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,

Plaintiffs,

v.

Civil Action No. 5:09-cv-1253
Honorable Irene C. Berger

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.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT JOHN HAJASH'S MOTION FOR SUMMARY JUDGMENT

NOW COME PLAINTIFF, Mary Webb, individually and in her capacity as Administratrix of the Estate of Robert A. Webb, by counsel, Michael A. Olivio, and Travis A. Griffith, and respectfully file this *Plaintiff's Memorandum of Law in Opposition to Defendant John Hajash's Motion for Summary Judgment* filed in the above-styled civil action.

PROCEDURAL HISTORY

Mary Webb, as Administratrix of the Estate of Robert Webb filed her original Complaint on or about May 5, 2008 setting forth twelve counts against the defendants herein.[1] After initial

[1] Plaintiff Webb's original Complaint contained the exact language contained in Counts I-XII of the Amended Complaint.

discovery and further investigation, Plaintiff Webb moved to amend her Complaint in order to add a count for violation of civil rights after learning that her husband was likely alive at the time emergency medical personnel arrived at the scene but that those same medical personnel were denied access to Robert Webb for an extended period of time. Those facts were set forth in Count XIII of the Amended Complaint and filed upon permission from the Circuit Court of Raleigh County. Thereafter, the Defendants removed this matter to this forum.

Deputy Hajash has seven claims pled against him individually. Specifically, the Plaintiff has pled a claim for federal violation of civil rights pursuant to 42 U.S.C. §1983 and the West Virginia state law claims of wrongful death, suffering prior to death, intentional infliction of emotional distress, negligence, outrage, and a claim for punitive damages. On August 31, 2010, Defendant Hajash moved this Court for summary judgment based on qualified immunity for excessive force and all state law claims pursuant to federal law and claiming that the force exerted by Defendant Hajash was "reasonable" under the circumstances. Nevertheless, Defendant Hajash's Motion for Summary Judgment fails to address several Counts in Plaintiff's Amended Complaint which do not fall within a broadly defined umbrella of "excessive force" under which Defendant Hajash attempts to consolidate the numerous claims asserted against him. Plaintiff is left to presume Defendant Hajash's motion should be viewed as a Motion for Partial Summary Judgment based upon the argument asserted. Accordingly, Plaintiff Mary Webb will address the motion for summary judgment, as presented. In doing so, the evidence of factual disputes of material facts preclude summary judgment and require a trial by jury on the merits of the case.

RULE 56 STANDARD

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure goes to the merits of the claim and is designed to test whether there is a genuine issue of material fact. *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833 (N.D. W. Va. 1997).

The court will only grant summary judgment in those cases where it is not only perfectly clear that there exists no dispute as to the facts, but also where there is no dispute as to conclusions or inferences which may reasonably be drawn therefrom. *Pauley v. Combustion Eng'g, Inc.*, 528 F.Supp. 759 (S.D. W. Va. 1981); *Prete v. Royal Globe Ins. Co.*, 533 F. Supp. 332 (N.D. W. Va. 1982). The court will grant summary judgment only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law and the party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence. *Kinney v. Daniels*, 574 F. Supp. 542 (S.D. W. Va. 1983); *United States v. One 1976 Lincoln Continental Mark IV*, 578 F. Supp. 402 (S.D. W. Va. 1984). Issues of negligence are not ordinarily susceptible to adjudication upon a motion for summary judgment made pursuant to Rule 56 … See, *Anderson v. Turner*, 155 W. Va. 283, 184 S.E.2d 304 (W. Va. 1971).

The burden is upon the party moving for summary judgment to demonstrate clearly that there is no genuine issue of material fact, and any doubt as to the existence of such an issue is resolved against the movant. Summary judgment should not be granted if the evidence is such that conflicting inferences may be drawn therefrom. *Prince v. Pittston Co.*, 63 F.R.D. 28 (S.D. W. Va. 1974).

STATEMENT OF FACTS

On July 4, 2006, Raleigh County Deputy Sheriffs Greg Kade and John Hajash responded to a nuisance report made on the non-emergency administrative line that Robert Webb was playing loud music and shooting a gun while at his home. (See Deposition of John Hajash, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit A; Deposition of Greg Kade, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit B. Earlier that evening, Robert Webb discharged his firearm in celebration of his birthday and the Fourth of July holiday. However, more than thirty minutes had elapsed from the time Robert Webb last discharged his firearm and when Deputy Kade and Deputy Hajash arrived at the Webb residence. Robert Webb never discharged his firearm in a manner to threaten or endanger the safety of himself or other persons (See Deposition of Kristi Robinson, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit C, p. 65.)

