

STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
COUNTY OF LIVINGSTON

DEC 18 2018

*H. Ann Nelson*  
CIRCUIT CLERK

MARGARET F. BEAUPRE, Independent Executor )  
of the Estate of Shawn A. Beaupre, deceased, )  
Plaintiff )

vs. )

Case: 16-L-37

LIVINGSTON COUNTY, a municipal corporation; )  
ROUND GROVE TOWNSHIP ROAD )  
COMMISSIONER NEIL "BUD" TURNER, in his )  
professional capacity; COUNTY OF LIVINGSTON )  
COUNTY CLAY METCALF, in his professional )  
capacity; and COUNTY ENGINEER OF )  
LIVINGSTON COUNTY DAVE WINTERS, in his )  
professional capacity, TONY CHILDRESS )  
SHERIFF OF LIVINGSTON COUNTY, ILLINOIS; )  
and ROUND GROVE TOWNSHIP, a )  
governmental entity, )  
Defendants )

**ORDER**

Margaret F. Beaupre, as Independent Executor of the Estate of Shawn A. Beaupre, filed a Complaint at Law against the aforementioned individuals in the Amended Complaint at Law and the County of Livingston and the Township of Round Grove.

Plaintiff's complaint alleges two counts: Count I is for Wrongful Death and Count II for Survival Action.

The condensed facts state that between the dates of Saturday, December 26, 2015, through Monday, December 28, 2015, a heavy rainfall fell in the central and southeastern areas of central Illinois. The heavy rain led to flooding conditions in low elevation areas and parcels of land adjacent to waterways. Flood warnings had been issued for these areas by the National Weather Service. N. 3300 East Road (also known as the Campus Blair Road), which runs north and south, intersects with E. 3100 North Road, which runs east and west. The elevation of E. 3100 North Road immediately west of the intersection was lower than the elevation of N. 3300 East

Road. A raised metal guardrail bordered the west shoulder of E. 3100 North Road and it is alleged this impeded a southbound driver's view of the portion of 3100 North Road immediately west of the intersection.

The decedent, Shawn Beaupre, was driving on the night of December 28, 2015, on Campus Blair Road in the direction of the aforescribed intersection. Mr. Beaupre turned right, heading west onto E. 3100 North Road. At this time, E. 3100 North Road at this location was submerged by raging flood waters and these conditions posed a hazard to nighttime drivers whose view was limited due to the darkness and the intersection's configuration. There were no barricades, cones or any other warnings or notifications alerting drivers of the flooded road. Mr. Beaupre's vehicle was swept off E. 3100 North Road and was overturned by the flood waters and was later discovered upside down and mostly submerged by these waters. Two days later, Mr. Beaupre's body was found approximately 1200 feet northeast of the intersection. Mr. Beaupre was pronounced dead by the Livingston County Coroner and the cause of death was attributed to drowning.

Defendants to this complaint assert that the defendants are not liable pursuant to the defenses and immunities under the local government and governmental employees tort immunity act; therefore, the complaint should be dismissed pursuant to 735 ILCS 5/2-619(a)(9). "That the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). The meaning "other affirmative matter avoiding the legal effect of or defeating the claim" must be something more than evidence offered to refute a material fact alleged in the complaint, because all well-pleaded facts in a complaint must be taken as true for the purposes of the motion. Lo v. Provena Covenant Med. Ctr., 356 Ill. App. 3d 538, 540 (4<sup>th</sup> Dist. 2005). To defeat the plaintiff's claim, the defendant's assertion of affirmative matter must negate the cause of action completely or refute conclusions of law or conclusions of fact contained in the complaint that are unsupported by allegations of specific fact upon which the conclusions rest. Smith v. Waukegan Park Dist., 231 Ill. 2d 111, 120-121 (2008); Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4<sup>th</sup>) 120139, Section 33. "The test for whether a defense is an affirmative defense is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated". "By moving to dismiss a complaint based on statutory tort immunities in a 2-619(a)(9) motion, a defendant does not concede that he owed any duty of care. A court may decide the immunity issues without deciding the duty question." DeSmet ex rel. Estate of Hays v. County of Rock Island, 219 Ill. 2d 497, 509.

