UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

ACTION NO. 1:22-cv-00345-DCR

JOHN SMITH,
SALLY SMITH,
AND (J.D.S.) Minor child PLAINTIFFS

V. **MEMORANDUM OF LAW IN SUPPORT OF MUNICIPAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

CITY OF GRANDVIEW, BILL BROWN, MAYOR,
CITY OF GRANDVIEW POLICE DEPARTMENT,
JOE JONES, POLICE CHIEF,
AND JOHN DOE(S) DEFENDANTS

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INTRODUCTION

Plaintiffs John Smith and Sally Smith and their minor grandchild J.D.S. commenced this action pursuant to 42 U.S.C. § 1983 and Kentucky state law seeking damages purportedly suffered due to the alleged failure of the City of Grandview, Mayor Bill Brown, the City of Grandview Police Department, and Police Chief Joe Jones (collectively, "Municipal Defendants") to properly investigate the motor vehicle accident that caused the death of Mr. and Mrs. Smith's minor son and J.D.S.'s father ("J.S.") and to prosecute the other driver involved in the accident for the homicide of their minor son and father by filing a Complaint on August 28, 2015. Plaintiffs filed an Amended Complaint on September 3,

2015. Counts I through IV of the Amended Complaint[1] allege that Plaintiffs suffered injury due to the alleged failure of the Municipal Defendants to properly investigate the motor vehicle accident that caused J.S.'s death and to prosecute the other driver involved in the accident for the homicide of J.S.

Municipal Defendants filed an answer denying liability on January 14, 2016.[2] Thereafter, on April 13, 2016, Municipal Defendants moved to dismiss the Amended Complaint pursuant to Rule 12(b) or, in the alternative, for judgment on the pleadings under Rule 12(c). That motion is still pending before the Court. Since that motion was filed, the parties have completed discovery. Municipal Defendants now move for summary judgment on Counts I through IV on the ground that there are no genuine issues of material fact and each Municipal Defendant is entitled to summary judgment as a matter of law.

[1]Count V of the Amended Complaint purports to allege a claim against "John Doe," who is not identified as a Municipal Defendant.

[2]The Municipal Defendants answered the Amended Complaint even though Plaintiffs did not properly serve each of Municipal Defendants until January 22, 2016, after the answer was filed.

STATEMENT OF UNDISPUTED FACTS[3]

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Municipal Defendants set forth the following material facts as to which there is no genuine issue:

1. On February 14, 2014, J.S. was fatally injured in a motor vehicle collision in Kent County, Kentucky, when his vehicle was struck by a vehicle driven by David Lane. (Jones Dep., Ex. 2.)

2. At the time of the accident, J.S. was on his dirt bike, which was not licensed for highway use and was not insured. (S. Smith Dep. 32-33; J. Smith Dep. 9.)

3. J.S.'s parents had told him not to ride the dirt bike on the highway. (S. Smith Dep. 35; J. Smith Dep. 8-9.)

4. At the time of the accident, Kent County Sheriff Oliver Powers was out of the County. By agreement of City of Grandview Police Chief Joe Jones and Sheriff Powers, Chief Jones covered Kent County criminal and traffic matters while Sheriff Powers was out of the County on February 14, 2014. (Powers Dep. 9; Jones Dep. 3; Brown Dep. 18.)

5. By law, Chief Jones has jurisdiction in Kent County. (Jones Dep. 85.)

6. Chief Jones responded to the scene of the accident. He took pictures, spoke to witnesses, including David Lane, and once the Fire Department removed J.S. from the scene,

[3]Unless specially identified as a separate exhibit in the body of this Statement of Undisputed Facts, all documents cited in this Statement have been filed with this Court under separate cover.

marked with spray paint where everything was on the road, including the dirt bike and debris. (Jones Dep. 4.)

7. Chief Jones performed field sobriety tests on Lane, including the one-leg stands, the walk and turn, and the horizontal gaze nystagmus test. (Jones Dep. 18.)

8. Lane passed all three field sobriety tests. (Jones Dep. 90.)

9. Based on the field sobriety tests, it did not appear to Chief Jones that Lane was under the influence of drugs or alcohol. Nonetheless, he asked Lane if he would voluntarily submit to a blood test because the accident was serious, and he was concerned that Lane's troubled criminal past would cause people to talk if Lane was not tested for drug or alcohol use. (Jones Dep. 5.)

10. Sheriff Powers arrived at the scene of the accident about 30 minutes after Chief Jones. He spoke to Lane and did not notice slurred speech or a smell of alcohol or any other signs that he was impaired by alcohol or drugs. (Powers Dep. 10-12; Jones Dep. 89.)