Deputy Kade and Deputy Hajash approached Robert Webb's house without the visual or audio warnings devices available on their police patrol vehicles and parked those vehicles at a location not visible to Mr. Webb. (See Exhibit A, p. 63-66; Exhibit B, p. 37-44.) When they arrived in the area where Mr. Webb resided, at approximately 1:00 a.m. Deputy Kade and Deputy Hajash used cover of darkness and foliage to observe Mr. Webb engage in peaceful conduct on his property and they did not hear any shooting. Deputies Kade and Hajash waited at their

hidden vantage point until they witnessed Robert Webb turn away from them at which time they ran toward Robert Webb in order to close the distance between them. (See Exhibit A, p. 77-80; Exhibit B, p. 51-53.) Deputies Kade and Hajash failed to identify themselves as law enforcement officers prior to firing their fatal shots at Mr. Webb. This fact has been confirmed by Christopher Hatfield and Kriti Robinson who were mere feet away from the Webb driveway attempting to go to sleep. (See Deposition of Christopher Hatfield attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit D, p. 57-60; Exhibit C, p. 73. Thereafter, both Deputies claim that Mr. Webb raised a weapon to his right shoulder in a threatening manner toward them and they were forced to fire. (See Exhibit A, p. 94-97; Exhibit B, p. 61-71.) Nevertheless, this is an improbable event as Robert Webb was born left-handed and performed all tasks, including firing a rifle, with the left dominant position. (See, affidavit of Mary Webb, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit E.) Robert Webb was hit in the head and knocked to the ground by an initial shot from a shotgun. While Mr. Webb was lying on the ground, one of the deputies shot Robert Webb again using his handgun. (See Exhibit A.) Upon arrival at the scene, emergency medical personnel were denied immediate access to Robert Webb by personnel from the Raleigh County Sheriff's Department. (See EMT Report of July 4, 2006, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit F.)[2]

[2] Chief Deputy Steve Tanner testified during his deposition that this too was improper pursuant to the Raleigh County Sheriff's Department's policies and Procedures. (See Deposition of Steve Tanner, attached to *Plaintiff's*

More specifically, emergency medical personnel were instructed not to touch the patient until Raleigh County Sheriff's Department personnel were finished taking photographs (approximately 20 minutes). *Id*. Consequently, Robert Webb's medical condition is completely unknown for the time that medical personnel arrived on the scene until the time that the Raleigh County Sheriff's Department allowed them to access the condition of the patient.

Following the death of Robert Webb, Plaintiff claims the Sheriff's Department and other agents of the County Commission: failed to take steps to conduct a fair, reasonable, and unbiased investigation of the shooting of Robert Webb; engaged in acts of extreme cruelty toward Mary Webb; made statements about the events leading to the death of Mr. Webb that were false and/or made with reckless disregard for the truth and that caused Mary Webb and others who know and loved Robert Webb humiliation and severe emotional distress; and engaged in a hasty and inadequate investigation designed solely to absolve Deputies Kade and Hajash from any liability and to taint Robert Webb's name in the public forum. (See Amended Complaint, ¶¶ 26-31).

Subsequent to the fatal shooting of Robert Webb, members of the Raleigh County Sheriff's Department are required to be examined for duty by a psychiatric or psychological expert prior to returning to work. (See Raleigh County Sheriff's Department Policy Manual attached (under seal) to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit H, p. 2-6.) Furthermore, the deputies involved in the shooting are required to submit to drug and alcohol testing post-shooting pursuant to the County's procedures. (See

Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment as Exhibit G, p. 17.)

Exhibit H, p. 2-35.18) The Raleigh County Sheriff's Department arranged for Deputies Kade and Hajash to meet with Mike Johnson, a counselor in the Beckley area for such evaluation. However, Deputy Hajash could not obtain an appointment. Consequently, he sought the assistance of Dr. Sied in Raleigh County for emotion problems he was having after Robert Webb's death. Dr. Sied apparently refused to clear Deputy Hajash to return to work deeming him unfit for duty and informed the Raleigh County Sheriff's Department as such. (See Exhibit G, p.46-49.) Moreover, neither deputy was tested for drugs or alcohol. (See Exhibit G, p.50-54.) When questioned regarding the lack of testing, Steve Tanner simply stated that drug testing the deputies "would not have been permissible." (See Exhibit G, p. 51.)

