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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al., Plaintiffs, v. DUKE UNIVERSITY, et al., Defendants.	**JOINT BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS BY DEFENDANTS TARA LEVICY, GARY SMITH, DUKE UNIVERSITY, AND DUKE UNIVERSITY HEALTH SYSTEM, INC.**

Defendants Tara Levicy ("Nurse Levicy"), Gary Smith ("Officer Smith"), Duke University ("Duke"), and Duke University Health System, Inc. ("DUHS"), submit this brief in support of their motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Given the recent decision in *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012) (hereinafter the "Fourth Circuit decision"), Nurse Levicy is entitled to judgment as a matter of law on Counts 1, 2, and 18; Officer Smith is entitled to judgment as a matter of law on Count 2; and Duke and DUHS are entitled to judgment as a matter of law on Count 32.

NATURE OF THE CASE AND STATEMENT OF THE FACTS

This action arises out of the investigation of members of the 2005-2006 Duke men's lacrosse team stemming from allegations of rape made by a stripper who performed at a party hosted by the team captains at the off-campus house they

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rented. None of the Plaintiffs were charged or tried for any offense resulting from the allegations. Nevertheless, Plaintiffs sued Duke, DUHS, certain Duke employees (including Nurse Levicy and Officer Smith), the City of Durham and associated individuals, and a DNA laboratory for purported violations of their legal rights in connection with the investigation.

Nurse Levicy, Officer Smith, Duke, DUHS, and other defendants moved to dismiss the claims against them, and the Court dismissed twenty-seven counts on 31 March 2011. (Order at 2, No. 1:07CV953 (M.D.N.C. Mar. 31, 2011) (DE 187)). The Court allowed discovery to proceed against the Duke defendants on two counts—Counts 21 (alleging breach of contract) and 24 (alleging fraud). (Order at 9, No. 1:07CV953 (M.D.N.C. June 9, 2011) (DE 218)). The Court stayed all proceedings, including discovery, with respect to the remaining twelve counts, pending resolution of an interlocutory appeal by the City of Durham and its officials. *Id.* Among the stayed counts were two claims brought under 42 U.S.C. § 1983 (Counts 1 and 2) against various combinations of the Durham-related defendants, Nurse Levicy, and Officer Smith; a state law obstruction of justice claim (Count 18) against Nurse Levicy and others; and a state law negligent supervision claim (Count 32) against Duke and DUHS. *Id.* On 17 December 2012, the Fourth Circuit issued an opinion reversing, inter alia, the district court's denial of the Durham defendants' motions to dismiss the federal claims against

them, including the § 1983 claims in Counts 1 and 2, and the state law obstruction of justice claims against them in Count 18. *Evans*, 703 F.3d at 659.

QUESTIONS PRESENTED

1. Whether Nurse Levicy is entitled to judgment as a matter of law on Plaintiffs' § 1983 claim in Count 1 given the Fourth Circuit's holding that there was no constitutional violation in the issuance of the non-testimonial order?

2. Whether Nurse Levicy and Officer Smith are entitled to judgment as a matter of law on Plaintiffs' § 1983 claim in Count 2 given the Fourth Circuit's holding that there was no constitutional violation with respect to the search of Ryan McFadyen's dorm room and car?

3. Whether Nurse Levicy is entitled to judgment as a matter of law on Plaintiffs' obstruction of justice claim in Count 18, which is based on her alleged actions in aid of a criminal investigation, given the Fourth Circuit's reasoning that such a claim cannot be based on official investigative actions relating to a criminal proceeding?

4. Whether Duke and DUHS are entitled to judgment as a matter of law on Plaintiffs' negligent supervision claim in Count 32 because there is no underlying claim remaining against Nurse Levicy?

STANDARD OF REVIEW

"A motion for judgment on the pleadings pursuant to Rule 12(c) is analyzed under the same standard as a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss." *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 723 (M.D.N.C. 2012). At the 12(c) stage, "the court is tasked with determining if the complaint contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.,* No. 1:12CV260, 2013 WL 170523, at *3 (M.D.N.C. Jan. 16, 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted)). The Court must consider the facts alleged in the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. *Mendenhall*, 856 F. Supp. 2d at 723. However, the Court "'need not accept the legal conclusions drawn from the facts,' and 'need not accept as true unwarranted inferences, unreasonable conclusions or arguments.'" *Id.* (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)). "The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *Smith v. McDonald*, 562 F. Supp. 829, 842 (M.D.N.C. 1983).

