

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**VANESSA JEAN PRUITT, ADMINISTATRIX OF
THE ESTATE OF CHARLES E. PRUITT, DECEASED;
VANESSA JEAN PRUITT, MOTHER AND LEGAL
GUARDIAN OF ANGEL M. PRUITT, AN INFANT
UNDER THE AGE OF 18 YEARS, VANESSA JEAN
PRUITT, INDIVIDUALLY; AND TIMOTHY B. PRUITT,**

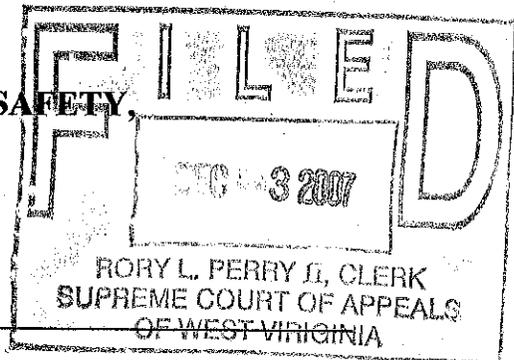
Appellants,

NO. 33526

v.

**WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY,
C. F. KANE, JOHN DOE I, JOHN DOE II, and
JOHN DOE III,**

Appellees.



APPELLANTS' BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. NATURE OF PROCEEDINGS AND RULINGS BELOW	2
III. STATEMENT OF THE FACTS	3
IV. ASSIGNMENTS OF ERROR	9
V. STANDARD OF REVIEW	9
VI. DISCUSSION OF LAW	10
A. The Circuit Court Erred in Ruling That Common Law Claims Cannot Be Brought up to the Limit of the State's Insurance Policy Limits Pursuant to <i>Pittsburgh Elevator V. West Virginia Board of Regents</i>	10
B. Claims Against the State's Insurance Policy Limits Pursuant to <i>Pittsburgh Elevator</i> Are Claims Against a "Person" under 42 U.S.C. Section 1983	13
C. The Circuit Court Erred in Finding There Was Not Sufficient Evidence Upon Which the Defendant West Virginia Department of Public Safety Could Be Held Liable	18
1. There is sufficient evidence on the issue of failure to train to submit this matter to a jury	18
2. There is sufficient evidence to show an official custom or policy on the part of the defendant Department that caused a deprivation of plaintiffs' constitutional rights ...	19
D. Defendants Are Judicially and Equitably Estopped from Asserting their Avoidance Defenses	23
VII. RELIEF REQUESTED	35

TABLE OF AUTHORITIES

Cases	Page
<i>Beck v. City of Pittsburgh</i> , 89 F.3d 966 (3d Cir. 1996)	21
<i>Bordanaro v. McLeode</i> , 871 F.2d 1151 (1st Cir. 1989)	20-21
<i>Burless v. West Virginia University Hospital</i> , 215 W. Va. 765, 601 S.E.2d 85 (2004)	12
<i>Cobbledick v. United States</i> , 309 U.S. 323 (1940)	28
<i>Dept. of Transp. v. Robertson</i> , 217 W. Va. 497, 618 S.E.2d 506 (W.Va. 2005)	29-31
<i>Echols v. Parker</i> , 909 F.2d 795 (5th Cir. 1990)	23
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	14
<i>Foley v. City of Lowell</i> , 948 F.2d 10 (1st Cir. 1991)	7, 22
<i>Gauze v. Reed</i> , 219 W. Va. 381, 633 S.E.2d 326 (2006)	9
<i>Grandstaff v. City of Berger</i> , 767 F.2d 161 (5th Cir. 1985)	20-22
<i>Greenburg v. Superior Court</i> , 19 C.2d 319, 121 P.2d 713(1942)	28
<i>Hively v. Merrifield</i> , 212 W. Va. 804, 575 S.E.2d 414 (2002)	10
<i>Hunter v. Christian</i> , 191 W. Va. 390, 446 S.E.2d 177 (1994)	33
<i>Kentucky v. Graham</i> , 473 U.S. 159 (1985)	14
<i>Levine v. United States</i> , 362 U.S. 610 (1960)	28
<i>Liberty Mut. Fire Ins. Co. v. Mandile</i> , 963 P.2d 295 (Ariz. Ct. App. 1998)	31
<i>Maitland v. University of Minnesota</i> , 43 F.3d 357 (8 th Cir. 1994)	33
<i>McLaughlin v. City of Canton</i> , 947 F. Supp. 954 (S.D. Miss. 1995)	23
<i>Monnell v. New York City Dept. of Social Services</i> , 436 U.S. 658, 98 S. Ct. 2018 (1978)	12, 14
<i>New Hampshire v. Maine</i> , 532 U.S. 742, 121 S. Ct. 1808 (2001)	27
<i>Parkulo v. W.V. Board of Probation</i> , 199 W. Va. 161, 483 S.E.2d 507 (1996)	12, 16-17
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986)	23
<i>Pittsburgh Elevator Co. v. West Virginia Board of Regents</i> , 172 W. Va. 743, 310 S.E.2d 675 (1983)	10, 12, 15-17
<i>Pritt v. Republican Nat. Committee</i> , 210 W. Va. 446, 557 S.E.2d 853 (2001)	9
<i>Pusey v. City of Youngstown</i> , 11 F.3d 652 (6th Cir. 1993)	23
<i>Shaw v. Stroud</i> , 13 F.3d 791 (4th Cir.1994)	19
<i>State v. Chowder</i> , 193 N.C. 130, 136 S.E. 336 (1927)	28
<i>State v. Fouse</i> , 355 N.W.2d 366 (Wis. Ct. App. 1984)	31
<i>State v. McGuire</i> , 200 W. Va. 824, 490 S.E.2d 912 (1997)	34
<i>Teledyne Industries, Inc. v. N.L.R.B.</i> , 911 F.2d 1214 (6 th Cir. 1990)	28, 32-33

<i>Toth v. Board of Parks and Recreation Commissioners</i> , 215 W. Va. 51, 593 S.E.2d 576 (2003)	10
<i>Waterman v. Batton</i> , 393 F.3d 471 (4th Cir. 2005)	18
<i>Warda v. C.I.R.</i> , 15 F.3d 533 (6 th Cir. 1994)	28
<i>West Virginia Dept. of Transp., Div. of Highways v. Robertson</i> , 217 W. Va. 497, 618 S.E.2d 506 (2005)	9, 29
<i>Will v. Michigan Department of State</i> , 491 U.S. 58 (1989)	13-14, 17

Statutes

42 U.S.C. § 1983	passim
W.Va. Code § 14-2-2	15-16
W.Va. Code § 31D-1-150	15

I. INTRODUCTION

This case involves a situation where a West Virginia trooper entered the home of a man who was sitting at home on his couch, without a warrant and without permission, and shot him 14 times. The man, Charles E. Pruitt, had broken no laws and was not breaking any laws. After shooting 12 bullets, the trooper reloaded the clip in his gun, and continued shooting Mr. Pruitt, firing a total of 16 shots, hitting him with bullets in the back as he was laying face down by the couch, and endangering the lives of the others in the house as well as the infant daughter of the deceased.

The evidence indicates that the trooper then planted a gun by the hand of the body of Mr. Pruitt after killing him, since the medical examiner testified the deceased could not have been holding a gun in his hands when the trooper shot him, and no bullets had been fired from the planted gun. Eyewitnesses in the house also testified that Mr. Pruitt did not have a gun in his hand and that there was not one laying by his body immediately after he was gunned down and killed.