Plaintiff's complaint alleges a duty was owed by Defendants to the Plaintiff. Plaintiff states in its one count (Wrongful Death), that at all times on the dates previously stated the defendants listed, by and through their respective agents and

employees knew, or absent willful and wanton conduct, should have known of the flooded condition of the roadway at or near the intersection of N. 3300 East Road and E. 3100 North Road, in Round Grove Township.

Plaintiff states the listed defendants, individually or by and through their respective agents and employees, "committed one or more of the following willful and wanton acts or omissions exhibiting a conscious disregard for the safety of the general public:"

- a. Permitted the said section of E. 3100 North Road and its surrounding area to remain in a hazardous condition for a long time despite actual knowledge of its susceptibility to flooding and the use of the roadway by motorists and other members of the general public;
- b. Created a latent defect on E. 3100 North Road to southbound drivers entering the road from N. 3300 East Road in erecting a guard rail that obstructed a driver's view of the surface of E. 3100 North Road;
- c. Permitted a latent hazard to exist for a long time on E. 3100 North Road to southbound drivers entering the road from N. 3300 East road;
- d. Failed to maintain, repair or construct the said roadway and surrounding area of E. 3100 North Road to safeguard against roadway flooding;
- e. Failed to maintain, repair or construct the culverts, drainage systems, lands and waterways of Livingston County to safeguard against roadway flooding on E. 3100 North Road;
- f. Failed on December 28, 2015 to close the roadway at or near the intersection of N. 3300 East Road and E. 3100 North Road to safeguard the public from the dangers of flooding;
- g. Failed to provide members of the general public with adequate warnings as to the presence of flood waters on and around the intersection of N. 3300 East Road and E. 3100 North Road in Round Grove Township;
- h. Failed to provide members of the general public with adequate warnings as to the possibility of flood waters on and around the intersection of N. 3300 East Road and E. 3100 North Road in Round Grove Township;
- i. Failed to close the said roadways to vehicular traffic;
- j. Failed to put barricades at and around the intersection of N. 3300 East Road and E. 3100 North Road in Round Grove Township when such area was flooded or likely to become flooded;
- k. Failed to inspect the roadway and surrounding area of N. 3300 East Road and E. 3100 North Road in Round Grove Township in order to prevent or minimize the dangers of flooding;
- l. Failed to take necessary actions to prevent or minimize flooding on the roadway and surrounding area of N. 3300 East Road and E. 3100 North Road in Round Grove Township;

- m. Failed to maintain a sufficient supply of barricades, cones or other hazard warnings or barriers to enable such devices to be placed at the said intersection on December 28, 2015;
- n. Failed to be adequately prepared and/or have an adequate emergency response systems in place to minimize the risk to the general public when the roadway and surrounding area of N. 3300 East Road and E. 3100 North Road in Round Grove Township became flooded;
- o. Failed to maintain adequate lighting to facilitate motorist visibility of any flood hazard at or near the intersection; and
- p. Was otherwise willful and wanton in failing to reasonably safeguard the said roadway from a known flood hazard.

In its argument, the Defendants state that Section 735 ILCS 5/2-619(a)(9) allows for the involuntary dismissal of a claim when barred by affirmative matter that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Defendant goes on to state that statutory tort immunities and defenses qualify as the type of affirmative matter that should be raised on a Section 2-619(a)(9) motion to dismiss. "The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101(a). Defendant's argument states the rationale of the Act is to "prevent the diversion of public funds from their intended purpose to the payment of damage claims." The Village of Bloomingdale v. CDG Enterprises, 752 N.E. 2d at 1096; "to allow public employees to exercise their judgment without the fear that a mistake made in good faith might subject them to a lawsuit." Fender v. Town of Cicero, 347 Ill. App. 3d 46.