When it became clear that Deputy Hajash would eventually lose his position with the Department, he began secretly taping conversations between himself, Sheriff Moore and Chief Deputy Tanner. Thereafter, Deputy Hajash delivered these tapes to former West Virginia State Trooper Robert McCommas because Hajash feared that something would happen to the tapes. (See Deposition of Robert McCommas, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit J. Eventually, Deputy Hajash arranged to have these audio tapes placed in the possession of Mary Webb. On these tapes, Robert Webb was described as a "lunatic" as well as other various names and Deputy Hajash was informed that he had "done the world a favor" by killing Robert Webb. (See Transcript of Audio Tape and Audio Tape of John Hajash and Danny Moore, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit I.; see also Audio Tape of John

Hajash and Steve Tanner, attached to *Plaintiff's Response to Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit K.) Furthermore, the tapes shockingly reveal that Mike Johnson was the person that the Raleigh County Sheriff's Department uses to clear deputies after shootings. These tapes disturbingly reveal attempts by Sheriff Moore and Chief Deputy Tanner to coerce Deputy Hajash into convincing Dr. Sied to change his opinion and allow the Department to place a deputy back on the street despite a prognosis that he was unfit for duty.

This case presents a situation for the Court where the factual basis for the claims precludes granting summary judgment to any defendant including Deputy John Hajash. According to Mary Webb, her husband was a reasonable man who would not knowingly raise a weapon against an officer of the law. (See Exhibit E.) Furthermore, self-serving factual scenario proposed by the officers is improbably given that it would require Robert Webb to point his weapon at them with his non-dominate hand. *Id.* Reasonable inferences contradict the version of events described by Defendant Hajash and Defendant Kade whose statements must be viewed as obviously biased. Consequently, Plaintiff hereby requests that Defendant Hajash's motion be denied.

DEPUTY HAJASH IS NOT ENTITLED TO JUDGMENT
AS A MATTER OF LAW BASED ON QUALIFIED IMMUNITY

Defendant's motion ignores numerous factual circumstances in this case and is not based on the established law in the Fourth Circuit. When evaluating a claim of violation of due process rights/excessive force under 42 U.S.C. §1983, a Court is charged as follows:

> A court reviewing an excessive use of force claim must determine whether the force employed was objectively reasonable under the circumstances and at the moment of action. *See Graham, 490 U.S. at 396-99*. **In so doing, a court must pay "careful attention to the facts and circumstances of each particular case.**" *Id. at 396*. "The 'reasonableness' of a particular use of force [**16] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation omitted).
>
> The use of deadly force by a police officer is reasonable when the officer has "probable cause" to believe that the suspect poses a threat of serious physical harm to the officer or to others. *Tennessee v. Garner, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)*. **Where a suspect poses no immediate threat, the use of deadly force is not justified.** However, "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary . . . and if, where feasible, some warning has been given." *Id. at 11-12*.

Pena v. Porter, 316, Fed. Appx. 303, 310, 2009 U.S. App. 5324 (4th Cir. 2009) (emphasis added).

In *Pena*, probation officers and local law enforcement in North Carolina were in search of a fleeing suspect and were attempting door-to-door searches for persons who might have information. *Id.* at 306. While conducting their searches, Officer Porter (who was sued individually along with his department) attempted to knock on the door of the plaintiff. The plaintiff had been drinking earlier in the evening and was asleep when the officer originally knocked. *Id.* at 307. The officer left the porch and searched the area and then attempted to knock on the plaintiff's door again. This time, the plaintiff awoke hearing the rustling of dogs and chickens outside of his home and feared that a fox or other predator was raiding his chicken coup. *Id.* Consequently, the plaintiff answered the door holding a rifle in his hand. *Id.* Officer Porter immediately shouted to other officers that the plaintiff had a weapon. Other officers sought refuge behind a car and trailer, respectively while Officer Porter shot the plaintiff twice.

Porter and other officers then shot fourteen times into the plaintiff's trailer. The Court denied the Officer Porter's argument for qualified immunity and Officer Porter appealed.

