AL-ZAHRANI v. DONALD RUMSFELD, et al Doc. 33

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Talal AL-ZAHRANI **and** **Ali Abdullah Ahmed AL-SALAMI** **In their individual capacities;** **and** **Talal AL-ZAHRANI,** **As the representative of the estate of** **Yasser AL-ZAHRANI;** **and** **Ali Abdullah Ahmed AL-SALAMI,** **As the representative of the estate of** **Salah Ali Abdullah Ahmed AL-SALAMI** **Plaintiffs,** **vs.** **Donald H. RUMSFELD et al.** **and** **UNITED STATES** **Defendants.**	**Civ. No. 1:09-cv-00028 (ESH)**

THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTIONS FOR RECONSIDERATION AND LEAVE TO AMEND THE AMENDED COMPLAINT

INTRODUCTION

Plaintiffs Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami are the fathers of two deceased aliens, Yasser Al-Zahrani and Salah Ali Abdullah Amhed Al-Salami, who died during

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their detention at U.S. Naval Station Guantanamo Bay, Cuba ("Guantanamo"). The detainees are alleged to have been detained by the United States at Guantanamo as "enemy combatants" for over four years until their deaths on June 10, 2006. The U.S. military concluded that the deaths were suicides by hanging.[1]

In an Amended Complaint filed with this Court on January 29, 2009, which includes fourteen claims for relief, Plaintiffs brought suit against twenty-four U.S. officials in their individual capacities ("the individual defendants") and the United States.[2] On June 26, 2009, the United States filed a Motion For Substitution (Doc. 14) pursuant to the *Westfall* Act, 28 U.S.C. § 2679(b)(1), in which it moved this Court for an Order substituting the United States for the individual defendants for Claims I to IV ("the ATS claims") of the Amended Complaint. The United States also filed a Motion to Dismiss (Doc. 15) on the grounds that the United States has not waived its sovereign immunity with respect to the ATS claims; the ATS claims and Claims

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[1] A more fulsome recitation of the pertinent factual allegations by Plaintiffs is set forth in this Court's order dated February 16, 2010. *See* Mem. Op. (Doc. 25) at 2-4.

[2] In Claims I to IV, Plaintiffs allege violations of the Alien Tort Claims Act, also commonly referred to as the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, by the individual defendants for: prolonged arbitrary detention, in violation of the law of nations (Amend. Comp. ¶¶ 199-205); torture, in violation of the law of nations and various treaties (Amend. Comp. ¶¶ 206-214); cruel, inhuman or degrading treatment or punishment, in violation of the law of nations and various treaties (Amend. Comp. ¶¶ 215-223); and violations of the Third and Fourth Geneva Conventions (Amend. Comp. ¶¶ 224-234). In Claims VII to XIV, Plaintiffs allege violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, by the United States for: failure to protect the detainees from harm (Amend. Comp. ¶¶ 254-264); medical negligence (Amend. Comp. ¶¶ 265-272); medical malpractice (Amend. Comp. ¶¶ 273-281); intentional infliction of emotional distress toward the detainees (Amend. Comp. ¶¶ 282-289); battery (Amend. Comp. ¶¶ 290-298); intentional infliction of emotional distress toward the detainees' fathers (Amend. Comp. ¶¶ 299-305); negligent infliction of emotional distress toward the detainees' fathers (Amend. Comp. ¶¶ 306-317); and wrongful death (Amend. Comp. ¶¶ 318-325).

VII to XIII are barred by the foreign country exception to the FTCA, 28 U.S.C. § 2680(k); and Plaintiffs failed to file jurisdictionally adequate administrative claims.

On February 16, 2010, this Court granted the United States' Motion For Substitution, holding that the individual defendants were acting within the scope of employment with respect to the four ATS claims. *See* Mem. Op. (Doc. 25) at 14-17. This Court also granted the United States' Motion to Dismiss on the grounds that the foreign country exception to the FTCA, 28 U.S.C. 2680(k), barred the ATS claims and Claims VII to XIII, *see* Mem. Op. (Doc. 25) at 19-25, and that Plaintiffs failed to file jurisdictionally adequate administrative claims with respect to Claims I to IV and VII to XIII. *See* Mem. Op. (Doc. 25) at 25 n.12.

On March 16, 2010, Plaintiffs filed a Motion For Reconsideration In Light of Newly-Discovered Evidence (Doc. 27) pursuant to Federal Rule of Civil Procedure 59(e) and a Motion For Leave To Amend In Light Of Newly-Discovered Evidence (Doc. 28) pursuant to Federal Rule of Civil Procedure 15(a)(2). The so-called newly-discovered evidence consists of statements purportedly made by former soldiers – one of whom (Sergeant Hickman) claims to have been on duty in an observation tower the night the detainees died – as set forth in a *Harper's Magazine* article ("the magazine article") released on-line on January 18, 2010.[3] Based ostensibly on the version of events set forth in the magazine article, Plaintiffs have devised an additional theory of liability, the gist of which is that the detainees did not commit suicide in their cells, but were the victims of homicide that occurred at a secret "black site" location within

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[3] Plaintiffs and their counsel claim that this newly-discovered evidence came to their attention only after their briefing was complete. *See* Pls.' Mot. for Recons. at 3. Plaintiffs attach the magazine article to their motion for reconsideration, *see* Doc. 27-1, and incorporated it in its entirety into the Proposed Second Amended Complaint explicitly and by attaching it as an exhibit.