After the trooper shot and killed Mr. Pruitt, the West Virginia Department of Public Safety ("Department") did not place the trooper on administrative leave pending an investigation, but instead handed him a gun and placed him back on the street that same day. The trooper testified in his deposition that he had never been trained when to quit shooting once he opened fire, and that he could not remember anything from the time when he first pulled the trigger until he quit pulling the trigger.

Further, when a grand jury subsequently wanted to indict the trooper for shooting

and killing Mr. Pruitt, the prosecutor dissuaded the grand jury from doing so on the ground that the plaintiffs had filed this lawsuit against the State for civil damages and could get relief in the form of monetary damages against the State.

The court below found that the trooper was not entitled to qualified immunity and that he could be held personally and officially liable for his actions, but found that the Department had no potential liability and dismissed the State as a defendant.

II. NATURE OF PROCEEDINGS AND RULINGS BELOW

The plaintiffs filed a Complaint against the West Virginia Department of Public Safety ("Department") and C.F. Kane in his official and personal capacity for the events surrounding the shooting and killing of Charles E. Pruitt. The Complaint contained federal counts for violations of the Constitution of the United States brought pursuant to 42 U.S.C. § 1983, along with several common law state tort claims, including wrongful death. The defendants Department and Kane filed separate motions for summary judgment. In an order issued November 29, 2006, the circuit court denied the motion for summary judgment with respect to the defendant Kane, but granted it with respect to the defendant Department, dismissing all counts against the defendant Department. The jury trial on the claims against defendant C. F. Kane is now stayed pending the outcome of this appeal of the dismissal of the claims against the Department.

The Court granted certiorari on September 13, 2007.

III. STATEMENT OF THE FACTS

This case involves the killing and shooting of Charles E. Pruitt by defendant C.F. Kane, a State trooper, who entered the house and residence of Charles Pruitt without permission and without a warrant when Mr. Pruitt was breaking no laws, and shot 14 bullets into Mr. Pruitt's body.¹ The incident occurred right before Christmas on December 23, 2001, after Tasha Pruitt, the daughter of Charles Pruitt, the deceased, called in a false report about her father to 911, concerning her natural daughter, whom had been adopted by Charles Pruitt and his wife Vanessa Pruitt. (R. 629, PFN 1: *Exhibit 32, Birth Certificate of Angel Marie Pruitt and 911 Tape.*)²

The defendant, C.F. Kane responded to the call, and went to the residence of Vanessa Pruitt, Charles Pruitt, their son Timothy Pruitt, and their adopted child, four-year-old Angel Pruitt. (R. 630, PFN 2: *Exhibit 33, Kane deposition, pp. 46, 138.*) When defendant Kane arrived at the Pruitt residence, there was no ongoing dispute or argument of any kind inside the Pruitt residence, and defendant Kane had been informed in the 911

¹ In its cursory two (2) page order granting summary judgment to the defendant Department, the circuit court makes no findings of fact. (R. 700-01.) Thus, the facts set forth here are taken from the record below.

²The appellants'/plaintiffs' fact numbers are set forth in the record on pages 16-20 of the Plaintiffs' Counter-Statement of Material Facts and Statement of Controverted Material Facts Submitted in Opposition to Defendants' Motions For Summary Judgment. (R. 629-632.) Appellant's/defendant's fact numbers are set forth on pages 1-16 of the Plaintiffs' Counter-Statement of Material Facts and Statement of Controverted Material Facts Submitted in Opposition to Defendants' Motions For Summary Judgment (R. 614-629) and are taken directly from the Statement of Facts set forth on pages 2-4 of the Memorandum of Law in Support of Defendant C. F. Kane's Motion for Summary Judgment. The Plaintiffs' Fact Numbers are referred to here in abbreviate form as "PFN" and the Defendants' Fact Numbers are referred to in abbreviated form as "DFN".

call that there was no ongoing disturbance. (R. 630, PFN 3: *Exhibit 3, Kane deposition, p. 50 and 911 Tape.*) Tasha Pruitt, who had called in the false 911 report, was standing outside the house, but defendant Kane did not talk to her before going to the house to ascertain the facts or to determine in advance what was transpiring. (R. 630, PFN 4: *Exhibit 34, Kane deposition, pp. 37-38.*)

Rather than talking to Tasha Pruitt to find out the status, defendant Kane opened the screen door to the front door, and pushed open the wooden front door by knocking on it. (R. 630, PFN 4 & 5: *Exhibit 34, Kane deposition, pp. 37-38*; R. 619, DFN 13.) Charles Pruitt then stood up from the couch where he was sitting in the living room, and defendant C.F. Kane shot 12 bullets from his gun at Charles Pruitt. Defendant Kane then reloaded the clip in his gun, and after reloading it, he fired 4 more shots at Charles Pruitt, killing him in the process of firing a total of 16 bullets with 14 of the 16 bullets hitting the body of Charles Pruitt. (R. 630, PFN 5: *Exhibit 35, West Virginia State Police Report of Criminal Investigation, p. 1*; PFN 6: *Exhibit 36, West Virginia State Police Report of Criminal Investigation, p. 10.*) A number of the fourteen (14) bullet entry wounds in the body of Charles Pruitt appear to have been fired into his body when he had his back turned to defendant Kane or was laying face down on the floor after being shot. (R. 630-31, PFN 7: *Exhibit 37, Autopsy Report, pp. 4, 9*; *Exhibit 21, Kaplan deposition, pp. 22-23*; *Exhibit 23, Autopsy Pictures of Bullet wounds to Charles Pruitt's back.*)

Defendant Kane did not have permission to open the door and enter the premises

without a warrant when there was no evidence of an ongoing disturbance or dispute. Further, the physical facts indicate that Charles Pruitt did not have a gun in either hand, and therefore was not pointing a gun at defendant Kane. In that regard, Charles Pruitt had a cigarette butt clutched in his left hand after he was killed, making it unlikely that he was holding a gun in his left hand as Trooper Kane claims. (R. 619-21, Response to DFN 13: *Exhibit 7, Autopsy Report, p. 2.*) Further, a bullet entered the palm of Charles Pruitt's right hand and exited out of the back of his right hand, making it highly unlikely that he could have been holding a gun in his right hand when he was shot and killed by Trooper Kane. (R. 619-21, Response to DFN 13: *Exhibit 8, Autopsy Report, p. 6; Exhibit 9, Kaplan deposition, pp. 26, 74-76, 92-93; Exhibit 10, Pictures of entry and exit wound to right hand.*) The medical examiner also stated that he could "testify to a reasonable degree of medical certainty" that Charles Pruitt "could not have been holding a gun in his hand" at the time the wound to his right hand was received. (R. 620, Response to DFN13: *Exhibit 9, Kaplan deposition, p. 92.*) The physical evidence is consistent with Charles Pruitt putting up empty palms towards Trooper Kane as if to say "don't shoot". Further, an inference can be drawn from the location of the gun next to Charles Pruitt's body that the gun was placed there after the killing and that it was not in Mr. Pruitt's hand(s). (R. 619-21, Response to DFN 13: *Exhibit 11, State Police photo showing location of gun at scene.*)

Finally, the testimony of Tasha Pruitt, Timothy Pruitt, and Vanessa Pruitt indicates there was no gun laying by Mr. Pruitt's body or hand immediately after the shooting.