Defendant quotes from Coleman v. East Joliet Fire Prot. Dist., 2016 IL 117952 (2016). "A court may decide the immunity issues without deciding the duty question." DeSmet ex rel. Estate of Hays v. County of Rock Island, 219 Ill. 2d 497, 509 (2006).

Defendants argue that pursuant to 745 ILCS 10/4-102, the County Defendants are absolutely immune from liability for the alleged failure to provide police protection or service or for failure to provide adequate police protection or service. "Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service . . ." 745 ILCS 10/4-102.

In DeSmet, Mary L. DeSmet was the personal representative of the Estate of Doris F. Hays, Deceased. On April 5, 2002, Doris Hays was driving her vehicle on U.S. Route 150 in rural Rock Island County when it left the road and ran into the ditch. A passing motorist witnessed the "accident" and made a call to law enforcement. Ultimately, none of the parties contacted responded to the scene the day the call was

made. Three days later, Ms. Hays' body was found lying outside her vehicle at the scene of the accident. The cause of death was drowning.

In DeSmet, the plaintiff filed a wrongful death and survival action against defendants Rock Island and Henry Counties, their respective sheriffs, dispatch center, as well as other local officials. The Supreme Court of Illinois affirmed dismissal of the filed suit referencing immunity from Section 4-102. In its decision, the Court refused to construe Section 4-102 narrowly and held that the statute implicated the "structural adequacy of police protection services." DeSmet, 219 Ill. 2d at 513-514. The Court stated, "Section 4-102 of the Act is comprehensive in the breadth of its reach, addressing situations where no police protection is provided to the general public and those in which inadequate protection is provided." DeSmet, at 515. Therefore, the Court concluded the failures of the defendants in DeSmet were immunized from liability under both negligence and willful and wanton conduct under Section 4-102.

In DeSmet, the Court distinguished Section 4-102 absolute immunity from qualified immunity under Section 745 ILCS 10/2-202. Section 2-202 immunizes negligent acts or omissions in the enforcement or execution of the law except for willful and wanton conduct. In DeSmet, the Court rejected application of Section 2-202 because no officer actually responded to the scene and, even if they had, they would have been performing a community caretaking function and not enforcing the law. DeSmet, at 520. Unlike in situations where an officer actually responds and takes control of the situation or alters the status quo, here the Court held, "where no officers respond to the scene – whether it is because no police protection services are provided or because the services provided prove to be inadequate – the status quo ante is at least not altered to the detriment of those present. We believe that to be the reasoning behind the legislature's enactment of Section 4-102 of the Tort Immunity Act." DeSmet at 521.

Defendant argues Plaintiff's allegations against Livingston County Sheriff Childress fall within the scope of Section 4-102 immunity. Plaintiff's allegations that Sheriff Childress "was responsible for policing, patrolling the roadways, enforcing the laws, and providing for the safety and well-being of the general public," and that Sheriff Childress "provided safety services" for areas of the county that had no local police agencies, such as the Township of Round Rock.

As the Defendant has argued, the allegations stated by the Plaintiff listed in this Order, page 2 and 3 (a-p), as in DeSmet, is more like a community caretaking function. Defendant does go on to list several other cases arguing this point. The Court does find for the Defendant, Sheriff Childress, and believes Section 4-102 does bar Sheriff Childress from liability, and Sheriff Childress is dismissed from the case with prejudice.

Defendants argue that the County and the County Engineers are also entitled to absolute immunity based on 745 ILCS 10/4-102 immunity. Defendant states that Section 4-102 immunity is not limited to functions performed by the police.