Guantanamo referred to as “Camp No,” and that one or more persons subsequently engaged in an elaborate cover-up to hide the true cause of the detainees’ deaths. Plaintiffs argue that such conduct was outside the scope of employment, and ask this Court to reconsider its decision to allow substitution of the United States for the individual defendants.

This Court should deny both motions. Regarding the motion for reconsideration, the evidence Plaintiffs rely on is not newly discovered, nor would it alter this Court’s conclusion that the individual defendants were acting in the scope of employment. Regarding the motion to amend their complaint, Plaintiffs’ proposed amended complaint would not survive a motion to dismiss and amendment would therefore be futile.

ARGUMENT

I. The Motion For Reconsideration Should Be Denied

Before this Court can consider Plaintiffs’ motion to amend their complaint, the Court must first rule upon their motion to reconsider under Fed. R. Civ. P. 59(e). *See Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 27-28 (D.D.C. 2001) (citations omitted).[4] As this Court has stated, “the reconsideration and amendment of a previous order is an extraordinary measure,” *Rann v. Chao*, 209 F. Supp. 2d 75, 78 (D.D.C. 2002), and “[a] trial court has broad discretion to grant or deny a motion for reconsideration.” *McDonnell Douglas Corp. v. NASA*, 109 F. Supp.

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[4] *See also Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (“Rule 15(a)’s liberal standard for granting leave to amend governs once the court has vacated the judgment. . . . But to vacate the judgment, [Plaintiffs] must first satisfy Rule 59(e)’s more stringent standard”) (citing 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1489 at 694 (2d ed. 1990)); *Confederate Mem’l Ass’n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *Helm v. Resolution Trust Corp.*, 84 F.3d 874, 879 (7th Cir. 1996) (plaintiff “must have first succeeded on a Rule 59(e) . . . motion before the court could grant her leave to file an amended complaint”).

2d 27, 28 (D.D.C. 2000) (citations omitted); *see also Niedermeier*, 153 F. Supp. 2d at 28 ("Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances.").

To succeed in a motion to reconsider, a litigant must demonstrate that there is (1) a change in the law; (2) newly available evidence; or (3) a need to correct a clear error or prevent manifest injustice. *See Firestone v. Firestone*, 76 F.3d 1205, 1205 (D.C. Cir. 1996); *Ciralsky v. CIA,* 355 F.3d 661, 671 (D.C. Cir. 2004); *Fox v. Am. Airlines Inc*., 389 F.3d 1291, 1296 (D.C. Cir. 2004). It is on this second basis that Plaintiffs bring their motion for reconsideration of this Court's prior ruling that the individual defendants were acting within the scope of employment. Plaintiffs have failed to carry their burden under Rule 59(e) for several reasons.

A. Plaintiffs have not come forward with specific facts that support their new allegations

As stated above, Plaintiffs now allege that the detainees were whisked away to a secret location within Guantanamo where they were killed at the hands of their interrogators, and argue that such conduct – *i.e*., "direct involvement in homicides at a 'black site' at Guantanamo" – was outside the scope of employment. The so-called newly discovered evidence that Plaintiffs claim to support such a theory boils down to this: a former soldier (Sergeant Hickman), who was on guard duty in an observation tower the night of the detainees' deaths, claims to have seen three unidentified prisoners being placed into a paddy wagon, which then traveled in the direction of what he believes, but does not claim to know for sure, is a secret "black site" within Guantanamo where interrogations sometimes occur. Sometime later, a paddy wagon returns, ostensibly from this "black site," and backs up to the medical clinic as if it was preparing to unload something. Later that evening, word circulates through Camp Delta that three detainees died that night, and

the preliminary conclusion was that they had committed suicide. In the aftermath of the detainees' death, military personnel stationed at Guantanamo were told not to discuss the deaths of the detainees with anyone.

What is most notable about these factual assertions is what they lack. The former soldiers do not claim to have seen these particular detainees being loaded into the paddy wagon, nor do they claim to know (or have anyway of knowing) whether this paddy wagon actually went to this secret "black site," let alone what occurred there. Indeed, at no time do they affirmatively claim to have any first-hand knowledge that the detainees were killed. Moreover, the former soldiers do not claim to have seen whether anything or anybody (let along these specific detainees) actually were unloaded from the paddy wagon into the medical clinic. Regarding the order by Defendant Bumgarner that base personnel not publicly discuss the events surrounding the detainees' deaths, the soldiers did not state, nor do Plaintiffs claim, that this order was a violation of any regulation, protocol, or standard operating procedure.

When challenging the government's scope of employment certification, the plaintiff "bears the burden of coming forward with specific facts rebutting the certification." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006) (citation omitted). The specific facts described above, taken as true and at face value, are woefully insufficient to support Plaintiffs' allegation that the detainees were killed at a secret site on Guantanamo. Indeed, what Plaintiffs really are asking this Court to do is not just accept their "newly discovered evidence" as true, but also assume the truth of the speculative scenario that Plaintiffs have conjured up based on these soldiers' putative statements. Accordingly, there is no need for this Court to reach the hypothetical issue of whether the killing of the detainees at a "black site" at Guantanamo was

within the scope of employment, since the "newly discovered evidence" proffered by Plaintiffs, even if accepted as true, do not objectively support such a theory.

