

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 DEFENDANTS'
RALEIGH COUNTY SHERIFF'S DEPARTMENT, RALEIGH COUNTY
COMMISSION, SHERIFF DANNY MOORE AND CHIEF DEPUTY
STEVE TANNER, MOTION FOR SUMMARY JUDGMENT**

NOW COMES 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 files *Plaintiff's Memorandum of Law in Opposition to Defendants'*
Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and
Chief Deputy Steve Tanner, 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 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.

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. Defendants moved this Court for summary judgment based on immunity and for all state law claims, a lack of evidence. Nevertheless, Defendants' Motion for Summary Judgment fails to address several Counts in Plaintiff's Amended Complaint which do not fall within the scope of immunities arguably available under West Virginia law. Plaintiff is left to presume Defendants' 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.

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

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 Kristi 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 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 Comm., Sheriff Danny Moore and Chief Deputy Tanner's Motion for Summary Judgment* as Exhibit F.)² 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 unknown for the time that medical personnel

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 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.)

arrived on the scene until the time that the Raleigh County Sheriff's Department allowed them to access Mr. Webb and determine his condition.

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 knew 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 Am. 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 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 for emotional 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.

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, the self-serving factual scenario proposed by the defendants is improbable 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.

DEFENDANT RALEIGH COUNTY COMMISSION IS NOT ENTITLED
TO SUMMARY JUDGMENT AS A MATTER OF LAW

Defendant Raleigh County Commission argues that it is entitled to summary judgment as a matter of law on three separate basis. Defendant's argument attacks the validity of the claims set forth in Plaintiff Mary Webb's Amended Complaint, and therefore, argues matters that were previously addressed under a Rule 12(b) motion standard.³ This section of Defendant's argument does not address a Rule 56 standard regarding a genuine issues of material fact. Accordingly, Defendant's argument must fail for the reasons set forth below.

1. Raleigh County Commission is not entitled to Judgment under W. Va. Code § 7-14A-4.

Defendant's Motion for Summary Judgment erroneously argues, pursuant W. Va. Code § 7-14A-4, that the Raleigh County Commission cannot be held liable for the conduct of its deputies. Defendant's reliance on this antiquated statute is in error however, since W. Va. Code § 7-14A-4 does not specifically relieve the sheriff's department [County Commission] from

³ See the Court's Memorandum Opinion and Order entered on September 16, 2010, identified as Docket Number 44, wherein the Court ruled upon issues raised under Rule 12(b)(6). Plaintiff incorporates by reference the Court's rulings as they pertain to this section of the Defendant's Motion for Summary Judgment.

liability, and is also in direct conflict with, and is superceded by, W. Va. Code § 29-12A-1, *et. seq.*, which specifically imposes liability upon the county commission.

Defendant's Motion attempts to interpret W. Va. Code § 7-14A-4, and appears to argue that since the Plaintiff does not allege that the deputies "were in the presence of and under the direct supervision of the Raleigh County Sheriff," immunity applies to the Commission and the Department. This is not what the statute actually states.

W. Va. Code § 7-14A-4 states in pertinent part that "no **sheriff** shall be held jointly or severally liable on **his** official bond or otherwise for any act or conduct of any deputies ..., except in cases where such deputy is acting in the presence of and under the direct, immediate and personal supervision of such sheriff[.]" W. Va. Code § 7-14A-4 (*emphasis added*). The plain and clear language of the statute applies immunity to the sheriff himself and not the sheriff's department. Presumably, the legislature intended such immunity for the specific office of sheriff so individuals could seek election to the office without fear of personal liability. Therefore, in the absence of specific language pertaining to the department of the sheriff, W. Va. Code § 7-14A-4 does not impute immunity for the Raleigh County Sheriff's Department. Therefore, as to the defendants' argument with regard to Defendant Raleigh County Sheriff's Department, this argument for immunity and subsequent summary judgment must fail.

