

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 34340

EUNA ROBINSON

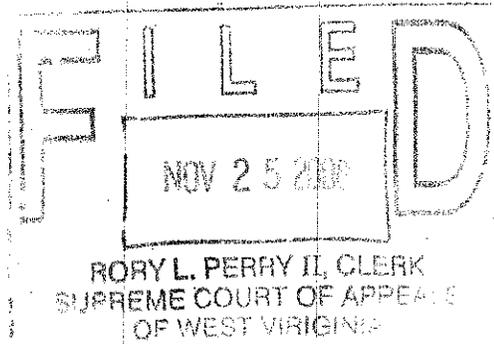
Plaintiff below,
Respondent,

v.

Civil Action No. 03-C-847
Circuit Court of Kanawha County
(Honorable Paul Zakaib)

JAMES PACK,

Defendant below,
Petitioner.



**RESPONSE BRIEF OF EUNA ROBINSON ON
CERTIFIED QUESTIONS**

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I. INTRODUCTION

Undisputably, Plaintiff Euna Robinson has been suffering from mental illness for the past thirty five (35) years. Numerous psychiatrists and psychologists have treated the Plaintiff for dysthymia, anorexia, bulimia, borderline personality disorder, agoraphobia, post-traumatic stress disorder, and "trouble with men of learned helplessness".¹ Due to her psychological impairment she was awarded Social Security Disability in part upon a finding that "she was unable to protect herself from people who are abusive."

Defendant Chief Deputy Pack repeatedly while in uniform and on duty used his position and perceived authority by Plaintiff to perpetrate disgusting and vile acts upon her for his own gratification for more than a year. Due to her psychiatric impairment, Plaintiff was incapable of consenting to or halting the abuse.

This pattern and practice of abuse reached its apex on April 4, 2002. On that day, Plaintiff had informed Defendant Chief Deputy Pack's wife of the sexual abuse. A few hours later, Chief Deputy Pack accompanied by eight or more of his fellow officers (some who had also abused Plaintiff) broke into Plaintiff's house, assaulted her with a police dog, sprayed her with Capstun, cuffed and strong-armed her, all under the pretense of a call on a possible "suicide threat". Since that day, Plaintiff has not been able to return to her home for fear of additional retaliation.

Defendant Chief Deputy Pack asserts that because he is a police officer he is cloaked with qualified immunity and therefore cannot be held liable for any of these acts. Defendant is asking this honorable Court to ignore current statutory and common law by extending the parameters of qualified immunity to afford police officers a blanket of complete immunity for any act regardless of the egregiousness of his conduct.

¹As acknowledged in footnote 14 of *Brief of James Pack on Certified Questions*.

Although Defendant insists that this case be confined to the acts occurring on April 4, 2002, and be analyzed pursuant to an "objective reasonableness" standard, the causes of action in this case encompass as separate counts all of the reprehensible acts perpetrated by the Defendant against the Plaintiff for more than a year preceding that date, and none of the causes of action include a federal civil rights action pursuant to 42 U.S.C.A. § 1983. The issues presented in the *Brief of James Pack on Certified Questions* are only relevant in a § 1983 cause of action.

The *Amended Complaint* in this case alleges various West Virginia constitutional and state tort claims such as abuse of process, intentional infliction of emotional distress, tort of outrage, false imprisonment, malicious prosecution, and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14 (neglect of duty, interference with lawful rights, abuse of authority and use of excessive force).

