

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

**MARY WEBB, individually, and in
her capacity as Administratrix of the
Estate of Robert A. Webb,**

Plaintiff,

v.

Civil Action No. 5:09-cv-1253

**RALEIGH COUNTY SHERIFF'S DEPARTMENT;
RALEIGH COUNTY COMMISSION;
SHERIFF DANNY MOORE, individually, and in his
official capacity; CHIEF DEPUTY STEVE TANNER,
individually and in his official capacity;
DEPUTY GREG S. KADE, individually and in his
official capacity; and DEPUTY JOHN E. HAJASH,
individually and in his official capacity,**

Defendants.

**DEFENDANTS' REPLY TO THE PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

NOW COME the Defendants, the Raleigh County Sheriff's Department, the Raleigh County Commission, Sheriff Danny Moore, individually and in his official capacity, Chief Deputy Steve Tanner, individually and in his official capacity, and Deputy Greg S. Kade, individually and in his official capacity (hereinafter collectively referred to as "Defendants"), by and through their counsel, Chip E. Williams, Wesley V. Queen, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and hereby submit the following Reply to the Memorandum of Law in Opposition to Defendants' Motion to Dismiss filed by the Plaintiff, Mary Webb, individually and in her capacity as Administratrix of the Estate of Robert A. Webb:

I. CONTRARY TO THE PLAINTIFF'S ARGUMENTS, W.VA. CODE § 7-14A-4 AND THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT ARE COMPLEMENTARY, NOT CONFLICTING, AND THE PLAINTIFF'S CLAIMS AGAINST THE RALEIGH COUNTY COMMISSION, SHERIFF MOORE, AND THE RALEIGH COUNTY SHERIFF'S DEPARTMENT SHOULD THEREFORE BE DISMISSED.

In her Memorandum of Law in Opposition to the Defendants' Motion to Dismiss, the Plaintiff attempts to argue that W.Va. Code § 7-14A-4 is an "antiquated statute" and has been superseded by the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.* The Plaintiff goes so far as to categorize the Defendants' reliance upon W.Va. Code § 7-14A-4 as "erroneous" and "misguided." However, careful readings of W.Va. Code § 7-14A-1, *et seq.*, and the Governmental Tort Claims and Insurance Reform Act clearly demonstrate that it is actually the arguments set forth by the Plaintiff, not those of the Defendants, which are erroneous and misguided.

A. THE LANGUAGE OF W.VA. CODE § 7-14A-4 IS NOT IN CONFLICT WITH PROVISIONS OF THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM RELATING TO THE LIABILITY OF COUNTY COMMISSIONS.

Contrary to the Plaintiff's assertions, the language of W.Va. Code § 7-14A-4 is not in direct conflict with the provisions of the Governmental Tort Claims and Insurance Reform Act. If anything, W.Va. Code § 7-14A-4 addresses the specific liability of sheriffs and county commissions for acts or omissions of deputy sheriffs whereas the Governmental Tort Claims and Insurance Reform Act, and more particularly W.Va. Code § 29-12A-4(c), addresses the general liability of all political subdivisions for the acts or omissions of their employees. The Defendants acknowledge that the Raleigh County Commission is a "political subdivision" as defined by W.Va. Code § 29-12A-3(c) and further acknowledge that W.Va. Code § 29-12A-4

sets forth limited circumstances under which a political subdivision may be liable for certain acts or omissions of its employees. It should be noted, however, the West Virginia Legislature stated its reason for enacting the Governmental Tort Claims and Insurance Reform Act as follows:

The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

W.Va. Code § 29-12A-2.

Although the stated purpose of the Governmental Tort Claims and Insurance Reform Act is to regulate insurance premiums and assist political subdivisions in obtaining insurance, it imposes no duty upon political subdivisions to procure insurance. W.Va. Code § 29-12A-16 affords political subdivisions complete discretion in determining the type, amount, and duration of any liability insurance policies they may procure. *Id.* Additionally, section generally affords political subdivisions the discretion to procure no liability insurance policies. *Id.*, *see also*, Trent v. Cook, 482 S.E. 2d 218; 198 W.Va. 601 (1996). It should also be noted that W.Va. Code § 29-12A-16 provides that the Governmental Tort Claims and Insurance Reform Act is merely intended to supplement any other provision of the West Virginia Code or West Virginia Constitution which mandates or provides for the procurement of insurance by a political subdivision. Specifically, W.Va. Code § 29-12A-16(e) specifically reads as follows:

The authorization for political subdivisions to secure insurance and to establish and maintain self-insurance programs and pools . . . are in addition

to any other authority to secure insurance or to establish and maintain self-insurance that is granted pursuant to this code or the constitution of this state, and they are not in derogation of any other authorization.