11. Polly Grimes, a registered nurse ("RN") who routinely drew blood at the request of the City of Grandview, was called by the police department dispatch to draw a sample of Lane's blood at the police station. (Grimes Dep. 6, 11, 17; Jones Dep. 6, 30.)

12. The official test kit provided by the City of Grandview contained three vials. (Grimes Dep. 17.)

13. In drawing blood, it is important to fill the one vial with powder in it, but the lab is usually satisfied if the other two vials are three-fourths or one-half full. (Grimes Dep. 21, 25.)

14. If an RN cannot draw blood, it is usually because the subject has bad veins. (Grimes Dep. 36.)

15. Ms. Grimes drew as much blood as she could from Lane, but she was unable to fill all three vials because he had bad veins due to admitted long-term drug use, which was evident from looking at his arms. (Grimes Dep. 37; Jones Dep. 45.)

16. Ms. Grimes believed she drew enough blood for the lab to conduct tests. (Grimes Dep. 37.)

17. Chief Jones relied on Ms. Grimes's professional judgment that she had drawn all the blood she could. (Jones Dep. 47.)

18. Based on Chief Jones's investigation, he prepared an investigative report on a form entitled Kentucky Uniform Policy Traffic Collision report. (Jones Dep., Ex. 2.)

19. Based on eyewitness testimony, Chief Jones concluded that J.S. was stopped at Patton Road where it intersects with KY 11, waiting to cross the road to Fernwood Road at the same time that Lane was driving north on KY 11. As Lane approached the intersection, he passed a school bus on his right. The bus was slowing down to turn right onto Patton Road. Just as Lane reached Patton Road, J.S. pulled out into the path of Lane's vehicle. The

eyewitnesses speculated that J.S. was unable to see Lane around the turning bus. Lane did not have time to stop or swerve. (Jones Dep., Ex. 2.)

20. Two eyewitnesses stated that Lane did not cross the yellow line and that he was not driving at a high rate of speed. He was traveling behind the bus, which had just dropped off a child, so his speed could not have exceeded 45 mph. The road was 23 feet wide at the point where Lane passed the bus, so there was sufficient room for him to pass the bus without having to cross the yellow line if the bus swung wide. There was no evidence that the bus swung wide when it turned. There were no skid marks at the scene. (Jones Dep. 105-08.)

21. Sally Smith went to the scene after learning that someone had hit her son. She arrived just as the ambulance pulled up and six or seven minutes before Chief Jones responded to the scene. (S. Smith Dep. 41, 44.)

22. At J.S.'s funeral, Sally Smith spoke with the coroner, who told her that there must have been a hard impact to cause the injuries J.S. had. (S. Smith Dep. 70.)

23. The coroner's comments about a hard impact and the fact that Sally Smith did not see any skid marks at the scene of the accident caused her to wonder whether David Lane was speeding. (S. Smith Dep. 69-70.)

24. Jane Smith spoke with Chief Jones about three days after the accident to inquire about the accident report. Chief Jones told her that he had conducted a field sobriety test on David Lane. (S. Smith Dep. 56-57, 71.)

25. When she spoke with Chief Jones three days after the accident, Sally Smith asked him whether David Lane was speeding. Chief Jones responded that he did not believe Lane was speeding due to the lack of brake marks and the fact that Lane was away from the scene of the accident when he stopped. (S. Smith Dep. 71-72.)

26. Sally Smith spoke with Chief Jones one more time in March 2014 when she called him to see whether the police report was done. He told her he was still working on a couple of things on it. She did not express any concerns to Chief Jones about her belief that David Lane was at fault for the accident. (S. Smith Dep. 72.)

27. Sally Smith obtained a copy of the police report in late March/early April 2014 from the Police Department, at which time she was told that the drug screening was pending. (S. Smith Dep. 58, 73, 74.)

28. On or about May 1, 2014, Chief Jones obtained the results of the blood tests conducted by the Kentucky State Police ("KSP") lab, which showed the presence of oxycodone, but not the amount. (Jones Dep. 42-43; Laboratory # 14-J-01155 Report 2, dated 5/1/14.)

29. In response to the blood test results, Chief Jones contacted the Commonwealth Attorney's office, which told him they needed to know the amount. Therefore, Chief Jones contacted the KSP lab, from which he learned that the KSP does not test for amount; it only tests for presence. Chief Jones was instructed that in order to test for amount, the

Commonwealth's Attorney would have to send a letter to KSP authorizing them to send the blood sample to a private lab for further testing on amount. (Jones Dep. 43-44, 68.)

30. Several days later, the Commonwealth's Attorney's office advised Chief Jones that in response to its letter asking for further testing on amount, the KSP lab had stated that they could not send the blood for further testing because the KSP lab had used up all the blood in its own testing. (Jones Dep. 44, 95.)