Any issues relevant to this case have been recently and clearly resolved by Supreme Court of Appeals of West Virginia. In reversing the trial court's order granting summary judgment of state tort claims on the basis of an analysis of qualified immunity in a § 1983 action, the honorable Court in *Neiswonger v. Hennessey*, 215 W.Va. 749, 601 S.E.2d 69 (2004) held as follows:

"In the present case, the appellants claim that Officer Hennessey and the Morgantown City Police Department committed torts as those torts are defined by West Virginia law, and as they are legally cognizable by West Virginia's courts. Whether the torts have been committed depends upon the **intent of the alleged tortfeasor, his recklessness, and whether he followed the prescribed standard of care.** Whether the torts have been committed, thus, depends potentially upon the character of the alleged tortfeasor's conduct and upon his **state of mind.**(fn2) In the federal action [§1983] involved in the present case, the federal court looked at the character of the alleged tortfeasors' actions to determine only whether they were objectively reasonable under the Fourth Amendment guarantee that an individual be free from unreasonable searches and seizures. *See Neiswonger v. Hennessey, supra*[89 F.Supp.2d] at 772. The federal court did not consider

whether the alleged tortfeasors' conduct constituted torts as defined by West Virginia law." *Id.* at p.753.

Additionally, this Court recently held in *Pruitt v. W.V. Dept of Public Safety* (2008) (Sup. Ct. No. No. 33526) an official is not entitled to qualified immunity for acts which are fraudulent, malicious, or otherwise oppressive.

Although counsel for Defendant insists that this Court analyze this case as though it were a federal §1983 cause of action, this case is not being pursued as such by Plaintiff. The issues presented in the *Brief of James Pack on Certified Questions* would be more appropriately resolved by this honorable Court when addressing a §1983 action, which is not at issue in this case.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff, Euna Robinson, is fifty six years old. As counsel for Defendant concedes, Plaintiff has been suffering from mental illness for the past thirty five (35) years. Due to her psychological impairment she was awarded Social Security Disability in part upon a finding that she was "unable to protect herself from abusive or anomalous situations, or from people who are abusive".²

Defendant, James Pack, has been a police officer since 1978. In 1989, he became a deputy sheriff with the Mingo County Sheriff's Department. In 2000, he became the Chief Deputy under Sheriff Tennis Hatfield. Defendant first met the Plaintiff sometime in 2000 when he was dispatched to her home for a possible prowler.

Shortly thereafter, around October of 2000, Defendant began engaging in sexual intercourse and other sexual acts with Plaintiff. Numerous sexual acts occurred in the sheriff's office, in the police car, in Plaintiff's home, and while Defendant was on duty and off duty. Without being too

² See Medical Report regarding award of Social Security Disability.

explicit, the sexual acts were demeaning, degrading and some included penetration with various objects. Defendant would often send subordinate officers and officers from other law enforcement agencies to engage in sexual acts with Plaintiff. This pattern and practice of abuse continued for more than a year.

A substantial amount of evidence was documented by Plaintiff in numerous phone recordings made by Plaintiff without Defendant's knowledge. When asked about the sexual encounters during his deposition, Defendant refused to answer by invoking his fifth amendment right against self incrimination as to each and every question involving the sexual exploitation of Plaintiff.

In early 2002, for reasons which are disputed, Defendant ceased all contact with Plaintiff, as did the officers he had sent to Plaintiff's home for sexual gratification.

By April of 2002, a psychologically fragile Plaintiff had suffered severe emotional distress inflicted by Defendant and other officers. On or around April 4, 2002, Plaintiff telephoned Defendant's wife and offered to let her hear the secret phone recordings she had made of Defendant. Defendant had become aware of the tapes several weeks earlier. Later that afternoon, Defendant's wife met him for lunch.³

In his deposition, Defendant, James Pack, described the events of the remainder of the day, in pertinent part, as follows:

Q. What if anything occurred?

A. There was several of us having lunch and the – we had beepers,.... Our beepers started going off and one of the officers went to the front desk and used the telephone and called the 911 center. And they told him what was going on. And he came back to the table and told us that they had received a call to go to Ms. Robinson's residence – and that she was threatening to kill herself.

³See Defendant James Pack's deposition p. 57.

A. I was in my own car,, and I think that there was two or three other deputies showed up that was having lunch with us. I think one deputy was coming from Gilbert, and he's the one with the drug dog. He heard the call, heard the guys calling out to the residence, and he came up to the residence.