Id. Thus, while the Governmental Tort Claims and Insurance Reform Act is intended to assist political subdivisions in procuring insurance coverage, it does not nullify, supersede, or conflict with any other provisions of the West Virginia Code which permit or require the procurement of insurance coverage by political subdivisions.

Unlike the discretionary provisions of W.Va. Code § 29-12A-16, the language of W.Va. Code § 7-14A-3 mandates that all county commissions procure liability insurance to cover the acts or liabilities of their deputy sheriffs. Specifically, W.Va. Code § 7-14A-3 states, in pertinent part, as follows:

Effective the first day of January, one thousand nine hundred seventy-eight, the county commission of each county wherein the provisions of this article are applicable, *shall* purchase a professional liability insurance policy covering all deputy sheriffs subject to this article, which policy shall provide for minimum coverage of fifty thousand dollars for each person injured or damaged in each occurrence and one hundred thousand dollars total coverage for each occurrence.

Id. (emphasis added).

Thus, while county commissions have discretion in obtaining liability insurance policies to cover other employees, they are required to procure policies that cover the acts or omissions of deputy sheriffs. Stated alternatively, the Raleigh County Commission has a choice as to whether it will procure and maintain liability insurance policies to cover the acts and conduct of employees other than deputy sheriffs. It does not, however, have any authority or discretion to choose not to procure liability insurance policies that cover the acts and omissions of deputy sheriffs like Deputy Kade and Deputy Hajash. In fact, any attempt to refuse or avoid such coverage would be in violation of W.Va. Code § 7-14A-3.

As discussed in the Memorandum of Law in Support of the Defendants' Motion to Dismiss, W.Va. Code § 7-14A-4 specifically provides that a county commission shall not be held liable for any act or conduct of a deputy sheriff. Id. Admittedly, the immunity granted to county commissions under W.Va. Code § 7-14A-4 for the acts or omissions of deputy sheriffs is more extensive than the immunities granted to other political subdivisions under W.Va. Code § 29-12A-4. However, the burden placed upon county commissions by W.Va. Code § 7-14A-3 is mandatory while the general ability to procure liability insurance under the Governmental Tort Claims and Insurance Reform Act is left to the election of individual political subdivisions. Clearly, the extensive liability provided under W.Va. Code § 7-14A-4 is an attempt to offset the additional financial burdens placed upon county commissions by W.Va. Code § 7-14A-3. In this respect, W.Va. Code § 7-14A-4 serves the same purposes as the Governmental Tort Claims and Insurance Reform Act – “to limit the liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.” W.Va. Code § 29-12A-2.

If liability could be imposed upon county commissions for the acts or commissions of deputy sheriffs, then exposure would increase because situations would arise, much like the present case, where plaintiffs attempt to target and recover from as many separate entities as possible. However, by enacting W.Va. Code § 7-14A-4, and thus excluding county commissions from any liability for the acts and omissions of deputy sheriffs, the West Virginia Legislature has, pursuant to the same principles articulated in the Governmental Tort Claims and Insurance Reform Act, reduced potential exposure and attempted to regulate the costs and coverage of the liability policies made mandatory under W.Va. Code § 7-14A-3.

Based upon the foregoing, it is clearly that W.Va. Code § 7-14A-4 and the Governmental Tort Claims and Insurance Reform Act are complimentary, not conflicting. Thus, pursuant to the language of W.Va. Code § 7-14A-4, the Raleigh County Commission should be dismissed, with prejudice, from the case *sub judice*.