31. Chief Jones followed up with the KSP lab, asking why they did not have enough blood to test, and they returned photographs he had taken of the vials, showing that they were not totally full. (Jones Dep. 44-45, 96.)

32. The Commonwealth's Attorney did not ask Chief Jones to conduct further investigations after learning of the lab results. (Jones Dep. 95.)

33. Sometime between June and August 2014, Sally Smith found out that the drug screening showed the presence of drugs. (S. Smith Dep. 75.)

34. Upon learning about the presence of drugs in the drug screening, Sally Smith contacted Jack Morris, the County Attorney. (S. Smith Dep. 74.)

35. Jack Morris advised Sally Smith that the Commonwealth's Attorney would handle the matter once the blood test was returned. (S. Smith Dep. 75-76.)

36. Sally Smith continued to call both Jack Morris and the Commonwealth's Attorney to see what they were going to do. (S. Smith Dep. 76.)

37. At some point after learning of the presence of oxycodone in the results of the blood screening of David Lane, someone in the Police Department confirmed that Lane did not have a prescription for oxycodone. (Jones Dep. 67.)

38. The absence of a prescription for oxycodone for David Lane was shared with the Commonwealth's Attorney. (Jones Dep. 69.)

39. A couple of months after the blood screening test was returned from the lab, the matter was presented to the grand jury. (Jones Dep. 49-50.)

40. The grand jury did not return an indictment. (Jones Dep. 104; S. Smith Dep. 78.)

41. On August 12, 2014, someone posted a comment on a news organization website, using Sally Smith's name with her consent and referring to her as "my wife," complaining, inter alia, that Sheriff Powers was late to the accident scene, Chief Jones did not give David Lane a blood test, David Lane's vehicle was not towed from the scene or searched, David Lane was assessed only a $500 fine and one year's probation, and implying that proper measurements would have been taken if J.S. had been Sheriff Powers's 15-year-old son. (S. Smith Dep. 94-96; S. Smith Dep., Ex. 1.)

42. In April 2015, the Commonwealth's Attorney told Sally Smith that Chief Jones had not given the office enough evidence to convict David Lane. (S. Smith Dep. 77.)

43. In April 2015, Jane and John Smith decided to write a letter to Chief Jones. (S. Smith Dep. 77.)

44. Sally and John Smith believe that Chief Jones conducted a flawed investigation in the following ways: (1) Chief Jones had David Lane's blood drawn at the police station instead of at a hospital; (2) Chief Jones did not order that Lane's vehicle be towed from the scene and, instead, allowed Lane to drive the vehicle to the police station; (3) Chief Jones selected Polly Grimes to draw Lane's blood because her son is a dispatcher for the City of Grandview; (4) Chief Jones failed to search Lane's vehicle; (5) Chief Jones did not provide enough evidence to convict David Lane of an offense; (6) Chief Jones did not reach the correct result at the conclusion of his investigation. (S. Smith Dep. 58-65, 77 & Ex. 1; J. Smith Dep. 17-19.)

45. Plaintiff J.D.S. was born after the death of her father, J.S. (J. Smith Dep. 28.)

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The appropriate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or

whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party, in this case, Hocker. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Cos.*, 8 F.3d 335, 340 (6th Cir.1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. Likewise, "the mere existence of a scintilla of evidence in support of a party's position will not suffice." *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 362 (6th Cir. 2011) (internal citation omitted) (internal quotation marks omitted).

ARGUMENT

I. THE MUNICIPAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CIVIL RIGHTS CLAIMS (COUNTS I AND II) AND THE STATE NEGLIGENCE CLAIM (COUNT IV) BECAUSE THOSE CLAIMS ARE BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS SET FORTH IN KENTUCKY REVISED STATUTES ("KRS") 413.140(1)(a)

Because Congress has failed to establish a limitations period for claims brought pursuant to 42 U.S.C. § 1983, the U.S. Supreme Court has directed courts to look to the

residual or general personal injury statute of limitations in the state in which the violation occurs, rather than the statute of limitations for enumerated intentional torts. *Owens v. Okure*, 488 U.S. 235 (1989). Thus, the applicable limitations period for federal civil rights claims is the same for all § 1983 claims arising in a particular state, regardless of the subject matter of the claim. In Kentucky, the applicable general personal injury limitations statute is KRS 413.140(1)(a), which requires an action to be brought within one year after accrual. *Bonner v. Perry*, 564 F.3d 424, 430-31 (6th Cir. 2009) (following *Collard v. Ky. Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990)). The one-year limitations period applies to negligence claims as well. *See, e.g., Bradford v. Bracken County*, 767 F. Supp. 2d 740, 745 (E.D. Ky. 2011).

