

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
11-CVS-01084

COUNTY OF HAYWOOD

FILED  
DEC 14 P 12:33

MATT ROBINSON, Administrator of the  
Estate of JESSICA LYNN MARTIN,  
Plaintiff,

v.

PAMELA SMATHERS, individually and as  
an employee of the Haywood County  
Sheriff's Department; HAYWOOD  
COUNTY, a body politic; BOBBY R.  
SUTTLES, Sheriff of Haywood County, and  
TRAVELERS INSURANCE COMPANY;  
TRAVELERS CASUALTY COMPANY  
OF CONNECTICUTT; TRAVELERS  
CASUALTY INSURANCE COMPANY  
OF AMERICA; TRAVELERS  
CASUALTY AND SURETY COMPANY;  
TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA; TRAVELERS  
COMMERCIAL CASUALTY COMPANY;  
TRAVELERS COMMERCIAL  
INSURANCE COMPANY; TRAVELERS  
EXCESS AND SURPLUS LINES  
COMPANY; TRAVELERS GROUP; THE  
TRAVELERS HOME AND MARINE  
INSURANCE COMPANY; TRAVELERS  
INDEMNITY COMPANY; TRAVELERS  
INDEMNITY COMPANY OF AMERICA;  
TRAVELERS INDEMNITY COMPANY  
OF CONNECTICUT; TRAVELERS  
MOTOR CLUB; TRAVELERS  
PERSONAL INSURANCE COMPANY;  
TRAVELERS PERSONAL SECURITY  
INSURANCE COMPANY; TRAVELERS  
PROPERTY CASUALTY COMPANY OF  
AMERICA; TRAVELERS PROPERTY  
CASUALTY INSURANCE COMPANY;  
TRAVELERS PROTECTIVE  
ASSOCIATION OF AMERICA,  
Defendants.

ANSWER OF  
DEFENDANT PAMELA SMATHERS

NOW COMES the Defendant, Pamela Smathers, by and through the undersigned counsel, and answers the Plaintiff's Complaint as follows:

**FIRST DEFENSE**  
**(Rule 12(b)(6) Motion to Dismiss)**

Defendants move the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Plaintiff's Complaint for failure to state a claim upon which relief can be granted as to the Defendants

**SECOND DEFENSE**  
**(Rule 12(b)(1) Motion to Dismiss)**

Defendants move the Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the Plaintiff' Complaint for lack of subject matter jurisdiction.

**THIRD DEFENSE**

Defendant Pamela Smathers responds to the individually numbered paragraphs of Plaintiff's Complaint as follows:

1. Admitted upon information and belief.
2. Admitted.
3. The allegations contained in the first sentence of Paragraph 3 are admitted.

The remaining allegations contained in Paragraph 3 constitute conclusions of law for which no response is required. To the extent a response is required, denied as stated.

4. It is admitted that Defendant Pamela Smathers was acting within the course and scope of her employment with the Haywood County Sheriff's Department and that Plaintiff is suing Smathers in her official capacity and in her individual capacity. However, it is specifically denied that Defendant Smathers is liable to the Plaintiff under any statute, law, or theory.

5. It is admitted that Defendant Smathers was engaged in the course and scope of her employment for the Haywood County Sheriff. Except as admitted, denied as stated or for lack of information or belief.

6. The allegations contained in Paragraph 6 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

7. The allegations contained in Paragraph 7 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

8. The allegations contained in Paragraph 8 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

9. The allegations contained in Paragraph 9 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

10. Admitted upon information or belief.

11. It is admitted that Defendant Smathers examined and assessed Plaintiff Decedent's condition during the time when she was confined at the Haywood County Detention Center. Except as admitted, denied as stated.

12. It is admitted that Defendant Smathers examined and assessed Plaintiff Decedent's condition during the time she was confined at the Haywood County Detention Center. Except as admitted, denied as stated.

13. It is admitted that Defendant Smathers examined and assessed Plaintiff

Decedent's condition during the time she was confined at the Haywood County Detention Center. Except as admitted, denied as stated.

14. It is admitted that Defendant Smathers examined and assessed Plaintiff Decedent's condition during the time she was confined at the Haywood County Detention Center. Except as admitted, denied as stated.