ARGUMENT

To state a claim under § 1983, Plaintiffs must adequately allege two elements: (1) that Defendants "deprived [them] of a right secured by the Constitution and laws of the United States"; and (2) that Defendants "deprived [them] of this constitutional right under color of any [State] statute, ordinance, regulation, custom, or usage." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150 (1970) (internal quotation omitted).

I. NURSE LEVICY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' § 1983 CLAIM BASED ON THE ISSUANCE OF THE NON-TESTIMONIAL ORDER BECAUSE THE FOURTH CIRCUIT HELD THAT THERE WAS NO CONSTITUTIONAL VIOLATION ASSOCIATED WITH THE ISSUANCE OF THE NON-TESTIMONIAL ORDER.

In Count 1 of their Second Amended Complaint, Plaintiffs assert a claim under 42 U.S.C. § 1983 based on the allegation that they were subject to an illegal seizure in violation of the Fourth and Fourteenth Amendments because the non-testimonial order ("NTO")[1] was not supported by probable cause. (Second Am. Compl. ¶¶ 904-17). In light of the Fourth Circuit's holding that Plaintiffs failed to state a constitutional claim based on the seizure of evidence pursuant to the NTO, Nurse Levicy is entitled to judgment as a matter of law on Count 1. *See Evans*,

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[1] Plaintiffs' Second Amended Complaint refers to a Non-testimonial Identification Order ("NTID Order"), whereas this Court's Order on Defendants' Motions to Dismiss refers to a Non-testimonial Order ("NTO"). This memorandum uses the Non-testimonial Order (NTO) phrasing.

703 F.3d at 652. Given that Nurse Levicy is the only remaining defendant, this Court can now dispose of Count 1 in its entirety.

Where Plaintiffs pleaded a § 1983 claim based on alleged false statements or omissions in the NTO supporting affidavit, the Fourth Circuit applied the two-prong test set forth in *Franks v. Delaware*, 438 U.S. 154 (1978), to determine whether Plaintiffs had stated a claim. *See Evans*, 703 F.3d at 649-50. To state a constitutional violation under *Franks*, a plaintiff must allege (1) that the defendants "knowingly and intentionally or with a reckless disregard for the truth either made false statements in their affidavits or omitted facts from those affidavits, thus rendering the affidavits misleading"; and (2) "that those false statements or omissions are material, that is, necessary to a neutral and disinterested magistrate's authorization of the search." *Id.* at 650 (internal quotations and alteration omitted).

According to the Fourth Circuit, in Count 1 Plaintiffs alleged four false statements in the affidavit that satisfied the first prong of the *Franks* test: (1) Crystal Mangum, the complaining witness, claimed she lost fingernails during the alleged attack and police recovered fingernails during the search of the house where the rape allegedly occurred; (2) the lacrosse players used aliases to conceal their identities from Mangum and another dancer, Kim Pittman; (3) the players tried to conceal their university and team affiliations from Mangum and Pittman; and (4) at the party, a man held up a broomstick and told Mangum and Pittman,

"I'm going to shove this up you." *Id*.

To determine whether the four false statements Plaintiffs pled were material under the second prong of *Franks*, the Fourth Circuit set aside the allegedly false material and considered a "corrected" version of the affidavit. *See id*. at 651-52. As corrected, the affidavit contained (1) Mangum's allegations that three white males raped her at the party; (2) the fact that police found some of Mangum's belongings at the house where the alleged rape occurred; and (3) Nurse Levicy's corroborating statement that Mangum had "signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally." *Id.* The Fourth Circuit then analyzed "'whether or not the corrected warrant affidavit would' provide adequate grounds for the search." *Id.* at 651 (quoting *Miller v. Prince George's Cnty.*, 475 F.3d 621, 628 (4th Cir. 2007)). The Fourth Circuit concluded that the corrected affidavit contained "sufficient factual bases to establish both probable cause that a rape was committed and 'reasonable grounds' that the named persons committed the rape, as required under the NTO statute." *Id.* Therefore, the false statements were not material under the *Franks* test, and Plaintiffs could not state a constitutional violation based on the seizure of evidence pursuant to the NTO. *Id.* at 652.