Vanessa Pruitt testified that she could see her husband's hand from her bedroom at the time when Trooper Kane entered the house and that her husband did not have a gun in his hand at the time, but was sitting on the couch and holding a magazine in his hand that he was viewing at the time. (R. 625, Response to DFN. 26: *Exhibit 25, Vanessa Pruitt deposition, pp. 148*; R. 620, Response to DFN 13: *Exhibit 12, Tasha Pruitt deposition, pp. 57, 60-62*; *Exhibit 13, Timothy Pruitt deposition, pp. 42-43*; R. 626, Response to DFN 27: *Exhibit 14, Vanessa Pruitt deposition, pp. 50, 229, 236*.) Trooper Kane had an opportunity to place the gun by Mr. Pruitt's hand when he entered the house alone after taking everyone else out of the house and before the other police arrived. (R. 620-21, Response to DFN 13: *Exhibit 15, Vanessa Pruitt deposition, p. 161*.) In addition, even if the gun was not planted, the evidence is very clear, and defendant Kane even admitted, that Charles Pruitt did not fire a single shot. (R. 621, Response to DFN. 13: *Exhibit 16, Kane deposition, pp. 73-74*.)

The defendant Kane essentially testified in his deposition that he did not remember anything in-between the time when he first began pulling the trigger until he saw Mr. Pruitt's body on the floor. (R. 631, PFN 8: *Exhibit 24, Kane deposition pp. 83-84, 88, 133*; *Exhibit 36, West Virginia State Police Report of Criminal Investigation, p. 10*.) Trooper Kane also testified in the first day of his deposition that he never received any training as to when he should quit firing a gun in a situation where he is shooting at someone. (R. 632, PFN 17: *Exhibit 40, Kane Depo., p. 91, lns. 17-21*.)

In addition, all the time when defendant Kane was firing the gun, he was firing it

towards the thin wall of four year old plaintiff Angel Pruitt's room (although unbeknownst to Trooper Kane, the infant was sleeping in another room with her adoptive mother, Vanessa Pruitt, at the time). (R. 631, PFN 9: *Exhibit 20, Vanessa Pruitt deposition p. 149.*) By doing so, Trooper Kane endangered the lives of others by shooting and discharging his gun in a house without knowing the location of people in the house—particularly where he shot bullets through a thin wall into the infant's bedroom. (R. 631, *Exhibit 20, Vanessa Pruitt deposition, p. 149.*)

According to the plaintiff's expert, Lou Reiter:

What is very unusual for a police involved shooting such as this one, are the actions following the shooting. Trooper Kane did not handcuff Mr. Pruitt or secure the three (3) handguns within reach of him. Trooper Kane did not ascertain whether Charles was in fact dead. While he took control of Vanessa and Timothy, he took no steps to determine the well fare [sic] of the 4 year old. ...

(R. 595, *Exhibit B of Memorandum of Law in Support of Defendant West Virginia Department of Public Safety's Motion for Summary Judgment, Preliminary Expert of Lou Reiter, p. 13.*)³

After the shooting had stopped, Vanessa Pruitt came out of the bedroom and into the living room from Trooper Kane's left. (R. 626, DFN 28.) Timothy Pruitt also made his way into the living room shortly after Vanessa. (R. 626, *Response to DFN 29.*)

Defendant Kane then turned his gun upon plaintiff Vanessa Pruitt, the wife of

³ Not only has the defendant Department submitted the entire report of plaintiff's expert, Lou Reiter, in support of its motion for summary judgment, but Mr. Reiter has been accepted in federal court as a qualified expert on the issue of excessive force in § 1983 cases. See, e.g. *Foley v. City of Lowell*, 948 F.2d 10, 14 (1st Cir. 1991.)

Charles Pruitt, followed by putting it to the head of Timothy Pruitt, the son of Charles Pruitt, who came out of the bedroom in his underwear and tried to go to the body of his dying father, Charles Pruitt. (R. 631, PFN 10: *Exhibit 27, Vanessa Pruitt deposition, p. 150.*) Timothy Pruitt was then placed outside, on the porch, in handcuffs, in below freezing weather, with only underwear on, for approximately 45 minutes by Trooper Kane, and was only allowed to get clothing to protect himself from the freezing cold after other police officers arrived on the scene. (R. 632, PFN 14: *Exhibit 30, Vanessa Pruitt deposition, p. 155; Exhibit 31, Timothy Pruitt deposition, p. 47.*)

The defendant Department reissued a service revolver to defendant Kane on the same day he shot and killed Charles Pruitt, and he was immediately placed back on the street with the gun as a State Trooper without any administrative suspension. (R. 632, PFN 15: *Exhibit 38, West Virginia State Police Report of Criminal Investigation p. 7.*) Further, no disciplinary action of any kind was ever taken by the State against Trooper Kane for the shooting and killing of Charles Pruitt. (R. 632, PFN 16: *Exhibit 39, Pauley deposition, p. 39.*)

When the grand jury investigating the shooting and killing of Charles Pruitt wanted to subsequently indict defendant C. F. Kane for his actions in shooting and killing Charles Pruitt, the State's prosecuting attorney dissuaded the grand jury from doing so by representing to the grand jury that Charles Pruitt's wife and family could get monetary relief "against the State" from this civil lawsuit in a "full-blown . . . jury trial" for "\$30 million dollars." *Infra, p. 27; R. 673, Grand Jury Transcript, pp. 61 and 112.*

IV. ASSIGNMENTS OF ERROR

1. Whether the circuit court erred in ruling that common law claims cannot be brought up to the limit of the State's insurance policy limits pursuant to *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983)?
2. Whether the circuit court erred in finding that the corporate insurance carrier of the state is not a "person" that can be sued under 42 U.S.C. Section 1983?
3. Whether the circuit court erred in finding that there was insufficient evidence upon which the defendant West Virginia Department of Safety could be held liable?
4. Whether the circuit court erred in finding that the doctrines of judicial and equitable estoppel are not applicable to the facts of this case where the State's prosecuting attorney successfully dissuaded the grand jury from indicting the defendant Kane by representing that plaintiffs could get monetary relief in this pending civil lawsuit against the State?

V. STANDARD OF REVIEW

"The standard of review of a circuit court's entry of summary judgment is *de novo*." *Gauze v. Reed*, 219 W. Va. 381, 633 S.E.2d 326, 331 (2006). "Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*." Syl. Pt. 1, *West Virginia Dept. of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 4, *Pritt v. Republican Nat. Committee*, 210 W. Va. 446, 557 S.E.2d 853 (2001)(internal citations omitted).

Further, when granting or denying summary judgment, "the circuit court's order

must provide clear notice to all parties and the reviewing court as to the rationale” and “legal analysis” applied to ensure that a meaningful review can be completed. *Toth v. Board of Parks and Recreation Commissioners*, 215 W.Va. 51, 54, 593 S.E.2d 576, 579 (2003). In addition, “a circuit court’s order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.” *Hively v. Merrifield*, 212 W.Va. 804, 808, 575 S.E.2d 414, 418 (2002).

VI. DISCUSSION OF LAW

A.. The Circuit Court Erred in Ruling That Common Law Claims Cannot Be Brought up to the Limit of the State’s Insurance Policy Pursuant to Pittsburgh Elevator.

The plaintiffs allege in the Complaint that they are “suing [the Department] under and up to the maximum limit of [its] liability insurance coverage.” (R. 4, Complaint, ¶ 4.) Plaintiffs’ claim(s) under and up to the maximum limits of the liability insurance coverage are based upon the case of *Pittsburgh Elevator Company v. West Virginia Board of Regents*, 172 W. Va. 743, 756, 310 S.E.2d 675, 688-89 (1983), which ruled that

[t]he Legislature has not, by enactment of W.Va. Code Section(s) 29-12-5, sought to waive the State's constitutional immunity from suit. Rather, we read the statute as the Legislature's recognition of the fact that **where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable.** As this Court recently stated in *Gooden v. County Comm'n of Webster County, W.Va.*, 298 S.E.2d 103, 105 (1982):

"Where liability insurance is present, the reasons for immunity completely disappear."

