

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NORTH CAROLINA
 EASTERN DIVISION
 4:07-CV-00109 BR

BARBARA POLLARD,)
)
 Plaintiff,)
 v.)
)
 MICHELLE POLLARD, in her)
 individual capacity, LEE MOORE)
 in both his individual and official)
 capacity, RICK FISHER, in both his)
 individual and official capacity,)
 and Mac Manning in his official)
 capacity as SHERIFF OF PITT)
 COUNTY,)
)
 Defendants.)
 _____)

RESPONSE IN OPPOSITION
 OF DEFENDANTS' FISHER, MOORE,
 AND MANNING'S MOTION
 TO DISMISS

First, Plaintiff requests that a hearing be granted on the Motions to Dismiss due to the unusual nature of this lawsuit.

Second, Plaintiff would incorporate by reference her response to Lieutenant Michelle Pollard's Motion to Dismiss as well as the Plaintiff's Motion for Leave to Amend.

Third, it is time to speak plainly. But for the filing of this lawsuit, Stacey Pollard's death would not currently be under investigation. A cover-up of the highest order has taken place and if not for the fact the case has received much notoriety, it would not be under investigation by the SBI as directed by the District Attorneys Office and the cause of death would not be under review by the medical examiners office.

Without restating Plaintiff's entire response to Defendant Lieutenant Pollard, Plaintiff would reiterate that *Christopher v. Harbury* 536 U.S. 403 (2003) does not state, as Defendants Manning, Moore, and Fisher argue, that "Plaintiff must first show that her remedies in [state]

court have been foreclosed.” It does state that Plaintiffs in “access to court” cases have to establish in their pleadings that their access regarding underlying state claims has not meaningful and effective. *Id.* Defendants Manning, Pollard, Moore and Fisher continue to do everything in their power to ensure that the true facts do not come to light. What they have done collectively constitutes an egregious conspiracy to interfere with the Plaintiff’s access to the Courts. All the case law says that a Plaintiff’s access to the courts must be meaningful and effective. The law in our country does not allow a sheriff to say “my deputies are exempt from investigation if I so choose.” In so many words, that is the position Sheriff Manning urges the Court to adopt. Moreover, Defendant cites no Fourth Circuit authority for his position and he totally ignores *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), which remains good law.

A Sheriff in North Carolina is a powerful figure, and he carries considerable clout. When he tells the District Attorney, with whom he works side by side on thousands of criminal prosecutions, that there is “nothing to it” and this [fact] is not true and the allegation of extramarital affairs is “slanderous,” it is sure to have a chilling effect on any investigation. Then add that the District Attorney and the Sheriff’s wife are cousins and one can see that the Sheriff has impeded the Pollard investigation even after the case was referred to the State Bureau of Investigation, hereinafter SBI.

In fact, District Attorney Clark Everett has recently stated that he “made mistakes” in directing the investigation because Sheriff Manning had a large “cushion of credibility.” District Attorney Clark Everett added that it was a mistake not having gone to the medical examiner when he first learned – over a year ago -- that Defendant Lt. Michelle Pollard had admitted to pushing her epileptic husband into their swimming pool. In fact, Defendant Sheriff Manning requested a meeting (shortly after Pollard flunked the polygraph test and changed her story) and

explained to the District Attorney and the SBI that she didn't really push him in; that she just "dreamed" it. He also explained to District Attorney Clark Everett about the really good "secret" work she does for the Sheriff. In so many words, he told his close colleague that Defendant Pollard is a highly valued employee whom – the chief law enforcement officer in this county – says did nothing wrong. The clear implication, if not explicit instruction, was to leave it alone. And he did. Very little was done on the investigation after that meeting occurred.

All Defendants say Plaintiff is not prejudiced; that she has no damages because she has in fact filed a wrongful death action within the statute of limitations. Plaintiff wishes that were true, but it is not. The case must still be tried.

Plaintiff is a private citizen. She cannot command the services of trained law enforcement investigators, medical examiners, polygraph operators, crime scene technicians, and laboratory analysts. She does not have the funds to hire these kinds of experts and she doesn't have a county insurance policy to cover legal her expenses. She doesn't even have access to the SBI investigative report, though all Defendants and their counsel have had access to it since last year. District Attorney Clark Everett gave it to Sheriff Manning twice, though Sheriff Manning denies having a copy. Plaintiff and her attorney were allowed to "look" at it.

What Plaintiff cannot do is turn back the hands of time and do a proper investigation when it should have been done. What evidence was lost forever because it wasn't collected on the night that Stacey Pollard died and the weeks and months that followed? Plaintiff can't plead facts or leads that were never investigated. No crime scene tape was used to secure the scene nor was a log taken of those who were there. No luminol was used to look for blood. No fingerprints were taken. The neighborhood wasn't canvassed. No financial queries were made. No inquiry into the status of the marriage was made. The decedent's family had to call the

Sheriff's department to find out who was investigating the matter because they were not contacted.

The full extent of the prejudice to Plaintiff's access to the courts may never be known. Defendants' say on the one hand that there is no specific evidence of wrongful death and on the other hand that the Plaintiff is not prejudiced because the wrongful death action was filed on time. Defendants want their cake and to eat it too.

