendant Barnes did command Plaintiff to accompany him in the front seat of his cruiser without handcuffs on, so that he could obtain the proper code citation to issue him a citation for the ABCC violation. Deposition of Michael Barnes, at 18:2-4.

² The relevant portions of the depositions cited herein were attached as Exhibits to the Motions for Summary Judgment filed by Appellee Barnes, which are included in the record

accident scene, he testified that he realized that he had left one of several bags of money at the bar.

Id., 30:1-9. He then admits that he returned to the bar and that all of his passengers re-entered the bar with him after 3:30:

Q. Let me make sure I understand. Was that after 3:30 and you just feel like you had a justification for going back in there because you weren't open for business or serving anyone?

A. No, there was no lights on. I mean I never got charged with anything. ABC never charged me for staying open after hours. I went to the accident and I realized I forgot my money bag and so I went back in. There was no lights on. I actually had a flashlight to get my money bag. I didn't turn any lights on, no music, no drinks were served.

Q. Okay. Would that have been after 3:30?

A. It was probably – yeah, it was close because I close a few minutes early, I try to close a few minutes early

Id. at 18:6-21. As amazing as this story is, taking it as true, it still leaves several individuals in the bar after 3:30 a.m.³

Plaintiff confirmed later in his deposition that he had re-entered the bar with his passengers after the time that he is legally permitted to have persons in the bar:

Q. Okay. So all these guys ride back with you over to Colie's again?

A. Yeah.

Q. What time do you think you got back to Colie's?

which was designated for consideration by this Court.

³ He testified that he brought the customers back into the bar so he could leave another bag of quarters in the car without worrying about the bag. *See id.* at 40. He could not explain why he chose to leave \$100 worth of quarters—ten rolls—in the car and instead force six or seven intoxicated people to exit the vehicle, come inside a dark bar to stand inside the foyer rather than waiting outside, while he fumbled around with a flashlight looking for another bag of money—all *after* 3:30 a.m. *See id.* at 18 and 38-40.

A. Probably around 3:30 maybe.

* * *

Q. And you went inside to go get the money bag?

A. Yeah, and I made the rest of the guys come in with me because I still had the money bag with quarters in my vehicle.

Id. at 38:20-39:2, 40:2-6.

Appellant Grady Kelley's Complaint asserts four causes of action against Michael Barnes and the City of Williamson. The first cause of action is for the tort of outrage and alleges that Officer Barnes' issuance of the citation was outrageous. The ruling on this cause of action is not raised in this Appeal. The second cause of action is for battery as a result of the touching engaged in to issue the citation. This allegation is not that excessive force was used, but rather that no touching should have occurred, because Appellant alleges that the citation should not have been issued. The third cause of action is for false swearing by Michael Barnes in violation of *West Virginia Code* § 61-5-2 and Appellant Grady Kelley specifically alleges in the Complaint that, "Defendant Michael Barnes violated *West Virginia Code* 61-5-2 by willfully swearing to and/or affirming false statements in said criminal complaint." The fourth cause of action is for negligence and is pled solely against the City of Williamson for negligent supervision of Officer Barnes. This count does not apply to this Appellee. Appellant Grady Kelley makes no claims for special damages, but makes claims for general damages for mental anguish, emotional and psychological harm, aggravation, inconvenience, embarrassment, humiliation, loss of reputation in the community and attorneys' fees and litigation expenses. Appellant also makes a claim for punitive damages.

The causes of action asserted by Grady Kelley against Michael Barnes are all based on one premise: that the citation of Grady Colin Kelley II on July 23, 2000, was unlawful and without

probable cause. Because Appellant does not dispute that he was in his bar with other persons after the time that he is legally permitted to have persons in his bar, the trial court was correct in granting Appellee Barnes's Motion for Summary Judgment.

The events that led to the claims by Frieda Kelley occurred later that morning. While Barnes was in the front lobby of the police station completing paperwork on the citations to Grady Kelley and one of the customers, Frieda Kelley came in the station and immediately began yelling at Appellee Barnes to let her son go:

Q. And what do you recall her saying when she got there? Who did she direct her statements to?

A. Well, directed to me, sir, because as soon as she walked in the door – as you walked through the police department, your first field of vision would be where I'm at because there's a television on top of the filing cabinet. And I'm sitting right there at the desk and her son was sitting in the chair.

His mother came in raising nine kinds of hell. She came in and said, "This is fucking harassment. You're just harassing me. You're working for the Howards. You're working for the Rubles."

And I told her, I said, "No, ma'am, I'm not working for no one." I said, "We're here conducting police business and, you know, you're out of order. You need to lower your voice."

She just kept telling me she wasn't going to lower her voice. At some point, several times she called me a "Uncle Tom" and "nigger." That's what she called me specifically. I remember that.

I told her, I said, "Well, your son is not going to be arrested. I've already cited him for an ABC violation." I said, "We have these other people in here." I said, "Your son is free to go and I'm asking you to leave." She refused to leave.

And I asked her at least nine times to leave the police department. And she was later arrested because she called me "Uncle Tom" and "nigger," she refused to leave the police department, told me I could lose my job and she just refused to leave.

Deposition of Michael Barnes at 20:8-22:5. Officer John Hall came out of the back office of the police station and told Frieda Kelley that she could not use such language in the police station, that Barnes was just doing his job and that she should not be calling him names:

Q. What happened when [Frieda and Colin Kelley, Sr.] arrived [at the police station]?

A. Well, Frieda came in the police station. She was cussing, going on; coming in calling [Defendant Barnes] niggers and said, "I'll have your f-ing job. You'll be on the back of a trash truck before this week is out." You know, he's supposedly harassing his club and harassing her and harassing Colin Kelley, and she just, you know, bent out of shape.

Q. And your recollection is she said it immediately when she got there, not after discussing something with anyone?

A. No. As soon as she came through the door, she started in.

Q. What did Mr. Barnes do at that point?

A. He got up, started telling her, you know, "Frieda, go back outside. This has nothing to do with you." She said, "Oh, yes it does. It has everything to do with me because it's my club, he's my son." At that time I got up and started in the lobby and I told her, I said, "Frieda, the best thing for you to do is go on back to the house, go outside and wait because we're going to cite them and let them go."