A. If I'm not mistaken there was two [police] cars or three cars there [Plaintiff's house].

{a few questions later}

Q. Do you recall how many police cruisers arrived on the scene this particular occasion?

A. Not really. I don't know if other ones rode with each other. I'm just not sure. Maybe everybody took their own car. I'm not sure. I imagine five, six cars maybe, altogether, if that was how many deputies was there.

Q. -- did you or any of the other officers possess a search warrant?

A. No.

Q. -- you or any of the officers possess an arrest warrant?

A. No, Sir.

Q. Did Ms. Robinson respond to the knocking on the door?

A. That was later. Whenever I pulled up Ms. Robinson was in the top window. And she was yelling out the window. And when she seen me, whenever I got out I yelled to her, Euna, you know, are you alright, come on out, let's talk. And she said, Fuck you, James Pack, and she went back -- she said, I'll kill myself if I want. And she went and disappeared out the window.

Q. What next did you do?

A. Well, I yelled back through the window a couple times at her, and no response. And so whenever I started pounding on the front door, I tried to push the front door in, but later on found out why it wouldn't open up. It was barricaded up. It had boards nailed and stuff like that in it.

Q. Did you eventually gain entrance to the house?

A. Yes, sir, in the back door.

Q. Were you the senior officer at the scene?

A. Yes, sir.

Q. Who made the decision to go in the house?

A. I did..

Q. Do you recall who decided to use the police dog?

A. It was probably me. I think I'm the one that told Nathan to go get the dog.

Q. What happened next?

A. Best I can remember, without looking at the report, it was -- we yelled and searched around downstairs first, we secured the downstairs. And we heard something moving around upstairs, so I got the guys to be quiet for a minute. And we could hear, you know, shuffling around and everything was quiet, so I yelled up the steps to her. And I told her, I said Euna, we're just here to help you. I said, come on out. I said, you're not going to hurt yourself, come down here, trying to just be nice to her, no response.

So we got upstairs and we looked -- I think there were bedrooms or little offices or whatever she's got made up there on the front part of the house, but the back part of the house is sort of slanted, it's the crawl space in there. And on each end of the house there's little doors, you know, little crawl doors that you can go in back to the crawl space.

We couldn't locate her in there, so when we opened the crawl space up there was a -- of course we had found a gun downstairs that was loaded, and when I opened the door there was another little small -- I don't remember if it was a .22 or .25 automatic -- and I figured that she would come out once she heard me tell Nathan to go get the dog, so I told Nathan, I said, Go get the dog. And we tried -- I yelled back again several times before he ever got the dog in, Euna, we're bringing the dog in. Now, he'll bite you, come out, please. And that didn't happen. She still remained silent. Nathan took control of the dog.

A. He barked once he got up into -- you know, by the crawl space, because he scented her. So after she still never came out, he released the dog. And when he released the dog, the dog didn't hesitate at all. He run from that -- see, I was on the other end and Nathan was on the other, so you're talking about two ends of the house, but it was a whole open space, you know, so we could see and hear each other.

So about that time the dog -- when he did release the dog it went straight from that door right straight to a pile of blankets that -- this particular pile of blankets. And then he started grabbing at the blankets and jerking his head. Well, we knew she was in those blankets.

And then Euna yelled, no Tarzan. You know, You're hurting me Tarzan, stop. So I yelled for Nathan. Of course Nathan was yelling about the same time for Tarzan to stop. So I yelled for Nathan, you know, get him. And so we could see her then, and she was flailing her hands out of the blankets. And so whenever Tarzan stopped and pulled away and we could see the blanket, the dog had her hair and was pulling back.

. And then of course by the time he finally called him off and got him, you know, we knew she didn't have anything in her hands, but we still didn't know if she had anything there. And I pleaded with her, I said, Come on out. And I threatened her. I said we're going to send the dog back after you, come out. Again, she disregarded anything we had to say. And we didn't let the dog back at

her anymore.