B. EVEN A CONFLICT EXISTS BETWEEN W.VA. CODE § 7-14A-4 AND THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, THE LANGUAGE OF W.VA. CODE § 7-14A-4 SHOULD BE GIVEN EFFECT OVER THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT.

Even if it were deemed that a conflict existed between the language of W.Va. Code § 7-14A-4 and the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 7-14A-4 should control in the case *sub judice* because, as discussed hereinabove, it specifically addresses the liability for sheriffs and county commissions for the acts and omissions of deputy sheriffs.

Just as she inaccurately interprets the language of W.Va. Code § 7-14A-4 and the Governmental Tort Claims and Insurance Reform Act, the Plaintiff also inaccurately states the principles for remedying apparent conflicts between statutes. The Plaintiff would have the Court completely ignore the provisions of W.Va. Code § 7-14A-3 simply because it predated the enactment of the Governmental Tort Claims and Insurance Reform Act. The Plaintiff fails to acknowledge, however, that the “black-letter principle” does not automatically give effect to the more recent statute where the statutes speak to the same subject. The Fourth Circuit Court of Appeals has explained that “[i]t is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision.” Farmer v. Employment Security Commission of North Carolina, 4 F.3d 1274, 1284 (4th Cir. 1993). *See also*, Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W.Va. 330; 325 S.E.2d 120 (1984) (“The general rule of statutory construction

requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.”). “Thus, ‘[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.’” Sigmon Coal Co., Inc. v. Apfel, 226 F.3d 291, 302 (4th Cir. 2000), *quoting*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) (internal quotations omitted from original).

As discussed hereinabove, W.Va. Code § 7-14A-4 addresses the specific liability of sheriffs and county commissions for acts or omissions of deputy sheriffs whereas the Governmental Tort Claims and Insurance Reform Act addresses the general liability of all political subdivisions for the acts or omissions of their employees. Therefore, Pursuant to the above principles, W.Va. Code § 7-14A-4 should be given effect over any conflicting provisions of the Governmental Tort Claims and Insurance Reform Act because W.Va. Code § 7-14A-4 speaks specifically to the issue of immunity to county commissions for acts and omissions of deputy sheriffs.

C. W.VA. CODE § 7-14A-4 UNEQUIVOCALLY PROVIDES THAT SHERIFF MOORE CANNOT BE HELD LIABLE FOR THE ALLEGED ACTS OR OMISSIONS OF DEPUTY KADE OR DEPUTY HAJASH AS HE WAS NOT PRESENT DURING ANY ALLEGED INAPPROPRIATE ACTS.

With regard to the immunity granted to Sheriff Moore pursuant to W.Va. Code § 7-14A-4, the Defendants reincorporate the arguments set forth hereinabove concerning county commissions. There can be no confusion that the provisions of W.Va. Code § 7-14A-4 extend immunity to Sheriff Moore for any alleged acts or omissions of Deputy Kade or Deputy Hajash. Furthermore, as the Plaintiff has not alleged that Sheriff Moore was present for or during the alleged inappropriate acts and conduct of Deputy Kade and Deputy Hajash, Sheriff Moore

cannot be held liable for any acts or omissions of Deputy Kade or Deputy Hajash. The Plaintiff's claims against Sheriff Moore, at least to the extent that any such claims are premised upon theories of agency or vicarious liability relating to the acts and/or conduct of Deputy Kade and/or Deputy Hajash, should therefore be dismissed as a matter of law.

D. THE PROVISIONS OF W.VA. CODE § 7-14A-4 EXTEND TO THE RALEIGH COUNTY SHERIFF'S DEPARTMENT, WHICH IS AN EXTENSION OF THE SHERIFF MOORE, THE RALEIGH COUNTY COMMISSION, AND THE COUNTY OF RALEIGH.

The Plaintiff also argues that even if W.Va. Code § 7-14A-4 is applicable to the case *sub judice*, immunity should not be afforded to the Raleigh County Sheriff's Department because the statute applies only to the sheriff as an individual and not the sheriff's department. The Defendants acknowledge that W.Va. Code § 7-14A-4 does not contain the words "sheriff's department." However, the sheriff's department is merely an extension of the sheriff individually, the county commission, and the entire county. The immunity provided under W.Va. Code § 7-14A-4 thus extends not only to the sheriff individually and the county commission, but also to the entire county, including the sheriff's department.