And she kept on running her mouth, and by that time Colin, Sr., came in. He tried to get her to calm down, she started cussing at him, using the "f" word. And, finally, we told her, "If you don't get out of here, we're going to arrest you."

Q. What do you mean by "we" told her that?

A. Well, I did. I told her we was going to arrest her. And she said, "Well, you'll have to arrest me." I said, "Frieda, go on, get out of here." And she – she started towards the door, [but then] she started cussing again. About that time I said, "Well, you're under arrest." She ran outside, we went and got her, brought her back in, handcuffed her and put her in the chair.

Deposition of John Hall at 17:10-19:22. Appellant, Grady Colin Kelly, II, confirmed that Frieda Kelley had cursed prior to her arrest and that she went out the front door after she was told that she was under arrest:

Q. Okay. Did your mom use any profanity before she got arrested?

A. She might have said, "This is bull shit," or something like that maybe.

Q. Did she say anything besides bull shit?

A. I don't remember. I remember her saying, "This is bull shit."

Q. Do you remember your mom being told she was being arrested and then running outside?

A. She might have went out. Yeah, I remember him telling her he was going to take her to jail.

Q. And then she ran outside?

A. Yeah.

Deposition of Grady Colin Kelley, II at 120:2-121:5. Frieda Kelley confirms that she was told that she needed to leave the premises:

Q. Okay. What happened between you and Officer Barnes or any of the other police officers that were there?

A. He 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.”

Q. Okay. What did he say when he told you to leave? Do you remember what his words were or what he –

A. He told me to leave and I said, “No, I’m not going to leave until I can take them with me.” He said, “They can drive home. . . .”

Deposition of Frieda Kelley at 63:5-19.

Further, Plaintiff does not dispute that she was warned that she would be arrested if she did not leave:

Q. Did he tell you to leave or you were going to be arrested, before he handcuffed you?

A. He might have said that, but I thought I really had as much right there as anybody else...

Q. Okay. So you think Barnes may have said, “Leave or you’ll be arrested,” and you said no, or you just didn’t leave, so he cuffed you and arrested you?

A. Right.

Id. at 66:22-67:22.

The testimony above shows that Frieda Kelley was told that her son was not being arrested and that once the citation was completed, he would be free to leave, yet she continued to make a scene and refused to leave the police station. Her husband, Grady Colin Kelly, Sr., even tried to calm her down and get her to leave, but she refused. Both Appellee Barnes and Officer Hall warned her to stop her abusive behavior. Officer Hall, the senior patrolman on duty, warned her that if she

did not leave, she would be arrested.⁴ Plaintiff did not comply with these orders. As a result, Officer Hall informed her that she was under arrest. At that point, Frieda Kelley ran out the door of the police station and attempted to flee on foot.

Q. . . . Now who decided – who decided to place her under arrest?

A. After I told her to leave – I told her if she don't leave – “If you don't leave, you're under arrest.” She turned around, she started cussing again. I said, “You're under arrest.” I don't know if it was Mike got her first or if I got her first, but we went outside and got her, brought her back inside, handcuffed her and put her in the chair –

Q. Okay.

A. – and placed her under arrest.

Deposition of John Hall, p. 21:5-16.

In addition, it was Officer Hall, not Appellee Barnes, who handcuffed Appellant Frieda Kelley:

Q. And do you remember who handcuffed her?

A. I believe I did, if I remember correctly.

Id., 24:4-6. Appellant Frieda Kelley was then charged with disturbing the peace, resisting arrest and willful disruption of a governmental process. Another significant and relevant fact in this case is that Officer Hall was the senior patrolman during the shift, based upon the fact that he had 15 years of experience as a police officer to Defendant Barnes' 6 years of experience. *See*, Deposition of John Hall at 4:10-23.

Appellant Frieda Kelley brought the current Complaint alleging causes of action against Michael Barnes and the City of Williamson for the tort of outrage, intentional infliction of emotional

⁴ Officer Hall was not named as a defendant in the Complaints filed by the Appellants.

distress, battery (based upon the contact made to arrest her) and false swearing. The claims for the torts of outrage and intentional infliction of emotional distress were not raised in this Appeal.

PROCEDURAL HISTORY

The Appellants filed two civil actions in the Circuit Court of Mingo County, West Virginia.⁵ The two actions were consolidated by an Order dated April 17, 2005. After discovery had been conducted, the Appellee filed a Motion to Bifurcate the trials of the claims against Defendant Barnes and Defendant City of Williamson. This Motion was granted on January 10, 2006. The Appellee also filed Motions for Summary Judgment. The Court granted summary judgment to the Appellee for the claims of Grady Kelley on January 10, 2006, and for the claims of Frieda Kelly on March 17, 2006. The Appellant filed a motion to reconsider the granting of summary judgment for the claims of Grady Kelly, and the Court denied this Motion on March 16, 2006. In this denial, the Court specifically stated that the motion was “**DENIED**, without prejudice to Plaintiff’s options to file a Motion under Rule 60(b) *or file a Petition for Appeal with the West Virginia Supreme Court of Appeals.*” *Id.* (emphasis in original). The Appellant did not file his Petition for a Writ of Error until August 10, 2006.⁶

STANDARD OF REVIEW

“A circuit court's entry of summary judgment is reviewed de novo.” Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Rule 56 of the *West Virginia Rules of Civil*

⁵ The Honorable Roger L. Perry from the Circuit Court of Logan County heard the case because of a conflict with the Honorable Michael Thornsby.

⁶ While the Petition for Appeal was pending, this Appellant filed a Motion to Dismiss Appeal. This Court did not hear this Motion. This Appellee is renewing this Motion contemporaneously with the filing of this Brief of Appellee.