15. Defendant incorporates her responses to Paragraphs 1 through 14 as if fully set forth herein.

16. The allegations contained in Paragraph 16, including subparts (a) – (e) are denied.

17. Denied.

18. The allegations contained in Paragraph 18, including subparts (a) – (d) are denied.

19. Defendant incorporates her responses to Paragraphs 1 through 18 as if fully set forth herein.

20. Denied.

21. Defendant incorporates her responses to Paragraphs 1 through 20 as if fully set forth herein.

22. Denied.

23. Defendant incorporates her responses to Paragraphs 1 through 22 as if fully set forth herein.

24. Denied.

25. The allegations contained in Paragraph 25 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required,

denied as stated.

26. Defendant incorporates her responses to Paragraphs 1 through 25 as if fully set forth herein.

27. Denied.

28. Denied.

29. Denied.

30. Defendant incorporates her responses to Paragraphs 1 through 29 as if fully set forth herein.

31. The allegations contained in Paragraph 31 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

32. The allegations contained in Paragraph 32 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

33. The allegations contained in Paragraph 33 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

34. The allegations contained in Paragraph 34 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

35. The allegations contained in Paragraph 35 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

36. The allegations contained in Paragraph 36 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

37. The allegations contained in Paragraph 37 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

38. The allegations contained in Paragraph 38 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

39. The allegations contained in Paragraph 39 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

40. The allegations contained in Paragraph 40 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

41. The allegations contained in Paragraph 41 are not directed towards this answering Defendant and therefore no response is required. To the extent a response is required, denied for lack of information or belief.

42. Denied.

43. Defendant incorporates her responses to Paragraphs 1 through 42 as if fully set forth herein.

44. The allegations contained in Paragraph 44 do not require a response except that it is denied that Defendant is liable to Plaintiff under any statute, law, or theory.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Defendant incorporates her responses to Paragraphs 1 through 50 as if fully set forth herein.

52. Denied as stated or for lack of information or belief.

53. Denied as stated or for lack of information or belief.

54. The remainder of Plaintiff's Complaint, not already fully answered herein, including plaintiff's Prayer for Relief, is denied.

#### **FOURTH DEFENSE**

Defendant Smathers pleads the doctrine of governmental, public official and sovereign immunity as a bar to some or all of Plaintiff's claims for relief.

#### **FIFTH DEFENSE**

Defendant Smathers was at all times relevant to this action, acting without malice and with the good faith belief that her duties were carried out in accordance with the laws and Constitution of the State of North Carolina and the laws and Constitution of the United States, and as such are protected by the doctrine of qualified immunity.

### **SIXTH DEFENSE**

Defendant Smathers at all times followed policies that are now, and have been during the period of time referred to in the Plaintiff's Complaint, conducted in all respects in accordance with state and federal laws, and in good faith.

### **SEVENTH DEFENSE**

As a further defense, Defendant Smathers, at all times relevant to this action, was legally justified in taking the reasonable and necessary steps with regard to the Plaintiff's decedent. Such legal justification is pled as an affirmative defense in bar of the Plaintiff's right to recover herein for the alleged, but denied, wrongful conduct of the Defendants.

### **EIGHTH DEFENSE**

Defendant Smathers did not engage in, promote or further any policy or practice which deprived Plaintiff's decedent of any rights secured by the Constitution or laws of this land.

### **NINTH DEFENSE**

Defendant Smathers pleads the public duty doctrine as a defense to all applicable claims asserted herein.

### **TENTH DEFENSE**

Defendant Smathers reserves the right to amend her Answer and to assert any additional affirmative defenses allowed by the North Carolina Rules of Civil Procedure, depending on any evidence discovered in pursuit of this litigation.



**PRAYER FOR RELIEF**

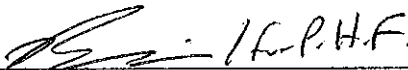
WHEREFORE, Defendant Smathers prays unto the Court as follows:

1. That plaintiff have and recover nothing of Defendant Smathers;
2. For the dismissal of Plaintiff's action, with prejudice;
3. For the cost of defending this action, including reasonable attorney's fees;
4. For such other and further relief as the Court may deem just and proper;  
and
5. For a trial by jury of all issues triable herein.

