

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.

**DEFENDANT, DEPUTY GREG S. KADE'S MEMORANDUM OF LAW IN SUPPORT
OF HIS MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Deputy Greg S. Kade, individually and in his official capacity (hereinafter referred to as "Defendant"), by and through counsel, Chip E. Williams, Kevin J. Robinson, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and hereby submits Defendant's Memorandum of Law in Support of Motion for Summary Judgment. For the reasons set forth herein below, this Defendant respectfully requests that this Honorable Court grant his Motion for Summary Judgment.

Procedural History

On May 5, 2008, the Plaintiff, Mary Webb, individually and in her capacity as Administratrix of the Estate of Robert A. Webb (hereinafter "Plaintiff"), instituted the present civil action by filing a Complaint in the Circuit Court of Raleigh County, West Virginia, designated Civil Action No. 08-C-406. The Complaint named as defendant, Deputy Greg S.

Kade (hereinafter “Deputy Kade”), individually and in his official capacity. The Plaintiff’s original Complaint contained the following twelve (12) counts: (1) wrongful death; (2) suffering prior to death; (3) intentional infliction of emotional distress; (4) negligent hiring, training, and supervision; (5) negligence; (6) tort of outrage; (7) punitive damages; (8) strict liability (agency); (9) civil conspiracy; (10) spoliation of evidence; (11) writ of mandamus; and (12) a claim for attorney’s fees.

On September 8, 2009, the Plaintiff filed a Motion for Leave to File an Amended Complaint asking the Circuit Court of Raleigh County, West Virginia, grant her leave for the purpose of filing a civil rights claim under 42 U.S.C. §1983. On November 3, 2009, the Plaintiff, pursuant to an Order of the Circuit Court of Raleigh County, West Virginia filed her Amended Complaint. See Amended Complaint attached hereto as “Exhibit A.” In addition to the claims contained in her original Complaint, the Plaintiff asserted a new claim for violation of civil rights under 42 U.S.C. §1983. Finally, on November 16, 2009, this action was removed from the Raleigh County Circuit Court to the United States District Court of the Southern District of West Virginia.

Statement of the Facts

On July 4, 2006, Mr. Webb fired several rounds from an AK-47¹ while at his home in Raleigh County, West Virginia. Amended Complaint, ¶ 9. Mr. Webb had also been consuming alcohol that evening and at the time of his death had a blood alcohol level of .22 percent. See Autopsy of Robert Webb at p. 9, attached hereto as “Exhibit C”. Upon being awakened by gunshots and loud music, Mr. Webb’s neighbor, Amy Smith, called the Raleigh County Sheriff’s Department on a private line. See statement under oath of Amy Smith at p. 53, 54, attached hereto

¹ Although the actual weapon involved in this incident is a Romarm/Cugir rifle, model SAR-1, the term AK-47 is generally used to describe any 762x38 semi-automatic rifle imported to the United States, thus will be referred to in this motion as an AK-47. See Deposition of Steve Tanner, p. 29. lines 15-20, attached hereto as “Exhibit B” hereinafter “Tanner Depo”.

as “Exhibit D”.² Ms. Smith reported to the EOC, “I have a neighbor who it sounds like is shooting a gun at his house.” See EOC Transmission Transcript, recorded on July 4, 2006 at p. 1, attached hereto as “Exhibit E”, hereinafter “EOC Transcript”. After gathering information from Ms. Smith, the EOC control officer transmitted the following: “I have reports of shots fired, Cabell Heights Road. I have a Rob Webb that is supposed to be outside of his own residence shooting toward his residence with a pistol”. *Id.* at p. 2. Deputies John Hajash and Gregory S. Kade received the EOC transmission and responded to the call³. Deputy Kade and Deputy Hajash approached Mr. Webb’s house without visual or audio warning devices and parked and exited their police patrol vehicles about a quarter mile away from the Mr. Webb’s home. See Deposition of Deputy John Hajash at p. 73, attached hereto as “Exhibit G”, hereinafter “Hajash Depo”.