Id. (emphasis added).

In an apparent attempt to override the holding of *Pittsburgh Elevator*, the circuit court dismissed all claims against the Department, including the state common law tort claims and state constitutional claims brought "under and up to the maximum limit of [its] liability insurance coverage". (R. 4, Complaint, ¶ 4.) The Department, however, did not even argue for the dismissal of the state claims in its Memorandum in Support of Motion for Summary Judgment. (R. 595.)⁴

The circuit court's only explanation for the dismissal of the state claims was "that the West Virginia Department of Public Safety is not a 'person', as that term is defined for purposes of an action, pursuant to Section 1983." (R. 700.) The circuit court provides no explanation or discussion as to how the statutory "person" requirement of 42 U.S.C. § 1983 applies to state constitutional claims or state tort claims brought under the common law of West Virginia, which has no "person" requirement. No mention is made of *Pittsburgh Elevator* even though it was discussed extensively below by plaintiffs in their brief. (R. 650-651, 667.) Thus, we have no explanation of the circuit court's rationale, although this defect in the order was very specifically brought to the attention of the circuit court in objections to the proposed order. (R. 693-695.)

⁴The Department summarily asked for the dismissal of all claims against it in its motion for summary judgment, and the circuit court granted the motion in its entirety. (R. 593; R. 700.)

The circuit court also says that plaintiffs have “fail[ed] to identify an official policy or custom.” (R. 700.)⁵ That requirement, however, applies to the § 1983 claims asserted by plaintiffs, but not the state law claims. *Infra*, pp. 19-23.

While the doctrine of respondeat superior does not apply to § 1983 claims,⁶ the doctrines of respondeat superior and vicarious liability do apply to state law claims in West Virginia. See *Parkulo v. West Virginia Board of Probation and Parole*, 199 W.Va. 161, 177, 483 S.E.2d 507 (1996) (referring to “vicarious liability of the State for its officer's conduct”); see also *Burless v. West Virginia University Hospital*, 215 W.Va. 765, 771, 601 S.E.2d 85 (2004) (setting forth elements for respondeat superior where State hospital is defendant). Thus, in contrast to the § 1983 claims, the doctrines of respondeat superior and vicarious liability would apply to make the Department, as the employer of the defendant Kane, liable for the acts of its employee, the defendant Kane.

There simply is no basis for the dismissal of the state tort and state constitutional claims based upon a federal statute that only applies to the § 1983 claims. The circuit court ignores *Pittsburgh Elevator* and progeny, as well as the statute that *Pittsburgh Elevator* is based upon by holding, in effect, that no recovery of any kind can be obtained in suits seeking recovery against the insurance carrier of a State agency. This ruling of

⁵Similarly, the statement about the “deliberately indifferent” elements set forth in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994) applies to the § 1983 claims but not to the state law claims. (R. 700-01.)

⁶ See e.g., *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 692-94, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)(principles of respondeat superior do not apply in imposing liability under § 1983).

the circuit court dismissing the state common claims based upon a § 1983 statutory analysis that does not apply, without any explanation or pertinent analysis, is contrary to well-established case law and should be summarily reversed.

B. Claims Against the State's Insurance Policy Limits Pursuant to Pittsburgh Elevator Are Claims Against a "Person" under 42 U.S.C. Section 1983.

In dismissing the plaintiff's claims against the Department, the circuit court concluded that a state entity cannot be sued pursuant to 42 U.S.C. § 1983 because the State is not a "person." (R. 700.) While the "person" language contained in 42 U.S.C. § 1983 does not apply to state claims, it does of course apply to the federal constitutional claims brought pursuant to § 1983. The concept of a "person" in § 1983, however, is a legal fiction that changes depending upon whether immunity applies or not, as the applicable case law shows.

The landmark case explaining what constitutes a "person" that can be sued under 42 U.S.C. § 1983 is *Will v. Michigan Department of State*, 491 U.S. 58 (1989).⁷ As *Will* demonstrates, in those cases where immunity applies, the courts have held that the entity being sued is not a person. In those cases where there is no immunity, the legal entity

⁷The circuit court, however, does not cite *Will* or any legal authority at all in reaching its conclusion. It's only explanation was as follows:

[T]he Court finds that the West Virginia Department of Public Safety is not a "person", as that term is defined for purposes of an action, pursuant to Section 1983. The Court finds the argument that it is actually the Department's insurer that is the real party, to be unpersuasive, Accepting that argument would essentially obliterate the definition of the term "person" as used in the statute for most all cases.

(R. 700.)

being sued is considered to be a person.

For example, as explained in *Will*, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under §§ 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 491 U.S. at 71, n. 10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). But, the named defendant for the § 1983 claim is exactly the same, whether the claim be for prospective injunctive relief or monetary damages, although the same named defendant is considered to be a person in the former case where injunctive relief is sought but not in the latter case. Thus, *Will* makes clear that when the State is named as a defendant where immunity does not preclude the claim, it is a "person" for purposes of § 1983.

In further making a distinction between actions that are treated as actions against a "person" and those that are not, *Will* reaffirms the long-standing holding of *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978), "that a municipality is a person under § 1983" and further recognizing that the definition of "persons" in § 1983 "include[s] towns, cities, and counties." *Will*, 491 U.S. at 58, 69, 109 S. Ct. at 2036, 2311, fn. 9. The U.S. Supreme Court reiterates that this is still the established law after its decision in *Will*, i.e. "our holding here does not cast any doubt on *Monnell*." *Will*, 491 U.S. at 70, 109 S. Ct. at 2312. The crucial distinction, of course, is that cities and counties, while subdivisions of the state, do not have immunity, while the

state does.

Similarly, under *Pittsburgh Elevator*, actions such as the instant one, that seek recovery against the State's insurance policy, are not treated as actions against the State, but as actions against the State's corporate insurance carrier.⁸ *Pittsburgh Elevator* makes this distinction in at least two different ways. First, this Court states outright: "Where a cause of action is, in essence, a suit against a state agency's insurance carrier . . . [the] **real party in interest is the insurance carrier.**" *Pittsburgh Elevator*, 172 W. Va. at 757, 310 S.E.2d at 689 (1983) (emphasis added). Since the insurance carrier is the "real party in interest here", according to the holding in *Pittsburgh Elevator*, the "person" requirement of §1983 is met here under *Pittsburgh Elevator*.⁹

Pittsburgh Elevator reaffirms this position in another way by also holding that a suit seeking recovery up to the limits of the State's insurance policy is not subject to the exclusive venue provision appearing at W.Va. Code § 14-2-2, which requires suits

⁸The plaintiffs allege in the Complaint that they are "suing [the Department] under and up to the maximum limit of [its] liability insurance coverage." (R. 4, Complaint, ¶ 4.)