As quoted in the Memorandum of Law in Support of the Defendants' Motion for Summary Judgment, W.Va. Code § 7-14A-4 reads as follows:

Any other provision of this code or rule of law to the contrary notwithstanding, on and after the first day of January, one thousand nine hundred seventy-eight, ***no sheriff shall be held jointly or severally liable on his official bond or otherwise for any act or conduct of any deputies*** subject to the provisions of this article committed on or after such date, except in cases where such deputy is acting in the presence of and under the direct, immediate and personal supervision of such sheriff, ***nor shall the county commission of a county nor the county itself be held so liable***, and the liability of such sheriff, county or county commission in such cases shall be no greater than would be the liability of the superintendent of the department of public safety, or such department or the state of West Virginia under the same or substantially similar circumstances.

W.Va. Code §7-14A-4 (emphasis added). Although the Legislature did not include the words “sheriff’s department,” logic clearly follows that the sheriff’s department, as an extension of each of the three entities mentioned in W.Va. Code § 7-14A-4, is afforded immunity as well. Accordingly, the Plaintiff’s claims against the Raleigh County Sheriff’s Department should be dismissed, with prejudice, as a matter of law.

II. THE PLAINTIFF HAS FAILED TO SET FORTH ANY VALID CLAIMS AGAINST SHERIFF MOORE OR CHIEF DEPUTY TANNER UNDER THE THEORIES OF *RESPONDEAT SUPERIOR* AND SUPERVISORY LIABILITY.

Although the second argument section in the Plaintiff’s Memorandum of Law in Opposition to the Defendants’ Motion to Dismiss falls under the heading “PLAINTIFF HAS SET FORTH VALID CLAIMS FOR *RESPONDEAT SUPERIOR* AND SUPERVISORY LIABILITY AGAINST SHERIFF MOORE AND CHIEF DEPUTY TANNER,” the Plaintiff has not, by her own acknowledgement, set forth any such claims. In fact, the Plaintiff readily “concede[s] that Defendants Sheriff Moore and Chief Deputy Tanner cannot be held personally liable for the acts or omissions of their subordinate deputies by theories of vicarious liability or respondeat superior” and further states that she does not seek any remedy under such theories.

The Plaintiff goes on to argue that Sheriff Moore and Chief Deputy Tanner may still be held liable for their own acts and omissions. While the Defendants deny that either Sheriff Moore or Chief Deputy Tanner committed any wrongful act or omission, the Defendants did not advance any such argument in their Motion to Dismiss or accompanying Memorandum of Law. As such, the Defendants are perplexed as to what the intended purpose was for the second argument set forth in the Plaintiff’s Memorandum of Law in Opposition to the Defendants’ Motion to Dismiss. In essence, said argument is nothing more than a concession to the points

discussed under Section IV of the Memorandum of Law in Support of the Defendants' Motion to Dismiss.

To the extent that the Plaintiff's Memorandum attempts to address the issue of supervisory liability with regard to alleged civil rights violations by any defendant herein, the Defendants would again direct the Court to the language of Robinson v. Pack, 223 W.Va. 828; 679 S.E.2d 660 (W.Va. 2009), which provides that "[a]s 'As it stands today, the issue of supervisory liability in connection with an alleged civil rights violation is clear: there is none.'" Id. at 833; 669.

III. THE PLAINTIFF'S MEMORANDUM WHOLLY FAILS TO ADDRESS THE DEFENDANTS' ARGUMENT THAT THE EMPLOYEES OF THE RALEIGH COUNTY SHERIFF'S DEPARTMENT SHOULD BE DISMISSED, WITH PREJUDICE, BECAUSE SAID DEFENDANTS ARE AFFORDED PERSONAL IMMUNITY UNDER W.VA. CODE §29-12A-5.

The third argument section of the Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion to Dismiss provides an intriguing dissertation on the history of governmental immunity and the West Virginia Legislature's eventual enactment of the Governmental Tort Claims and Insurance Reform Act. Additionally, the section provides a relatively recitation of W.Va. Code §29-12A-4 and W.Va. Code §29-12A-5. It does not, however, contain any argument that in any way contests or disputes Section V. of the Memorandum of Law in Support of the Defendants' Motion to Dismiss.