As this was in response to a shooting, Deputy Kade removed the standard issued shotgun from his patrol vehicle. Kade Depo at p. 48. Subsequently, the deputies proceeded to walk towards Mr. Webb’s residence. *Id.* at p. 49, 50. About four houses away from Mr. Webb’s residence, the deputies called and confirmed that the home with loud music was indeed Mr. Webb’s residence. See EOC Transcript at p. 6, 7. Deputy Kade and Deputy Hajash then proceeded towards Mr. Webb’s residence and, after locating a vantage point to observe Mr. Webb’s actions, noticed Mr. Webb was standing in the door way of his truck. Hajash Depo at p. 75. Still maintaining cover, the deputies proceeded towards Mr. Webb’s driveway at which time loud music ceased playing. *Id.* at p. 77. The deputies chose this moment to approach Mr. Webb as they did not want to startle him when the music was blaring. *Id.* at p. 78. As they approached,

² Ms. Smith did not call 911 because she was attempting to remain anonymous because Robert Webb had previously threatened her with a firearm.

³ Deputy Hajash was on regular duty that evening and Deputy Kade was working special duty as security at the Holiday Inn Construction site on Harper Road. Although not on regular duty, Deputy Kade was in full uniform and driving his Raleigh County Sheriff’s Department cruiser. Additionally, Deputy Kade was being paid by the Raleigh County Sheriff’s Department while on special duty assignment at the Holiday Inn Construction site. See Deposition of Greg S. Kade at p. 26, attached hereto as “Exhibit F”, hereinafter “Kade Depo”.

Deputy Kade announced their presence by stating "police, let us or let me see your hands." Kade Depo at p. 64.

Mr. Webb then turned to face the deputies at which time they could see he was holding an AK-47 in his hands. *Id.* at p. 67. After standing motionless for a few seconds, Mr. Webb raised the tip of the weapon and aimed it directly towards Deputy Kade and Deputy Hajash. Hajash Depo. at p. 83, 96. Feeling this action threatened their safety, the two deputies proceeded to fire their weapons almost simultaneously. See *Id.* at p. 84-85. Deputy Kade, armed with the shotgun, fired once, and Deputy Hajash, armed with his service handgun, fired three times. *Id.*

These shots caused Mr. Webb to stumble to the ground still holding the AK-47 and pointing it at the deputy's feet. *Id.* at p. 86. In response, Deputy Hajash fired his handgun the third and final time. *Id.* The deputies immediately thereafter radioed for emergency medical services to be dispatched to the scene. *Id.* at p. 92. Additionally, the deputies checked Mr. Webb for signs that he was breathing and for movement and found neither, nor did they observe any additional signs of life. *Id.* at p.99⁴. Shortly thereafter, Lt. Williams of the Sheriff's Department arrived and assumed control of the crime scene. *Id.* at p. 106-108.

Discussion of Law and Argument

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. See *Celotex*

⁴ In the autopsy report, the medical examiners concluded that Robert A. Webb died as the result of firearm injuries, including a gunshot wound of the chest and shot gun pellet (2) associated injuries of the head, resulting in significant internal injury of vital organs within the chest and head." Autopsy of Robert Webb at p. 8. There is no evidence in the record to suggest that Mr. Webbs' death would have been anything other than instantaneous.

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). "The burden then shifts to the nonmoving party to come forward with facts sufficient to create a triable issue of fact." *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991), cert. denied, 502 U.S. 1095 (1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

However, as the United States Supreme Court noted in *Anderson*, "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. In *Celotex*, the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Summary judgment is not appropriate until after the non-moving party has had sufficient opportunity for discovery. *See Oksanen v. Page Mem'l Hosp.*, 912 F.2d 73, 78 (4th Cir. 1990), cert. denied, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992).

II. Deputy Kade is entitled to Summary Judgment as he is afforded personal immunity under W.Va. Code § 29-12A-5 by virtue of being an employee of a political subdivision.

The individual employees of the Sheriff's Department are protected from liability under the West Virginia Governmental Torts Claims and Insurance Reform Act. W.Va. Code §29-12A-5, *et seq.* Specifically, "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*, 477 S.E.2d 525 (1996), quoting, Syl. Pt. 1, *Beckley v. Crabtree*, 428 S.E.2d 317 (1993).

In the present case, there is no question of fact that the actions of Deputy Kade were within the scope of his employment and were consistent with the actions of a reasonable law enforcement officer. In the Amended Complaint, Plaintiff explicitly states “On July 4, 2006, Raleigh County Deputy Sheriffs Greg Kade and John Hajash, *acting within the scope of their employment*, 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.⁵” See *Amended Complaint*, ¶9 (emphasis added). This allegation alone should suffice to establish that Deputy Kade was acting within the scope of his employment. However, this Defendant recognizes Plaintiff will likely counter this argument by stating Deputy Kade only acted within the scope of his employment when he responded to the shooting incident at Mr. Webb’s residence. Based on the following, though, there is no question of fact that Deputy Kade acted within the scope of his employment throughout the entire incident at issue in this case and did not act in a malicious, wanton or reckless manner, or in bad faith.