⁹Under the West Virginia corporate code, a "[p]erson" includes, but is not limited to, . . . an entity. WV Code §31D-1-150(14). An "entity" is then defined to "include[] **corporations** and foreign corporations; nonprofit corporations; profit and nonprofit unincorporated associations; limited liability companies and foreign limited liability companies; business trusts, estates, partnerships, trusts and two or more persons having a joint or common economic interest; and **state**, United States and foreign government." WV Code §31D-1-150(10)(emphasis added). Thus, under the West Virginia corporate code, a "person" is defined to include both insurance corporations and the State.

against the State to be brought in Kanawha County, because such a suit is not a suit against the State. More specifically in this regard, *Pittsburgh* states and holds:

Where a cause of action is, in essence, a suit against a state agency's insurance carrier, the justification for applying the exclusive venue provisions of W.Va.Code §§ 14-2-2 evaporates. ... Thus, where the real party in interest is the insurance carrier which is obliged to defend the action brought against the Board of Regents, there is no rational justification for application of W.Va.Code §§ 14-2-2.

...

We therefore hold that the exclusive venue provision of W.Va.Code §§ 14-2-2 is not applicable to a cause of action wherein recovery is sought against the liability insurance coverage of a state agency.

Pittsburgh Elevator, 172 W. Va. at 757, 310 S.E.2d at 689.

Finally, it should be noted that the Department has never produced its insurance policy or placed it in the record and has never contended that its insurance policy does not cover the acts involved here. Under *Parkulo v. West Virginia Board of Probation and Parole*, 199 W.Va. 161, 177-78, 483 S.E.2d 507, 523-24 (1996), at a minimum, the circuit court should have examined the terms of the Department's insurance coverage before concluding that plaintiffs could not recover when suing under and up to the Department's insurance policy limits. More specifically,

[i]f the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W. Va. Code §§ 29-12-5 expressly grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract.

Id. (emphasis in original). This Court has previously admonished that "the text of the

applicable insurance coverages afforded, including any applicable contractual exceptions or limitations contained in the policies, should be included in the record at an early stage of the proceedings" *Id.*, 483 S.E.2d at 515.

In any event, applying the analysis and rationale of *Will*, a lawsuit seeking recoveries against the State's insurance proceeds would involve a lawsuit against a "person" for purposes of § 1983, since the State of West Virginia has waived immunity to suits up to the limits of its insurance policy, and such a lawsuit is not treated as a suit against the State pursuant to the holding of this Court in *Pittsburgh Elevator*. The circuit court therefore erred in ruling that a lawsuit seeking recovery against the insurance policy of the State is not a lawsuit against a person for the purposes of §1983, and should be reversed.¹⁰

¹⁰While the circuit court granted the Department's motion for summary judgment in its entirety, it denied defendant Kane's motion for summary judgment in its entirety. (R. 701.) The Department's motion for summary judgment did not address the official capacity claim against Kane, while defendant Kane's motion for summary judgment did ask that the official capacity claims against him be dismissed along with the personal capacity claims against him. (R. 515.) Thus, under the circuit court's order, the claims against the Department are dismissed in toto, but the official capacity claims against Kane, which are also claims against the Department, survive. There is no explanation at all for the difference in treatment for official capacity claims against the Department as compared to the official capacity claims against defendant Kane, which is also a claim against the Department. If the distinction is just a mere technicality, however, where the head of the Department should have just been named and sued in his official capacity in order to meet the "person" requirement, then the plaintiffs should be given leave to name the head of the Department in his official capacity in order to meet any technical pleading requirements.

C. **The Circuit Court Erred in Finding There Was Not Sufficient Evidence Upon Which the West Virginia Department of Safety Could Be Held Liable.**

1. **There is sufficient evidence on the issue of failure to train to submit this matter to a jury.**

Trooper Kane testified in the first day of his deposition that he never received any training as to when he should quit firing a gun in a situation where he is shooting at someone. (R. 632, PFN 17.) The applicable law requires that a person make an assessment as to each stage of the firing of a gun as to whether it is necessary to continue firing. *See Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005)(once the threat to safety has been eliminated subsequent shots cannot be justified.) The expert witness report of Lou Reiter, attached as Exhibit B to the Motion for Summary Judgment of Defendant West Virginia Department of Public Safety, sums up the applicable law, as follows:

27. Reasonable police officer[s] are trained to acquire “target acquisition” when they resort to the use of deadly force. That means that each shot is a decision point and the officer is trained to evaluate the necessity for the use of deadly force each time he/she pulls the trigger. In the past several years the generally accepted police training is to continue to fire the weapon until the immediate threat stops. Once the immediate threat stops, officers are trained to cease firing at the subject.

(R. 595, *Exhibit B, Preliminary Expert Report of Lou Reiter, p. 12.*) Here, however, the defendant Kane, who shot Mr. Pruitt 14 times, including shooting him in the back, and who reloaded his gun after firing 12 shots to continue firing at Mr. Pruitt, admitted in the first day of his deposition that he was never given any training on when to stop firing once he started. Thus, based upon the defendant Kane’s own admission in his

deposition testimony, and the applicable standard, there is sufficient evidence upon which a jury could find that the Department failed to adequately train defendant Kane when he should quit firing a gun at a person after he opened fire.

2. There is sufficient evidence to show an official custom or policy on the part of the defendant Department that caused a deprivation of plaintiffs' constitutional rights

As an additional reason for dismissing the claims against the Department, the circuit court states:

[T]he plaintiffs have failed to identify an official policy or custom of the West Virginia Department of Public Safety that caused a deprivation of plaintiffs' or plaintiffs' decedent's constitutional rights, nor has there been evidence offered which creates a genuine issue of material fact that the West Virginia Department of Public Safety was deliberately indifferent to any rights of the plaintiffs or plaintiffs' decedent, given the elements outlined in Shaw v. Stroud. Further, given the totality of the deposition testimony, the plaintiffs have failed to establish a genuine issue of material fact such that a reasonable jury could find in her favor.

(R. 700-01.) The circuit court does not give the full citation for the case of *Shaw v. Stroud* that it relies upon, but the full cite of the case is *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). *Shaw*, however, is not remotely applicable to this case because *Shaw* involves a situation where supervisors were being sued personally for the actions of a subordinate. In the instant case, no supervisor of Trooper Kane is being sued for failure to supervise Trooper Kane. Rather, the relevant basis for liability here is (1) whether the Department is liable for the actions of Trooper Kane based upon a failure to train theory; or (2) whether the Department exercised deliberate indifference in allowing a policy or custom of excessive force to continue within the Department.

Under the facts here, the defendant Kane stated in his deposition that he did not

remember anything in-between the time when he first began pulling the trigger until he saw Mr. Pruitt's body on the floor. (R. 631, PFN 8: *Exhibit 24, Kane deposition pp. 83-84, 88, 133; Exhibit 36, West Virginia State Police Report of Criminal Investigation, p. 10.*) Then, despite the fact that he did not even remember the details of his shooting and killing Charles Pruitt, defendant Kane was reissued a service revolver by the State police on the same day he shot Charles Pruitt 14 times and killed him. He was then immediately placed back on the street with his gun as a State Trooper without any administrative suspension. (R. 632, PFN 15.) Further, no disciplinary action of any kind was taken by the State against Trooper Kane for the shooting and killing of Charles Pruitt. (R. 632, PFN 16.)

This conduct of the State, immediately giving Trooper Kane a gun and putting him back on the street without even a short administrative suspension pending investigation, and the failure to take any disciplinary action against him shows, at worst, that the State and its supervisors ratified Trooper Kane's misconduct, and at best, that the State has an ongoing custom and practice of allowing and tolerating excessive force amongst its troopers.

Although the general rule is that it normally takes more than a single incident to show a custom or practice sufficient to hold a governmental entity responsible for the wrongful acts of its employees, the plaintiff contends that the facts of this case bring it within the exception to the general rule. That is because post-conduct evidence is relevant to show a custom of government entities. *Bordanaro v. McLeode*, 871 F.2d 1151, 1166-67 (1st Cir. 1989). For example, as stated in *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987):

The disposition of a policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. . . . If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made.