The same can be said for Plaintiffs' allegation that certain persons engaged in a cover-up to hide the true nature of the detainees' deaths. The so-called cover-up, as alleged by Plaintiffs, consisted of an order by Defendant Bumgarner that none of the guards make any comments to the media that would undermine the preliminary determination that the detainees had committed suicide in their cells, *see* Pls.' Mot. for Recons. at 6, followed by various acts of "concealing evidence" and "obstructing the military's investigation into the deaths." *See* Pls.' Mot. for Recons. at 21. Although the motion for reconsideration does not go into much detail regarding what specific actions were taken that constituted "concealing evidence" and "obstructing the military's investigation," the magazine article and the Proposed Second Amended Complaint describe an order being given that certain guards on duty the night of the incident not provide sworn statements during the course of the investigation; perceived anomalies with the autopsy (to wit, a failure to explain broken hyoid bones); and the failure to include certain neck organs when the detainees' remains were returned to their families. *See* Doc. 27-1 at 10-11; Pls.' Prop. Sec. Amend. Compl. at ¶¶ 57, 103.

While Plaintiffs assert that the above acts were part of an elaborate cover-up, they fail to explain how any of these actions were forbidden or failed to comply with any regulations or standing orders. Plaintiffs have not come forward with any regulations, protocols, standard operating procedures, or anything else that obligates the military to conduct an autopsy in a particular manner or to return the remains in any particular manner, that dictate when and from whom sworn statements are to be taken for purposes of an investigation, or that forbid a

commanding officer from ordering his troops not to publicly discuss military-related matters. Therefore, once again, even if the Court were to accept Plaintiffs' factual assertions as true, they hardly support the speculative scenario that Plaintiffs have conjured up. Accordingly, the Court need not reach the hypothetical issue of whether a cover-up of the sort alleged was within the scope of employment.

B. Plaintiffs' motion is not based on "newly discovered" evidence

Even if the Court were to accept as true Plaintiffs' new allegation that the detainees did not commit suicide in their cells, but died at the hands of their interrogators at a "black site," Plaintiffs' motion for reconsideration should nevertheless be denied because this allegation is not based on newly discovered evidence.

"New evidence," as the term is employed in Rule 59(e), constitutes evidence which is "newly discovered or previously unavailable despite the exercise of due diligence." *Int'l Painters & Allied Trade Indus. Pension Fund v. Design Tech.*, 254 F.R.D. 13, 18-19 (D.D.C. 2008).[5] Plaintiffs' failure to discover the existence of these former soldiers and their version of events, as eventually recounted in the magazine article, evinces a complete lack of due diligence.

It is widely known that the Seton Hall University Law School's Center for Policy and Research ("Seton Hall") has been closely monitoring the detention and intelligence gathering activities at Guantanamo.[6] The publicly available and widely publicized reports published by

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[5] *See also Schoenbohm v. FCC*, 204 F.3d 243, 250 (D.C. Cir. 2000) (citing *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283(1987) (even if evidence is "newly raised," it is not considered "new" evidence if it was "previously available.").

[6] As explained on their website:

(continued...)

Seton Hall, referred to as "Guantanamo Reports,"[7] include two reports specifically addressing the deaths of the detainees: "June 10th Suicides at Guantanamo," published on August 21, 2006,[8] and "Death in Camp Delta," published on December 17, 2009.[9] The former mentions that the

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6 (...continued)

> Since 2006, Fellows with the Center for Policy and Research have been analyzing government data to illuminate the interrogations and intelligence practices of the United States. The findings have been quite revealing, showing that what's found in the data is often the best divulger of the truth. The reports have been introduced into the Congressional record by the Senate Armed Services Committee, the Senate Judiciary Committee, the House Armed Services Committee, and as part of a Resolution by the European Parliament.

http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm (last visited April 14, 2010).

7 Seton Hall's website touts that:

> The reports have been cited by media throughout the world, including television and radio networks such as CBS, ABC, NBC, MSNBC, CNN, NPR, PBS, BBC, Fox News, and the Christian Broadcasting Network; newspapers such as The New York Times, Los Angeles Times, Washington Post, Wall St. Journal, Toronto Star, Guardian (UK), Der Spiegel (Ger.), Le Monde (Fr.), Times of India, Jerusalem Post, New Zealand Times, Manila Times; magazines such as Time, Newsweek, The New Yorker, Rolling Stone, The Village Voice, Harpers, The Nation, Mother Jones, and The Economist; and Web-based news sources including The Huffington Post, Salon, Slate.com, Daily Kos, Yahoo News, AOL News, Amnesty USA, and others simply too numerous to list here.

http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm (last visited April 14, 2010).

8 *See* Mark P. Denbeaux et al., *June 10th Suicides at Guantanamo: Government Words and Deeds Compared* (August 21, 2006), available at http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm (last visited April 14, 2010) (hereinafter "June 10th Suicides").