According to the expert opinion provided by Samuel D. Faulkner; Law Enforcement Training Specialist at The Ohio Peace Officers Training Academy and national expert in the field of law enforcement personnel training, practice, and procedure, Deputy Kade performed his law

⁵ While the Plaintiffs continually try to portray this as a response to a nuisance report made on a non-emergency administrative line, the reading of the EOC transcript, as well as the Statement Under Oath of Amy Smith fully contradicts that notion. As is set forth in Amy Smith’s statement under oath, the only reason she did not call 911 is because she believed that by calling a non-emergency line, she would be protecting her identity because she was in fear of Robert Webb. Although the call was not made directly to 911, the call was an emergency call and was dispatched as a man who was firing a gun at his home. It is further evident from the EOC transcript that at the time the officers arrived at the scene, they believed that not only was there a man firing a gun at his home, but that his family was inside the home.

enforcement duties in full accordance with the procedures prescribed for responding to a situation such as what occurred in this case. See Expert Report of Samuel Faulkner (hereinafter "Faulkner Report"), attached hereto as "Exhibit H". To comment on the deputies actions, the Faulkner Report divided the entire incident into seven distinct series of events.

Discussing each in turn, Deputy Kade fulfilled his duty as a Sheriff's Deputy by responding to the emergency situation of a man shooting a weapon after being dispatched to the scene of the incident. Faulkner Report p. 8, 9. Additionally, Deputy Kade followed a standard and accepted practice when he left his special detail at the Holiday Inn construction site to go on duty to aid a fellow deputy. This conduct, according to the Faulkner Report, is an accepted practice as it is customary for an off duty deputy to go on duty to assist a fellow deputy responding to a high risk call. *Id.* Thus, the first two actions of Deputy Kade were completed while in the scope of employment and were that of a reasonable law enforcement officer.

The deputy's approach to the shooting scene also complied with the manner in which deputies are trained to respond to such a high risk call. After leaving the construction site, the deputies traveled utilizing their overhead lights and sirens whenever there was a traffic pattern that might create a safety risk for the general public. Once arriving in the neighborhood of Mr. Webb, the deputies, without the use of their overhead lights and sirens, drove about a quarter mile past Mr. Webb's residence and parked at a wide spot in the road. Kade Depo p. 40-41. All of these actions were in full compliance with the training that Deputy Kade received which is consistent with the training received by law enforcement officers across the country responding to a scene where there is a man with a gun. Faulkner Report, p. 9. As such, there can be no question of fact that the methods utilized by Deputy Kade in driving to the vicinity of the reported shooting and arriving silently with his cruiser blacked out was done in accordance with the procedures prescribed for responding to such a call. Accordingly, the third action of Deputy Kade was done

within the scope of employment and in a manner consistent with a reasonable law enforcement officer.

After exiting their vehicles, Deputy Kade utilized the same approach tactics and announcement procedures taught to law enforcement personnel throughout the county. More specifically, after walking towards the location of the shooting, Deputy Hajash called dispatch and confirmed that the residence with the loud music was indeed the location of the shooting. Hajash Depo p. 70. After observing Mr. Webb walking around his driveway and going in and out of his truck, the deputies used a row of shrubs along Mr. Webb's property as cover and proceeded towards his driveway. Kade Depo p. 53-58. As this occurred, the loud music suddenly stopped. *Id.* Determining this to be the best time to confront Mr. Webb so as to not surprise him, the deputies stepped out from behind the end of the shrub line. *Id.* Deputy Kade announced their presence by stating, "Police, let us or let me you hands." Kade Depo p. 64. According to the Faulkner Report, this approach was about as by the book as it could get. Faulkner Report, p.10. As such, there is no question of fact that the approach tactics and announcement procedure utilized by Deputy Kade was in compliance with the procedures prescribed for such an occasion. Accordingly, the fourth and fifth actions of Deputy Kade were within the scope of his employment and were consistent with a reasonably prudent law enforcement officer.