So after a couple of minutes two of the deputies went back in the crawl space. And they had to crouch down too, you know, because they was pretty good size boys. And they crawled back in there after her and got her and put her in an arm bar and was trying to get her out. And she was just – for her to be tiny then, she was just as wiry as she could be, and she just flat refused. And she was saying, You're hurting my arm, you're hurting my arm.

So I just told the deputies, I said, Don't hurt her. I said, Don't hurt her, you'll break her arm or dislocate her shoulder or something. I said, Let her go. So when the deputies came out, you know, I said, Close the doors and spray her, spray the room full. And we had Capstun. And we told her what we was going to do, and still she refused to come out.

I know I sprayed and another deputy down at the other end, we sprayed in the direction. We just closed the doors. And we went downstairs. And it was – I would say it wasn't a minute maybe, minute and a half, you could hear her coughing and cussing and raising hell. And she come out and she was calling us names.

And finally when she did come out, she was saying, I'm coming out, I'm coming out, not to spray no more. So a couple of the deputies went up the steps and got her, and they had to, you know, put her arm behind her back and handcuff her. And she was fighting them and everything with them. And they got her down the steps and we took her out to the car and put her in one of the deputy's car that had a cage.

Q. At that time do you know if anybody had filed a mental hygiene petition?

A. Nobody had filed anything.

Q. Did you-all take her somewhere to the courthouse?

A. Took her directly to the Sheriff's Department.

Q. What next, if anything, occurred?

A. We called the prosecutor and mental health and told them we had her in custody and told them what she had done. They said they would make arrangements to get ahold of the prosecutor and public defender's office. Well, they said an attorney for her, so they ended up getting I guess the public defender's office.

Q. Was there a hearing held on the mental hygiene petition?

A. Well, that's the problem, we didn't make the petition. When they came they never really basically had a hearing. They interviewed her just for – it seemed like only for a minute or two. And then they made the decision between the public defender's office and the prosecutor and the doctor that she could be dealt with on an outpatient, but that she was having some mental issues. And they released her to go to the women's battered shelter

.....
Plaintiff, Euna Robinson, testified during her deposition that Defendant Pack stated "I'm tired of this shit... Find that woman and drag her down here by the hair of her head... Nobody calls my wife."

As described above by Defendant, Plaintiff was first taken to the sheriff's office and then to the mental hygiene commissioner. She eventually met with her counsel, Steven Knopp. As witnesses will attest, Plaintiff appeared bloody and battered, having just survived her home being broken into by eight or more police officers, attacked, bitten and hair pulled out by a police dog, strong armed, cuffed and sprayed with Capstun.

The Mental Hygiene Commissioner ordered that the application for involuntary commitment be dismissed and further found that "the Respondent has a history of suicidal ideation, plan and intent... however, **the examining physician and the Respondent's treating psychologist do not consider the Respondent to be currently suicidal.**"⁴

Plaintiff was released to go to the hospital for medical treatment and then to a shelter for battered women. Plaintiff did not feel that it would be safe for her to return to her home due to her fear of additional retaliation by the police. After that day, Plaintiff abandoned her home and moved. Six years later, Plaintiff is still too afraid to live there.

In November of 2003, an *Amended Complaint* was filed on behalf of Plaintiff alleging various West Virginia constitutional and state tort claims such as abuse of process, intentional infliction of emotional distress, tort of outrage, false imprisonment, malicious prosecution, and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14 (neglect of duty,

⁴ See *Order: No Probable Cause for Involuntary Hospitalization for Examination.*

interference with lawful rights, abuse of authority and use of excessive force).

By Order entered on May 8, 2006, the circuit court denied Defendant's *Motion for Summary Judgment*. On September 18, 2007, counsel for Defendant filed *Defendant James Pack's Motion for Certification*. By Order entered on March 28, 2008, the circuit court entered the *Certification Order* which is now pending before this honorable Court.⁵

Although counsel for Defendant insists upon limiting this case to the "objectively reasonable" events which occurred on April 4, 2002, the intentional emotional distress inflicted by the Defendant upon the Plaintiff for more than a year preceding that date cannot be succinctly summarized and dismissed under the guise of a § 1983 action. The *Amended Complaint* does not include a federal § 1983 cause of action. The *Amended Complaint* alleges various West Virginia state tort and state constitutional violations.