Procedure is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial if only a question of law is involved or if there is no genuine issue of material fact for the jury to determine with respect to one or more necessary elements of a claim. *See id.* “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Id.* “Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. pt. 2, *Minshall v. Health Care & Retirement Corp. Of America*, 208 W.Va. 4, 537 S.E.2d 320 (2000) (quoting Syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)). This Court has further held that mere conclusory allegations, rather than factual evidence, are insufficient to create a genuine issue of material fact with respect to each element of a claim. *See Miller v. City Hosp.*, 197 W.Va. 403, 475 S.E.2d 495 (1996).

When a party makes a properly supported motion for summary judgment, the burden shifts to the party opposing the motion to show a trial worthy issue. This Court has stated:

If the movant . . . make[s] this showing, the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a “trialworthy” issue. To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted. *See Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317, 328 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695, 713 (1990).

Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W.Va. 692, 699, 474 S.E.2d 872, 879

(1996) (emphasis added).

In addition, dispositive motions filed on behalf of governmental Defendants which, as is the present case, implicate one or more immunities require unique consideration. “Immunities under West Virginia law are more than a defense to a suit in that *they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.*” *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (emphasis added). Indeed “[t]he very heart of the immunity defense is that *it spares the defendant from having to go forward with an inquiry* into the merits of the case.” *Id.* (emphasis added) (citing *Swint v. Chambers County Commission*, 514 U.S. 35 (1995) (parallel citations omitted)). As Justice Cleckley in *Hutchinson* wrote:

An assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune – a trial – will[,] absent a pretrial ruling[,] occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based upon immunity does not lead to a loss of right that cannot be corrected on appeal.

Id., at Footnote 13.

Similarly, in a recent decision, the United States Supreme Court used almost identical reasoning to that of Justice Cleckley in *Hutchinson* to guide the federal judiciary as to the importance of a government agency’s right to be summarily dismissed from litigation when qualified immunity is applicable. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). “The privilege of immunity from suit is an immunity rather than a mere defense to liability, and like absolute immunity *it is effectively lost if a case is erroneously permitted to go to trial.*” *Id.* (emphasis added). As such, the trial court was correct in granting Appellee Barnes’s Motion for Summary Judgment on the grounds of his entitlement to qualified immunity, an issue completely ignored by the Appellants in their Brief.

ARGUMENT

- A. THE TRIAL JUDGE WAS CORRECT IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE, MICHAEL BARNES FOR ANY OF THE CLAIMS FILED BY GRADY COLIN KELLEY BECAUSE EVEN AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE APPELLANT GRADY COLIN KELLEY, THERE WAS NO MATERIAL ISSUE OF FACT AND APPELLEE BARNES WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

Under *W.Va. Code* §60-7-12(11), it is illegal for a licensee of a private club to “violate any reasonable rule of the commissioner.” Pursuant to its authority, the Alcohol Beverage Control Commission has established that private club owners are not to sell alcoholic beverages after 3:00 a.m. on Sunday mornings and that the private clubs *are to be vacant* by 3:30 a.m. on those days. *W.Va. C.S.R.* §175-2-4.7 and -4.8 (“The licensed premises of all private clubs shall be closed for operation and *cleared of all persons, including employees*, thirty (30) minutes after the hours of sale of alcoholic liquors and nonintoxicating beer have expired.” (emphasis added)).

Appellee Barnes presented uncontradicted evidence that he had probable cause to believe a crime had been committed. In particular, and as the Appellant asserted in his Brief, he testified that he had closed the bar down in accordance with the ABCC regulation that requires all persons to be out of a bar by 3:30 a.m. on a Sunday morning and then packed six or seven customers and/or employees into his vehicle to take them home and stopped on the way at a vehicular accident that had occurred on Route 119. *See* Deposition of Grady Colin Kelley, II at 17:18-18:1, 26:14-20, and 32:14-19. After going to the accident scene, he testified that he realized that he had left one of several bags of money at the bar. *Id.* at 30:1-9. He then admits that he returned to the bar and that all of his passengers re-entered the bar with him after 3:30:

- Q. Let me make sure I understand. Was that after 3:30 and you just feel like you

had a justification for going back in there because you weren't open for business or serving anyone?

A. No, there was no lights on. I mean I never got charged with anything. ABC never charged me for staying open after hours. I went to the accident and I realized I forgot my money bag and so I went back in. There was no lights on. I actually had a flashlight to get my money bag. I didn't turn any lights on, no music, no drinks were served.

Q. Okay. Would that have been after 3:30?

A. It was probably – yeah, it was close because I close a few minutes early, I try to close a few minutes early

Id. at 18:6-21. As amazing as this story is, taking it as true, it still leaves several individuals in the bar after 3:30 a.m.⁷

Grady Kelley confirmed later in his deposition that he had re-entered the bar with his passengers after the time that he is legally permitted to have persons in the bar:

Q. Okay. So all these guys ride back with you over to Colie's again?

A. Yeah.

Q. What time do you think you got back to Colie's?

A. Probably around 3:30 maybe.

* * *

Q. And you went inside to go get the money bag?

A. Yeah, and I made the rest of the guys come in with me because I still had the money bag with quarters in my vehicle.

⁷ Again, Grady Kelley testified that he brought the customers back into the bar so he could leave another bag of quarters in the car without worrying about the bag. *See id.* 40. He could not explain why he chose to leave \$100 worth of quarters—ten rolls—in the car while forcing six or seven intoxicated people to exit the vehicle, come inside a dark bar, and stand in the foyer instead of remaining outside, while he fumbled around with a flashlight looking for another bag of money—all *after* 3:30 a.m. *See id.* At 18 and 38-40.

Id. at 38:20-39:2, 40:2-6.

Notwithstanding his own admission that he was present in his bar, with at least six other individuals after the time that he is not permitted to have anyone in his bar, he now alleges that Appellee Barnes unlawfully issued a citation to him. He attempts to argue that the citation issued on July 23, 2000, and the Criminal Complaint sworn before Magistrate Green are contradictory. This statement is plainly wrong. The Criminal Complaint states that the offense occurred “after the hour of 4:00 a.m.,” while the citations states that the offense occurred at 4:30 a.m. These two statements are not contradictory, in fact, this Court can take judicial notice that 4:30 a.m. is “after the hour of 4:00 a.m.,” just as 5:30 a.m. would be after the hour of 5:00 a.m., and 6:30 a.m. would be after the hour of 6:00 a.m., . . . Clearly, these statements are not only not contradictory, they are completely harmonious and support Appellee Barnes’s testimony that the offense occurred “in the late morning hours, after the clubs should have been closed.” Deposition of Michael Barnes at 120:18-20..