Plaintiff's argument as to the County of Livingston and the County's Engineers Dave Winters and Clay Mitchell are similar in nature to allegations against Sheriff Childress, that being responsibility for its response to weather caused/highway safety related emergencies. Plaintiff's Amended Complaint goes on to state that the county, by way of the Livingston County Emergency Services and Disaster Agency, coordinated functions necessary to prevent injuries to persons resulting from natural causes, such as flooding, and was responsible for disseminating warning information to the public and notifying personnel during an emergency. The Amended Complaint further alleges that Livingston County and the aforementioned County Engineers (Metcalf and Winters), breached as follows: (1) failing to close the roadway at or near the subject intersection; (2) failing to provide the public with adequate warnings of flood hazards; (3) failing to place barricades where needed; (4) failure to maintain an adequate number of barricades; (5) failure to be properly prepared or have an adequate response system in place.

Defendant argues that the scope of Section 4-102 immunity is not limited to police functions and applies even if not performed by police personnel. Lawson v. City of Chicago, 278 Ill. App. 3d, 628, 635. "The City was alleged to have engaged in a governmental function, the providing of police protection to the students at Tilden High School by its control, maintenance and operation of metal detectors at Tilden. In accordance with Section 4-102 of the Tort Immunity Act, the City was immune from liability for any alleged failure to provide adequate police protection or to prevent the commission of the alleged crime. The City's undertaking to operate the metal detector does not override the Tort Immunity Act nor does it prevent that statutory immunity from attaching to immunize the City from liability for any alleged negligence in the performance of that function." In Hernandez v. Kirksey, 306 Ill. App. 3d 912, 916, holding the conduct of a crossing guard fell within the scope of Section 4-102.

The Court agrees with the argument made by the Defendant, as in the claim against Sheriff Childress, the allegations made against the county, its departments and engineers, falls squarely within the scope of police protection and services and are immunized under Section 4-102.

Defendants argue that County Defendants are not liable under 745 ILCS 10/3-102(a) of the Tort Immunity Act stating they did not have timely notice of the "raging flood waters" that swept up and submerged Mr. Beaupre's vehicle which lead to his drowning. 745 ILCS 10/3-102(a): "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of

people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that it is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.” Defendants argue notice is a necessary predicate for establishing liability against a municipality. Lansing v. McLean County, 69 Ill. 2d 562, 572-573 (1978). “The burden of proving notice is on the party charging it.” Burke v. Grillo, 227 Ill. App. 3d 9, 18 (1992). The Section quoted, 745 ILCS 10/3-102(a). As the Defendant argues, the aforementioned statute requires actual proof the county had timely notice of the specific defect that caused Beaupre’s injuries and death, not merely notice of the condition of the surrounding area. Krivokuea v. City of Chicago, 2017 IL (App. 1<sup>st</sup>) 152397, Sec. 50 (1<sup>st</sup> Dist. Feb. 17, 2017).

Amended Complaint filed by Plaintiff alleges the county knew this area was prone to flooding. However, as argued by Defendant, knowledge or notice of surrounding conditions is not enough to overcome the notice defense per Section 3-102(a). Therefore, pursuant to 745 ILCS 10/3-102(a) and arguments made by Defendant, the Court finds Defendants are not liable given 10/3-102(a).

Argument is made pursuant to 745 ILCS 10/3-103 that County Defendants are immune from liability for the design or configuration of roadways or adjacent areas pursuant to 745 ILCS 10/13-103. In Plaintiff’s Amended Complaint, it is alleged that Livingston County by its highway department, were responsible for drainage design or roadways, bridges, culverts, shoulders, drainage systems, lands and waterways. Plaintiff alleges that “roadway, lands and waterways were of insufficient configuration to alleviate or avert the flooding of said intersection.” Amended Complaint, Paragraph 35. Plaintiff argues that the configuration of the roadways and intersection and its proximity to insufficiently engineered or configured waterways were defective. Amended Complaint Paragraph 50. Plaintiff’s Amended Complaint Paragraph 53 concludes that these failures caused the death of the decedent.

745 ILCS 10/3-103(a): “A local entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the design has been approved in advance of the construction or improvement by the Legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable; however, if after the execution of such plan or design it appears from its use that it has created a condition that is not reasonably safe. (b): A public employee is not liable under this Article for an injury

caused by the adoption of a plan or design of a construction of, or an improvement to public property.”