Deputy Kade's firearm response to Mr. Webb's life-threatening actions was in compliance with national law enforcement training, policies, and practices. According to the United States District Court for the Northern District of West Virginia, "A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others. *Pethtel v. West Virginia State Police*, 568 F.Supp.2d 658 (N.D.W.Va. 2008). Specifically, a court must determine "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force."

Anderson v. Russell, 247 F.3d 125, 129 (4th Cir.2001) (citing *Graham v. Connor*, 490 U.S. at 395 (1989)). Additionally, “the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham v. Connor*, 490 U.S. 386 (1989).

In a case with facts similar to the instant case, the Fourth Circuit Court of Appeals granted summary judgment to two police officers after determining their use of deadly force to be reasonable under the circumstances. *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996). In *Elliott*, after arresting Mr. Elliott for driving under the influence, the police officers placed Mr. Elliot in their police cruiser. As the officers discussed the situation next to the police cruiser, they noticed Mr. Elliott point a small pistol in their direction. After not responding to their request to drop the gun, the two officers opened fire on Mr. Elliott killing him at the scene. Based on the foregoing law, the Court found the officers use of force to be justified:

The standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force. A police officer may use deadly force when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others.

Elliott 99 F.3d at 642.

In this case, there is no question of fact that the actions of Deputy Kade were that of a reasonable law enforcement officer. Likewise, there is no question of fact these deputies discharged their weapons from a distance of approximately thirty feet only after Mr. Webb raised and pointed his weapon at the deputies. The aforementioned facts are confirmed by the physical evidence obtained from the scene of the incident and the forensic analysis completed. See Forensic Training & Consulting Report, attached hereto as “Exhibit I”. This analysis was completed after removing shotgun pellets from the left rear portion of the gas piston housing of Mr. Webb’s weapon and shotgun pellets removed from Mr. Webb’s left jaw bone. *Id.* at p. 2. According to the

forensic analysis, a shotgun like the one utilized by Deputy Kade and discharged from approximately thirty feet will create an average maximum pellet spread of 8.66 inches and average minimum pellet spread of 1.25 inches. *Id.* Based on this information and the proximity of the shotgun pellets removed from Mr. Webb and the AK-47, the weapon would have to be positioned with the butt at or near the shoulder and the muzzle of the rifle at or near parallel to the ground when Deputy Kade fired in order for the pellets to strike both Mr. Webb's head and the rifle. More specifically, the assault rifle would have to have been in a raised position and directed towards Deputy Kade. As there is no evidence to dispute this conclusion, there is no question of fact that Deputy Kade was faced with a life threatening situation as Mr. Webb pointed an AK-47 directly towards him.

Accordingly, the only question that remains is whether Deputy Kade's response to the situation was that of a reasonable officer. According to *Elliot* and the Faulkner Report, the actions of Deputy Kade were that of a reasonable officer. First, numerous training models utilized by law enforcement departments across the county teach officers faced with this type of situation to act in a manner similar to that of Deputy Kade. *See* Faulkner Report p. 13-14. Additionally, *Elliot* indicates that an officer is permitted to utilize deadly force when a weapon is pointed directly in his direction. Based on this law and the expert opinion of Mr. Faulkner, there can be no question of fact that Deputy Kade acted reasonably in responding to Mr. Webb's threat of deadly force. Accordingly, with regard to the sixth action of Deputy Kade, there is no question of fact he acted within the scope of his employment and consistent with that of a reasonable law enforcement officer.

Finally, with regard to the seventh and final action of Deputy Kade, which transpired immediately after Mr. Webb was shot, Deputy Kade proceeded in accordance with the training and procedures for such an event. More specifically, after determining Mr. Webb was no longer

breathing, Deputy Kade secured the crime scene while Deputy Hajash checked the garage to make sure there were no additional threats. Hajash Depo p. 99. Finding none, the deputies kept the crime scene secure until a supervisor arrived. *Id.* All of these follow-up procedures were done in compliance with law enforcement training and guidelines. As there is no evidence to dispute this conclusion, there can be no question of fact Deputy Kade acted within the scope of his employment and as a reasonable officer in conducting these activities.