This the 17<sup>th</sup> day of December, 2011.

CRANFILL SUMNER & HARTZOG LLP

BY:

  
Patrick H. Flanagan (N.C. Bar No. 17407)  
*Attorneys for Defendant Pamela Smathers*  
P.O. Box 30787  
Charlotte, NC 28230  
Telephone (704) 332-8300

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the attached **Defendant Pamela Smathers' Answer** on all of the parties to this cause by:

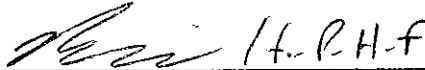
- Hand delivering a copy hereof to the attorney for each said party addressed as follows:
- Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:
- Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:
- Telecopying a copy hereof to the attorney for each said party as follows:

Steven R. Warren  
LONG, PARKER, WARREN,  
ANDERSON & PAYNE, P.A.  
P.O. Box 7216  
Asheville, NC 28802

William Hill  
FRAZIER HILL & FURY, RLLP  
P.O. Box 1559  
Greensboro, NC 27402-1559

This the 12<sup>th</sup> day of December, 2011.

CRANFILL SUMNER & HARTZOG LLP

BY:   
Patrick H. Flanagan (N.C. Bar No. 17407)  
*Attorneys for Defendant Pamela Smathers*  
P.O. Box 30787  
Charlotte, NC 28230  
Telephone (704) 332-8300

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF HAYWOOD

2011 JUN 23 PM 1:08

11 CVS 01084

MATT ROBINSON, Administrator of the )  
Estate of JESSICA LYNN MARTIN, )

HAYWOOD COUNTY, C.S.C.

Plaintiff, )

vs. )

**DEFENDANTS HAYWOOD COUNTY,  
BOBBY R. SUTTLES, AND OHIO  
CASUALTY INSURANCE  
COMPANY'S MOTION TO DISMISS  
AND ANSWER**

PAMELA SMATHERS, individually )  
and as an employee of the Haywood )  
County Sheriff's Department; )  
HAYWOOD COUNTY, a body politic; )  
BOBBY R. SUTTLES, Sheriff of )  
Haywood County; and OHIO )  
CASUALTY INSURANCE COMPANY, )

Defendant. )

**COMES NOW** Defendants Haywood County, and Bobby R. Suttles, in his official capacity and move to dismiss as follows:

**FIRST MOTION TO DISMISS**

**COMES NOW** the Defendant Haywood County and hereby moves to dismiss this action against it pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted against it, as it is not a proper party to this action under North Carolina caselaw and N.C.G.S. § 153A-103(1) and N.C.G.S. § 162-22.

**SECOND MOTION TO DISMISS**

**COMES NOW** the Defendant Bobby R. Suttles, and hereby moves to dismiss this action against him pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure

to state a claim upon which relief can be granted against him, as he is not a proper party to this action under North Carolina Case Law and N.C.G.S. 153A-103(1).<sup>1</sup>

### ANSWER

**COME NOW** Defendants Haywood County a body politic; Bobby R. Suttles, Sheriff of Haywood County; and Ohio Casualty Insurance Company, through counsel, and without waiving the foregoing Motion to Dismiss and hereby respond to Plaintiff's Complaint as follows:

1. Said documents speak for themselves. However, these Defendants do not contest the authenticity of same.

2. These answering Defendants lack sufficient information to form a belief as to the truth or falsity of the allegations contained in this. Therefore, these allegations are **DENIED**.

3. It is **DENIED** that Defendant Pamela Smathers was an employee of the Sheriff's Department as there is no such legal entity. The remaining allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

4. It is **DENIED** that Defendant Pamela Smathers was an employee of the Sheriff's Department as there is no such legal entity. The remaining allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

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<sup>1</sup> Defendants attach the Certified Policy Endorsement, which is a matter of public record. Defendants respectfully request that the Court take judicial notice of this matter of public record. *See Clark v. BASF Salaried Employees*, 329 F.Supp.2d 694, 697 (W.D.N.C. 2004) *aff'd* as modified by 142 Fed.Appx. 659 (4<sup>th</sup> Cir. 2005); quoting *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7<sup>th</sup> Cir. 1994) (holding that "the district court may also take judicial notice of matters of public record" without converting a 12(b)(6) motion into a motion for summary judgment.")