Defendant’s argument points out that no facts alleged by Plaintiff support the exceptions of the aforementioned statute. There are no factual allegations that the county created an unsafe condition that was apparent by its use. Defendant points out in the Amended Complaint, no specific allegations of prior accidents, injuries or complaints regarding the design or configuration of the roadways, intersections or bridges. Defendant claims that absent such facts, occurrences, the exception identified in Section 3-103(a) does not apply.

Defendants cite Deren v. Carbondale, 13 Ill. App. 3d 473 (5<sup>th</sup> Dist., 1973). In Deren, the Appellate Court affirmed dismissal of a complaint brought by the parent of a decedent who was struck and killed by an automobile while decedent was walking on the edge of a city roadway. The Court affirmed dismissal of the mayor, the city manager, the commissioners of public property, streets, and public safety pursuant to 745 ILCS 10/3-103(b). Court stated these individual defendants “are exempted from liabilities having to do with the design and construction of improvements to public property.” Deren at 476. Defendant argues that reasoning applies to the case at hand, and that County Engineers Winters and Metcalf are entitled to absolute immunity from liability under Section 3-103(b). The Court agrees with the arguments on behalf of Defendants.

In Plaintiff’s Amended Complaint, Paragraph 30, Plaintiff states there were no traffic lights, stop signs or street lighting at the intersection where this took place. Amended Complaint Paragraph 42 states that E. 3100 North Road was open and that there were no barricades, cones or other warnings or notifications to alert drivers of the flooded roadway. 745 ILCS 10/3-104: “Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning signs, devices or marking signs, overhead lights, traffic separating or restraining devices or barriers. West v. Kirkham, 147 Ill. 2d 1, 13 (1992). Section 3-104 provides absolute immunity from failing to provide traffic control devices even if the defendant had knowledge of a hazardous road condition. See West. Allegations made in the Amended Complaint regarding these allegations to fall within immunity pursuant to 745 ILCS 10/3-104.

Defendants also argue immunity from liability by the effect of weather conditions pursuant to Section 245 ILCS 10/3-105(a): “Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways, or places, or the ways adjoining any of the foregoing, or the signals, signs, markings, traffic or pedestrian control devices, equipment or structures on or near



any of the foregoing or the ways adjoining any of the foregoing. For the purpose of this section, the effect of weather conditions as such includes but is not limited to the effect of wind, rain, flood, hail, ice or snow but does not include physical damage to or deterioration of streets, highways, alleys, sidewalks, or other public ways or place or the ways adjoining any of the foregoing, or devices, equipment or structures on or near any of the foregoing or the ways adjoining any of the foregoing resulting from weather conditions." Defendants argue via Section 3-105(a), absolutely immunizes public entities and employees from liability for injuries caused by the natural accumulation of weather conditions. Enriquez v. City of Chicago, 187 Ill. App. 3d 1110, 1114-1115 (1<sup>st</sup> Dist. 1989). Defendants argue pursuant to Enriquez Case and Section 3-105(a), that the effect of the heavy rainfall which lead to flooding conditions on the roadways and adjacent to the intersection in question, such arguments fall within the scope of Section 3-105 immunity. Given the allegations, the Court agrees with Defendant's argument regarding 745 ILCS 10/3-105(a).

Defendant's refer to 745 ILCS 10/3-110: "Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned, supervised, maintained, operated, managed or controlled by the local public entity." In the Amended Complaint, plaintiff does allege that the fast moving flood waters from these waterways in the area flooded the township road west of the intersection and the decedent's vehicle was swept away which resulted in the drowning of Mr. Beaupre. Defendant points out that in the Amended Complaint there is no allegation that the County Defendants owned, supervised, maintained, operated, managed or controlled these alleged waterways. In support, Defendant's reference Frayne v. Dacor Corp., 362 Ill. App. 3d 575 (3<sup>rd</sup> Dist. 2005), a case that held a fire district was immune where it did not own the lake where drowning occurred. Choice v. YMCA of McHenry County, 2012 IL App (1<sup>st</sup>) 102877, a holding that a school district was immune when three students drowned in a lake that the district did not supervise. The Court finds, that pursuant to 745 ILCS 10/3-110, the County Defendants are immune for the tragic death of decedent.