9 *See* Mark P. Denbeaux et al., *Death In Camp Delta* (December 7, 2009), available at http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm (last visited April 14, 2010) (hereinafter "Death In Camp Delta").

families of the deceased detainees suspected that the three men did not die as a result of suicide, but rather at the hands of American guards. Indeed, Plaintiffs acknowledge that they have held this suspicion all along. *See* Pls.' Mot. for Recons. at 3 ("Plaintiffs have always questioned the official account of their sons' deaths."). In the latter report, which consists of a very critical review of the Naval Criminal Investigative Service's report ("NCIS report"), the authors call into question the official determination that the detainees committed suicide in their cells. Thus, for a period of time ranging from more than two years before the filing of Plaintiffs' Amended Complaint to approximately three months before this Court dismissed Plaintiffs' claims, an organization which holds itself out as one of the premier watchdogs of Guantanamo was investigating the circumstances of the detainees deaths. What is more, the magazine article states, and Plaintiffs acknowledge, that attorneys from Seton Hall had been speaking with Sergeant Hickman (the soldier whose statements Plaintiffs most rely on) as early as January of 2009 and setting up meetings between him and the Department of Justice throughout 2009 (the earliest of which occurred on February 2, 2009) where he recounted his version of events. *See* Pls.' Mot. for Recons. at 3 and Doc. 27-1 at 11-12.

While counsel may not have had actual knowledge of the soldiers' specific versions of events prior to publication of the magazine article, counsel is careful not to assert that they were unaware of the investigative activities of Seton Hall or that they had been contacted by a former soldier (Sergeant Hickman) who was relaying a version of events that, in his mind, called into question the government's official conclusion that the detainees committed suicide. In any event, it is difficult to understand why an attorney, whose clients believed all along that their sons were killed at the hands of American interrogators, would decide to abandon this theory of liability

before reaching out to an organization that not only touts itself as one of the premier watchdogs of Guantanamo, but was specifically investigating the death of the detainees. A simple phone call to Seton Hall would have revealed well in advance of both this Court's ruling and the close of briefing that they had been contacted by a former soldier who was communicating to them and several government officials the version of events that eventually appeared in the magazine article.[10] The failure to make such inquiries represents a total lack of due diligence on the part of Plaintiffs' counsel, which alone justifies the denial of their motion to reconsider. *See Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006) (denying motion for reconsideration even though plaintiff did not discover evidence before ruling because plaintiff failed to pursue discovery diligently and could have found evidence before ruling).

Furthermore, regardless of whether Plaintiffs' counsel exercised due diligence, "[a] Rule 59(e) motion is not a . . . means to bring before the Court theories or arguments that could have been advanced earlier," *W.C. & A.N. Miller Co.'s v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997).[11] Yet this is exactly what Plaintiffs seek to do. There is no getting around the fact that the

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[10] Plaintiffs' counsel may attempt to argue that any communications between Sergeant Hickman and attorneys from Seton Hall could not have been revealed because of the attorney-client privilege. However, such an argument would be baseless since Sergeant Hickman recounted his version of events to the FBI and the Department of Justice, thus destroying whatever tenuous claim to attorney-client privilege that may have existed prior to these meetings with the government.

[11] *See also Kattan by Thomas v. Dist. of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993); *Jones v. Bernanke*, 538 F. Supp. 2d 53, 60 (D.D.C. 2008); *Burlington Ins. Co. v. Okie Dokie, Inc.*, 439 F. Supp. 2d 124, 128 (D.D.C. 2006) (citations omitted); *Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4, 8-9 (D.D.C. 2005); *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 421 (D.D.C. 2005); *Piper v. United States Dep't of Justice*, 312 F. Supp. 2d 17, 21 (D.D.C. 2004).

magazine article was discovered by Plaintiffs well before this Court dismissed their claims.[12] Indeed, as Plaintiffs concede, this article was publicly available and known to them on January 18, 2010, almost a full month *before* this Court dismissed Plaintiffs' claims.[13] There is no plausible reason why Plaintiffs could not have sought to advance these new allegations and claims by seeking leave to amend their complaint during the pendency of the filings, especially

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[12] Plaintiffs seem to think that evidence, to be considered newly discovered, need only be unearthed prior to the completion of both parties' filings. On the contrary, Courts routinely deny Rule 59(e) motions where all relevant facts were known by the party prior to the entry of judgment and the party failed to present those facts. *See Niedermeier*, 153 F. Supp. 2d at 30 (D.D.C. 2001) (rejecting plaintiff's claim that evidence was newly discovered when three months had passed between time of discovery and ruling on motion to dismiss); *Artis v. Bernanki*, 256 F.R.D. 4, 6 (D.D.C. 2009) (declaration did not amount to "new evidence," since the statements could have been presented when the dismissal motion was pending); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 178 F.R.D. 323, 327 (D.D.C. 1998) (denial of Rule 59(e) motion was not an abuse of discretion when plaintiff's counsel knew all relevant facts prior to entry of judgment and failed to assert them), *affd*, 235 F.3d 588 (D.C. Cir. 2001); *Hagerman v. Yukon Energy Corp*., 839 F.2d 407, 414 (8th Cir. 1988) (denying motion to reconsider when evidence could have been submitted prior to ruling on dispositive motion); *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (upholding lower court's dismissal with prejudice and denial of motion to reconsider where, prior to judgment, plaintiff chose to stand on complaint rather than amend); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993) (dismissing suit without leave to amend held not to be an abuse of discretion, because plaintiff did not attempt to amend complaint until after judgment was entered); *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008) ("[M]otions under Rule 59(e) cannot be used to present evidence that could have been presented before judgment was entered.").