Accordingly, there is no question of fact that Deputy Kade acted within the scope of his employment, in a reasonable manner, and without a malicious purpose, in bad faith, or in a wanton or reckless manner. All of the actions of Deputy Kade were in compliance with the training, practices, and procedures outlined for deputies engaged in an incident involving a suspected shooting and a threat of deadly force. It must also be noted that there is no express provision of the West Virginia Code which imposes liability on these deputies. This is not alleged by Plaintiff and there is no evidence to suggest such a provision. Therefore, Deputy Kade is entitled to immunity pursuant to West Virginia Code 29-12A-5(b) as none of his actions satisfy an exception to this rule. As such, Deputy Kade is entitled to summary judgment against all of Plaintiff's state law claims.⁶

III. Deputy Kade is Entitled to Summary Judgment as Qualified Immunity protects him from Liability.

As the actions of Deputy Kade were in compliance with nationally accepted law enforcement procedures and that of a reasonable law enforcement officer, there is no question of fact that Deputy Kade did nothing to deprive the Plaintiff or Mr. Webb of constitutionally

⁶ As stated above, the Sheriff's Department is not liable pursuant to W.Va. Code § 29-12A-4(c)(2). As the evidence establishes Deputy Kade acted in a reasonable manner, he cannot have acted negligently in performing his duties as a sheriff's deputy. It must also be noted that Defendant John Hajash has proffered a substantially similar argument with regard to the immunity provided to him pursuant to W.Va. Code § 29-12A-5(b). This argument is contained in Deputy John Hajash's Memorandum in Support of Motion for Summary Judgment. As established in the present memorandum and Deputy Hajash's memorandum, the actions of each Deputy Kade and Deputy Hajash were that of reasonable law enforcement officers. Accordingly, as neither of these individuals acted negligently in the performance of their employment duties, there can be no liability to the Sheriff's Department.

guaranteed civil liberties. According to the United States Supreme Court of Appeals, “The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

As discussed above, the actions of Deputy Kade fully complied with law enforcement policies and procedures. The aforementioned law and expert analysis indicates the force utilized response to a deadly situation was justified and was that of a reasonable officer. As such, there is no question of fact that none of Deputy Kade’s actions amounted to a statutory or constitutional violation of the Plaintiffs. Accordingly, Deputy Kade is entitled to summary judgment with regard to Plaintiff’s 42 U.S.C. § 1983 claim.

IV. Any Claims against Deputy Kade in his Official Capacity, are redundant and thus Summary Judgment for these individuals is appropriate.

The Plaintiff brought the present lawsuit against Deputy Kade, in his personal capacity as well as his official capacity as an employee of the Sheriff’s Department. The United States Supreme Court of Appeals has held that official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, at 165 (1985), *quoting*, *Monell v. Department of Social Services*, 436 U.S. 658, at 690 n.55 (1978). Thus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant. *Id*; *See also*, *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004). This result is consistent with West Virginia Code § 29-12A-13 which provides:

Suits instituted pursuant to the provisions of this article shall name as defendant the political subdivision against which liability is sought to be established. In no instance may an employee of a political subdivision acting within the scope of his employment be named as a defendant.

W.Va. Code § 29-12A-13(b).

The Plaintiff's claims against the individual employees of the Sheriff's Department relate to alleged actions and conduct while within their official capacity as officers for a political subdivision. Therefore, even if this Court does not grant these officers personal immunity under W.Va. Code §29-12A-5, said Defendants should, in the alternative, be entitled to summary judgment on Plaintiff's claims, as they are being sued in their official capacities, which are redundant claims.

V. Count VII of the Plaintiff's Amended Complaint, which alleges Plaintiff should be Entitled to Punitive Damages, is Improper under West Virginia law.

The Defendants are entitled to summary judgment with regard to Count VII of the Plaintiff's Amended Complaint as any demand for punitive damages against a governmental entity or its employees blatantly violates the plain language of the West Virginia Governmental Torts Claims and Insurance Reform Act. W.Va. Code § 29-12A-1, *et seq.* 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.

As clearly established by the language of W.Va. Code § 29-12-7, any award of punitive or exemplary damages against the Defendants is strictly prohibited. Accordingly, Deputy Kade is entitled to summary judgment with regard to Count VII of the Plaintiff's Amended Complaint.

VI. Deputy Kade is entitled to summary judgment on each of the individual State Law counts because discovery is closed and the record is devoid of any evidence which would support any of the Plaintiffs individual state causes of action

In addition to the various immunities that have been asserted under both State and Federal law which provide protection to Deputy Kade, even without such immunities, the record in this case is devoid of any facts which would support any of the Plaintiffs' individual state causes of action against him as he acted in good faith, within the scope of his duties and in accordance with his training as a law enforcement officer.