Defendants argue that the County Defendants are entitled to discretionary immunity pursuant to 745 ILCS 10/2-201 of the Tort Immunity Act. 745 ILCS 10/2-201: "Except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." The Defendants state that Section 2-201 and 745 ILCS 10/2-109 provides discretionary immunity to public entities. Smith v. Waukegan Park District, 231 Ill. 2d 111,118 (2008).

Plaintiff states that current County Engineer Metcalf and the former County Engineer Winters were to operate, manage, inspect, maintain, and control roadways

and adjacent areas within the county. Amended Complaint Paragraph 4-5. Plaintiff also states that the County Highway Department and the County Engineer cooperated with the Township Road Commissioner to conduct draining studies, design, replace, maintain and control the roadways and adjacent areas for the safety of the traveling public. Amended Complaint Paragraph 8. Plaintiff states that the County Emergency Service and Disaster Agency coordinated functions necessary to prevent and alleviate injury to persons resulting from flooding. Amended Complaint Paragraph 9. Plaintiff states Sheriff Childress was appointed to police and patrol roadways, enforce the laws, and provide for the safety and wellbeing of the general public. Paragraph 6. Defendant contends that Plaintiff further alleges that Sheriff Childress provides and provided safety services in the areas of the townships. Defendant contends these arguments made by the Plaintiff allege the existence of specific public employees who occupied policy making and/or discretionary positions within the scope of Section 2-201 immunity.

745 ILCS 10/2-201 immunity is concerned with both the position held by the municipal employee and the action performed by the employee. "Except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." Snyder v. Curran Township, 167 Ill. 2d, 466, 474 (1995). Discretionary acts encompass decisions that are unique to the particular public office, as opposed to ministerial acts which are performed on a given set of facts in a prescribed manner, in obedience to a legal mandate, and without reference to the official's discretion as to the propriety of the act. Policy decisions "are these decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." Arteman v. Clinton Community Unit School District, 198 Ill. 2d 475, 484.

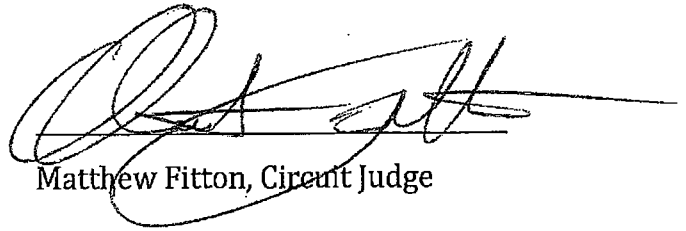
Defendant contends that pursuant to 2-201, Metcalf, Winters and Childress as well as the county pursuant to 2-109, are not liable for any injury which resulted from the exercise of discretion and policy. Defendant argues that Plaintiff's contentions fall squarely within the scope of their discretionary and policymaking authority which includes maintenance, repair and construction of roadways, patrolling and inspecting of the roadways, closing roads, installing barricades and warning signs, having an adequate amount of barricades, having an adequate emergency response system, and maintaining adequate road lighting. Defendant argues these functions are unique to the office of the County Engineer and Sheriff and requires that they exercise discretion in the performance.

Court does agree with Defendants and finds the County Defendants are entitled to immunity under Section 2-201 and 2-109.

In making its ruling in favor of the said Defendants in this case, the Court did consider all filings and arguments made by the parties as well as the appropriate statutory law and case law.

In finding for the Defendants with regards to the Wrongful Death Claim, the Court does not see the need to make any ruling regarding the Survival Action. This is a final and appealable order.

Dated: December 17, 2018



Matthew Fitton, Circuit Judge