[13] The magazine article's author appeared on the same day of its publication on MSNBC to discuss the article's contents. *See* Transcript of Keith Olbermann Interview with Scott Horton on Jan. 18, 2010, *available at* http://www.msnbc.msn.com/id/34937503/ (last visited Mar. 25, 2010). Thus, even if Plaintiffs or their counsel did not have actual knowledge of this magazine article on the date it was published on-line, they would be charged with such knowledge given the publicity that surrounded its publication. *See United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) ("Where events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence."). Moreover, the magazine article recounts a pre-publication interview with Plaintiff Talal Al-Zahrani, which supports a reasonable inference that Plaintiffs were aware of the allegations discussed in the article long before January 18, 2010. *See* Doc. 27-1 at 9-10, 14.

considering that Plaintiffs obviously did little more than simply paste select excerpts of the magazine article into their Proposed Second Amended Complaint. *Cf. Niedermeier*, 153 F. Supp. 2d at 30 (D.D.C. 2001) (noting that three months had passed between time of discovery and ruling on motion to dismiss). Instead, while the briefing was pending before this Court, Plaintiffs opted to take the unusual step of seeking a status conference "to discuss next steps in this case." *See* Pls.' Mot. for Recons. at 7. Moreover, Plaintiffs were not even prepared to take such a step until "just prior to February 16, 2010, when the Court issued its decision." *Id*. This delay in coming forward with the former soldiers' version of events is inexplicable. Accordingly, Plaintiffs' motion for reconsideration should be denied.

The same can be said for the so-called evidence cited by Plaintiffs to support their allegation of a cover-up. All of the factual assertions to support their allegations of a cover-up (described *supra* at 7) were learned by Plaintiffs, at the very latest, when the magazine article was published. For reasons explained *supra*, information learned from the magazine article cannot be considered newly discovered.

In fact, the majority of the factual assertions related to the alleged cover-up – to wit, the request that guards on duty the night of the incident not provide sworn statements, the condition of the remains (*i.e*., missing neck organs), and the perceived anomalies with the autopsies (*i.e.,* the failure to explain a broken hyoid bone) – were known or knowable to Plaintiffs long before the magazine article was published.[14] As mentioned, the report by Seton Hall titled "Death In

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[14] This is especially true regarding the neck organs missing from the remains. It is difficult to see how this could be considered newly discovered evidence when the remains were not only presented to the detainees's families in the complained-of condition several years ago, the condition of the remains caused the families to immediately suspect that the detainees had not
(continued...)

Camp Delta" was publicly released on December 7, 2009, over three months before this Court dismissed Plaintiffs' claims. In this report, the authors highlight some of the same supposed indications of a cover-up that Plaintiffs now attempt to characterize as newly discovered evidence. *See* Death In Camp Delta at 21 (failure to account for broken hyoid bone during autopsy) and 34, 41-47 (failure to have certain personnel provide sworn statements). Moreover, this report cannot be said to have broken any news with respect to the circumstances surrounding the detainees deaths that was unknown or unknowable to Plaintiffs prior to its publication on December 7, 2009. Rather, the report, is an analysis of the NCIS report, which was released to the public in August of 2008, as well as other publicly available sources. *See* Death In Camp Delta at 7-8. There is no reason why Plaintiffs could not have undertaken the same investigation done by Seton Hall – which was based on information available months before the Amended Complaint was ever filed and over 18 months before this Court dismissed their claims – in order to craft many of the same exact allegations they now belatedly seek to bring before the Court. [15] Accordingly, the facts Plaintiffs rely on to support allegations of a cover-up do not qualify as newly discovered evidence. *See Schoenbohm*, 204 F.3d at 250 (even if evidence is "newly raised," it is not considered "new" evidence if it was "previously available.") (citations omitted).

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[14] (...continued)
committed suicide.

[15] In fact, Plaintiffs admit that they did review the NCIS report prior to filing their Amended Complaint. *See* Pls.' Mot. for Recons. at 3 ("The NCIS report . . . served as the basis for Plaintiffs' Complaint and Amended Complaint.").

C. The individual defendants were acting in the scope of employment

In any event, even if this Court were to accept as true the accusation that the detainees were in fact secreted away to an unauthorized "black site" at Guantanamo where they were killed, the persons who engaged in such acts nevertheless were acting in the scope of employment.