As discussed in the Memorandum of Law in Support of the Defendants' Motion to Dismiss, and as further acknowledged in the Plaintiff's Memorandum, "West Virginia Code §29-12A-5 provides that employees of political subdivisions are immune from personal tort liability unless '(1)[h]is or her acts or omissions were manifestly outside the scope of employment or

official responsibilities; (2) [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) [l]iability is expressly imposed upon the employee by a provision of this code.” Syl. Pt. 1, Mallamo v. Town of Rivesville, 197 W.Va. 616; 477 S.E.2d 525 (1996), *quoting*, Syl. Pt. 1, Beckley v. Crabtree, 189 W.Va. 94; 428 S.E.2d 317 (1993). Applying these principles to the case *sub judice*, the Plaintiff has advanced no argument that the actions of any defendant were manifestly outside the scope of his employment or official responsibilities or that the West Virginia Code specifically waives immunity and invokes liability against any individual defendant. The Plaintiff instead bases her claims against the individual defendants on unfounded allegations that each of the individual Defendants acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

Although Rule 12 of the *Federal Rules of Civil Procedure* requires that courts, when evaluating a motion to dismiss, are to view any allegations in the light most favorable to the plaintiff, Rule 12 does not relieve a plaintiff from her obligation to allege sufficient facts to support her claims. In the case *sub judice*, the Plaintiff has failed to allege any such sufficient facts. Granted, the facts underlying this case are tragic, but the simple fact that Robert Webb lost his life does not provide sufficient grounds to show that the individual defendants acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

General allegations that a defendant acted negligently are in no way sufficient to support claims that said defendant acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. As explained by the Supreme Court of Appeals of West Virginia in Stone v. Rudolph, 127 W.Va. 335, 346, 32 S.E.2d 742, 748 (1944):

Wilfulness or wantonness imports premeditation or knowledge and consciousness that injury is likely to result from the act done or from the omission to act. Wilful, malicious, or intentional misconduct is not,

properly speaking, within the meaning of the term ‘negligence.’ Negligence and wilfulness are mutually exclusive terms which imply radically different mental states. ‘Negligence’ conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge of danger and wilfulness enter is not negligence of any degree, but is wilful misconduct.

Id. at 346; 748, *citing*, 38 Am.Jur. 692.

In the absence of any factual allegations that the individual Defendants acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. , the individual defendants are immune from liability under the provision of W.Va. Code § 29-12A-5(b) and should therefore be dismissed, with prejudice, from the above-styled civil action.

It should be noted that the third section of the Plaintiff’s argument again raises the issue of whether the Raleigh County Sheriff’s Department and Raleigh County Commission can be held liable for the negligence of the individual Defendants. The Defendants have fully addressed this issue hereinabove and thus incorporate their previous arguments which demonstrate why neither the Raleigh County Sheriff’s Department nor the Raleigh County Commission can in any way be liable for the acts or omissions of the individual Defendants.

IV. THE PLAINTIFF CONCEDES THAT NEITHER THE RALEIGH COUNTY SHERIFF’S DEPARTMENT NOR THE RALEIGH COUNTY COMMISSION MAY BE HELD LIABLE UNDER ANY CLAIM FOR VIOLATION OF CIVIL RIGHTS.

In the fourth argument section of her Memorandum of Law in Opposition to the Defendants’ Motion to Dismiss, the Plaintiff unequivocally concedes that “[t]o the extent that Defendants’ Motion to Dismiss seeks a dismissal of Defendants Raleigh County Sheriff’s Department and Raleigh County Commission for the allegations in Count XIII, the Plaintiff did not intend to assert the Count XIII claims against these Defendants.” As such, Count XIII should, by the Plaintiff’s concession, be dismissed to the extent that it contains any allegations or

inferences that the Raleigh County Sheriff's Department or Raleigh County Commission may be liable for any alleged civil rights violations.