1. There is no evidence to support a cause of action against Deputy Kade for Wrongful Death nor for Negligence

Under the West Virginia wrongful death statute, West Virginia Code §55-7-5, in order to maintain an action for wrongful death, there must be the death of a person and the death must be caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured to maintain such action to recover damages for such wrongful death. *Bradshaw v. Soulsby*, 210 W.Va. 682, 558, S.E.2d 681 (W.Va. 2001). In the instant cause of action, even though the immunities previously argued apply to this cause of action, even without such immunities, there is no evidence in the record to suggest that Deputy Kade committed any wrongful act or negligent act which led to the death of Robert Webb. To the contrary, Deputy Kade's actions with regard to their response to an emergency call involving a firearm were proper under national law enforcement standards. The forensics report of Edward E. Hueske is uncontroverted in this matter and shows conclusively that at the time Deputies Kade and Hajash fired their weapons at Robert Webb, he was pointing the AK-47 assault rifle directly toward Deputy Kade. See Forensics Training & Consulting Report. Additionally, it is uncontroverted that both officers were in full uniform and identified themselves as police officers before Robert Webb pointed the AK-47 at them. Once Mr. Webb pointed the firearm at Deputy Kade, it is

appropriate under every national standard for the officers to respond with the use of deadly force. See Report of Samuel Faulkner.⁷

It follows, that in West Virginia, there must be some wrongful or negligent act by one of the Defendants that led to the death of the Plaintiff. In this matter, Deputy Kade's response to Robert Webb's actions were completely appropriate under law enforcement standards and thus the record in this case supports no cause of action for wrongful death against Deputy Kade.

In the State of West Virginia, in order to establish a *prima facie* cause of negligence, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken. Syllabus Pt. 3, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (W.Va. 2000). The only count of negligence applicable to Deputy Kade is Count V a in the Plaintiff's Amended Complaint and again deals with the response to and use of force with regard to Robert Webb. The same argument applicable to Deputy Kade's rebuttal to the wrongful death claim would also apply to this negligence cause of action and once again there is no expert or factual evidence to support this cause of action.

2. There is no evidence to support causes of action against Deputy Kade for Intentional Infliction of Emotional Distress or Outrage

In order to maintain a cause of action for intentional infliction of emotional distress in West Virginia, it must be shown: "(1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress

⁷ It should be noted that discovery in this matter is closed and the Plaintiffs have provided no expert witness testimony to say that either Deputy Kade, Deputy Hajash, the Raleigh County Sheriff's Department, the Raleigh County Commission, Sheriff Moore nor Chief Deputy Tanner violated any custom, practice or law enforcement standard in this case.

suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.”

Delp v. American Nat. Red Cross, 2005 WL 1924399, p. 3 (S.D.W.Va. 2005).

Once again, these Defendants believe that the immunities previously argued apply to this cause of action, however, to the extent that they do not, the record is devoid of any actions on the part of Deputy Kade that were intentionally meant to inflict emotional distress upon Mary Webb. In the Plaintiffs' Amended Complaint, they argue that the Defendants' conduct following the death of Robert Webb caused Ms. Webb to suffer severe emotional distress. While Deputy Kade does not dispute that Ms. Webb would have been in emotional distress following the death of her husband, there is no evidence in the record that he “acted with intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotion distress would result from his conduct.”

In her deposition, Ms. Webb's chief complaint regarding the conduct of Deputy Kade, following the shooting, was that she was not allowed to immediately access her husband's body. See deposition of Mary Webb at p. 59-61, attached hereto as “Exhibit J”. When Ms. Webb asked to exit her residence and go to where her husband was, only Officers Kade and Hajash were on the scene and still had not fully concluded what was occurring at the residence. Thus, they advised Ms. Webb, for her own safety as well as for the safety of both officers, to go back inside the residence until they could conduct a search of the property and secure the scene insuring everyone's safety. Thus, even without the applicable immunities, there is no evidence in this record to support a cause of action for intentional infliction of emotional distress against Deputy Kade.

According to the case of *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 176 W.Va 39, 341 S.E.2d 414, 417 (W.Va. 1986), “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for

such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Once again, the immunities previously argued in this matter squarely apply to this state cause of action. However, to the extent that this Court believes immunity may not apply, the record is devoid of any facts to support Deputy Kade committed the tort of outrage. Specifically in the Plaintiff’s Amended Complaint, they point to the actual incident involving the shooting of Robert Webb as well as to conduct with regard to Ms. Webb following the shooting. Both of these actions have been previously discussed in previous sections of this brief, and thus we will not rehash those discussions. There is no evidence to suggest Deputy Kade’s conduct with regard to the shooting of Robert Webb was inappropriate, nor is there any evidence to suggest that his conduct with regard to how Ms. Webb was handled after the incident would give rise to liability under the tort of outrage.