As the Court well knows, the Restatement's test for whether an employee's conduct is within the scope of employment is whether: (1) "it is of the kind he is employed to perform;" (2) "it occurs substantially within the authorized time and space limits;" (3) "it is actuated, at least in part, by a purpose to serve the master;" and (4) "if force is intentionally used by the servant against another, the use of force is not unexpected by the master." Restatement (Second) of Agency § 228 (1958). Plaintiffs argue that the alleged conduct was outside the scope of employment because it "fell outside of sanctioned policies and standard procedures" and was "prohibited by the military's own rules." *See* Pls.' Mot. for Recons. at 18. Plaintiffs go on to cite the Army Field Manual, the Uniform Code of Military Justice, and various Standard Operating Procedures for Camp Delta as employer polices or directives that *ipso facto* must have been violated given that the detainees wound up dead. Plaintiffs clearly misunderstand the first prong of the Restatement's test.[16]

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[16] This Court observed that, according to Plaintiffs' Amended Complaint, "[t]he individual defendants conduct in this case, like the conduct in *Rasul*, was 'pursuant to standard operating procedures' and was 'use[d] in connection with interrogations at Guantanamo.'" Mem. Op. (Doc. 25) at 16 (citing Am. Compl. ¶¶ 57, 61). Taking this allegation to be true, the Court found that the conduct met the test for scope of employment – that is, the conduct was "foreseeable and incidental to the defendants' positions as military, medical, or civilian personnel in connection with Guantanamo . . ." Mem. Op. (Doc.) at 16-17. Plaintiffs clearly have misinterpreted this Court's holding to mean that if the converse were true – that is, an employee failed to abide by an (continued...)

The first prong of this test focuses on the "foreseeability" of the conduct and whether it was a "direct outgrowth" of the employer's objective,[17] not on whether that employee strictly adhered to the employer's code of conduct, guidelines, or even explicit instructions. Indeed, as the Restatement makes clear, "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency § 230 (1958). As the Restatement further explains:

> A master cannot avoid responsibility for the negligence of a servant by telling him to act carefully. He cannot limit the servant to the pound of flesh and direct him not to spill blood. But the rule stated in this Section goes much further; it includes specifically forbidden acts and forbidden means of accomplishing results. A master cannot direct a servant to accomplish a result and anticipate that he will always use the means which he directs or will refrain from acts which it is natural to expect that servants may do.

Id. at cmt. b.[18]

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[16] (...continued)
employer's standard operating procedures or codes of conduct – then the employee as a matter of law was acting outside the scope of employment. This is not what the Court said or meant, nor is it supported by the applicable scope of employment law

[17] *See Harbury v. Hayden*, 522 F.3d 413, 422 (D.C. Cir. 2008) (alleged acts of torture committed or directed by CIA personnel within scope of employment because such acts were "foreseeable" and a "direct outgrowth" of their responsibility to gather intelligence); *Rasul v. Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008) (acts of torture allegedly committed against detainees at Guantanamo Bay were within the scope of employment of military personnel); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 8-9 (D.D.C. 2004) (genocide, torture, forced relocation, and cruel, inhuman, and degrading treatment by individual defendants employed by Department of Defense and State Department were within scope of employment because they "arose directly out of the United States' efforts to build a secured military facility in the Indian Ocean"); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 265-266 (D.D.C. 2004) (kidnapping was within National Security Advisor's scope of employment as it related to directing a military coup in South America).

[18] *See Sheet Metal Workers' Intern. Ass'n, AFL-CIO v. N. L. R. B.,* 293 F.2d 141, 149 (D.C. Cir. 1961) (parent union liable for local union's conduct even though local union conducted itself
(continued...)

Furthermore, as this Court held, the conduct originally alleged by Plaintiffs that supposedly resulted in severe bodily harm to the detainees during their detention and interrogation at Guantanamo was "foreseeable and incidental to the defendants' positions as military, medical, or civilian personnel in connection with Guantanamo . . ." and thus within the scope of employment. *See* Mem. Op. (Doc.) at 16-17. Conduct related to the detention and interrogation of detainees that is allegedly more egregious in that it led to the detainees' deaths, rather than severe bodily harm, is certainly no less foreseeable. To argue otherwise places too much emphasis on the outcome of that conduct – *i.e.*, the nature of the tort – rather than its foreseeability,[19] and is really just another way of re-hashing the argument already rejected by this Court that the severity and egregiousness of the alleged conduct takes it outside the scope of

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[18] (...continued)
in a manner specifically prohibited); *Schweinhaut v. Flaherty*, 49 F.2d 533, 535 (D.C. Cir. 1931) (conduct that violated employer's rules regarding operation of vehicle within scope of employment); *Freiman v. Lazur*, 925 F. Supp. 14, 15 (D.D.C. 1996) (government employee who allegedly infringed or conspired to infringe copyrights in computer programs acted within scope of his employment when he awarded agency contracts to contractors who allegedly infringed copyright, even if employee violated federal procurement laws by awarding contracts in consideration for future employment with the contractors); *see also Aversa v. United States*, 99 F.3d 1200, 1212 (1st Cir. 1996) (in slander and defamation suit brought against Assistant U.S. Attorney under the FTCA, court held that "there were policies and regulations against the kinds of statements that were made, but an act which is forbidden or done in a forbidden manner may nonetheless be within the scope of employment"); *N.L.R.B. v. Int'l Longshoremen's and Warehousemen's Union*, *Local 10*, 283 F.2d 558, 565 (9th Cir. 1960) ("[I]t is beyond doubt that an agent may well be acting within the scope of his authority even when he commits an act specifically forbidden by his principal.") (citations omitted); *Thompson v. United States*, 504 F. Supp.1087, 1091 (D. S.D. 1980) (employee held to be within scope of employment in lawsuit involving a shooting caused by the handling of firearms by federal employee in a manner prohibited by government regulations).