Defendant also argues that W. Va. Code § 7-14A-4 grants immunity to the Raleigh County Commission. In arguing such, Defendant relies on a later provision in the statute which states that "nor shall the county commission of a county nor the county itself be held so liable[.]" This particular provision of the statute is in direct conflict with, and has been superceded by, the Governmental Tort Claims and Insurance Reform Act, as codified in W. Va. Code § 29-12A-1, *et. seq.*

W. Va. Code § 29-12A-4(c)(2) provides that “[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.” W. Va. Code § 29-12-3(c) defines a “Political Subdivision” as, *inter alia*, “any county commission.” W. Va. Code § 29-12A-3(a) defines an employee as meaning an “officer, agent, employee, or servant ... who is authorized to act and is acting within the scope of his or her employment for a political subdivision.” Thus, pursuant to W. Va. Code § 29-12A-4(c)(2), the county commission is liable for negligent acts of its deputies since they are employees of the county.

The Court has previously ruled upon this issue in its Memorandum Opinion and Order dated September 16, 2010, Docket Number 44, wherein the Court determined that W. Va. Code § 7-14A-4 was superceded by W. Va. Code § 29-12A-4. Accordingly, the defendants’ argument for immunity under the W. Va. Code § 7-14A-4 at summary judgment is now moot for purposes of this response.

2. *Defendant Raleigh County Commission/Sheriff’s Department is not entitled to Summary Judgment under W. Va. Code § 29-12A-4*

Defendant Raleigh County Sheriff’s Department (and/or Raleigh County Commission) asserts the legal argument that it 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.*⁴ This position

⁴ The Court’s Memorandum Opinion and Order of September 16, 2010, Docket Number 44, decided that it is not proper to maintain claims against both Defendant Raleigh County Sheriff’s Department and Defendant Raleigh County Commission. The Court determined that Defendant Raleigh County Sheriff’s Department is not an entity capable of being sued under West Virginia law, but that Raleigh County Commission is the proper political subdivision defendant. Defendant only seeks summary judgment under Section II (2.) for Defendant Raleigh County Sheriff’s Department and not Defendant Raleigh County Commission. The Court has dismissed Defendant Raleigh County Sheriff’s Department from this civil action, thus making a response to Section II (2.) of the Motion for Summary Judgment moot. To the extent that Defendant attempts to assert this argument to be applicable to

appears to be premised upon the factual assumption and conclusion that the Raleigh County Commission is immune due to a determination that its employees were not negligent. Defendant Raleigh County Commission's argument in this section of its Motion is premised upon the factual assertion that "as Deputy Kade and Deputy Hajash were not negligent in the performance of their duties" which is, in essence, the very basis of the controversy between the parties. Defendants' argument appears to assume that a determination of negligence has already been decided which it most certainly has not. It is axiomatic that questions of negligence are questions of fact that are to be determined by the jury. Therefore, Defendants' argument is based upon assumptions and determinations that are not supported. Accordingly, Defendants' Motion, as it relates to Defendant Raleigh County Commission's claim for immunity under W. Va. Code § 29-12A-4 must be denied.

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*

Defendant Raleigh County Commission, Plaintiff Mary Webb retains this argument in response which was drafted prior to the Court's entry of its September 16, 2010 Memorandum Opinion and Order.

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's factual evidence will be addressed later in this Memorandum of Law in the format set forth in Defendants' Motion for Summary Judgment in an effort to maintain a consistency in format. Plaintiff incorporates by reference the statement of facts herein to the extent necessary, as Defendant's argument herein was more appropriately addressed under a Rule 12(b) standard.

3. *Violation of Civil Rights Claims as to Defendants*
Raleigh County Sheriff's Department and Raleigh County Commission

To the extent that Defendants' seek Summary Judgment on the issue of a violation of Robert Webb's civil rights, as those claims may be construed to be directed toward Defendant Raleigh County Commission only, Plaintiff Mary Webb concedes and hereby agrees that the government agency defendant is entitled to such relief as Defendant Raleigh County Commission is not within the definition of "persons" as defined in 42 U.S.C. § 1983.