The Appellant cites to *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963), for the proposition that if different inferences may be drawn from evidence, then they must be construed in favor of the non-moving party. The inference he is asking this Court to draw is found in the deposition of Appellant Frieda Kelley, where he cites that she indicated that her son called her “probably around 4:00.” Appellant Brief at 7. The full quote actually states:

Q. What time was it when he called?

A. Gosh, *I don't remember. Approximately, “probably around 4:00.” It might have been later than that. I don't know. . . .*

Deposition of Frieda Kelley at 52. As this Court can see by the nowhere in this testimony can an

inference be drawn that the Appellant Grady Barnes was not in his bar with at least six other individuals after 3:30 a.m., as he admitted. Clearly, Ms. Kelley is far from certain in her testimony, and even she does not testify that the events occurred before 3:30 a.m. A trial court does not have to exhaust every possible scenario that a jury could infer from the testimony listed above, because the potential inferences are limitless. “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.” *Painter v. Peavy*, 192 W.Va. 189, 192-3, 451 S.E.2d 755, 758-9 (1994). The trial court only has the evidence before it upon which he can base his decision, and the evidence established that the Appellee Barnes had probable cause for issuing the citation. The evidence cited above, while far from equivocal, merely establishes that Frieda Kelley thinks she may have, sometime, approximately, received a call around 4:00 a.m., or later. It does not provide more than a scintilla of evidence that Grady Kelly was not in the bar with other individuals after 3:30 a.m., it only establishes that he called her sometime after arriving at the police station, which according to her was at least 4:00 a.m.. A reasonable jury could not infer from these facts that when Grady Kelley escorted six or seven intoxicated individuals into his bar *before* 3:30 a.m. to safeguard ten rolls of quarters that he wanted to leave in his car and that all of these intoxicated individuals were out of the bar before 3:30 a.m..

The Appellant argues that neither Barnes nor Officer John Hall testified in their depositions that it was after 3:30 a.m. when they first approached the bar. However, he then cites to the citation and the Criminal Complaint, which both state that it was after 3:30 a.m. when the offense occurred.⁸

⁸ Here again, “after 4:00 a.m.”, or 4:30 a.m. are both after 3:30 a.m., thus, these statements are not contradictory and it supports the testimony of Appellee Barnes and establishes that it was after 3:30 a.m. when Officer Barnes witnessed six or seven individuals in Collies. *See*

This Court recently addressed this very argument and stated:

In other words, "Rule 56(c) does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to those listed, [a court] **'may consider any material that would be admissible or usable at trial.'**" *Williams v. Vasquez*, 2002 WL 799854, *1 (N.D.Ill.2002) (quoting *Aguilera v. Cook County Police & Corrections Merit Bd.*, 760 F.2d 844, 849 (7th Cir. 1985)). FN5 See also *Bramlage v. Wells Fargo Home Mortgage, Inc.*, 144 Fed.Appx. 489, 494 (6th Cir.2005) ("Legal commentators have recognized that **'[d]ocuments are routinely considered in Rule 56 motions** and the omission of them in Rule 56(c)'s listing of summary judgment evidence must be considered nothing more than an oversight. The inclusion of documentary evidence as a legitimate form of summary judgment input should be seen as uncontroversial." (quoting Edward Brunet, Summary Judgment Materials, Federal Rules Decisions (May 1993)); Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 56(c), at 937 (2002) ("A motion for summary judgment should be granted if the pleadings, **exhibits**, depositions, interrogatories, affidavits or other evidence show ... that the moving party is entitled to judgment as a matter of law." (emphasis added)).

Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 504, 625 S.E.2d 260, 266 (2005)(emphasis added). The Appellant cites to the very exhibits that the trial court had every right to consider as evidence that would be submitted at trial. Additionally Michael Barnes testified as follows:

- Q. . . . Well, let's get back to that night. Do you recall any other individuals walking in front of that bar prior to you seeing the gentleman come out?
- A. No. It was dark and it was in the late morning hours, after the clubs should have been closed. There was nobody on the street. He just came out. I can't think of the doctor's last name, but he just come out of - I looked and - again, I never would have looked over there. The part that bothered me was that he came out the club at that hour, and I knew that we had received an order from the chief to go and tell them that they need to be closed.

Deposition of Michael Barnes at 120:14-121:4. This testimony, along with the citation and the Criminal Complaint are direct evidence that Appellee Barnes had probable cause to believe a crime had been committed.

Deposition of Michael Barnes at 120-21.

Furthermore, Appellant Grady Kelley admits that he had at least six individuals in his bar after the time set forth by the ABC Commission. He attempts to validate this violation by arguing that the six individuals were all waiting just inside the closed door to his bar. Deposition of Grady Colin Kelley, II, 41:20-42:17. This argument is of no import, however, because the mere fact that there *were* persons on the premises is a violation of 175 C.S.R. § 2-4.8. The regulations clearly require that such taverns are to be *vacant* after the time established by the Commission, 3:30 a.m. Thus, the presence of *any* individuals at the time in question amounts to a violation. Further, Appellee Barnes's observation of an individual leaving the bar and subsequently of those six individuals exiting the bar, whether they were previously waiting by the door or actually sitting at the bar, gives rise to probable cause that a violation of the regulations occurred. Therefore, Appellee Barnes's decision to cite Plaintiff for the violation was clearly justified. In fact, Appellant himself admits that, if a police officer saw seven individuals entering a bar after the time established by the ABCC for a bar to be vacant, then it would be reasonable for a police officer to believe that those individuals were going into the bar to drink. *See* Deposition of Grady Colin Kelley, II, 161:18-164:6. Consequently, Appellee Barnes had probable cause to believe that a violation of the ABCC regulations had occurred.