5. It is **DENIED** that Defendant Pamela Smathers was an employee of the Sheriff's Department as there is no such legal entity. The remaining allegations contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

6. It is **ADMITTED** that Bobby R. Suttles is the duly elected Sheriff of the County of Haywood. It is also **ADMITTED** that the Complaint contains allegations against Defendant Suttles in his official and individual capacities. Except as otherwise **ADMITTED** herein, **DENIED**.

7. It is **ADMITTED** that Haywood County is a body politic and is a political subdivision and constituent part of the state of North Carolina. It is **ADMITTED** that the County has a policy of liability insurance, the terms and conditions of which speak for itself. It is specifically **DENIED** that the County has waived Governmental Immunity for the claims in this action. Except as otherwise **ADMITTED** herein, the remaining allegations contained in this paragraph are **DENIED**.

8. It is **ADMITTED** that Ohio Casualty Insurance Company is the surety for the Haywood County Sheriff. Except as otherwise **ADMITTED** herein, the remaining allegations contained in this paragraph are **DENIED**.<sup>2</sup>

9. It is **ADMITTED** that Ohio Casualty Insurance Company provided the surety bond for the Haywood County Sheriff. Except as otherwise **ADMITTED** herein, the remaining allegations contained in this paragraph are **DENIED**.

10. It is **ADMITTED** that Jessica Lynn Martin was arrested for possession of drug paraphernalia and a violation of unsupervised probation for not paying the monetary charges of

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<sup>2</sup> In his original Complaint, Plaintiff named numerous "Travelers" Insurance Companies. These Defendants understand same have been dismissed as none of them are the bond company for the Sheriff.

her probation. It is **ADMITTED** that Jessica Lynn Martin was placed in the Haywood County Detention Center beginning on August 5, 2011 until August 10, 2011.

11. It is **ADMITTED** that upon information and belief Martin authored a Sick Call Request form on August 5, 2011. It is further **ADMITTED** that Defendant Smathers examined the decedent the same day. The remaining allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

12. It is **ADMITTED** upon information and belief that Martin authored a Sick Call Request form on August 8, 2011. The remaining allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

13. It is **ADMITTED** upon information and belief that Martin authored a Sick Call Request form on August 10, 2011 and Defendant Smathers examined decedent the same day. The remaining allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

14. It is **ADMITTED** that on August 10, 2011, an emergency call was placed to Haywood County 911 the nature of which was “emergency unconscious.” It is **ADMITTED** that Plaintiff’s decedent was rushed to the local hospital where she died the same day. The remaining allegations are **DENIED**.

**FIRST CAUSE OF ACTION**  
**(N.C.G.S.A. § 90-21.12)**

15. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-14 of the Amended Complaint.

16. The allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

17. It is **ADMITTED** that Jessica Lynn Martin died on 10 August 2011. The remaining allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

18. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

**SECOND CAUSE OF ACTION  
(Best Judgment)**

19. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-18 of the Amended Complaint.

20. The allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

**THIRD CAUSE OF ACTION  
(Reasonable Care)**

21. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-20 of the Amended Complaint.

22. The allegations in this Paragraph are not directed to these answering Defendants. It is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

**FOURTH CAUSE OF ACTION  
(Negligence)**

23. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-22 of the Amended Complaint.

24. It is **DENIED** that there was any failure and/or breach of legal duty to decedent on the part of Sheriff Suttles. There is no such entity as the Haywood County Sheriff's Department. The remaining allegations contained in this paragraph contain legal conclusions to

which no response is required. To the extent a response is required; it is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

25. It is **DENIED** that there was any failure on the part of Sheriff Suttles. The remaining allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; it is **DENIED** that these answering Defendants are in any way liable.

**FIFTH CAUSE OF ACTION  
(Reasonable Care)**

26. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-25 of the Amended Complaint.