3. The causes of action for Suffering Prior to Death and Spoliation of Evidence are improper as plead in Plaintiff’s Amended Complaint

In West Virginia, according to Syllabus Pt. 3, *Estate of Helmick by Fox v. Martin*, 425 S.E.2d 235 (W.Va. 1992), West Virginia Code § 55-7-8 (1989) authorizes the decedent’s beneficiaries to recover damages for a decedent’s pain and suffering incurred between the time of injury and the time of death where the decedent had instituted an action for personal injury prior to his death and the action was revived and amended pursuant to West Virginia Code §§ 55-7-8 and 55-7-6 (1989).

In the instant case, this particular cause of action is inapplicable because there was no suit instituted before Robert Webb’s death. In the instant case, any pain and suffering that Robert Webb incurred would simply be an element of damages to a wrongful death cause of action and not an independent cause of action.

The Plaintiff alleges that Deputy Kade’s actions constitute spoliation of evidence under the West Virginia case of *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560, 569 (W.Va.

2003). The *Hannah* case actually imposes liability for spoliation of evidence by a third party. In the case at hand, obviously the named Defendants are not third parties to the lawsuit and thus an action under *Hannah* is not appropriate. In a case where it is alleged that actual parties to a lawsuit have engaged in spoliation of evidence, some sort of sanction or limiting instruction is the proper remedy.

4. There is no evidence to support a cause of action against Deputy Kade for Civil Conspiracy

According to *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (W.Va. 2009), “a civil conspiracy is a combination of two or more persons by concerted action to accomplish and unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.” In the case at hand, the Plaintiff alleges that Deputy Kade acted in an effort to conceal his acts and acts of the other individual Defendants which constitute a civil conspiracy in violation of West Virginia law. Once again, there is no evidence in this case that Deputy Kade acted to conceal his acts, nor acts of any other Defendant in this matter. Deputy Kade was not involved with the investigation of this matter other than giving a statement. The individuals who investigated this matter are not Defendants. The investigation of this matter was conducted by Chief Detective Larry Lilly and was independently submitted to the Raleigh County Prosecutor’s office. Detective Lilly was at no time obstructed in performing his duties and conducting the investigation in this matter. There is simply no evidence that any Defendants acted to conceal any acts and/or omissions of any other Defendant in this matter and thus summary judgment is appropriate with regard to the count of civil conspiracy.

5. The Plaintiff cannot support an action for Writ of Mandamus

According to *State ex rel. Sowards v. County Com’n of Lincoln County*, 196 W.Va. 739, 474 S.E.2d 919, 925 (W.Va. 1996), “[M]andamus is a drastic remedy to be invoked only in

extraordinary situations[; therefore], a party seeking such a writ must satisfy three conditions: (1) there are no adequate means for the party to obtain the desired relief; (2) the party has a clear and indisputable right to the issuance of the writ; and (3) there is a legal duty on the party of the respondent to do that which the petitioner seeks to compel.” It follows that if the evidence does not support any of the other individual causes of actions in this matter, then Plaintiff cannot support a cause of action for Writ of Mandamus, as Deputy Kade was already acting responsibly with regard to any legal duty owed to the Plaintiffs or to any other member of the public.

Conclusion

Defendant, Deputy Greg S. Kade respectfully prays that this Court grant his Motion for Summary Judgment based upon Federal and State Immunity as well as the lack of evidence to support any cause of action against him; he acted in good faith with regard to his duties to the public and to the Plaintiff in this matter.

**DEPUTY GREG S. KADE, individually and in his
official capacity**

By Counsel:

/s/ Chip E. Williams

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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,

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.

CERTIFICATE OF SERVICE

I, Chip E. Williams, counsel for Defendants, do hereby certify that a true copy of the foregoing "**Defendant, Deputy Greg S. Kade's Memorandum of Law in Support of His Motion for Summary Judgment**" was served upon counsel of record as follows:

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by electronically filing the same on the PACER system, on this the 2nd day of September, 2010.

/s/ Chip E. Williams