Because the fact before the circuit court were undisputed—that Appellant and six other individuals were on the premises of the bar after the time that the premises were required to be vacant and because Appellant admits that it would be reasonable for a police officer to suspect a violation of the ABCC regulations under the circumstances, the circuit court was correct in granting summary judgment to Appellee Barnes.

Appellee Barnes came forward with affirmative evidence that established that there was no

material issue of fact—a properly supported motion for summary judgment, and therefore he was entitled to judgment as a matter of law. The Appellant attempts to argue that Barnes had no such evidence, but as noted above, the citation and the Criminal Complaint are both evidence that would be available for consideration by a jury and was appropriate for consideration by the trial court. Furthermore, the testimony of Appellee Barnes supports this evidence and his Motion for Summary Judgment while the Appellants' testimony merely confirms that of Appellee Barnes. Syl. pt. 3,

Williams v. Precision Coil, Inc., states:

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 a 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 as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329, rehearing denied (1995). This Court has further noted that:

If the movant ... make[s] this showing, the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a "trialworthy" issue. To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted. See *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317, 328 (1993); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695, 713 (1990).

Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W.Va. 692, 699, 474 S.E.2d 872, 879 (1996) (emphasis added). Barnes made a properly supported motion for summary judgment, the Appellants failed to come forward with additional evidence to show that there is a material issue of

fact in dispute, and the Appellants failed to establish that Barnes was not entitled to judgment as a matter of law. Thus, the trial court was correct in granting Appellant's Barnes's Motion for Summary Judgment.

B. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO APPELLEE BARNES ON THE APPELLANT'S CLAIMS OF FALSE SWEARING BECAUSE APPELLEE BARNES DID NOT VIOLATE W.VA. CODE § 61-5-2.

West Virginia Code § 61-5-2 (1923) states:

To wilfully swear falsely, under oath or affirmation lawfully administered, in a trial of the witness or any other person for a felony, concerning a matter or thing not material, and on any occasion other than a trial for a felony, concerning any matter or thing material or not material, or to procure another person to do so, is false swearing and is a misdemeanor.

Violations of *West Virginia Code* 61-5-2 are almost always based on trial testimony known to be false when made. This Court has specifically held that for there to be false swearing, there must be an intention by the defendant to testify falsely and that such false swearing was wilful, knowing and absolute and was not an expression of opinion. *State v. Crowder*, 146 W.Va. 810, 123 S.E.2d 42 (1961). This Court has more recently affirmed that such a claim may only rest on the accused having offered sworn testimony given under lawfully administered oath. *Farber v. Douglas*, 178 W.Va. 491, 361 S.E.2d 142 (1985).

Appellee acknowledges that the statute appears to open the door to false swearing charges based upon written statements given under oath that are known to be false when made by stating, "and on any occasion other than a trial for a felony". *W.Va. Code* § 61-5-2. Indeed, this Court has upheld such charges when the false statements are set forth in an affidavit given under oath lawfully administered. *See Farber v. Douglas*, 178 W.Va. 491, 361 S.E.2d 456 (1985). However, this Court

has never explicitly held that statements made in a citation or a Criminal Complaint, even if proven to have been false, constitute false swearing in violation of *West Virginia Code* § 61-5-2—particularly where the officer had probable cause to believe the violation had been committed.

Here, Appellant Grady Kelley's claim of false swearing rests upon his allegation that Officer Barnes wrote untrue facts in the citation or the Criminal Complaint that he filed against Grady Kelley. First, as demonstrated throughout this Brief, and fully shown to the trial court, the evidence is clear that Appellant actually *did* violate the ABCC's Regulations. Consequently, Appellee Barnes made no false statement under any oath and cannot be held liable under the statute. Second, even if Appellant could successfully argue that the statements made by Barnes in the citation or the Criminal Complaint are untrue, that fact, in and of itself, cannot constitute false swearing under the circumstances, because Officer Barnes was not placed under *lawfully administered oath* prior to or upon issuing the criminal citation or the Criminal Complaint.

The Appellant argues, in effect, that this Court should overrule *Farber* and find that a lawfully administered oath or affirmation is no longer an essential element of the crime of false swearing. *See* Appellant Brief at 7 (citing *Farber v. Douglas*, 178 W.Va. 491, 361 S.E.2d 142 (1985)). This Court was clear on that requirement, and the mere fact that the citation is in lieu of appearing before a magistrate or that it has some language that indicates that it is sworn, it is not sworn before a person lawfully authorized to conduct an oath. However, this argument is immaterial because the information contained in the citation was in fact true. Furthermore, Officer Barnes did not offer trial testimony under oath against Appellant, as the criminal charges were dismissed without trial because Officer Barnes' was not unavailable after having been suspended for an

unrelated matter.⁹

The Appellant next raises the criminal complaint which was sworn before a magistrate. Again, as outlined to the trial court, and in this Brief, the allegations in the criminal complaint were true. Furthermore, the Appellant has cited to no authority, nor can he, for the proposition that a civil cause of action is created for the crime of false swearing.¹⁰ In the absence of any testimony under oath in support of the citation or the criminal complaint, there is no basis for Appellant's false swearing claims against Officer Barnes. Thus, the circuit court was correct in granting Appellee Barnes's Motion for Summary Judgment on the claims of Grady Kelley.

In sum, not only does the evidence show that the statements made by Barnes in the citation and the criminal complaint are *true*, but also Appellee Barnes cannot be held liable because he did not make any allegations against Appellant under any type of oath, sworn before an official authorized to take such oath. For these reasons, the circuit court was correct in granting Officer Barnes's Motion for Summary Judgment on the allegations of false swearing by Appellant Grady Kelley.

Appellant Frieda Kelley's claim of false swearing rests upon her allegation that Barnes wrote untrue facts in the criminal complaint that he filed against her. First, as demonstrated earlier

⁹ The Appellants cite to various other actions filed against Appellee Barnes and the City of Williamson and the fact that many of these claims were settled. However, as the Appellants are well aware, there is no bootstrapping of causes of action. Each case rises and falls on its own facts, and a settlement in a case, with no admission of liability, does not establish liability in a totally unrelated case—especially where the facts do not support it. The trial court was correct not to consider the facts of these other cases because they would not be admissible in the trial of this matter. See West Virginia Rules of Evidence, Rule 404(b).