Furthermore, Nurse Levicy's alleged involvement in the NTO process did not provide any basis for the § 1983 claim that Plaintiffs asserted. First, as the

Fourth Circuit pointed out, "[t]he McFadyen complaint does not even mention the nurse's statements when detailing the false statements in the affidavits." *Id.* at 650. Second, Nurse Levicy's alleged statement cannot constitute a deliberate falsehood within the meaning of *Franks* given that "the truthfulness of a *witness* statement is irrelevant as to whether *affiants'* statements were truthful." *Id*. (citing *Franks*, 438 U.S. at 171). The supporting affidavit for the NTO contains sufficient facts to satisfy the "flexible standard" for probable cause "that simply requires 'reasonable ground for belief of guilt' and 'more than bare suspicion.'" *United States v. Ortiz*, 669 F.3d 439, 444 (4th Cir. 2012) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

Because the Fourth Circuit has held that the seizure of evidence pursuant to the NTO did not deprive Plaintiffs of a "right secured by the Constitution and laws of the United States" as required to state a claim under § 1983, *see Evans*, 703 F.3d at 652, Plaintiffs' rights were not violated by these actions. Nurse Levicy cannot be liable for a violation that did not occur, and she is therefore entitled to judgment as a matter of law as to the § 1983 claim pleaded in Count 1.

II. OFFICER SMITH AND NURSE LEVICY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' § 1983 CLAIM BASED ON THE SEARCH OF RYAN MCFADYEN'S DORM ROOM AND CAR.

In Count 2 of their Second Amended Complaint, Plaintiffs assert a claim

under 42 U.S.C. § 1983 for the allegedly unconstitutional search of Ryan McFadyen's dorm room and car pursuant to a warrant that was obtained based on an allegedly false and misleading affidavit. (Second Am. Compl. ¶¶ 918-28). Plaintiffs contend that Officer Smith is liable under § 1983 for "[standing by], outside the door of McFadyen's dorm room throughout the entire search and [taking] no affirmative acts to intervene, aware that there was not probable cause to believe the crimes alleged had been committed, much less that McFadyen had committed them." (*Id.* ¶ 922). Plaintiffs further allege that Nurse Levicy is liable for "agree[ing] to act in concert with Nifong, Gottlieb and Himan by, among other things, providing and/or ratifying the false claims relating to the forensic medical evidence obtained in the SAE [sexual assault examination] that Levicy and Arico falsely claimed was conducted by Levicy." (*Id.* ¶ 925).

As a preliminary matter, Plaintiffs Matthew Wilson and Breck Archer lack standing to assert a claim based on an alleged violation of Ryan McFadyen's constitutional rights. *Evans*, 703 F.3d at 652 n.8. Further, based on the Fourth Circuit's holding that the search of McFadyen's dorm room did not violate McFadyen's constitutional rights, pursuant to *Adickes*, the § 1983 claim brought by all three Plaintiffs fails as a matter of law. *See id.* at 654. Similarly, because Plaintiffs did not allege that McFadyen's car was searched, their claim that such a search was unconstitutional fails. *See id*. at 653 n.9. Therefore, Count 2 can now

be dismissed as to the only remaining defendants, Officer Smith and Nurse Levicy.

A. Plaintiffs Matthew Wilson And Breck Archer Lack Standing To Assert A Claim Based On An Alleged Violation Of Ryan McFadyen's Constitutional Rights.

The Fourth Circuit held that Plaintiffs Matthew Wilson and Breck Archer lacked standing to bring a § 1983 claim for the alleged unlawful search and seizure of Ryan McFadyen's dorm room and car. *Id.* at 652 n.8 (citing *United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007)). Accordingly, Officer Smith and Nurse Levicy are entitled to judgment as a matter of law as against Wilson and Archer on standing grounds.

B. Plaintiffs' Claim Based On The Search Of Ryan McFadyen's Dorm Room Fails As To Defendants Levicy And Smith Because There Was No Constitutional Violation Associated With The Search.

Even if Plaintiffs Wilson and Archer did have standing to assert a claim based on an alleged violation of Plaintiff McFadyen's constitutional rights, all three Plaintiffs' claims would fail because the Fourth Circuit held that there was no constitutional violation in connection with the search. *See id.* at 654. In view of the Fourth Circuit's conclusion, Officer Smith and Nurse Levicy are entitled to judgment as a matter of law on Plaintiffs' § 1983 claim based on the search of McFadyen's dorm room.