On appeal, the 4th Circuit found that the underlying Court properly denied Officer Porter qualified immunity even though the test was not what the plaintiff subjectively believed but was the officers perceived. *Id.* at 312, n. 8. Specifically, the officers did not identify themselves prior to firing. *Id.* at 310 The plaintiff had been drinking and was asleep when the officers arrived. Furthermore, the Court found it was reasonable for the plaintiff to bring a gun to the door given the time of night. The Court noted that unlike other cases involving qualified immunity, the plaintiff in *Pena* was not arrested and seeking a weapon after arrest. In short, in taking the facts in the light most favorable to the plaintiff, as the Court is required to do on summary judgment, the case was one where reasonable minds could differ and a jury would be the ultimate trier of the fact.

There is a striking similarity between the *Pena* case and the current case at bar. Specifically, Robert Webb had been drinking on his own, private property on the evening in question. The time of night was one where it would be rare for others to be around. There is a question of fact whether or not the deputies at the scene actually announced their presense. Even if Robert Webb had raised his weapon at the officers, a jury could find this reasonable given the time of night and testimony from Kristi Robinson that there had been some criminal activity in the area around the time of the shooting. (See Exhibit C, p. 60-61). In reality, the only true difference between the instant action and *Pena* was the fact that the plaintiff in *Pena* lived. Robert Webb was shot and killed. Consequently, Robert Webb's side of this story can only be told by all other witnesses and their rendition of the facts of the case. It is not, and never has

been, the policy of any Court to grant immunity to an individual simply because they state that they did nothing wrong. In essence, Defendant Hajash's motion asks the Court to take his and Deputy Kade's own, self-serving version of the events involving the shooting and declaring it to be fact to establish qualified immunity. Respectfully, this position comes nowhere close to meeting the standard of granting summary judgment for qualified immunity. Consequently, Plaintiff requests that Defendant's motion be denied.

IMUNITY UNDER THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT; W. VA. CODE § 29-12A-1

Defendant Hajash asserts the legal argument that he is entitled to absolute immunity from the plaintiff's state law tort claims under the West Virginia Governmental Tort Claims and Insurance Reform Act (hereinafter "Tort Reform Act") as codified in W. Va. Code § 29-12A-1, *et seq*. This position is simply overreaching and not an accurate reflection of the qualified immunities afforded under the Tort Reform Act. Individual police officers are granted immunity *unless* their actions fall into certain and specific categories. Moreover, the individual officer's claim for immunity must be read in conjunction with the fact that the political subdivision generally bears liability for the negligent acts of its employees if the employees themselves are afforded immunity under the act. The policy reasons for this are quite obvious, so that both the [political subdivision] employer and its employees are not held accountable for the same conduct.

In 1974, the West Virginia Supreme Court held that state constitutional sovereign, or absolute, immunity from tort liability is not available to a municipality. *Higginbotham v. City of Charleston*, 157 W.Va. 724, 204 S.E.2d 1 (1974), overruled on another point in Syl. Pt. 3, *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977). Subsequently, in *Long v. City of*

Weirton, Syl. Pt. 10, 158 W.Va. 741, 214 S.E.2d 832 (1975), the Court abolished qualified tort immunity for municipalities for "governmental" as opposed to "proprietary" functions. The Court in *Long* discussed in detail problems in both the nature and inconsistent application of qualified immunity. Likewise, the Court proceeded to abolish common law qualified governmental tort immunity as to counties and other political subdivisions. *See, Gooden v. City Comm'n*., Syl. Pt. 2, 171 W.Va. 130, 298 S.E.2d 103 (1982) (county commissions); *Ohio Valley Contractors v. Board of Educ.*, 170 W.Va. 240, 293 S.E.2d 437 (1982) (boards of education).

Thereafter, the West Virginia Legislature in 1986 enacted the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 through 18. The purpose of the Act was two-fold. First the purpose was to limit the liability of political subdivisions and provide immunity in certain instances. Second, the purpose was to regulate the costs and coverage of insurance available to political subdivisions for such liability. It should be noted that the Raleigh County Sheriff's Department and the Raleigh County Commission maintain insurance under which the sheriff's department, the county commission, elected officials and employees, including deputies, are covered.