27. It is **ADMITTED** that Plaintiff alternatively alleges this cause of action for wrongful death and that Plaintiff seeks monetary damages and injunctive relief but it is **DENIED** that the Defendants are in any way liable. Except as admitted herein, **DENIED**.

28. It is **DENIED** that these answering Defendants were negligent in any way. As such, the remaining allegations are **DENIED**.

29. It is **DENIED** that these answering Defendants were negligent in any way. As such, the remaining allegations are **DENIED**.

**SIXTH CAUSE OF ACTION  
(Reasonable Care)**

30. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-29 of the Amended Complaint.



31. The provisions of N.C.G.S. 162-8 speak for themselves. To the extent a response is required, it is **DENIED** Sheriff Suttles or any of these answering Defendants have any legal liability to Plaintiff.

32. **ADMITTED**, as to Defendant Ohio Casualty.

33. The provisions of State Law relating to the Statutory Bond speak for themselves. It is **DENIED** Sheriff Suttles and these answering Defendants have any legal liability to Plaintiff.

34. It is **DENIED** that pursuant to the provisions of N.C.G.S. 162-2 provide for the responsibility for the care and custody of inmates.

35. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

36. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

37. The statutory provisions speak for themselves. Further, the allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

38. Pursuant to state law, a Sheriff may be held liable for the acts and omissions of jailers but it is **DENIED** that these answering Defendants have any liability to Plaintiff in this matter.

39. It is **DENIED** that Jessica Lynn Martin was in the custody of the Haywood County Sheriff's Department as no such entity exists. It is **DENIED** these answering Defendants have any liability to Plaintiff in this matter.

40. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

41. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

42. **DENIED**.

**SEVENTH CAUSE OF ACTION  
(Reasonable Care)**

43. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-42 of the Amended Complaint.

44. It is **ADMITTED** that Plaintiff brings this action in the alternative and in addition to the foregoing claims for wrongful death contained within this Complaint but it is **DENIED** that these answering Defendants are in any way liable. Except as admitted herein, **DENIED**.

45. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

46. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

47. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

48. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

49. **ADMITTED**; however it is **DENIED** that the Defendants are in any way liable. Except as admitted herein, **DENIED**.

50. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

### **Rule 9(j) Certification**

51. These answering Defendants incorporate by reference as though fully set forth herein their responses to Paragraphs 1-42 of the Amended Complaint.

52. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

53. The allegations contained in this paragraph contain legal conclusions to which no response is required. To the extent a response is required; **DENIED**.

**WHEREFORE**, Defendants Haywood County, a body politic; Bobby R. Suttles, Sheriff of Haywood County; and Ohio Casualty Insurance Company deny that Plaintiff is entitled to any judgment whatsoever as against these Defendants.

### **FIRST FURTHER DEFENSE**

Without waiving it's Motion to Dismiss herein, Haywood County is not a proper Defendant pursuant to N.C. Gen.Stat. § 153A-103(1).

## **SECOND FURTHER DEFENSE**

The Defendants plead the Doctrine of Sovereign Immunity in bar of the State law claims against the Defendant Officers. In support thereof, Defendants attach a copy of the Policy Endorsement as Exhibit A.<sup>3</sup>

## **THIRD FURTHER DEFENSE**

The Defendants plead the Doctrine of Public Officers Immunity in bar of any State law claims made against them in their individual capacity for negligence.

## **FOURTH FURTHER DEFENSE**

To the extent that Plaintiff seeks redress against any of these answering Defendants pursuant to a theory of negligence, the Defendants plead the decedent's own contributory negligence to include, but not limited to, failing to act as a reasonably and ordinarily prudent person would under the same or similar circumstances. The aforementioned conduct of the Plaintiff constitutes contributory negligence as a proximate cause of any injuries suffered and bars any and all recovery from these Defendants based upon claims for negligence.