[19] *See Council on Am. Islamic Relations*, 444 F.3d at 664 (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)) ("The proper inquiry . . . 'focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf.'").

employment.[20]

Plaintiffs also take issue with the location of the alleged conduct, alleging that it occurred at a location within Guantanamo not specifically approved for detainee interrogations. *See* Pls.' Mot. for Recons. at 21. To the extent Plaintiffs argue that the alleged conduct falls outside the scope of employment because it occurred at a location not specifically authorized for interrogation sessions, this argument also fails because it places too much emphasis on adherence to an employer's instructions rather than the foreseeability of the conduct. To the extent Plaintiffs' argument is meant to invoke the second prong of the Restatement's test – *i.e.*, the requirement that the conduct have been "substantially within" the approved geographic area – this argument also fails. Again, there is no requirement that an employee confine him or herself to the precise spatial limits set by the employer. As the Restatement explains, the location of the conduct need only be "in the authorized area or in a locality not unreasonably distant from it." Restatement (Second) of Agency § 234 (1958); *see also id.* at cmt. a ("One may be a servant . . . in performing his master's business at a forbidden place if the place is within the *general territory* in which the servant is employed.") (emphasis added); *Id*. at § 228(2) (conduct must have occurred "far beyond" approved area to fall outside scope of employment).

Plaintiffs have failed to come forward with any specific facts regarding the location of this "black site" or just how far outside "the perimeter of the main prison camp" it is. In other

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[20] A Rule 59(e) motion is not "simply an opportunity to reargue facts and theories upon which a court has already ruled." *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995); *Koretoff v. Vilsack*, 626 F. Supp. 2d 4, 8 (D.D.C. 2009) (motion to reconsider may not "simply rehash arguments that were previously rejected by the Court."); *Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecomm. Network*, 571 F. Supp. 2d 59, 63 (D.D.C. 2008) ("A motion under Rule 59(e) is not an opportunity to rehash arguments already raised.") (citing *Sieverding v. Am. Bar Assoc.*, 239 F.R.D. 288, 290 (D.D.C. 2006)).

words, Plaintiffs have failed to provide any facts that the Court can use to determine whether this prong of the Restatement has not been met. Accordingly, the Court would be well-justified in ignoring this particular argument altogether. Nevertheless, it can be fairly deduced from Plaintiffs' allegations that the conduct occurred not only within Guantanamo (*i.e.*, the "general territory" within which such interrogations were authorized), but also, if Sergeant Hickman's observations of the paddy wagon's comings and goings are to be believed, at a location not too far from his vantage point within the area of Guantanamo that was devoted to the detention of suspected terrorists. Certainly, then, the alleged conduct did not occur at an unreasonable distance from the authorized locations. *Cf. Serman v. Unigard Mut. Ins. Co.*, 504 F.2d 33, 37 (10th Cir. 1974) (Doyle, J. dissenting) (had property manager's duties included security, his assault on trespasser on adjacent property would have been within scope of employment because the "location [where the assault occurred] is in close proximity to the property and is arguably related to it").

Finally, with respect to the third prong of the Restatement's test, the conduct must be "actuated, at least in part, by a purpose to serve the master." Restatement (Second) of Agency § 228(1). Acts are within the scope of employment even where self-interest is the predominate motive "so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.'" *Freiman v. Lazur*, 925 F. Supp. 14, 19 (D.D.C.1996) (quoting *Local 1814, Int'l Longshoremen's Ass'n v. N.L.R.B.*, 735 F.2d 1384, 1395 (D.C. Cir. 1984)). Indeed, even intentionally tortious behavior is within the scope of employment when the employee acted at

least in part by a desire to serve the employer's interest.[21]

Plaintiffs have not come forward with specific facts demonstrating that the persons who allegedly killed the detainees did so without any intent whatsoever to serve their employer, the United States. The best Plaintiffs can do is allege that certain persons engaged in a cover-up to hide the true nature of the detainees' deaths, and then argue that attempts to cover-up one's conduct indicates that this conduct must have been undertaken solely for the employee's own interest. *See* Pls.' Mot. for Recons. at 19. Plaintiffs cite no cases to support this proposition other than *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003), which is wholly inapposite. In *Stokes*, the issue was not whether a subsequent cover-up of one's previous conduct demonstrates that the employee had been acting in his or her own self-interest, but the completely distinct question of whether a cover-up itself – which, in *Stokes*, involved destroying critical evidence, preparing and submitting false affidavits by use of threat and coercion, and engaging in other criminal acts – can be inside the scope of employment. *Id*. at 1216. To the extent Plaintiffs argue that the cover-up itself is the tortious conduct that took place outside the scope of employment, Plaintiffs have come forward with no support for that argument either. Indeed, in *Stokes*, the Court declined to address that issue, noting that "[i]t is unclear whether evidence of such conduct alone would be sufficient under District of Columbia law [to be held to be outside