To evaluate the constitutionality of the search, the Fourth Circuit applied the *Franks* test to the affidavit Officers Gottlieb and Himan submitted in support of the

search warrant for McFadyen's dorm room and car. *Id.* at 652-54. The court identified five false statements Plaintiffs sufficiently pled under the first prong of the *Franks* analysis: the four false statements Plaintiffs pleaded as to the NTO supporting affidavit, and "the additional statement as to the players' use of jersey numbers to hide their identities." *Id*. at 653. The Fourth Circuit set aside these five statements; as corrected, the affidavit included: (1) Mangum's allegations; (2) Nurse Levicy's alleged statement; and (3) McFadyen's email, sent only hours after the alleged rape, describing plans to kill exotic dancers in his dorm room. *Id*.; *see also id.* at 644 (quoting McFadyen's email). The court concluded that "as corrected, the affidavit still contains significant evidence that a rape was committed," *id.* at 653, and that the "corrected affidavit would provide adequate support for a magistrate's finding of probable cause," *id*. at 654. Accordingly, any alleged false statements in the affidavit were not material. *Id.* Because the corrected affidavit was supported by probable cause, Plaintiffs' constitutional rights were not violated in connection with the search of McFadyen's room and car. *Id.*

1. Officer Smith cannot be liable as a bystander for an alleged constitutional violation that did not occur.

Plaintiffs' claim as to Officer Smith is based on a theory of "bystander liability." *See McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 933 (M.D.N.C.

2011). A police officer may be liable as a bystander under § 1983 only upon a showing that, at the time the warrant was executed, the officer "(1) kn[ew] that a fellow officer [wa]s violating an individual's constitutional rights; (2) ha[d] a reasonable opportunity to prevent the harm; and (3) [chose] not to act." *Id.* (quoting *Randall v. Prince George's Cnty.*, 302 F.3d 188, 202-04 (4th Cir. 2002)). Because of the Fourth Circuit's holding that there was no violation of McFadyen's constitutional rights based on the search of his dorm room, *Evans*, 703 F.3d at 654, Plaintiffs cannot establish that Officer Smith's actions satisfy the elements of a bystander claim.

First, given that there was no violation of Plaintiffs' constitutional rights, Officer Smith could have had no basis for knowing that "a fellow officer [wa]s violating an individual's constitutional rights." *See McFadyen*, 786 F. Supp. 2d at 933; *see also Moore v. Cease*, No. 703-CV-144, 2005 WL 5322794, at *17 (E.D.N.C. July 5, 2005) (unpublished) (dismissing § 1983 bystander liability claim where "there was no constitutional violation for [defendant officer] to act upon"). Second, Officer Smith could not have had a reasonable opportunity to prevent an alleged constitutional violation that did not occur. *See McFadyen*, 786 F. Supp. 2d at 933. Because the Fourth Circuit has concluded that Officers Himan and Gottlieb committed no constitutional violation in executing the warrant, *Evans*, 703 F.3d at 654, Plaintiffs' bystander liability claim against Officer Smith fails as a matter of

law. *See Moore*, 2005 WL 5322794, at *15, *17.

2. Nurse Levicy cannot be liable for conspiring to violate Plaintiffs' constitutional rights where no such violation actually occurred.

In order to succeed on a claim for civil conspiracy under § 1983, a plaintiff must establish that the defendants "acted jointly in concert and that some overt act was done in furtherance of the conspiracy *which resulted in . . . deprivation of a constitutional right*." *Hinkle v. City of Clarksburg, W. Va.*, 81 F.3d 416, 421 (4th Cir. 1996) (emphasis added). A plaintiff cannot state a cause of action for conspiracy where he "was subjected to no such deprivation." *See Carlyle v. Sitterson*, 438 F. Supp. 956, 963 (E.D.N.C. 1975). Plaintiffs allege that Nurse Levicy acted in furtherance of a conspiracy among Nifong, Gottlieb, and Himan to obtain the warrant for McFadyen's dorm room using fabricated evidence and thereby perform an unconstitutional search. (Second Am. Compl. ¶¶ 924-25). According to Plaintiffs, Nurse Levicy "agreed to act in concert with Nifong, Gottlieb and Himan" by allegedly providing the Durham police with false forensic evidence and/or ratifying their false claims regarding the forensic evidence. (*Id.* ¶ 925).

However, in view of the Fourth Circuit's holding that Plaintiffs could not state a constitutional violation based on the search of McFadyen's dorm room, *see Evans*, 703 F.3d at 654, Plaintiffs cannot show any deprivation of a constitutional

right. *See Carlyle*, 438 F. Supp. at 964 (granting summary judgment for defendants on civil conspiracy claim where "the plaintiff ha[d] failed to allege a deprivation of a constitutional right, a necessary element in a civil rights action"). If there was no constitutional violation in the execution of the search warrant, Nurse Levicy's alleged actions in helping to procure the warrant for that search cannot, as a matter of law, support a § 1983 claim.