The fact that J.S. died in an automobile accident does not bring the two-year limitations period of the Motor Vehicle Reparations Act ("MVRA"), KRS 304.39-230, into play for claims against the Municipal Defendants. As just stated, the one-year period in Kentucky's general personal injury limitations statute, KRS 413.140(1)(a), applies to all § 1983 claims regardless of the underlying facts. In any event, the MVRA does not apply for a variety of reasons. Plaintiffs are not seeking damages "arising from the ownership, maintenance, or use of a motor vehicle" under the MVRA. KRS 304.39-060(2)(a). The driver of the vehicle that was involved with the accident was David Lane, not a Municipal Defendant. (Stmt. of Undisputed Facts ¶ 1.) Plaintiffs do not contend that a Municipal

Defendant owned the vehicle driven by David Lane. The accident victim, J.S., was not even driving a motor vehicle at the time of the accident.[4]

Indeed, Plaintiffs do not take the position that the Municipal Defendants were in any way responsible for the death of J.S. Rather, Plaintiffs are seeking damages for the alleged failure of the Municipal Defendants to properly investigate the accident. It appears to be Plaintiff's theory that if Defendants had properly investigated the accident, there would have been sufficient evidence of the driver's intoxication such that the grand jury would have returned a true bill against the driver.[5] (*See* Stmt. of Undisputed Facts ¶ 44.)

The Sixth Circuit Court of Appeals "follows the 'discovery rule,' which provides that 'the statute of limitation begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action and that a plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.'" *Dixon v. Clem*, 492 F.3d 665, 671 (6th Cir. 2007) (quoting *Collard*, 896 F.2d at 183). The rule in Kentucky is the same, that is, a cause of action accrues when the plaintiff knows or

[4]At the time of the accident, J.S. was on his dirt bike, which was not licensed for highway use and was not insured. (Stmt. of Undisputed Facts ¶ 2.) The Supreme Court of Kentucky has stated that the MVRA applies to motorcycles the same as it applies to all motor vehicles, unless specifically stated in the Act itself. *Troxell v. Trammell*, 730 S.W.2d 525, 527 (Ky. 1987). The court has not spoken to whether a dirt bike is a motorcycle for purposes of the MVRA.

[5]The Commonwealth's Attorney, and not one or more of the Municipal Defendants, is responsible for presentation of a case to the grand jury, an act for which the Commonwealth's Attorney is absolutely immune. *See, e.g., Carmichael v. City of Cleveland*, 571 F. App'x 426, 437 (6th Cir. 2014).

reasonably should know that an injury has occurred. *See Prout v. PRG Real Estate Mgmt., Inc.*, 51 F. Supp. 3d 702, 705 (E.D. Ky. 2014) (citing *Lane v. Richards*, 256 S.W.3d 581 (Ky. App. 2008)).

To the extent that Plaintiffs state a cause of action, which the Municipal Defendants dispute, *see infra* Point II, there are several dates when Plaintiffs, through the exercise of reasonable diligence, knew or should have known that a compensable injury had occurred: (1) February 14, 2014, the day on which J.S. was killed in a motor vehicle accident and the date Chief Jones conducted his investigation into the accident; (2) late March/early April 2014, when Plaintiffs received the investigation report; (3) May 1, 2014, the date on which the KSP lab issued its report establishing the presence, but not the amount, of oxycodone in David Lane's blood at the time of the accident; (4) sometime between June and August 2014,[6] when Plaintiffs learned that the May 1, 2014 lab report showed the presence of drugs, and (5) August 12, 2014, when someone posted an online comment on Sally Smith's behalf complaining that the investigation into the fatal traffic accident resulted in only light punishment for David Lane. All five of these dates occur more than one year before the Complaint was filed and process was issued on August 28, 2015.[7] Accordingly, Counts I, II,

[6]Given that Sally Smith knew no later than August 12, 2014 that the evidence of drugs in David Lane's system was insufficient to prosecute him (*see* Stmt. of Undisputed Facts ¶ 41), this time span must be between June and August 12, 2014.

[7]Although Rule 3 of the Federal Rules of Civil Procedure states that an action is commenced when the complaint is filed, practice in Kentucky is different. Under Kentucky law, which applies to state law claims in federal court, a civil action is commenced by the

and IV are barred by the statute of limitations and summary judgment should be granted in favor of the Municipal Defendants on those counts.