Stacey Pollard's death may be a murder and the Plaintiff is not on equal footing with the Sheriff to pursue the facts in a murder case. It is ridiculous to say otherwise. The Defendants' actions may allow a murderer to go free.

The true distinction in the *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), is that the death certificate was changed from suicide and the responsible party was prosecuted for murder – before the statute of limitations expired on the civil wrongful death action. In this case, the cause of death is still under review. Originally, the cause of Stacey Pollard's death was deemed accidental. Plaintiff here was forced to proceed to file suit with a death certificate which deemed the death to be accidental. To further show the prejudice, Plaintiff could not even show the medical examiner the conflicting evidence that the death certificate was based upon because the District Attorney chose to only give copies of the SBI file (which contains the conflicting accounts by Defendant Pollard in her own hand) to the Sheriff and not the Plaintiff or the medical examiner. Only because Sheriff Manning used the power of his office to give a press conference wherein he said the allegations in the complaint were false, did the medical examiner's office become aware that Defendant Lieutenant Pollard had changed her story. See Dr. Gilliland's previously filed affidavit.

Currently, Plaintiff's situation is that she still doesn't have access to the SBI file (Opposing Counsel, Scott Hart, refused to enter into a stipulation with the SBI allowing Plaintiff access to it), the evidence that was collected and she does not know what the cause of death will read on the "yet-to-be-updated" death certificate. The statute of limitations will run out in about seventy (70) days and Plaintiff is forced to proceed now literally encumbered by blinders. Her other alternative, according to Defendants, is to have gone to state court with little or no evidence, then lost due to the cover-up conspiracy, and only then come to federal court. At that time, of course, their position would be that since a court determined no wrongful death occurred there could be no denial of access to the courts for an invalid wrongful death claim, a true "Hobson's Dilemma."

Plaintiff's best evidence of wrongful death is Defendant Lieutenant Michelle Pollard's own admission to pushing her epileptic husband into the pool which Defendant Sheriff Manning ALONE has recanted on her behalf. Other than that, Plaintiff will be forced to submit evidence that shows that neither of her accounts is accurate or credible.

Defendants Lieutenant Pollard, Sheriff Manning and Chief Moore have conspired to obstruct justice by denying Plaintiff evidence of motive. Perhaps the most egregious instance involves allowing Defendant Pollard to be directly involved in the investigation of her own husband's death – even when an anonymous caller hinted that Defendant Pollard may have caused his death and that she was involved in an extra-marital affair with a known felon on the very day of his call. Defendant Sheriff Manning allowed Defendant Pollard to listen to the call along with her felon friend, Ray Thompson, who was able to identify the caller as Marvin Cox, a man who dated Thompson's mother. Defendant Pollard then typed a statement for Marvin Cox to sign stating that his call was false. Marvin Cox, who is illiterate, signed the statement even

though Plaintiff has video tape of Defendant Pollard and a married man coming out of a hotel in Havelock that very day.

To further evidence the conspiracy, the entire investigation into the anonymous caller was withheld from the lead investigator for the Pitt County Sheriffs Office assigned to the case and it was withheld from the SBI and the District Attorney. In fact, the lead investigator was suspended on the false belief that she had forwarded a digital recording of the call to the Plaintiff's attorney. Yet Defendant Manning gave a press conference stating that Defendant Pollard had done nothing wrong while leaving out the damaging details listed above. This shows that he is still using the power of his office to improperly affect the Plaintiff's access to the courts.

Last, when the complaint was originally filed, the Plaintiff was aware of the rumors of numerous affairs by Defendant Pollard with sheriffs deputies but did not expect to find that Sheriff Manning himself had been seen at Defendant Pollard's residence several times this year by at least one member of each household on the road she lives upon. It is difficult to draw but one conclusion from this information especially when one adds that Defendant Pollard has been allowed to keep her job even though she has appeared topless in a public bar within the past year.

A last fact that this Court should consider is that the extent of the cover-up will never be known unless this case is allowed to go forward and discovery is allowed. Deputies serve at the leisure of the Sheriff and they can not come forward without risking their jobs and the financial security of their families. Only under subpoena in a deposition will many officers admit the truth of the scandalous nature of the whole sordid affair. The Plaintiff does not invoke the authority of this Court lightly. The fact is that but for the authority of this Court to decide whether a citizen's constitutional right to access the courts has been denied, the Plaintiff has no where to go. And if

the Court dismisses this action, the parties that have been spurred into action by the filing of this action will no doubt take the path of least resistance and do nothing once again. And Stacey Pollard and the Plaintiff, his mother, will be denied justice once again.

For the foregoing reasons, the plaintiff respectfully requests that this Court deny the defendants' motion to dismiss.

This the 10th day of September, 2007.

/s/ David C. Sutton
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum of Law in Opposition of Defendant Pollard's Motion to Dismiss was duly served upon all relevant parties in accordance with the provisions of Rule 5 of the Federal Rules of Civil Procedure by depositing it in the United States Mail this the 10th day of September, 2007, postage prepaid, addressed as follows:

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