¹⁰ There may be a cause of action for abuse of process or a claim for remedy under Section 1983 if Barnes had in fact committed the crime of false swearing, but these torts were not alleged in the Complaint.

throughout this Brief, the evidence is clear that Frieda Kelley actually *did* violate a Code section at issue. Consequently, Barnes made no false statement under any oath and cannot be held liable under the statute. Second, even if she could successfully argue that the statements made by Barnes in the criminal complaint are untrue, that fact, in and of itself, cannot constitute false swearing under the circumstances, because Barnes was not placed under lawfully administered oath prior to or upon issuing the criminal complaint. Furthermore, Barnes did not offer trial testimony under oath against Frieda Kelley, as the criminal charges were dismissed without trial due to Barnes's unavailability after having been suspended for an unrelated matter. In the absence of such testimony under oath in support of the complaint, there is no basis for Frieda Kelley's false swearing claims against Barnes. Finally, if the arrest was lawful, as set forth throughout this Brief, but the criminal complaint otherwise included false statements, which Barnes denies and has fully demonstrated to be unsupported by the facts, Frieda Kelley could still not maintain a claim for false swearing, due to a lack of damages caused by the alleged false swearing.

In sum, not only does the evidence show that the statements made by Barnes in the complaint are *true*, but also Barnes cannot be held liable because he did not make any allegations against Frieda Kelley under any type of sworn oath. Furthermore, if Plaintiff's arrest was lawful, any false statements contained in the criminal complaint did not lead to any damages to her. For these reasons, the trial court was correct in granting Appellee Barnes's Motion for Summary Judgment because there were no material issue of fact in dispute and Barnes was entitled to judgment as a matter of law as to Frieda Kelley's claim for false swearing.

C. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT TO BARNES ON APPELLANT FRIEDA KELLEY'S CLAIMS BECAUSE HER ARREST WAS LAWFUL.

Appellant Frieda Kelley was charged with three crimes: 1) Disorderly Conduct pursuant to *West Virginia Code* § 61-6-1b; 2) Obstruction/Resisting Arrest, pursuant to *West Virginia Code* § 61-5-17(d); and 3) Wilful disruption of a governmental process, pursuant to *West Virginia Code* § 61-6-19. The evidence in the record, and cited herein, makes it clear that probable cause existed to arrest Frieda Kelley on all three charges. Furthermore, if probable cause existed to arrest Frieda Kelley on any one of the three charges, then the arrest was proper and Barnes cannot be held liable for unlawful arrest or battery.

West Virginia Code § 61-6-1b provides:

Any person who, in a public place, any office or office building of the state of West Virginia, or in the state capitol complex, or on any other 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 persists 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...

W.Va. Code § 61-6-1b(a).

Appellant Frieda Kelley conducted herself in a manner violative of this statute. In particular, both Officer John Hall and Defendant Barnes have testified that Plaintiff uttered racial slurs at Defendant Barnes and cursed prodigiously throughout her tirade at the police station. In addition, Plaintiff herself admits that *even after* she was placed under arrest, she stated as follows:

A. . . . I said, "I'm about to shit."

Q. Okay.

A. "You either take me to the bathroom or you can clean it up."

Deposition of Frieda Kelley, p. 72:8-11.

Even though Frieda Kelley has denied that she used foul language or racial slurs, the above-

quoted admission clearly shows her conduct during the event at issue. Further, she admits that she was told to leave, but did not do so:

Q. . . . So you said, "I've got a nephew there [at the police station], I'm not leaving without him." What does [Officer Barnes] say to that?

A. He just tells me to leave, leave, leave.

Q. Okay.

A. And I didn't leave.

Id. at 66:9-15.

The cumulative testimony makes it clear that Frieda Kelley was acting in a disorderly, offensive manner in a public place, making Officer Hall's decision to arrest her proper.¹¹ Consequently, as a matter of law, Defendant Barnes cannot be held liable for unlawful arrest or battery.

W.Va. Code § 61-5-17(d) states:

Any person who intentionally flees or attempts to flee by any means other than the use of a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity who is attempting to make a lawful arrest of the person, and who knows or reasonably believes that the officer is attempting to arrest him or her, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars or confined in the county or regional jail not more than one year, or both.

The facts outline above and in the Statement of Facts show that Frieda Kelley violated this section and that Officers Hall and Barnes had probable cause to believe that this crime had been committed. Thus, Barnes cannot be held liable for the arrest of Frieda Kelley because she actually violated this section. Thus the trial court was correct in granting summary judgment to Appellee

¹¹ At a minimum, the testimony of Officers Hall and Barnes and the admissions of Frieda Kelley and Grady Kelley show that Officer Hall had probable cause to arrest Frieda Kelley.

Barnes for the claims of Frieda Kelley.

Finally, West Virginia Code § 61-6-19(a) states:

If 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 and, upon conviction thereof, shall be fined not more than one hundred dollars, or imprisoned in the county or regional jail not more than six months, or both fined and imprisoned: Provided, That any assembly in a peaceable, lawful and orderly manner for a redress of grievances shall not be a violation of this section.

Again, the facts cited above show that Officers Hall and Barnes had probable cause to believe that Frieda Kelley willfully interrupted the orderly and peaceful process of the Williamson Police Department—a political subdivision—while they were attempting to issue citations to individuals who had violated ABCC regulations or were intoxicated in public. Therefore, the trial court was correct in granting the Motion for Summary Judgment filed by Appellee Barnes for the claims of Frieda Kelley.