II. THE MUNICIPAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON ALL CLAIMS AGAINST THEM BECAUSE, AS A MATTER OF LAW, THEY DID NOT OWE PLAINTIFFS A DUTY TO INVESTIGATE J.S.'S ACCIDENT

Plaintiffs seek damages for the alleged failure of the Municipal Defendants to conduct a traffic investigation sufficient to result in the indictment of David Lane. The general rule is that a municipality is not liable for failure to enforce laws enacted to protect the public health and safety. *See Grogan v. Commonwealth*, 577 S.W.2d 4, 5 (Ky.), *cert. denied*, 444 U.S. 835 (1979); *see also Siding Sales, Inc. v. Warren County Water Dist.*, 984 S.W.2d 490, 492-93 (Ky. App. 1998) (following *Grogan*, 577 S.W.2d 4); *Moore v. Commonwealth*, 846 S.W.2d 715, 716 (Ky. App. 1992) (same). "In order to establish an affirmative legal duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials." *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995); *see also Ashby v. Louisville*, 841 S.W.2d 184 (Ky. App. 1992). "[I]n the absence of some 'special relationship,' . . . a municipality or a law enforcement agency or official does not owe individual citizens a duty to protect them from crime." *Ashby*, 841 S.W.2d at 189.

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filing of the complaint and issuance of the summons, and the statute continues to run until the summons is issued, even if the complaint has been filed. *See Bradford v. Bracken County*, 767 F. Supp. 2d 740, 745-47 (E.D. Ky. 2011).

Thus, it is unnecessary to inquire into "the 'reasonableness' of actions taken to protect individual citizens from crime." *Id.*

The requirement of a special relationship applies to both tort claims and federal civil rights claims brought pursuant to 42 U.S.C. § 1983. *Fryman*, 896 S.W.2d at 910. A special relationship is established only when (1) the person seeking compensation for breach of the duty is in government custody or otherwise restrained by the Government, and (2) the offensive conduct was perpetrated by a government actor. *Id. See generally DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (State had no duty to protect child from father after receiving complaints of alleged abuse).

The Supreme Court of Kentucky has been willing to uphold damages awards under discrete circumstances that do not quite fit the "special relationship" rule established in *Fryman* and *Ashby* when the injury to the claimant "was not only foreseeable, it was entirely predictable." *Gaither v. Justice & Pub. Safety Cabinet*, 447 S.W.3d 628, 638 (Ky. 2014). In *Gaither*, for example, the court affirmed a damages award to the administratrix of a confidential informant's estate for the death of the informant because the state police owed a duty to protect the informant while he was actively working as an undercover operative. According to the court in that case, "the state officials involved here actively sought out the individual who was destined to become the victim." *Id.* His death, therefore, "was uniquely foreseeable." *Id.*

The evidence does not establish a special relationship between Plaintiffs and the Municipal Defendants. Neither the Plaintiff parents nor their deceased son, J.S., were in the custody or control of the Municipal Defendants during the course of the investigation into the fatal accident.[8] Whatever duty to investigate fatal traffic accidents the Municipal Defendants owed Plaintiffs was no greater than or distinct from the duty owed to the general public to perform their functions. Sally Smith's presence at the accident scene when emergency responders arrived (Stmt. of Undisputed Facts § 21) did not put her in a special relationship with the Municipal Defendants. Likewise, Mrs. Smith's communications with Chief Jones about the accident investigation and her receipt of the accident report (Stmt. of Undisputed Facts ¶¶ 24-27) did not create a duty on the part of the Municipal Defendants to conduct an investigation that would reach the factual conclusion desired by Plaintiffs. The evidence establishes that Chief Jones went to the accident outside the City of Grandview pursuant to an agreement with Sheriff Powers to cover Kent County in his absence (Stmt. of Undisputed Facts ¶¶ 4, 6), not in response to a special request from Plaintiffs. In any event, Chief Jones has jurisdiction in Kent County (Stmt. of Undisputed Facts ¶ 5), and even if Plaintiffs had specifically requested that he investigate the accident, they would have assumed no authority over Chief Jones distinct from that of any other member of the public.

[8]Plaintiff J.D.S. was born after the death of her father, J.S. (Stmt. of Undisputed Facts ¶ 45), so she cannot have been in the custody or control of the Municipal Defendants during the investigation of the accident.

Furthermore, the facts of this case do not justify the limited departure from the special relationship rule illustrated in *Gaither*. In contrast to the defendant state police officers in that case, who solicited an informant to work as an undercover operative on behalf of the state and, thus, "assumed a duty to exercise ordinary care for his safety," 447 S.W.3d 639, neither Chief Jones nor any other Municipal Defendant did not reach out to Plaintiffs specially and bring them into the criminal justice/highway administration system. The relationship between Plaintiffs and the Municipal Defendants was a fortuitous one, arising solely out of the occurrence of the accident and Chief Jones's duty to investigate accidents. That Plaintiffs would suffer mental anguish because the results of the police investigation did not inspire the grand jury to return a true bill against David Lane was not "uniquely foreseeable," as it was just as likely that Plaintiffs' mental anguish was caused by the loss of their teenaged son. The Municipal Defendants did not owe Plaintiffs a special duty of care, as was the case in *Gaither*, and, thus, they breached no duty resulting in a constitutional or tort injury.