III. ISSUES ON APPEAL

As delineated in the circuit court's *Certification Order* the issues pending in the *Petition of James Pack for Certification Review* are as follows:

- a. Is a governmental official entitled to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity? Answer: Yes.
- b. Are the subjective motivations of a police officer relevant to an analysis of the reasonableness of an entry into a residence, the detention of the occupant of the residence, and the alleged use of force upon the occupant? Answer: Yes.

⁵ It should be noted that the *Certification Order* was prepared by counsel for Defendant and prior to its entry was not reviewed by Plaintiff's current counsel. Due to serious health problems, it is unclear whether Plaintiff's lead counsel was able to review the proposed order. Plaintiff has objections to portions of the order, which Plaintiff believes will likely be modified or clarified by the circuit court if this case is remanded back for trial.

c. Is a supervising police officer civilly liable for the alleged wrongful conduct of his or her subordinate officers? Answer: Yes.

IV. DISCUSSION OF LAW

A. STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E2d 172 (1996).

Counsel for Defendant James Pack asks this Court to affirm Judge Zakaib's answer to question a, reverse his answer as to question b, and to reformulate the issue as to question c.

Counsel for Plaintiff Euna Robinson respectfully requests that this Honorable Court reverse Judge Zakaib's answer to question a, affirm his answer to question b, and affirm his answer to question c without reformation.

B. A GOVERNMENTAL OFFICIAL IS NOT ENTITLED TO AN IMMEDIATE APPEAL OF THE DENIAL OF A MOTION FOR SUMMARY JUDGMENT THAT IS BASED UPON QUALIFIED IMMUNITY

As conceded by counsel for Defendant, there is no legal precedent in this state which entitles a governmental official to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity. West Virginia Code §58-5-1 permits a party to appeal civil actions to the supreme court only upon final judgment rendered by a circuit court. Additionally, denial of summary judgment is not one of the exceptions to this rule as expressed in Rule 54(b) of the West Virginia Rules of Civil Procedure.

Opposing counsel's brief regarding this issue fails to specify the legal basis for which the Defendant is entitled to qualified immunity, and instead advances a creative argument and method

for which this Court could, if it wanted to, create additional entitlements for governmental officials and create additional impediments for recovery by injured Plaintiffs.

Opposing counsel cites a litany of federal cases to argue that this Court should follow the federal courts lead regarding this issue. Counsel for Defendant relies upon this Court's holding in *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) to imply that this Court is already leaning in that direction.

The *Hutchinson* case involved a § 1983 civil action by a landowner to recover damages resulting from the city's four month delay in issuing a building permit. The issues in that § 1983 cause of action regarding qualified and statutory immunity were clear and unambiguous. West Virginia Code § 29-12A-4(c)(2) and 29-12A-5(a) expressly grant a public official statutory immunity for losses resulting from licensing or the issuances of permits, and a four month delay is clearly not so unreasonable as to offend the basic notions of fairness embodied in the Due Process Clause.

Whereas, in the present case, Defendant is not entitled to either qualified or statutory immunity. West Virginia Code § 29-12A-5(b)(2) unequivocally states that there is no immunity for an employee whose acts were with malicious purpose, in bad faith, or in a wanton or reckless manner. In Syllabus point 5 of *Pruitt* (2008), the Court held that there is no qualified immunity for acts which are fraudulent, malicious, or otherwise oppressive. The *Amended Complaint* in this case alleges torts as defined by West Virginia law. This is not a § 1983 action and federal rules permitting automatic appeals for issues regarding qualified immunity are simply not applicable to this case.

