

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

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

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S  
MOTION FOR MEDIATION SANCTIONS**

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Come now defendants, by counsel, in response to plaintiff's motion for sanctions for alleged failure to participate in mediation and state as follows:

1. By court order entered January 8, 2010, this court required mediation in this case.
2. By agreement of the parties, mediation was held on November 4, 2010, and lasted approximately four (4) hours. Parties further agreed to use Graydon C. Ooten, Jr. as the mediator.
3. The plaintiffs made a initial demand to settle this case for the sum of One Million Two Hundred Thousand Dollars (\$1,200,000.00).
4. Defendants were represented at the mediation by counsel and a representative of the defendants' insurance carrier was likewise present along with

defendant Greg S. Kade, personally. The plaintiff's assertion that the defendants refused to participate in the mediation process is disingenuous as the defendants appeared and participated throughout the four hour mediation.

5. Throughout the course of the mediation, the parties had the opportunity and engaged in advising the mediator of their respective positions. During the mediation process the plaintiffs were unable to persuade counsel for defendants or the insurance adjuster that their case had a value anywhere close to their demand. Based upon a totality of the facts and law of this case, defendants counsel were jointly of the opinion that the case had virtually no settlement value. However, recognizing that new developments or unknown facts may come to light, the defendants willingly participated in the mediation process.

6. The plaintiffs have cited no legal authority for their position that sanctions are recoverable in this case. In fact, the Courts that have reviewed a motion for sanctions for failure to settle have been during Pre-Trial Conference held before the court. In fact, the 5<sup>th</sup> Circuit in Dawson v. United States, 68 F.3<sup>rd</sup> 886, 897 has said "obviously there is no meaningful difference between coercion of an offer and coercion of a settlement; if a party is forced to make a settlement offer because of the threat of sanctions and the offer is accepted, a settlement has been achieved by coercion. Such a result cannot be tolerated".

Likewise, the 7<sup>th</sup> Circuit has held that where a party was sanctioned because it refused to make an offer to pay money that is, refused to submit to settlement coercion, then the court said it would be faced with a situation it could not countenance. G. Heilman Brewing Co. v. Joseph Oat Corp., 871 F2 648, 653 (1989). The 8<sup>th</sup> Circuit has also held "Pre Trial Conference discussion of settlement is designed to encourage and

facilitate settlement but it is not designed to impose settlement upon unwilling litigants". In re Ashcroft, 888 F2 546 (8<sup>th</sup> Circuit 1989).

7. Rule 16.5 of the Local Rules of Civil Procedure, which was cited as plaintiff's authority for sanctions in this case, allows for sanctions for lack of preparation respecting pre-trial conferences and orders and failure to participate in submission of a discovery plan. None of those situations are at issue in this case. The defendants appeared, fully prepared, at mediation and participated in the process, in good faith.

8. The defendants were ready, willing and able to discuss meaningful mediation, but the plaintiff failed to provide adequate reasons to offer any settlement in this case, and plaintiff has failed to show proper cause for sanctions.

WHEREFORE, defendants pray that the motion for sanctions be denied and that the plaintiff be ordered to pay her share of the mediation cost.

JOHN E. HAJASH  
By Counsel.

/s/ Kermit J. Moore  
Kermit J. Moore  
West Virginia State Bar #2611  
Brewster, Morhous, Cameron, Caruth,  
Moore, Kersey & Stafford, PLLC  
Attorneys at Law  
Post Office Box 529  
Bluefield, West Virginia 24701-0529  
(304) 324-0348

RALEIGH COUNTY SHERIFF'S  
DEPARTMENT, RALEIGH COUNTY  
COMMISSION, SHERIFF DANNY MOORE,  
CHIEF DEPUTY STEVE TANNER, DEPUTY  
GREG S. KADE  
By Counsel

/s/ Chip E. Williams

Chip E. Williams  
West Virginia State Bar #8116  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
600 Neville Street, Suite 201  
Beckley, West Virginia 25801  
(304) 254-9300

**CERTIFICATE OF SERVICE**

I, Kermit J. Moore, counsel for Deputy John E. Hajash, and Chip E. Williams, counsel for Raleigh County Sheriff's Department, Raleigh County Commission, Sheriff Danny Moore, Chief Deputy Steve Tanner and Deputy Greg S. Kade, in the above-styled civil action, hereby certify that on the 17<sup>th</sup> day of November, 2010, I electronically filed the DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR MEDIATION SANCTIONS with the Clerk of this Court using the CM/ECF system which will send notification of such filing to CM/ECF participants:

Michael A. Olivio, Esquire  
Travis A. Griffith, Esquire  
Olivio & Griffith  
Attorneys at Law  
813 Quarrier Street  
Charleston, West Virginia 25301  
*Attorneys for plaintiff*

/s/ Kermit J. Moore  
Kermit J. Moore

/s/ Chip E. Williams  
Chip E. Williams