III. TO THE EXTENT CHIEF JONES AND MAYOR SMITH ARE SUED IN THEIR INDIVIDUAL CAPACITIES, EACH OF THEM ARE ENTITLED TO QUALIFIED IMMUNITY FROM SUIT

Both state and federal qualified immunity apply where, as here, Plaintiffs have asserted both constitutional and state tort claims. "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*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

> Qualified immunity ordinarily applies unless it is obvious that no reasonably competent official would have concluded that the actions taken were unlawful. *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir.2002). Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Qualified immunity applies irrespective of whether the official's error was a mistake of law or a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson*, [555 U.S. at 231].

Chappell v. City of Cleveland, 585 F.3d 901, 907 (6th Cir. 2009).

A government actor is shielded from damages unless the plaintiff can show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow*, 457 U.S. at 818). It is up to the district court "to decide which of the two prongs of qualified-immunity analysis to tackle first." *Id.* (citing *Pearson*, 555 U.S. at 236).

Plaintiffs have the burden to demonstrate that the official is *not* entitled to qualified immunity. *Simmonds v. Genesee County*, 682 F.3d 438, 444 (6th Cir. 2012). "To defeat the qualified immunity bar, a plaintiff 'must present evidence sufficient to create a genuine issue as to whether the defendant committed the acts that violated the law.'" *Id.* (quoting *Adams v. Metiva*, 1994 FED App. 0277P, 31 F.3d 375, 386 (6th Cir.)). In the context of summary

judgment, "to create the requisite genuine issue of material fact, the plaintiff must raise 'disputes over facts that might affect the outcome of the suit under the governing law.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 248). In carrying this burden, the "plaintiff must do more than rely merely on the allegations of h[is] pleadings or identify a 'metaphysical doubt' or hypothetical 'plausibility' based on a lack of evidence; []he is obliged to come forward with 'specific facts,' based on 'discovery and disclosure materials on file, and any affidavits,' showing that there is a genuine issue for trial." *Chappell*, 585 F.3d at 912 (quoting *Matsushita*, 475 U.S. at 586-87).

Akin to federal qualified immunity, which applies to constitutional claims, Kentucky law recognizes "official immunity," which is "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions." *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). For officers sued in their individual capacities, the immunity is qualified, that is, it "affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Id.* at 522. Qualified immunity is available for (1) discretionary acts (2) performed in good faith and (3) within the officer's scope of authority. *Id.*

"[D]iscretionary acts . . . are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). "On the other hand, ministerial acts . . . are those that require 'only obedience to the orders of others,

or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.'" *Id.* (quoting *Yanero*, 65 S.W.3d at 522). Because few acts are ever purely discretionary or purely ministerial, a court must look at the dominant nature of the act. *Id.*

As set forth in Point II, *supra*, there is no cognizable claim under the constitution or state tort law for breach of a duty to investigate a crime or traffic accident. If such a claim exists, it is Plaintiffs' burden to come forward with evidence that such a duty existed at the time of the investigation and that a reasonable government actor would have known he breached that duty. There is no evidence in the record from which such a constitutional duty or knowledge of that duty can be inferred, and thus, the constitutional claims against the individual Municipal Defendants (Counts I and II) are barred by the doctrine of qualified immunity. Similarly, the state negligence claim (Count IV) against Chief Jones and Mayor Smith[9] is barred by the doctrine of qualified official immunity, because the "failure to investigate further, standing alone, was a discretionary judgment taken within the scope of their authority." *Foster v. City of Georgetown, Ky.*, Civ. Act. No. 05-467-JBC, 2007 WL 1385937, at *8 (E.D. Ky. May 7, 2007); *see also Palm v. United States*, Civ. Act. No. 06-4334, 2007 WL 9254426, at *3 (6th Cir. Nov. 5, 2007) (United States could not be held liable for negligently investigating a claim of Social Security benefits fraud, because

[9]The Amended Complaint does not contain any factual allegations against Mayor Smith. *See infra* note 9.

"negligent investigation falls squarely within the discretionary function exception [to the Federal Tort Claims Act").

IV. THE MUNICIPAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE EQUAL PROTECTION CLAIM IN COUNT I OF THE AMENDED COMPLAINT

Paragraphs 20 and 31 of the Amended Complaint allege that the Municipal Defendants denied Plaintiffs the equal protection of the laws with regard to the enforcement of traffic and criminal law. "The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Establishment of an equal protection claim requires a showing that Plaintiffs were members of a protected class and that they were "intentionally and purposefully discriminated against because of [their] membership in that protected class." *Jones v. Union County, Tenn.*, 2002 FED App. 0235P, 296 F.3d 417, 426 (6th Cir.). The record is completely devoid of any evidence that Plaintiffs are members of a protected class and that they were discriminated against on account of that membership. Accordingly, the Municipal Defendants are entitled to summary judgment on the equal protection claim in Count I of the Amended Complaint.