In addition to no statutory authority permitting automatic appeal to the West Virginia Supreme Court upon a denial of a motion for summary judgment, this Court has had a long history

of closely scrutinizing the granting of such motions. "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 law". *Aetna Co. V. Federal Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). "In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations are jury functions, not those of a judge ... and in cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial". *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

More recently, in *Neiswonger v. Hennessey*, this Court reversed an order granting summary judgment for a police officer alleged to have used excessive force and further noted that "summary judgment is a harsh remedy which, in effect, limits the development of the issues in a case, and as stated in Syllabus Point 3 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York, supra*, it should only be granted when 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". *Id.* at p. 754.

James Pack suggests that, although this action includes no allegations pertaining to a federal § 1983 action, this Court should review this matter under federal precedent regarding qualified immunity with the implication that the Plaintiff is completely dismissive of the issue (*See* Fn. 8 of *Defendant's Brief*). The Plaintiff, however, is not contending that the issue of qualified immunity holds no place in this matter.

To the contrary, the Plaintiff suggests that the Defendant is not entitled to either qualified or statutory immunity under West Virginia Code § 29-12A-5(b)(2) which unequivocally states that there is no immunity for an employee whose acts were with malicious purpose, in bad faith, or in a wanton or reckless manner. In Syllabus point 5 of *Pruitt* (2008), the Court held that there is no

qualified immunity for acts which are fraudulent, malicious, or otherwise oppressive. The *Amended Complaint* in this case alleges torts as defined by West Virginia law, under which this case should proceed. This is not a § 1983 action, and federal rules permitting automatic appeals for issues regarding qualified immunity are simply not applicable to this case.

Because there is no statutory authority which permits an automatic appeal to the supreme court upon a denial of a motion for summary judgment and this honorable Court has long recognized the severity of such motions, Defendant's request to create such an avenue causing additional burdens upon injured Plaintiff's should be denied. Plaintiff respectfully requests that this Court answer no to question a in the *Certification Order*.

C. THE ALLEGED SUBJECTIVE MOTIVATIONS OF A POLICE OFFICER ARE RELEVANT TO AN ANALYSIS OF THE REASONABLENESS OF AN ENTRY INTO A RESIDENCE, THE DETENTION OF THE OCCUPANT, AND THE ALLEGED USE OF FORCE UPON THE OCCUPANT AS TO STATE TORT CLAIMS.

Once again, opposing counsel insists that this Court analyze this case as a federal § 1983 cause of action and find that the inquiry is limited to the "objective reasonableness" of the officer's actions as to the entry into the residence and the detention and use of force upon the occupant. All of the cases cited by opposing counsel are federal § 1983 actions involving violations of the Fourth Amendment of the United States Constitution.

The *Amended Complaint* in the present case alleges various West Virginia constitutional and state tort claims such as abuse of process, intentional infliction of emotional distress, tort of outrage, false imprisonment, malicious prosecution, and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14 (neglect of duty, interference with lawful rights, abuse of authority and use of excessive force).

This honorable Court has previously dealt with and summarily rejected this identical argument in *Neiswonger v. Hennessey*, 215 W. Va. 749, 601 S.E.2d 69 (2004). In *Neiswonger*, the Plaintiff accidentally set off a burglar alarm at his friend's house. When the police arrived they mistook him for a burglar, tackled him, and broke his leg. The Plaintiff filed a civil suit alleging various state tort claims as well as a federal § 1983 action. The federal district court granted summary judgment as to the federal § 1983 claim based upon a finding that the officer's actions were "objectively reasonable". The state tort claims were remanded back to circuit court. The circuit court granted summary judgment on the ground that the appellants were collaterally stopped by the federal decision from asserting their state claims.