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[21] *See Lyon v. Carey*, 533 F.2d 649 (D.C. Cir.1976) (upholding jury verdict finding a mattress deliveryman's assault and rape of plaintiff to be within the scope of employment because it followed a dispute regarding delivery and payment of the mattress); *Johnson v. Weinberg*, 434 A.2d 404 (D.C. 1981) (holding that a laundromat employee was acting within the scope of employment when he shot a customer following a dispute over missing clothes); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 (D.C. 2001) (holding that a reasonable jury could determine a security guard's perpetration of an alleged sexual assault occurred within the scope of employment because it began with a physical search of a suspected shoplifter).

the scope of employment.")." *Id* at 1216. Nevertheless, because such allegations of a cover-up are based on evidence that is neither "newly discovered" nor objectively indicative of any sort of cover-up, there is no need for this Court to delve into this issue, let alone permit Plaintiffs limited discovery on this issue.[22]

II. The Motion to Amend Is Both Moot and Futile

Once a final judgment has been entered, an amendment to a complaint can only be granted after the requisites of Rule 59(e) have been satisfied. [23] For reasons explained above, Plaintiffs have not met the requirements set forth under Rule 59(e) for vacating this Court's previous order. Accordingly, their Motion to Amend the Complaint should be denied as moot. *See Nextel Spectrum Acquisition Corp.*, 571 F. Supp. 2d at 63.

Additionally, it is well-settled that the Court should deny a motion to amend a complaint when such amendment would be futile. *See, e.g., Willoughby v. Potomac Elec. Power Co.,* 100 F.3d 999, 1003 (D.C. Cir. 1996).[24] Plaintiffs' motion to amend is futile for several reasons.

First, as explained above, even if Plaintiffs' new allegations are assumed to be true, the

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[22] Indeed, there is no need for discovery or an evidentiary hearing on any of the issues raised by Plaintiffs since the their allegations, even if true, are insufficient as a matter of law to rebut the government's scope of employment certification.

[23] *See Ciralsky*, 355 F.3d at 673 (once final judgment is entered, a court cannot permit amendment of the complaint unless the plaintiff has " first satisfied Rule 59(e)'s more stringent standard for setting aside that judgment.'") (quoting *Firestone*, 76 F.3d at 1208 (citations omitted)); *Epps v. Howes*, 573 F. Supp. 2d 180, 186-87 (D.D.C. 2008).

[24] *See also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) ("Courts may deny a motion to amend a complaint as futile, as the district court did here, if the proposed claim would not survive a motion to dismiss."); *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002) (same).

individual defendants' conduct was within the scope of employment. Therefore, the United States is the proper defendant pursuant to the *Westfall* Act, 28 U.S.C. § 2679(b)(1), for each of the non-Constitutional tort claims (including the newly added fifth ATS claim for extra-judicial killing and the new claim for spoliation), and Plaintiffs' sole remedy lies against the United States under the FTCA. This, of course, means that all of Plaintiffs' non-Constitutional tort claims would be dismissed pursuant to the foreign country exception to the FTCA set forth at 28 U.S.C. § 2680(k). *See* Mem. Op. (Doc. 25) at 19-25.

Second, as this Court correctly noted, Plaintiffs failed to fulfill the mandatory jurisdictional requirements, set forth at 28 U.S.C. § 2675(a), of adequately presenting administrative claims to the appropriate federal agency prior to filing suit in the district court. *See* Mem. Op. (Doc. 25) at 25 n.12. Because the proper defendant for all non-Constitutional tort claims is the United States, thus rendering Plaintiffs' suit as one brought under the FTCA, this jurisdictional deficiency remains for the first four ATS claims, and exists anew for the additional ATS claim (extra-judicial killing) and the spoliation claim for which Plaintiffs have presented no administrative claims whatsoever. Accordingly, all of Plaintiffs' non-Constitutional tort claims would be dismissed on these grounds as well.

Finally, each of Plaintiffs' non-constitutional tort claims are barred by section 7 of the Military Commissions Act, codified at 28 U.S.C. § 2241(e)(2) ("MCA"), which this Court held to be valid after *Boumediene v. Bush*, 553 U.S. 723 (2008). *See* Mem. Op. (Doc. 25) at 8. With respect to the Constitutional tort claims brought against the individual defendants, this Court stated that § 2241(e)(2) – which removes jurisdiction from claims regarding, *inter alia*, treatment or conditions of confinement by aliens determined to be properly detained as enemy combatants

– "precludes this Court from hearing [Plaintiffs'] claims." Mem. Op. (Doc. 25) at 9. Because of the two above-mentioned jurisdictional defenses available to the United States, it was not necessary to assert the MCA in its motion to dismiss. However, now that this Court has ruled section 7 of the MCA remains valid, it is clear that it bars all of Plaintiffs' non-Constitutional tort claims. *See* 28 U.S.C. § 2241(e)(2) ("[N]o court . . . shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

CONCLUSION

Plaintiffs have failed to present any new evidence to this Court, or any evidence that warrants reconsideration of the Court's holding that the individual defendants were acting in the scope of employment. Furthermore, Plaintiffs' proposed amended complaint would be futile because they failed to comply with the jurisdictional administrative claims requirement, and because their claims would be barred by the foreign country exception and the MCA. Accordingly, the Court should deny Plaintiffs' motion for reconsideration and motion for leave to file an amended complaint.

Dated: April 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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