An examination of Plaintiff Mary Webb's Amended Complaint, Count XIII, clearly identifies that the allegations contained in Count XIII are directed specifically by name toward Defendant Hajash and Defendant Kade. Count XIII only identifies those two individual defendants as the subject of the factual allegations set forth to support the claim of violation of civil rights. Accordingly, Plaintiff Mary Webb did not plead, and does not herein contend, that Defendant Raleigh County Commission was subject to Count XIII and hereby agrees that

Defendant Raleigh County Commission is not subject to 42 U.S.C. § 1983 as that government agency is not a “persons” as defined therein. While Plaintiff Mary Webb does not believe that granting Summary Judgment as to this defendant is proper in light of the fact that no such claim was asserted against this defendant, the plaintiff will hereby not contest or object to the Court granting Summary Judgment with regard to, and only to, Count XIII as to Defendant Raleigh County Commission.

**OFFICIAL CAPACITY CLAIMS AGAINST DEFENDANT
SHERIFF MOORE AND DEFENDANT CHIEF DEPUTY TANNER**

As the Court has previously noted in its Memorandum Opinion and Order entered on September 16, 2010, Docket Number 44, Plaintiff Mary Webb did not contest in her response to the defendants’ previous Rule 12(b) motion that the “official capacity” claims against Defendant Sheriff Danny Moore and Defendant Chief Deputy Tanner are redundant to the claims set forth against the political subdivision defendant. Accordingly, Plaintiff Mary Webb does not raise any new objection/defense to this issue not previously set forth in her response to the Rule 12(b) motions.

PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES IS PROPER UNDER W. VA. LAW

Defendants’ argument that any award of punitive damages is prohibited by W. Va. Code § 29-12A-1 et seq. is an incorrect reading of the protections afforded to political subdivisions under the Tort Reform Act. Punitive damages may be awarded against individual officers (employees) as the Tort Reform Act provides that punitive damages are prohibited only against the political subdivision, e.g., the Raleigh County Commission.

Specifically, W. Va. Code § 29-12A-7 states, in pertinent part:

Notwithstanding any other provisions of this code or rules of a court to the contrary, in an action against a political subdivision or its employee to recover damages for injury, death or loss to persons or property for injury, death, or loss

to persons or property caused by an act or omission of such political subdivision or employee:

- (a) In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.

W. Va. Code § 29-12A-7.

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 Commission may choose to indemnify the officers. *See, Sloane v. Kanawha County Sheriff’s Dept.*, 342 F.Supp.2d 545 (S.D. W. Va.2004).

Plaintiff Mary Webb concedes that punitive damages may not be imposed upon Defendant Raleigh County Commission and does not seek such an award. Plaintiff Mary Webb does assert her claim for punitive damages against the individual defendants which is permissible under the Tort Reform Act.

**DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE
STATE LAW COUNTS OF PLAINTIFF MARY WEBB’S AMENDED COMPLAINT**

1. Defendants are not entitled to Immunity from Plaintiff's Wrongful Death Claim.

Defendants' argument for summary judgment as set forth in Section VI (1.) of their motion, incorporates and relies upon the legal argument for immunity from said claims as set forth and argued previously in their motion and responded to previously herein. Plaintiff Mary Webb believes this argument has now been rendered moot by the Court's Memorandum Opinion and Order entered on September 16, 2010, Docket Number 44. On Page 15 of the Court's Order, the Court found that "the Commission may be liable for any negligence on the part of Kade, Hajash, Moore and Tanner as alleged in Counts I, II, IV, and VIII, as well as any direct negligence on its part as alleged in Counts IV and V."

The Court went on to rule that "Counts I, II, III, IV, V, VI, VII, IX, X and XIII against the respective individual officer Defendants, therefore remain intact. Defendants' argument relies solely upon its legal argument for immunity for the individual officers and the political subdivision. In light of the Court's ruling in favor of the plaintiff with regard to the immunity issues raised, the defendants' argument in Section VI (1.) thereby fails as result of the loss of immunity.

2. Defendants are not entitled to Summary Judgment as Plaintiff's claims are supported by sufficient evidence to create a genuine issue of material fact.