In reversing the circuit court's order granting summary judgment, this honorable Court held as follows:

"In the present case, the appellants claim that Officer Hennessey and the Morgantown City Police Department committed torts as those torts are defined by West Virginia law, and as they are legally cognizable by West Virginia's courts. Whether the torts have been committed depends upon the **intent of the alleged tortfeasor, his recklessness, and whether he followed the prescribed standard of care**. Whether the torts have been committed, thus, depends potentially upon the character of the alleged tortfeasor's conduct and upon his **state of mind**.^(fn2) In the federal action [§1983] involved in the present case, the federal court looked at the character of the alleged tortfeasors' actions to determine only whether they were objectively reasonable under the Fourth Amendment guarantee that an individual be free from unreasonable searches and seizures. See *Neiswonger v. Hennessey, supra* [89 F.Supp.2d] at 772. The federal court did not consider whether the alleged tortfeasors' conduct constituted torts as defined by West Virginia law." *Id.* at p.753.

In the present case, the Court believes that **further development of the evidence on the character of Officer Hennessey's conduct and his state of mind at the time of the incident in issue is appropriate** to clarify the application of the law. Likewise, further development of the evidence relating to Morgantown City Police Department's

hiring, training, and supervising Officer Hennessey is appropriate. *Id.*
at p. 754.

Clearly, subjective motivations or intent of the tortfeasor is relevant as to the Plaintiff's state tort claims. For instance, the Court in *Cook v. Heck's, Inc.*, 176 W.Va. 368, 342 S.E.2d 453, held that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress is subject to liability for emotional distress. Similarly, the Court has held abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process. *Preiser v. MacQueen*, [177] W.Va. [273, 279], 352 S.E.2d 22, 28 (1985). Such as, police officers like the Defendant who allegedly break into Plaintiff's home and brutally attack her with a police dog and pepper spray under the guise of responding to a "call for help" on the same day his wife discovers there are incriminating tapes kept in Plaintiff's home.

Limiting the present case to an "objectively reasonableness" standard as to the events which occurred on April 4, 2002, ignores the intentional emotional distress inflicted by the Defendant upon the Plaintiff for more than a year preceding that date, and the intent and motive of Chief Deputy Pack on that date. This case should not be summarily dismissed under the guise of a § 1983 action. The *Amended Complaint* does not include a federal § 1983 cause of action. The *Amended Complaint* alleges various West Virginia state tort and state constitutional violations. Plaintiff should be afforded the opportunity to have a trial on the merit of her case.

D. A SUPERVISING POLICE OFFICER IS CIVILLY LIABLE FOR THE ALLEGED WRONGFUL CONDUCT OF HIS OR HER SUBORDINATE OFFICERS

It is well established law that an "agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee

relationship. Of course, if he is acting within the scope of his employment, then his principal or employer may also be held liable." *Musgrove v. Hickory Inn, Inc.*, 168 W. Va. 65, 281 S.E.2d 499 (1981), also see Syllabus point 4 of *Pruitt (2008)*.

Counsel for Chief Deputy Pack is requesting that this Court change the law to a "deliberate indifference" standard as applied by the Fourth Circuit Court of Appeals in a federal § 1983 action.

As stated in his deposition, Chief Deputy Pack readily admits he was the officer in charge on April 4, 2002. He was the first to enter Ms. Robinson's house without a warrant or permission. He told the other officer to release the attack dog. He and another officer at his direction initiated the Capstun spray. As to the numerous sexual exploitation of a psychologically frail Plaintiff during the previous year, he invoked his fifth amendment right against self incrimination.

The Plaintiff looks to actions of the Defendant as supervisor of the several officers utilized to carry out this attack on her causing her harm. Once again, the Defendant relies upon a federal precedent in an attempt to persuade this judiciary that a supervisor in such a position is not liable for actions of his subordinates (See Fn. 12 in Defendant's *Brief*). Plaintiff contends that law enforcement is a specialized situation in which an individual designated as Chief Deputy becomes the principal in the master-servant relationship under which a subordinate deputy would be found actionably insubordinate should he or she not regard such individual as the principal body. Ultimately, there is no distinction by subordinates between the Chief Deputy and a "higher master" during actions in the field that involve orders made by the Chief Deputy.