The Plaintiff's Memorandum goes on to argue that the Defendants' Motion to Dismiss should not be granted to the extent that it dismisses all Defendants for alleged violations of civil rights. Although the Defendants vehemently deny any allegations of civil rights violations, the Defendants' Motion and accompanying Memorandum of Law contains no argument that the Amended Complaint failed to meet the minimal threshold requirements under Rule 12 of the *Federal Rules of Civil Procedure* to state a claim against Deputy Kade or Deputy Hajash for alleged civil rights violations. With regard to any allegations that either Sheriff Moore or Chief Deputy Tanner violated Robert Webb's civil rights, however, the Defendants' take great issue as Count XIII of the Amended Complaint fails to set forth any claim whatsoever against either Defendant individually. Furthermore, as explained both hereinabove and in the Memorandum of Law in Support of the Defendants' Motion to Dismiss, there exist no grounds to impute liability for alleged civil rights violations on either Sheriff Moore or Chief Deputy Tanner. In Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), the United States Supreme Court clearly explained that "[a]bsent vicarious liability, each Governmental official, his or her title notwithstanding, is only liable for his or her own misconduct" and thus "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Id. at 1949.

Because the Amended Complaint contains no allegations that either Sheriff Moore or Chief Deputy Tanner, by their individual actions, violated the Constitution, Count XIII of the Plaintiff's Amended Complaint should be dismissed to the extent that it contains any inferences of any civil rights violations by Sheriff Moore or Chief Deputy Tanner.

V. THE PLAINTIFF'S MEMORANDUM FAILS TO ADDRESS THE DEFENDANTS' ARGUMENT THAT ANY CLAIMS AGAINST DEPUTY KADE, SHERIFF MOORE, AND CHIEF DEPUTY TANNER, IN THEIR OFFICIAL CAPACITIES, ARE REDUNDANT AND THUS SHOULD BE DISMISSED AS A MATTER OF LAW.

The Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion to Dismiss does is silent with regard to the Defendants' argument that the Plaintiff's claims against Deputy Kade, Sheriff Moore, and Chief Deputy Tanner in their official capacities are redundant and thus should be dismissed as a matter of law pursuant to Kentucky v. Graham, 473 U.S. 159 (1985). The Plaintiff's silence the face of such clearly established caselaw suggests concession. Accordingly, the Defendants respectfully request that even if the Court does not grant personal immunity to the individual Defendants under W.Va. Code §29-12A-5, said Defendants should, in the alternative, be dismissed, with prejudice, as they are being sued in their official capacities, which are redundant claims.

CONCLUSION

WHEREFORE, for the reasons set forth hereinabove, together with the reasons set forth in the Memorandum of Law in Support of the Defendants' Motion for Summary Judgment, the Defendants, the Raleigh County Sheriff's Department, the Raleigh County Commission, Sheriff Danny Moore, individually and in his official capacity, Chief Deputy Steve Tanner, individually and in his official capacity, and Deputy Greg S. Kade, individually and in his official capacity, respectfully request that this Honorable Court grant their Motion to Dismiss and thereby dismiss, with prejudice, each and every allegation set forth against said Defendants in the above-styled civil action.

**RALEIGH COUNTY SHERIFF'S DEPARTMENT;
RALEIGH COUNTY COMMISSION;
SHERIFF DANNY MOORE, individually, and in his
official capacity; CHIEF DEPUTY STEVE TANNER,
individually and in his official capacity;
DEPUTY GREG S. KADE, individually and in his
official capacity; and DEPUTY JOHN E. HAJASH,
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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

**MARY WEBB, individually, and in
her capacity as Administratrix of the
Estate of Robert A. Webb,**

Plaintiff,

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**RALEIGH COUNTY SHERIFF'S DEPARTMENT;
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DEPUTY GREG S. KADE, individually and in his
official capacity; and DEPUTY JOHN E. HAJASH,
individually and in his official capacity,**

Defendants.

CERTIFICATE OF SERVICE

I, Chip E. Williams, Wesley V. Queen, counsel for Defendants, do hereby certify that a true copy of the foregoing **"DEFENDANTS' REPLY TO THE PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS"** was served upon counsel of record as follows:

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by electronically filing the same on the PACER system, on this the 5th day of January, 2010.

/s/ Wesley V. Queen

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