This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11. See 2 Wigmore, Evidence §§ 382, 437 (Chadbourn rev. 1979). ... [T]he subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.

After August 11, 1981, we all know of the dangerous recklessness of that police force. If the police chief had not known and approved of it beforehand, we would expect a change when he, too, learned the facts. But there is no sign of any concern except that the City avoid liability. The jury was entitled to infer that the conduct on the 6666 Ranch demonstrated the policy of the Borger city police force as approved by its policymaker, both before and after that time.

Id. at 171-72. Similarly, in *Bordanaro v. McLeode, supra.*, the court upheld the trial court's admission of post-event evidence (lack of proper internal investigation and failure to discipline officers involved) for the purpose of establishing what customs were in effect in the City *before* the incident. *Bordanaro* at 1167. "Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right." *Id. Accord Beck v. City of Pittsburgh*, 89 F.3d 966, 973 (3d Cir. 1996) (recognizing that post-event incident "may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the

use of excessive force.”); *Foley v. City of Lowell*, 948 F.2d 10, 14 (1st Cir. 1991); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

Here, the fact that the Department put Trooper Kane back on the street immediately with a gun -- after he entered the house of a man without a warrant and shot him 14 times, including shooting him in the back, after reloading his clip -- without even a short administrative suspension pending investigation, shows the behavior was part of an ongoing policy and custom of the Department. The conduct is shocking, yet it did not cause the Department to pause for a moment before handing Trooper Kane his gun and putting him on the street again that very same day, indicating that this kind of shocking behavior and excessive force was an accepted custom and practice for the State. This is particularly true where the defendant Kane admitted in the first day of his deposition that he received no training as to when to quit shooting once he opened fire, where the evidence on the scene immediately after the shooting would at least raise questions to investigators about whether defendant Kane planted the gun by Charles Pruitt after killing and shooting him, and where he was subsequently cleared without being disciplined in an internal investigation. At a very minimum, there is a factual question here to be decided by the jury as to whether this post-conduct behavior indicates an accepted ongoing custom and practice.

In addition, the State, through its prosecutor, covered up the conduct of Trooper

Kane and thereby denied the Pruitts access to the courts. (*Infra*, pp. 23-35.)¹¹ Since the State prosecutor has final decision making authority for the State with respect to grand jury proceedings, the State would be liable for the cover-up (and thus due process violations) of the State prosecutor that occurred during the grand jury proceedings without the need to even show a custom or policy on the part of the Department. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

If nothing else, the actions of State prosecutor on behalf of the State also show an ongoing pattern and practice of the State. For these reasons, there is evidence in the record upon which a jury could find the State is liable under the §1983 claims for the shooting and killing of Charles Pruitt by the defendant Kane, as well as for the subsequent cover-up by defendant Kane and the State prosecutor.

D. Defendants Are Judicially and Equitably Estopped from Asserting their Avoidance Defenses

As the plaintiffs argued in the court below, the doctrines of judicial and equitable estoppel preclude the State (West Virginia Department of Public Safety) from asserting “avoidance defenses” such as immunity. Given the inconsistent representations and

¹¹*See Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) (“City prosecutors are responsible for prosecuting state criminal charges ... Clearly state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy.”), *cert. denied*, 114 S. Ct. 2742 (1994). *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (“county official pursues his duties as a state agent when he is enforcing state law or policy”); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 966 (S.D. Miss. 1995) (“The municipal defendants here, like the local defendants in *Echols* and *Familias Unidas*, were merely enforcing a state statutory scheme which they believed to be unambiguous on its face and which reflected state, rather than county, policy. . . .”).

inconsistencies that the State made to the grand jury concerning this incident, the State cannot now hide behind these avoidance defenses to avoid a decision on the merits.

When the grand jury investigating the shooting and killing of Charles Pruitt wanted to indict Trooper Kane for shooting and killing Charles Pruitt, the State prosecuting attorney dissuaded the grand jury from doing so by representing to the grand jury that Charles Pruitt's wife and family had filed this pending civil lawsuit for "\$30 million dollars" and could get their relief from this civil lawsuit "against the State" in a "full-blown trial, jury trial." *Infra*, pp. 27. Then, having successfully persuaded the grand jury not to indict Trooper Kane because of the relief this civil lawsuit would provide for the plaintiffs, the State turned around in this lawsuit and successfully argued that the plaintiffs cannot get any relief at all due to the State's technical avoidance defenses.

Although this issue was briefed extensively in the court below in the Opposition to Defendants' Motion for Summary Judgment - Part I, the circuit court summarily rejected this argument without really addressing it in its dismissal Order, stating that, "[o]n the issue of failure to train and/or supervise against the West Virginia Department of Public Safety . . . the Doctrines of Judicial and Equitable Estoppel are not applicable to the facts of this case where a Prosecuting Attorney made certain statements before the Grand Jury." (R. 701.) This cursory and incomplete analysis of the circuit court, however, misses the point entirely with respect to the arguments of judicial and equitable estoppel, which is based upon the principle that you cannot successfully make a representation in one forum, and then turn around in another forum, and make the exact

opposite representation to the detriment of other parties.

This shooting and killing incident was the subject of a grand jury investigation held on February 23, 2003, in the Circuit Court of McDowell County, Welch, West Virginia, in a proceeding captioned *State of West Virginia v. Kristopher Kane*, with the grand jury acting under Circuit Judge Booker T. Stephens. (R. 673, Grand Jury Transcript, p. 111.) Counsel for the State of West Virginia in this prior criminal proceeding was Sidney Bell. (R. 673, Grand Jury Transcript, p. 1.) The grand jury was investigating the shooting and killing of Charles Pruitt, the husband and father of the plaintiffs, by Trooper Kane, and trying to determine whether to indict him for the shooting and killing of Charles Pruitt.

It was obvious from the grand jury's questions that it was seriously considering returning an indictment of some kind against Trooper Kane. The grand jury felt there may have been insufficient evidence to indict Trooper Kane for first degree murder, but was interested in looking at lesser included offenses, even though the State's attorney was resisting any indictment for a lesser included offenses. (R. 673, Grand Jury Transcript p. 109.) The State's prosecuting attorney discouraged the grand jury from indicting Kane at all, stating among other things:

MR. BELL [STATE'S ATTORNEY]: (Interposing) Yeah, I don't think really--and this is just my own personal opinion. It's not law, but my own personal opinion is that the number of shots, it stands out. It catches your attention, but if he were justified in firing one shot, then, that's all that matters. I mean, the number of shots really--

GRAND JUROR: (Interposing) Don't matter.

MR. BELL [STATE'S ATTORNEY]: --you know, wouldn't make it a crime because he just, you know, those type weapons, a semi-automatic pistol, you start pulling the trigger, and before you know it, you've fired ten

or twelve times. They used to carry six-shot, five or six-shot revolvers, but now, everybody carries these semi-automatic pistols that can fire twelve shots in a matter of seconds, and I--you know, our feeling about it is Trooper Kane did--he was excited, and he thought the man was about to shoot him, and he just started shooting, and he shot until the man was no longer able to take his life, and it's a terrible tragedy all the way around, but I think, as it was mentioned before, if he's charged with a crime, then his career probably is, if not ruined, it's significantly messed up, if he's charged with a crime.

(R. 673, Grand Jury Transcript, pp. 114-115, lns. 16-24 and 1-9.)