The key distinction in the Defendant's contention under the Eastern Pennsylvania Federal case relied upon in his footnote (Fn. 12) is that the plaintiff sought vicarious liability of the supervisor for actions by subordinates. However, in this action under the West Virginia Constitution

and state law, your Plaintiff seeks relief for direct liability for the direct actions of the Defendant in ordering his subordinates to undergo unconstitutional and unlawful actions on and toward the Plaintiff. Furthermore, this Court clearly reinforces this principal/master-servant distinction when it recognized in *Musgrove* that a "principal or employer may also be held liable." *Musgrove* (1981) (Emphasis added).

The allegations, if proven, in this case would meet virtually any standard the Court could impose. The facts alleged in this case are certainly not the type which should be used as a springboard to change current and well established law.

V. CONCLUSION

The issues presented in the *Brief of James Pack on Certified Questions* would be more appropriately resolved by this honorable Court when addressing a §1983 action, not this case. The *Amended Complaint* in this case alleges various West Virginia constitutional and state tort claims such as abuse of process, intentional infliction of emotional distress, tort of outrage, false imprisonment, malicious prosecution, and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14 (neglect of duty, interference with lawful rights, abuse of authority and use of excessive force).

Any issues relevant to this case have been recently and clearly resolved by this honorable Court in *Neiswonger* and *Pruitt*. Limiting this case to an "objectively reasonableness" standard as to the events which occurred on April 4, 2002, ignores the current law and the intentional emotional distress inflicted by the Defendant upon the Plaintiff for more than a year preceding that date, as well as the intent and motive of Chief Deputy Pack on that date. This case should not be summarily dismissed under the guise of a § 1983 action.

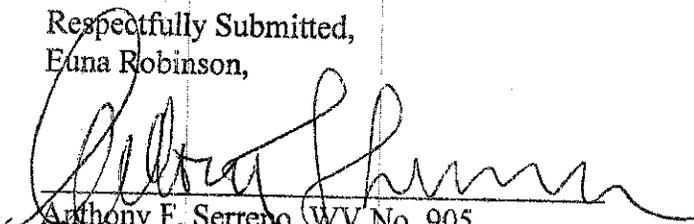
In the present case, under the West Virginia Constitution and state law, your Plaintiff seeks relief for the direct actions of the principal in ordering his subordinates to undergo unconstitutional and unlawful actions on and toward the Plaintiff. This Court clearly reinforces this principal/master-servant distinction when it recognized in *Musgrove* that a “principal *or* employer may also be held liable.”

Wherefore, counsel for Plaintiff, Euna Robinson respectfully requests that this honorable Court affirm current statutory and common law and find as follows:

- a. A governmental official is not entitled to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity;
- b. The subjective motivations of a police officer are relevant to an analysis of the reasonableness of an entry into a residence, the detention of the occupant of the residence, and the alleged use of force upon the occupant; and,
- c. A supervising police officer is civilly liable for the alleged wrongful conduct of his or her subordinate officers.

Respectfully Submitted,
Euna Robinson,

By counsel:


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 34340

EUNA ROBINSON

Plaintiff below,
Respondent,

v.

Civil Action No. 03-C-847
Circuit Court of Kanawha County
(Honorable Paul Zakaib)

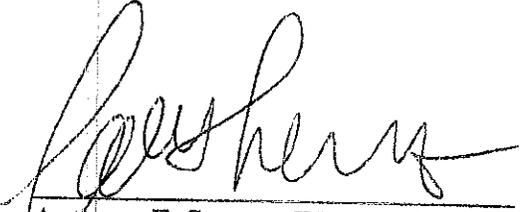
JAMES PACK,

Defendant below,
Petitioner.

CERTIFICATE OF SERVICE

I, Anthony F. Serreno, do hereby certify that I served counsel for James Pack a true and accurate copy of the *RESPONSE BRIEF OF EUNA ROBINSON ON CERTIFIED QUESTIONS* on this 25th day of November, 2008 by depositing the same in the United States mail, postage prepaid, addressed as follows:

Jeffrey K. Phillips, Esquire
Teresa A. Kleeh, Esquire
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588



Anthony F. Serreno WV No. 3340