Defendants argue that Counts III, IV, V and IX should be dismissed on the basis that no evidence exists in the record to support each claim. Defendants' argument fails as Plaintiff Mary Webb has developed sufficient evidence that, if taken in the light most favorable to the plaintiff along with all reasonable inferences therefrom, create genuine issues of material fact making summary judgment inappropriate. Plaintiff incorporates by reference her Statement of Facts contained herein an effort for brevity and will only insert a limited number of facts under each

subsection herein but believes the Statement of Facts as a whole is necessary to rebut each of the defendants' claims for summary judgment.

a) Counts III & VI - Intentional Infliction of Emotional Distress & Tort of Outrage

Plaintiff Webb testified that although her husband was shot and killed by Defendants Kade and Hajash just mere feet from the door to her home, that she and her two children were ordered by the defendants to remain inside their home for hours following their shooting, without little, if any, information from the defendants as to the condition or status of her husband who's body was lying within partial view. Plaintiff Webb testified that neither she nor her children were afforded the opportunity to access grief counselors, pastors, or even friends while being forced to remain inside their home for hours while the defendants controlled the scene of her husband's death. The plaintiff has developed evidence that the defendants took the affirmative act of denying emergency medical personnel from accessing Robert Webb's body upon arrival. Moreover, this denial of medical attention was made before any qualified person was afforded the opportunity to examine Mr. Webb and determine the status of his vital signs. Plaintiff Webb has been advised by at least one member of the ambulance crew that once access to Mr. Webb was permitted and electrical monitoring leads were applied, that Mr. Webb maintained a pulse at that time. The emergency medical technician was then instructed by law enforcement personnel to remove the medical equipment and move away from Mr. Webb's body. These facts, with those set forth above, are sufficient to support a claim for intentional infliction of emotional distress and the tort of outrage.

b) Counts IV& V - Negligent Hiring, Training & Supervision & Negligence

Plaintiff Mary Webb has developed evidence to support a claim of negligence as well as negligent hiring, training and supervision. Plaintiff has established by sworn testimony that the

defendants violated numerous provisions of their own Policy & Procedure Manual, both before and after the fatal shooting of Mr. Webb. There is evidence that the officers failed to identify themselves prior to discharging their weapons and killing Mr. Webb. There is evidence that the defendants intentionally prevented medical personnel from accessing Mr. Webb in order to render medical aid prior to Mr. Webb's death. There is admitted evidence that two of the defendants stalked Mr. Webb while he was peacefully working in his driveway, and used concealment to approach him in the dark prior to shooting him. There is evidence generated by Defendant Hajash that the political subdivision attempted to return him to duty against the opinion of his physician who believed him unfit for police duty.

c) Count IX – Civil Conspiracy

Evidence has been established to show the defendants may have acted to purposefully conceal acts or omissions by the defendant officers. The defendants admittedly: failed to follow their own internal Policy & Procedures for post-shooting incidents; failed to perform their own mandated examinations of Defendant Hajash and Defendant Kade for post-shooting events; failed to report that Chris Hatfield and Kristi Robinson gave an account that directly contradicted the defendants' claim of announcing their presence as law enforcement officers prior to discharging their firearms; gave statements to the press condemning Robert Webb's action prior to even completing the interviews and statements of the defendant officers involved in the shooting; and conducted the investigation in-house, and in a rapid manner rather than permitting the West Virginia State Police, or other outside agency, to perform the investigation so to remove any possible bias. Sheriff Danny Moore's public and private statements against Robert Webb were so cruel, and obviously designed to place Robert Webb in a negative light, so to justify the defendants' actions, even with the knowledge that evidence contradicted those public

statements. The defendants' attempts to contravene a medical diagnosis of Defendant Hajash for the purpose of closing this matter, along with the facts cited throughout this response, give sufficient evidence, along with the reasonable inferences therefrom, to support a genuine issue of material fact so to make summary judgment inappropriate.

Plaintiff Webb has asserted a more lengthy citation to facts supporting the state law claims in her Response in Opposition to Defendant Hajash's Motion for Summary Judgment and incorporates by reference the same herein so to remain within the page limitation for this response. Plaintiff Webb respectfully requests the Court consider the factual assertions contained in her responses to all motions for summary judgment in conjunction with one another.

WHEREFORE, Plaintiff Mary Webb respectfully requests that this Court enter an Order denying "Defendants Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore and Chief Deputy Steve Tanner, 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

By Counsel

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