D. DEFENDANT BARNES WAS ONLY ACTING AT THE DIRECTION OF THE SENIOR PATROLMAN ON DUTY, OFFICER HALL.

As stated in the Statement of Facts section above, Officer John Hall was the senior patrolman during the shift relevant to this case. Officer Hall had 12 years of experience with the Williamson Police Department. Deposition of John Hall at 4:10-23. Prior to that, he had 3 years of experience at the Kermit City and Delbarton City Police Departments. *Id.* Defendant Barnes only had 6 years of experience during the time at issue. As testified to by Frieda Kelley and Officer Hall, when Frieda Kelley came into the police station and started her tirade, Officer Hall came out of the back office to assist Barnes in dealing with her. It was Officer Hall who first informed Frieda Kelley that she would be arrested if she did not leave the station. Once she refused to leave one time too many,

it was Officer Hall who informed her that she was under arrest. Officer Barnes then assisted Officer Hall in chasing Frieda Kelley, but Officer Hall was the person to actually handcuff her, thereby taking her into custody. The evidence is undisputed and shows that Barnes was merely a role player in the arrest of Frieda Kelley, following the lead of the senior patrolman on duty. Consequently, because it was not Barnes who made the decision to arrest Frieda Kelley, and he was not the individual who actually handcuffed or took the Appellant into custody, he cannot be held responsible for allegations of unlawful arrest of Frieda Kelley or for a battery relative to such arrest, or for intentional infliction of emotional distress stemming from the arrest.¹² Interestingly, Officer Hall was not named as a defendant to the suit filed by Frieda Kelley. Nonetheless, the trial court was correct in granting Appellee Barnes's Motion for Summary Judgment because he did not arrest Appellant Frieda Kelley.

E. OFFICER BARNES IS ENTITLED TO QUALIFIED IMMUNITY, BECAUSE HIS CITATION OF GRADY KELLEY AND HIS ROLE IN THE ARREST OF FRIEDA KELLEY AND THE FILING OF THE CRIMINAL COMPLAINTS DID NOT VIOLATE ANY CLEARLY ARTICULATED STATUTES, LAWS OR REGULATIONS, NOR DID HE ACT IN BAD FAITH OR MALICIOUSLY OR OPPRESSIVELY TOWARD THE APPELLANTS.

Under the doctrine of qualified immunity, public officials and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law, or acting maliciously, fraudulently or oppressively. *See Parkulo v. WV Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). The determination of the entitlement to qualified immunity is a purely legal question. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). The common law doctrine of qualified immunity

¹² Again, the issue of intentional infliction of emotional distress was not raised in this Appeal.

is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of their employment. *See e.g., Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995). Recently, the United States Supreme Court held that qualified immunity is an entitlement not to stand trial and should be made as early in the proceedings as possible so that the costs and expenses of trial are avoided where the defense is dispositive. *See Saucier v. Katz, et al.*, 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151 (2001).

To sustain a viable claim against employees or public officials acting within the scope of their authority sufficient to overcome this immunity, the Appellants must establish that the employee or official, Michael Barnes knowingly violated a clearly established law or acted maliciously, fraudulently, or oppressively. *See Parkulo, supra; Clark, supra* (citing *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992)).

In *State v. Chase Securities, Inc.*, the common law doctrine of qualified immunity was analyzed in detail by this Court. In that case the State brought suit against Chase Securities, Inc. (hereinafter "Chase"), a brokerage company, to recover damages for losses sustained by the consolidated fund. *Id.*, 188 W.Va. at 592, 424 S.E.2d at 357. Chase filed a third-party complaint against members of the Board of Investments (hereinafter "State Board") alleging that board members' approval of certain large transactions which resulted in financial losses to the State, rendered it liable to the board members. *Id.* The circuit court dismissed Chase's third-party complaint against the board on the grounds that it was immune from suit, and Chase appealed. *Id.* This Court upheld the State Board's dismissal from suit, finding that the members of the State Board were entitled to qualified immunity for the discretionary decisions that they made regarding investment transactions. *Id.*, 188 W.Va. at 597, 424 S.E.2d at 362. This Court relied upon federal

court decisions explaining the concept of qualified immunity and commented that qualified immunity is designed to “insulate the decision making process from the harassment of perspective litigation.” *Id.*, 188 W.Va. at 596, 424 S.E.2d at 361. Later, this Court quoted *Westfall v. Erwin*, a United States Supreme Court opinion, which stated “the provision of immunity rests on the view that the threat of liability will make federal officials timid in carrying out their official duties, and that effective government will be promoted if officials are freed by the cost of fixations and often frivolous damage suits.” *Id.* (quoting *Westfall v. Erwin*, 484 U.S. 292, 295-96, 108 S.Ct. 580, 583, 98 L.Ed.2d 619, 625 (1988)).

This Court also adopted the test articulated by the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) to guide lower courts in determining the applicability of the doctrine of qualified immunity for the acts of public officials. *See id.* In *Harlow*, the United States Supreme Court held that “government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Chase*, 188 W.Va. at 597, 424 S.E.2d at 362 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Furthermore, “[I]f a public officer . . . is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.” *Clark*, 195 W.Va. at 278, 465 S.E.2d at 380 (quoting Footnote 7, *City of Fairmont v. Hawkins*, 172 W.Va. 240, 304 S.E.2d 824 (1983)).

Michael Barnes, while employed as a police officer by the City of Williamson, was required

to make difficult decisions regarding the exercise of his duties. Circumstances routinely force police officers to make difficult decisions regarding whether a violation of the law has occurred and whether an individual should be arrested. There is no evidence that Officer Barnes knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively with respect to the issuance of a citation to Grady Kelley or in his role in the arrest of Frieda Kelley or in filing Criminal Complaints against the Appellants. In fact, the evidence demonstrates that Grady Kelley was in violation of the ABCC regulations at issue and that his citation and the Criminal Complaint were, therefore, in accordance with all known and articulated standards, and not malicious or oppressive. As noted above, "government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *State v. Chase Securities, Inc.*, 188 W.Va. at 362, 424 S.E.2d at 597 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982)). The Court explained further that the term "reasonable person" is defined as a "a reasonable public official occupying the same position as the defendant public official." *Id.* at n. 16, (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)). These facts show no bright line violation, as required to overcome qualified immunity. Thus, Appellee Barnes is entitled to summary judgment, an issue that the Appellants have not disputed in their Brief.