V. THE MUNICIPAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN COUNT III OF THE AMENDED COMPLAINT

Under Kentucky law, to state a claim for the intentional infliction of emotional distress, also known as the tort of outrage, a plaintiff must show "(1) [d]efendant's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there is a causal connection between Defendant's conduct and the emotional distress; and (4) the emotional distress is severe." *Kastor v. Cash Express of Tenn.*, 77 F. Supp. 3d 605, 615 (W.D. Ky. 2015) (citing *Stringer v. Wal-Mart Stores*, 151 S.W.3d 781, 788 (Ky. 2004)). A defendant will be held liable for the emotional infliction of emotional distress "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting *Humana of Ky. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990)).

Under Kentucky law, the intentional infliction of emotional distress is a "gap-filler tort," although it can stand alone when there are appropriate facts. *Childers v. Geile*, 367 S.W.3d 576, 582 (Ky. 2012). For that reason, "[w]here an actor's conduct amounts to the commission of one of the traditional torts, such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie." *Banks v. Fritsch*, 39

S.W.3d 474, 480 (Ky. App. 2001) (trial court properly directed verdict in favor of defendant-teacher, who chained plaintiff-student to a tree as a joke, on claim of intentional infliction of emotional distress, because student could recover emotional distress damages for claims of false imprisonment, assault, and/or battery, and student did not show that teacher's actions were intended only to cause him extreme emotional distress); *see also Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 299 (Ky. App. 1993) (tort of outrage did not lie on behalf of sexually abused minor against deacon, because there was no evidence from which it could be inferred that the deacon's only interest was to cause severe emotional distress; his intent was plainly his own sexual gratification, which was accomplished by means of assault and battery).

The Municipal Defendants are entitled to judgment as a matter of law on the negligent infliction of emotional distress claim in Count III of the Amended Complaint because there is no evidence from which it could be inferred that they acted with respect to Plaintiffs in a manner that offends against the generally accepted standards of decency and morality. Mrs. Smith spoke to Chief Jones several times during the investigation, and the Municipal Defendants gave her the investigation report when it was completed. (Stmt. of Undisputed Facts ¶ 27.) There is no evidence of any personal interaction with Mayor Smith. Far from outrageous behavior, Chief Jones's willingness to talk to the mother of the accident victim indicates concern for and respect of her. Indeed, the acts upon which Plaintiffs apparently base their claim for the intentional infliction of emotional distress do not vary from the acts

relied on to support the negligence claim in Count IV. In short, there is no evidence from which it could be inferred that the Municipal Defendants engaged in a negligent investigation of the accident for the sole purpose of causing Plaintiffs severe emotional distress. Therefore, the Municipal Defendants are entitled to summary judgment on Count III of the Amended Complaint because there are no facts from which outrageous conduct can be inferred, and the claim is, at best, duplicative of the state negligence claim in Count IV.

V. DEFENDANT CITY OF GRANDVIEW POLICE DEPARTMENT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT IS NOT A SUABLE ENTITY

It is well settled that a police department is not an entity that can be sued. *Matthews v. Jones*, 1994 FED App. 0327P, 35 F.3d 1046, 1049 (6th Cir.); *see Hocker v. Pikeville City Police Dep't*, Civ. Act. No. 7:11-122-EBA, 2013 WL 587897, at *4 (E.D. Ky. Feb. 13, 2013), *aff'd*, 738 F.3d 150 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 70 (2014). To the extent that there is a basis for municipal liability, the proper Defendant is the City of Grandview, *Frodge v. City of Newport*, No. 11-5458, 2012 WL 4773558, at *5 n.3 (6th Cir. 2012), which already is a Defendant in this matter. Accordingly, the City of Grandview Police Department is entitled to summary judgment on all counts as a matter of law.

VII. DEFENDANT CITY OF GRANDVIEW IS ENTITLED TO SUMMARY JUDGMENT ON ALL FEDERAL CIVIL RIGHTS CLAIMS (COUNTS I AND II), BECAUSE

THERE IS NO RESPONDEAT SUPERIOR LIABILITY UNDER 42 U.S.C. § 1983

It is well settled that under § 1983, a municipality may be found liable only when the municipality itself, through the execution of its policies, practices, or customs, actually causes the constitutional harm at issue. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691-94 (1978). "[A] municipality cannot be held liable for a § 1983 action on *respondeat superior* theory." *Id.* at 691. This means that in this case the City of Grandview cannot be held liable for the unconstitutional acts of Police Chief Jones, if any.