The Tort Reform Act has survived constitutional challenges that it violated State principles of equal protection and certain remedy. *Randall v. Fairmont City Police Dep't*., 186 W.Va. 336, 412 S.E.2d 737 (1991). There has followed a large body of law applying the Act. Importantly, the West Virginia Supreme Court of Appeals has repeatedly indicated that the general rule of construction in governmental tort legislation cases favors liability, not immunity, unless the legislature clearly provided for immunity under the circumstances, as the general

common-law goal of compensating injured parties for damages is to prevail. *See*, *Id*., 186 W.Va. at 347, 412 S.E.2d at 748.

Pursuant to the Tort Reform Act, a political subdivision is immune generally from liability for damages in a civil action brought for death, injury, or loss to persons or property allegedly caused by any act or omission of the subdivision or employee in connection with a governmental or proprietary function. W.Va. Code § 29-12A-4(b)(I). Subject to certain provisions, a political subdivision is liable in damages in a civil action for injury, death or loss to persons or property caused by an act or omission of the subdivision or its employees in connection with a governmental or proprietary function. W.Va. Code § 29-12A-4(c). This liability applies in the context of negligent performance of acts by employees while acting within the scope of employment. W.Va. Code § 29-12A-4(c).

The Act recognizes five broad situations wherein a political subdivision is liable in damages in a civil action for injury, death or loss to persons or property. The five situations include: (1) those caused by the negligent operation of a vehicle; (2) those resulting from the negligent performance of acts by employees while acting within the scope of employment; (3) those caused by failure to keep roads, highways, alleys, sidewalks and the like open, in repair or free from nuisance; (4) those caused by employee negligence and occurring within or on the grounds of buildings used by the political subdivision and (5) those resulting from other expressly imposed liability under the State Code. W.Va. Code § 29-12A-4(c)(1)-(5) (*emphasis added*). At issue here is situation number two wherein liability results from the negligent performance of acts by employees while acting within the scope of employment.

The Tort Reform Act further enumerates seventeen specific types of acts or omissions for which there is immunity from liability. W.Va. Code § 29-12A-5(a)(1)-(17). One of those seventeen regarding "the failure to provide, or the method of providing police, law enforcement or fire protection" is at issue here. W.Va. Code § 29-12A-5(a)(5). An employee of a political subdivision is immune from liability unless: (1) his or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) his or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) if liability is expressly imposed by the Act. W.Va. Code § 29-12A-5(17)(b) (*emphasis added*).

Therefore, pursuant to W. Va. Code §29-12A-1 et seq., Defendant Raleigh County Sheriff's Department and Defendant Raleigh County Commission are liable for the negligent acts of their deputies while acting within the scope of their employment. Likewise, Defendant Hajash is liable for his acts which fall outside the scope of his employment, were with malicious purpose, in bad faith, or in wanton or reckless manner.

Finally, pursuant to W. Va. Code § 29-12A-5(b), Defendant Raleigh County Sheriff's Department and Raleigh County Commission, as political subdivisions, are not liable for any actions by their employees if those acts were manifestly outside the scope of their employment, or were with malicious purpose, in bad faith, wanton or reckless.

Plaintiff Mary Webb has set forth evidence that her deceased husband never discharged his firearm in a manner to threaten or endanger the safety of himself or others, per the testimony of witnesses Chris Hatfield and Kristi Hatfield. Mr. Webb discharged his firearm earlier that evening only in celebration of his birthday and the Fourth of July holiday.[3] While admittedly, not the wisest manner in which to celebrate, there is evidence that Mr. Webb was not presenting a

[3] Defendant Hajash has additionally admitted that the firing of a weapon in the air on the Fourth of July Holiday is not an uncommon event in Raleigh County.

threatening presence at the time Defendant Hajash admittedly watched Mr. Webb from a hidden vantage point upon arrival at the scene. Defendant Hajash admitted during deposition that he and Defendant Kade used cover to conceal their presence from Mr. Webb while watching his activities in his driveway. Admittedly, Defendant Hajash and Defendant Kade used cover and waited until Mr. Webb turned his back (while working in his driveway) on them to run along a row of trees further concealing their presence in order to close the gap to within a close distance of Mr. Webb before he would have been aware of their presence. Furthermore, Plaintiff Mary Webb has developed evidence that neither Defendant Hajash nor Defendant Kade identified themselves as law enforcement officer prior to discharging their firearms at Mr. Webb. In spite of the defendants' testimony to the contrary, two independent witnesses directly contradict this self-serving testimony which, standing alone, is a dispute of a material fact which goes to the defendant's position that his actions were justified. Taking the evidence in a light most favorable to the plaintiff, the defendant's analysis and argument for immunity fails if, as testified to by Chris Hatfield and Kristi Hatfield, the defendants failed to announce their presence as police officers prior to discharging their firearms to shoot and kill Robert Webb.