Appellee Barnes was also faced with the discretionary decision as to whether to follow Officer Hall's directives by assisting in the chase, capture, and arrest of Frieda Kelley and preparing the criminal complaints. There is no evidence that Barnes knowingly violated a clearly established law, or acted maliciously, fraudulently or oppressively with respect to the actions alleged by either of the Appellants in the Complaints. In fact, the evidence demonstrates that Grady Kelley admitted

to having violated ABCC regulations and Frieda Kelley was acting in a belligerent, disorderly manner in violation of the *West Virginia Code*, she was warned to cease such conduct on numerous occasions, and she refused. Her arrest was, therefore, in accordance with all known and articulated standards, and not malicious or oppressive. Furthermore, it was Officer John Hall who placed her under arrest and handcuffed her, not Appellee Barnes—he merely assisted in catching her after she ran. These facts show no bright-line violation of such standards, as required to overcome qualified immunity. Thus, Barnes is entitled to summary judgment and the Appellant has not argued otherwise. Therefore, this Court should affirm the decisions of the Mingo County Circuit Court should be affirmed.

CONCLUSION

The Circuit Court was correct in granting Officer Barnes Motions for Summary Judgment as to each of Appellants' claims. With respect to the asserted battery charge and the unlawful arrest charge by Grady Kelley, his presence with six other individuals in the bar after the time prescribed by the ABCC affirmatively and conclusively demonstrates that the citation for the violation of the regulation was lawful, as was the Criminal Complaint, which precludes a claim for battery. With respect to the false swearing charge on the citation or the Criminal Complaint, not only did Appellee Barnes never make a false statement, but also a false statement in a citation or Criminal Complaint, neither made under oath administered by a lawfully authorized person to administer such oath, even if proven to be false, cannot serve as the basis for a violation of *West Virginia Code* § 61-5-2. Additionally, Appellee Barnes is entitled to qualified immunity because the issuance of the citation and the filing of the Criminal Complaint were conclusively and irrefutably lawful. Consequently, Appellee Barnes's qualified immunity is not defeated as a result of any "violation of a clearly

articulated statute, law, rule, regulation or standard or other malicious or oppressive act.” The Mingo County Circuit Court was correct in granting Barnes’s Motion for Summary Judgment because there are not disputed material facts and he is entitled to judgment as a matter of law on all of the claims alleged by Grady Kelly. Furthermore, Appellee Barnes is entitled to qualified immunity from all of the claims of Appellant Grady Kelley.

As to the claims of Frieda Kelley, the undisputed facts establish that in the early morning hours of Sunday, July 23, 2000, Appellee Michael Barnes assisted Officer John Hall, the senior on-duty police officer with the City of Williamson, in the capture and arrest of Frieda Kelley for causing a disturbance at the City of Williamson police station. Frieda Kelley’s son, Appellant Grady Colin Kelley II, was at the police station being issued a citation for having people in his bar after hours in violation of ABCC regulations. Appellee Barnes and Officer John Hall took Mr. Kelley and six of his customers to the police station. The purpose of this transport was so that Barnes could look up the statute number for the ABCC violation to issue a citation to Mr. Kelley, and to determine if the customers were intoxicated, thus violating W. Va. Code, § 60-6-9(a)(1).

The circuit court was correct in granting Officer Barnes’s Motion for Summary Judgment as to each of Frieda Kelley’s claims. First, Appellee Barnes cannot be held liable to Frieda Kelley based upon her claims because Barnes did not order Frieda Kelley’s arrest and was merely assisting the senior patrolman, Officer Hall’s decision to arrest her. With respect to the asserted battery claim and the unlawful arrest claim, in particular, Frieda Kelley admittedly acted in a disorderly manner, even after she was arrested, and admitted that she had been warned several times to vacate the premises. This evidence conclusively demonstrates that the arrest of Frieda Kelley for violation of *West Virginia Code* § 61-6-1b was lawful, thereby precluding claims for unlawful arrest and battery.

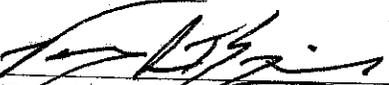
Likewise, the facts outline above demonstrate he had probable cause to believe that Frieda Kelley was guilty of obstruction/resisting arrest, in violation of *West Virginia Code* § 61-5-17(d) and of the wilful disruption of a governmental process, in violation of *West Virginia Code* § 61-6-19. Thus, the trial court was correct in finding that Appellee Barnes did not commit the alleged torts when he assisted Officer Hall in catching the fleeing Frieda Kelley.

With respect to the false swearing charge, not only did Barnes never make a false statement, but also a false statement in a criminal complaint not made under oath administered by a lawfully authorized person, even if proven false, cannot serve as the basis for a violation of *West Virginia Code* § 61-5-2, as this Court has previously found.

Finally, here again Appellee Barnes is entitled to qualified immunity on the claims of Frieda Kelley because his role in the arrest was conclusively and irrefutably lawful. Consequently, Appellee Barnes' qualified immunity is not defeated as a result of any violation of a clearly articulated statute, or other malicious or oppressive act. The circuit court was correct in granting Appellee Barnes's Motion for Summary Judgment as to the claims of Frieda Kelley. Thus, the Circuit Court of Mingo County was correct in issuing both Orders granting Appellee Barnes's Motions for Summary Judgment and this Court should affirm the decisions of the Circuit Court of Mingo County.

WHEREFORE, for the forgoing reasons, Appellee Barnes moves this Honorable Court to affirm the decision of the Mingo County Circuit Court.

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By Counsel,


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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 33311

GRADY COLIN KELLEY, II,

Appellant, Plaintiff-Below,

vs.

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, Defendants-Below

FRIEDA CAROL KELLEY,

Appellant, Plaintiff-Below,

vs.

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, Defendants-Below

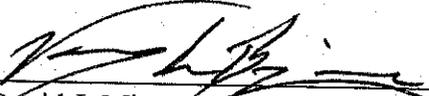
CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "**Response to Brief of Appellee Michael Barnes**" has been served upon the following counsel of record by this day mailing true copies thereof:

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Done this 23rd day of April, 2007


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