Although a municipality may not be held liable for a violation of § 1983 on the basis of respondeat superior, it may be held liable for constitutional injuries caused by a failure to provide adequate training if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Establishment of such a claim requires proof "that a training program is inadequate to the tasks that officers must perform, that the inadequacy is the result of the city's deliberate indifference, and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989) (quoting *Harris*, 489 U.S. at 379). While the Amended Complaint uses the words "train" and "training" on several occasions (*see, e.g.*, Compl. ¶¶ 6, 22-26, 30, 34), it makes no attempt to articulate in what way the training was inadequate or to allege facts from which inadequate training could be inferred. Plaintiffs can point to no evidence in the record from which it could be inferred that Chief Jones's training was, in fact, inadequate or that the Municipal Defendants were

deliberately indifferent to the inadequacy of the training. In any event, because Plaintiffs cannot establish a constitutional deprivation, *see supra* Part II, there is no basis in fact or in law for Plaintiffs to recover against the City of Grandview for a failure to train in violation of 42 U.S.C. § 1983, and the City is entitled to summary judgment on any such claim in Counts I and II of the Amended Complaint.

VIII. PUNITIVE DAMAGES MAY NOT BE AWARDED AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983 OR STATE TORT LAW, AND, THEREFORE, CLAIMS FOR PUNITIVE DAMAGES AGAINST DEFENDANT CITY OF GRANDVIEW MUST BE DISMISSED

A. The City of Grandview Is Immune From A Punitive Damages Award In A Suit Brought Under 42 U.S.C. § 1983

It has been established law for 35 years that punitive damages are not available against a municipality in a suit brought pursuant to 42 U.S.C. § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) ("Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983."); *see also Estate of Callahan v. City of Detroit*, No. 87-2088, 1988 WL 122965, at *3 (6th Cir. Nov. 16, 1988) (unpublished disposition) (observing that estate's argument that the district court should have instructed the jury that punitive damages could be recovered

against the City was patently frivolous based on *City of Newport*, 453 U.S. 247); *Tollison v. City of Independence*, Civ. Act. No. 13-55-DLB-CJS, 2015 WL 5684030, at *17 (E.D. Ky. Sept. 25, 2015) (following *City of Newport*, 453 U.S. 247). Accordingly, the City of Grandview is entitled to summary judgment on the claims for punitive damages in Counts I and II.

B. The City Of Grandview Is Immune From A Punitive Damages Award In A Suit Brought Under State Tort Law

The Claims Against Local Governments Act, KRS 65.200–65.2006, provides in pertinent part:

> The amount of damages recoverable against a local government for death, personal injury or property damages arising out of a single accident or occurrence, or sequence of accidents or occurrences, shall not exceed the total damages suffered by plaintiff, reduced by the percentage of fault including contributory fault, attributed by the trier of fact to other parties, if any.

KRS 65.2002. This provision has been interpreted by courts to prohibit an award of punitive damages against a municipality. *See Louisville Metro Hous. Auth. v. Burns*, 198 S.W.3d 147, 151 (Ky. App. 2005) ("[W]e are convinced that the Authority sufficiently satisfies the agency criteria described in *Phelps* to bring it within the protections against punitive damage awards contained in KRS 65.2002."), *review denied* (Aug. 17, 2006); *see also Tollison*, 2015 WL 5684030, at *17 (following *Burns*, 198 S.W.3d 147); *Dempsey v. City of Lawrenceburg*, Civ. Act. No. 3:09-33-DCR, 2010 WL 3825473, at *8 (E.D. Ky. Sept. 23, 2010) (same); *Foster*,

2007 WL 1385937, at *10; *Baker v. Warren County Fiscal Ct. ex rel. City-County Planning Comm'n of Warren County*, No. 1:06-CV-153-R, 2007 WL 486735, at *4 (W.D. Ky. Feb. 12, 2007). Accordingly, the City of Grandview is entitled to summary judgment on claims for punitive damages in Counts III and IV of the Amended Complaint.

CONCLUSION

For the foregoing reasons, the Municipal Defendants respectfully request that this Court grant their Motion for Summary Judgment in its entirety and enter judgment in favor of each of the Municipal Defendants on Counts I through IV of the Amended Complaint.

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Respectfully submitted,

s/ Brian K. Law
Brian K. Law, Esquire
Brian K. Law LLC
Post Office Box 100
123 Front Street
Courtland, KY 41000
Telephone: (606) 123-4567
Facsimile: (606) 123-4578
Email: bklaw@bklaw.com

Attorney for Municipal Defendants