More important for purposes of judicial and equitable estoppel, however, the State prosecutor clearly dissuaded the grand jury from indicting defendant Kane by making representations to its members leading them to believe that the instant civil lawsuit would provide plaintiffs monetary relief and sufficient punishment to Trooper Kane and to the State. The State's attorney began that representation by bringing up this civil lawsuit and questioning plaintiff Vanessa Pruitt about it in front of the grand jury as follows:

[State's Attorney] You aren't aware that he filed a lawsuit--
[Vanessa Pruitt] (Interposing) Yes.
[State's Attorney] --a thirty million dollar (30,000,000.00) lawsuit--
[Vanessa Pruitt] Uh-huh.
[State's Attorney] --against the State over this shooting?
[Vanessa Pruitt] Uh-huh. Uh-huh.
[State's Attorney] Okay. And you're the Plaintiff in that case--
[Vanessa Pruitt] (Interposing) Uh-huh

(R. 673, Grand Jury Transcript, p. 61, lns. 16-23.) Then, later in the Grand Jury proceedings, the State's attorney brought this lawsuit up again, as follows:

MR. BELL [STATE'S ATTORNEY]: Yeah, he's being sued for thirty million dollars (\$30, 000,000.00).

GRAND JUROR: All of that will come out in the lawsuit, as far as if the State was negligent or he was negligent. You know, that--that's like a civil suit, right, in that type--

MR. BELL [STATE'S ATTORNEY]: Well, yeah, they could end up having a full-blown trial, jury trial and bring out all the evidence on that case.

(R. 673, Grand Jury Transcript, p. 117, lns. 1-7.)

The State thus used the filing of this civil lawsuit to persuade the grand jury to not indict Trooper Kane, making representations to the grand jury that the plaintiffs could get "thirty million dollars (\$30,000,000.00)" in a "full-blown jury trial ... bring[ing] out all the evidence" in this civil lawsuit against the State. (R. 673, Grand Jury Transcript, p. 117, lns. 1-2, 6-7.) Having succeeded in persuading the grand jury to not return an indictment, based upon the notion that the plaintiffs could get up to thirty million dollars (\$30,000,000) in monetary relief, the State then reversed positions, successfully asserting that plaintiffs cannot get any monetary relief at all from the State in this civil case, and that the claims against it cannot even go in front of a jury because the State is entitled to technical avoidance defenses that prevent this case from being decided on the merits.

The State, however, is precluded from arguing those avoidance defenses here under the principles of judicial estoppel. As enunciated in the United States Supreme Court, in *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), three factors typically inform the decision whether to apply the doctrine of judicial estoppel to a particular case. First, a party's position must be plainly inconsistent with its earlier position. Second, the party has succeeded in persuading a court to accept the earlier position, so that judicial acceptance of an inconsistent position in the later proceeding would create the perception

that either the first or second court was misled.¹² Third, the party would derive an unfair advantage or would impose an unfair detriment on the opposing party if not estopped.

The doctrine “preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.” *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217-18 (6th Cir. 1990). The focus of the doctrine is not on the correctness of an earlier court’s ruling or on the truthfulness of the argument made by a party originally; the doctrine instead precludes a contradictory position without examining the truth of either statement. *Id.*; *See also Warda v. C.I.R.*, 15 F.3d 533, 538-39 (6th Cir. 1994).

In this case, the three factors could not point to a more compelling case of judicial estoppel. The State argued inconsistently between the two forums as to whether the State could be pursued in this separate action and were successful in persuading the grand jury to not indict Kane in the earlier proceeding, implying plaintiffs could get monetary relief and a full hearing in this civil case. Plaintiff is plainly prejudiced in that the State then turned around and successfully argued in the instant case that the plaintiffs should be denied any relief at all from the State by denying them the right to proceed against it or its insurance carrier in this forum also.

¹²A grand jury is an arm of the court and its proceedings constitute a judicial inquiry. *Levine v. United States*, 362 U.S. 610, 617 (1960); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). Further, a grand jury is a judicial body or tribunal. *Greenburg v. Superior Court*, 19 C.2d 319, 121 P.2d 713, 716 (1942); *State v. Chowder*, 193 N.C. 130, 136 S.E. 337 (1927).

This Court also applies the doctrine of judicial estoppel. In the case of *Dept. of Transp. v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506, 513-14 (W.Va. 2005), this Court describes and applies the doctrine as follows:

The doctrine of "[j]udicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." *In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex. Ct. App. 2004). Under the doctrine, a party is "generally prevent[ed] . . . from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 2154, n.8, 147 L.Ed.2d 164, 180 n.8 (2000). This Court recognized long ago that "[t]here are limits beyond which a party may not shift his position in the course of litigation[.]" *Watkins v. Norfolk & Western Ry. Co.*, 125 W.Va. 159, 163, 23 S.E.2d 621, 623 (1942). Thus, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 552 n.21, 584 S.E.2d 176, 186 n.21 (2003) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L.Ed.2d 968, 977 (2001)). See also Syl. pt. 2, *Dillon v. Board of Educ. of Mingo County*, 171 W.Va. 631, 301 S.E.2d 588 (1983) ("Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts."); *Getwicks v. Homan*, 124 W.Va. 572, 583, 20 S.E.2d 666, 671 (1942) ("One may not defend a suit upon one ground, and then later defend the same suit, or one growing out of the same transaction, on grounds separate and distinct from those formerly asserted[.]").

...

The "dual goals [of the doctrine] are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies." *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 125 Cal. Rptr. 2d 365, 370 (2002). (fn19) The doctrine fulfills its goals by "bind[ing] a party to his or her judicial declarations, and precludes [that] party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding." *Kauffman-Harmon v. Kauffman*, 36 P.3d 408, 412 (Mont. 2001).

Id. After thoroughly examining the application of the doctrine of judicial estoppel in a

number of other jurisdictions, this Court, in *Dept. of Transp.* held that judicial estoppel bars a party from taking a contrary position in litigation when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *Dept. of Transp.*, 618 S.E.2d at 515. In the instant case, these factors are all present as the following analysis of the facts indicates:

(1) Inconsistent positions. The State represented in the proceedings before the grand jury that the plaintiff, Vanessa Pruitt could get “thirty million dollars (\$30,000,000.00)” in a “full-blown jury trial ... bring[ing] out all the evidence” in the instant civil lawsuit. (R. 673, Grand Jury Transcript, p. 117, lns. 1-2, 6-7.) Then, in the lower court, in the instant lawsuit, the State successfully represented to the circuit court that plaintiffs are barred from getting any monetary relief from the State or its insurance carrier at all.

(2) Same parties. The State and Trooper Kane were named parties in the earlier proceeding, and the State was purportedly proceeding in the interest of the Pruitts as victims. So, all parties were involved in the earlier proceeding. The true alignment of the parties, however, was that the Pruitts were on one side, trying to get Trooper Kane indicted in the grand jury proceedings, and the State prosecutor and Trooper Kane were

on the other side, trying to keep Trooper Kane from being indicted, in an effort to deny the Pruitts as victims any relief in that proceeding.

(3) Benefit received. The State and Trooper Kane received a benefit in the earlier case, in that Trooper Kane was not indicted based upon the representations that the Pruitts could get monetary relief in the instant civil lawsuit. They also receive a benefit in this case from the fact that Trooper Kane was not convicted in an earlier criminal case because a criminal conviction could possibly have been used as evidence in this civil lawsuit that Kane's conduct was wrongful (and possibly have had a preclusive effect), thereby exposing the State to monetary damages.