## **FIFTH FURTHER DEFENSE**

The aforementioned conduct on the part of the Plaintiff was a proximate cause of any injuries suffered and constituted willful, wanton and gross contributory negligence which is

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<sup>3</sup> Defendants attach the Certified Policy Endorsement, which is a matter of public record. Defendants respectfully request that the Court take judicial notice of this matter of public record. See *Clark v. BASF Salaried Employees*, 329 F.Supp.2d 694, 697 (W.D.N.C. 2004) *aff'd* as modified by 142 Fed.Appx. 659 (4<sup>th</sup> Cir. 2005); quoting *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7<sup>th</sup> Cir. 1994) (holding that "the district court may also take judicial notice of matters of public record' without converting a 12(b)(6) motion into a motion for summary judgment.")

hereby pled in bar of any claims for willful, wanton and/or gross negligence on behalf of these answering Defendants.

**SIXTH FURTHER DEFENSE**

Plaintiff's State law claims under the North Carolina Constitution should be dismissed with prejudice as Plaintiff has alleged other adequate remedies at law in tort under State common law.

**SEVENTH FURTHER DEFENSE**

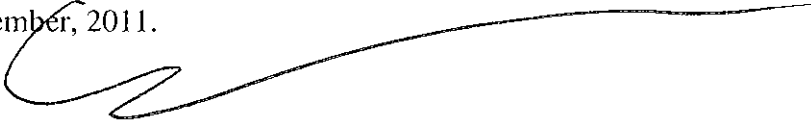
Defendant Ohio Casualty pleads the provision of Plaintiffs bond in bar of some or all claims against them.

**EIGHTH FURTHER DEFENSE**

These Defendants reserve the right to subsequently amend their affirmative defenses.

**WHEREFORE**, the Defendants Haywood County, a body politic; Bobby R. Suttles, Sheriff of Haywood County; and Ohio Casualty Insurance Company pray that Plaintiff's Complaint be dismissed, the Court find that Plaintiff is not entitled to recover, Defendants be awarded costs and attorneys fees for defense of the matter and that Defendants request a jury trial on all issues so triable.

This the 22 day of November, 2011.

  
\_\_\_\_\_  
William L. Hill (NCSB #21095)  
*Attorney for Defendants HAYWOOD COUNTY,  
a body politic; BOBBY R. SUTTLES, Sheriff of  
Haywood County; and OHIO CASUALTY  
INSURANCE COMPANY*

**OF COUNSEL:**

**FRAZIER, HILL & FURY, R.L.L.P.**

500 W. Friendly Avenue, Suite 100

P.O. Box 1559 (27402)

Greensboro, North Carolina 27401

Telephone: (336) 378-9411

Fax: (336) 274-7358

[whill@frazierlawnc.com](mailto:whill@frazierlawnc.com)

**CERTIFICATE OF SERVICE**

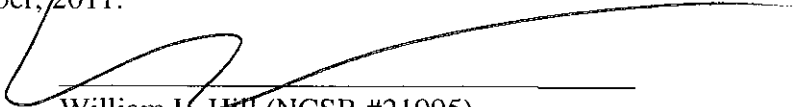
The undersigned does hereby certify that a copy of the foregoing **DEFENDANTS HAYWOOD COUNTY, BOBBY R. SUTTLES, AND OHIO CASUALTY INSURANCE COMPANY'S MOTION TO DISMISS AND ANSWER** was duly served upon all parties hereto in accordance with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure by:

- \_\_\_\_\_ Hand delivering a copy hereof to the attorney for each said party addressed as follows:
- X   Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:
- \_\_\_\_\_ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:
- \_\_\_\_\_ Telecopying a copy thereof to the attorney for each said party as follows:

Steve R. Warren  
LONG, PARKER, WARREN, ANDERSON & PAYNE, P.A.  
14 South Pack Square, Suite 600  
Asheville, NC 28801  
*Attorney for Plaintiff*

Patrick Flanagan  
CRANFILL, SUMNER, AND HARTZOG, L.L.P.  
2907 Providence Road, Suite 200  
Charlotte, NC 28211  
*Attorney for Defendant Smathers*

This the 22 day of November, 2011.

  
William L. Hill (NCSB #21095)  
*Attorney for Defendants HAYWOOD COUNTY,  
a body politic; BOBBY R. SUTTLES, Sheriff of  
Haywood County; and OHIO CASUALTY  
INSURANCE COMPANY*

**OF COUNSEL:**  
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