Employees of Defendant Raleigh County Sheriff's Department, possibly including Defendant Hajash, failed to make any attempt to render aid to Mr. Webb subsequent to the shooting. Additionally, those same employees of Defendant Raleigh County Sheriff's Department's denial of emergency medical personnel access to Mr. Webb upon their arrival on scene gives the plaintiff clear inference of acts that were either negligent, reckless or far outside the scope of employment.

Plaintiff Mary Webb has set forth evidence sufficient to support her claims that Defendant Hajash's actions were either negligent, wanton and reckless, or outside the scope of

his employment as a law enforcement officer. When the evidence is looked upon in a light most favorable to the plaintiff, and all reasonable inferences therefrom are likewise granted to the plaintiff, a jury may find that Defendant Hajash's actions rise to the level of wanton and reckless actions for which his employer, the political subdivision defendants, would not be statutorily liable. For those actions alleged to have been wanton and reckless, if taken as true as supported by the factual evidence cited herein, the individual officer defendants (Defendants Hajash and Kade) bear their own personal liability under the Tort Reform Act, as they do for the allegations set forth under 42 U.S.C.A. § 1983. The question of whether the political subdivision defendants might choose to indemnify their employees for that liability is a question not relevant to this motion or subject to any motion brought forth under Rule 56. Those allegations, if taken as true, are more than sufficient to set forth a claim of wantonness or recklessness on the part of those individual officer defendants for which those individual officer defendants would bear their own personal liability.

With regard to the claim of punitive damages, the Tort Reform Act provides that punitive damages are prohibited against the political subdivision, e.g., the Raleigh County Sheriff's Department and the Raleigh County Commission. However, punitive damages may be awarded against individual officers, as sought here. Significantly, the explicit language of the statute only prohibits punitive damages being imposed against the "political subdivision." W.Va. Code § 29-12A-7(a). The term "employees," used throughout the statute, is not included as part of the prohibition as to punitive damages. The Legislature could have included the term "employees" if it intended to include employees under the prohibition against punitive damages. The West Virginia Supreme Court of Appeals has consistently held "[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one

thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984).; *see also Gibson v. Northfield Ins. Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005). Further, an award of punitive damages may be made against the individual officers even if the Raleigh County Sheriff's Department or the Raleigh County Commission chooses to indemnify the officers. *See*, *Sloane v. Kanawha County Sheriff's Dept.*, 342 F.Supp.2d 545 (S.D. W. Va.2004).

The allegations set forth in the Amended Complaint, and the evidence developed to support those claims, adequately raise genuine issues of material fact and, if taken as true, could easily lead to an award of punitive damages against the individual officers. Specifically, Plaintiffs have asserted, *inter alia*, that the deputies acted and/or failed to act in conscious disregard of, or indifference, constituting willfulness, wantonness, recklessness, gross negligence, intentional misconduct and a violation of civil rights. Discharging their firearms without giving any warning to Robert Webb along with refusing to permit medical personnel to access Mr. Webb upon arrival, alone may serve as a basis for an award of punitive damages. It should be noted, although addressed elsewhere herein, that 42 U.S.C. § 1983 also serves as a mechanism to impose an award of punitive damages against the individual officer defendants. Plaintiff Mary Webb respectfully submits that there is the genuine issue of material fact in the record which precludes granting summary judgment in favor of Defendant Hajash.

WHEREFORE, Plaintiff Mary Webb respectfully requests that this Court deny Defendant Hajash's Motion for Summary Judgment and for such further relief as this Court deems necessary and appropriate.

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

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CERTIFICATE OF SERVICE

We, Michael A. Olivio and Travis A. Griffith, counsel for Plaintiff Mary Webb, individually, and in her capacity as Administratrix of the Estate of Robert A. Webb, do hereby certify that a true and exact copy of the foregoing **"PLAINTIFF'S REPONSE TO DEFENDNT JOHN HAJASH'S MOTION FOR SUMMARY JUDGMENT"** was made upon the parties listed below by electronic filing this 15th day of September, 2010 to:

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