(4) The new position injures plaintiffs. The new position of the State and Trooper Kane obviously injured the Pruitts in the instant case, as the new position was successfully used in the lower court to deny the Pruitts any monetary relief against the State or its insurance carrier in the instant case, having already used the instant civil lawsuit to deny them relief as victims in the earlier grand jury proceeding.

Moreover, the integrity of the judicial process is adversely affected by the new position taken by the State. Clearly, the defendant Department's position here "insults the integrity of the judicial process." *Dept. of Transp.*, 618 S.E.2d at 516, quoting *State v. Fouse*, 355 N.W.2d 366, 370 (Wis. Ct. App. 1984). "The inconsistent positions advanced by [defendant] 'operate[] to defeat goals designed to promote . . . respect for the judicial system.'" *Dept. of Transp.*, 618 S.E.2d at 516, quoting *Liberty Mut. Fire Ins. Co. v. Mandile*, 963 P.2d 295, 299 (Ariz. Ct. App. 1998). As further stated in *Dept. of*

Transp.:

The judicial system of this State is not designed to promote "footloose" tactics by litigants that lead to "gotcha" justice. Our system is designed to dispense justice based upon truth-seeking fair and impartial proceedings. Truth is the foundation of our system. "Without [it], our system would be a complete farce and cease to dispense justice." *In re Estate of Law*, 869 So. 2d 1027, 1030 (Miss. 2004). "The integrity and respect of our court system, founded on the search for truth and the adherence to principles of fundamental fairness, depends upon circuit court judges, attorneys that practice before them, and witnesses in all matters to act with forthright conviction and a commitment to truthfulness." *In re A.Y.*, 677 N.W.2d 684, 689-90 (Wis. Ct. App. 2004). To permit [a party] to take inconsistent positions in this case "impedes, rather than promotes, the truth-seeking function of the judiciary and thereby hinders public confidence in the integrity of the judicial process." *People v. Goldston*, 682 N.W.2d 479, 488 n.9 (Mich. 2004).

618 S.E.2d at 516. Thus, regardless of whether federal law is applied with respect to the federal claims asserted here, or state law with respect to the state law claims, the doctrine of judicial estoppel applies to bar the defendants from asserting their technical avoidance defenses here, after having led the grand jury to deny relief in the earlier proceeding based upon the representation of the State that the Pruitts could get relief in the instant civil case by getting up to thirty (\$30) million dollars in damages from the State in a full blown evidentiary trial on the merits.

Further, the defendants are also barred from asserting their technical avoidance defenses by the doctrine of equitable estoppel. As stated in *Teledyne Industries, Inc. v.*

N.L.R.B.:

[E]quitable estoppel serves to protect *litigants* from unscrupulous opponents who induce a litigants's reliance on a position, then reverse themselves to argue they win under the opposite scenario. [cit. omitted]. A

party may invoke equitable estoppel if (1) the party was an adverse party in the prior proceeding; (2) the party detrimentally relied on the opponent's prior position; and (3) the party would now be prejudiced if the opponent changed positions. [cit. omitted].

Supra, 911 F.2d at 1220. Clearly, the position of Vanessa Pruitt was adverse to that of the State and Trooper Kane in the earlier grand jury proceedings. The grand jury was persuaded, by the State's position and representations to rely on the State's position, and to not indict Kane. (The reliance need not be by the party; it can also be by the court acceding to the estopped litigant's position. *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994)). Obviously, plaintiffs would be prejudiced by any consequent rejection of their civil claim.

Under West Virginia law, as compared to federal law, the doctrine of equitable estoppel is explained in *Hunter v. Christian*, 191 W.Va. 390, 446 S.E.2d 177, 181 (1994), as follows:

"The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." Syl. pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

Id. Clearly, the State's earlier representation to the grand jury that plaintiffs could get up to \$30 million dollars in damages from the State was false or a concealment if the State could subsequently successfully assert avoidance defenses in this civil lawsuit to avoid

any monetary damages or liability at all. A reading of the grand jury transcript also shows that the State, through its attorney, falsely instructed the grand jury with respect to the element of intent necessary to bring a lesser offense of manslaughter, as follows:

MR. BELL: Well, you could charge negligence--what we used to call negligent homicide. Now, it would come under involuntary manslaughter, but you can only charge that if you believe--twelve of you believe that he committed an unlawful act--intentionally committed an unlawful act.

(Grand Jury Transcript, p. 117, lns. 9-13)(emphasis added). This was clearly a false and misleading instruction to the grand jury, as the crime of involuntary manslaughter does not require an intentional act. As stated in the case of *State v. McGuire*, 200 W. Va. 824, 490 S.E.2d 912, 921 (1997):

In syllabus point seven of *State v. Barker*, 128 W. Va. 744, 38 S.E.2d 346 (1946), we held "[t]he offense of involuntary manslaughter is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully causes the death of another." *Id.*; *State v. Hughes*, 197 W. Va. 518, 523, 476 S.E.2d 189, 194 (1996); *State v. Hose*, 187 W.Va. 429, 432, 419 S.E.2d 690, 693 (1992). ... As specifically indicated by the instruction, involuntary manslaughter does not require the death to be caused by an intentional, felonious, deliberate, premeditated, or malicious act.

Id. Thus, contrary to the false representation of the State prosecutor, there is no requirement that a person intentionally be committing an unlawful act, and here, defendant Kane's act of entering the house without permission and without a search warrant could very well be an unlawful act.

Accordingly, the doctrines of judicial and equitable estoppel now bar the State

from asserting its avoidance defenses in this civil trial in an effort to deny the plaintiffs any relief at all from the State or its insurance carrier. The circuit court erred in ignoring and summarily rejecting the plaintiffs' contentions regarding the application of judicial and equitable estoppel, and the decision of the circuit court dismissing all claims against the Department should be reversed in its entirety.¹³

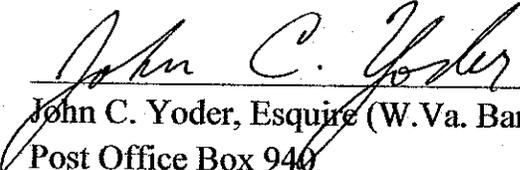
VII. RELIEF REQUESTED

The Court should reverse the November 29, 2006, Order entered by the circuit court and remand this matter to the circuit court with instructions for the circuit court to reinstate the claims against the Department in this matter, and to proceed to jury trial on all claims.

¹³ In the alternative, and at a bare minimum, if plaintiffs are to be denied relief in both forums, they should be allowed to file an Amended Complaint against the State alleging that the State retaliated against the plaintiffs for the filing of their lawsuit by denying them relief in the criminal case, thereby depriving them of their constitutional right to access the courts, guaranteed by the First Amendment of the Constitution of the United States and Article III, § 16, of the Constitution of West Virginia.

Vanessa Jean Pruitt, Administratrix of The
Estate Of Charles E. Pruitt, Deceased; Vanessa
Jean Pruitt, Mother and Legal Guardian of
Angel M. Pruitt, an Infant under the Age of 18
Years, Vanessa Jean Pruitt, Individually;
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CERTIFICATION

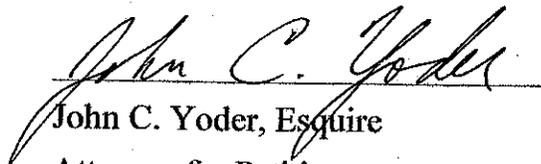
I, John C. Yoder hereby certify that on the 1st day of December, 2007, I served the foregoing **APPELLANTS' BRIEF**, upon all counsel and parties of record by placing a true and copy of same in the United States mail, first-class, postage prepaid and addressed as follows:

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