C. Plaintiffs' Claim Based On The Search Of Ryan McFadyen's Car Fails As To Defendants Levicy And Smith Because Plaintiffs Did Not Allege That The Car Was Searched And Any Search Was Constitutional.

The same warrant that authorized the search of Plaintiff McFadyen's dorm room also permitted the officers to search McFadyen's car. *Evans*, 703 F.3d at 653 n.9. In Count 2, Plaintiffs further allege that the search of McFadyen's car violated their constitutional rights. (Second Am. Compl. ¶ 924). However, Plaintiffs do not allege that McFadyen's car was searched. (*See id*. ¶¶ 918-28). Noting this deficiency, the Fourth Circuit held that Plaintiffs' claim based on the search of the vehicle must fail. *Evans*, 703 F.3d at 653 n.9. Because Plaintiffs alleged no search, there could be no unconstitutional search. *See, e.g.*, *United States v. Bellina*, 665 F.2d 1335, 1343 (4th Cir. 1981) (discussing circumstances where "there is no search and no unconstitutional intrusion"). For the same reason, Plaintiffs' claim based on the search of the car fails as to Nurse Levicy and Officer

Smith.

Even if Plaintiffs had alleged a search of McFadyen's car, however, the search would have been constitutional for the same reasons that the Fourth Circuit held the search of his dorm room was constitutional. *See supra* section II.B. Thus, in any event, Defendants Levicy and Smith are entitled to judgment as a matter of law on Plaintiffs' claim in Count 2 to the extent that it is based on a search of McFadyen's car.

III. UNDER THE FOURTH CIRCUIT'S HOLDING IN *EVANS*, NURSE LEVICY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' OBSTRUCTION OF JUSTICE CLAIM.

In Count 18, Plaintiffs allege that Nurse Levicy and others committed the tort of obstruction of justice by "conspiring to manufacture and manufacturing false and misleading forensic medical records and reports . . . with the knowledge that these reports would be used to bring and maintain criminal prosecutions against Plaintiffs." (Second Am. Compl. ¶ 1193). This Court denied Officers Himan and Gottlieb's motion to dismiss Count 18. *McFadyen*, 786 F. Supp. 2d at 976. The Fourth Circuit reversed, holding that North Carolina would not recognize a common law obstruction of justice claim "against a police officer for his actions relating to a criminal proceeding." *Evans*, 703 F.3d at 658. After the Fourth Circuit's decision, Count 18 remains pending as to Nurse Levicy and Defendants Robert Steel, Richard Brodhead, Victor Dzau, John Burness, Duke, and DUHS.

Id.; *McFadyen*, 786 F. Supp. 2d at 976-77. Because Nurse Levicy's alleged actions involve only the collection of evidence in aid of the officers' criminal investigation,[2] the Fourth Circuit's reasoning applies and Nurse Levicy is likewise entitled to judgment as a matter of law. *See Evans*, 703 F.3d at 658.

By Plaintiffs' own admission, Nurse Levicy, a sexual assault nurse examiner ("SANE") trainee, "was retained by the City of Durham[] to provide forensic medical evidence collection and analysis services in the investigation" of Crystal Mangum's allegation that she had been raped. (Second Am. Compl. ¶ 38). Under North Carolina law, a SANE nurse must undergo specialized training. N.C. Gen. Stat. § 143B-1200(i)(2). SANE nurses are specifically trained to collect evidence of sex crimes—the state-approved programs provide training in the "skills, procedures, and techniques necessary to conduct examinations *for the purpose of collecting evidence*" from victims of sex crimes. *Id.* § 90-171.38(b) (emphasis added); *see also* Second Am. Compl. ¶ 38. The investigation of reported crimes is squarely a law enforcement function. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36, 53 (2004) (noting that "investigative functions [are] associated primarily with

[2] Defendants Steel, Brodhead, Dzau, and Burness intend to move for summary judgment at the appropriate time given that Plaintiffs will be unable to point to any evidence that the alleged conspiracy among those defendants actually resulted in obstruction of justice. *See McFadyen*, 786 F. Supp. 2d at 976 ("It will ultimately be Plaintiffs' burden to establish actual obstruction of justice by these Defendants . . . .").

the police”).

The Fourth Circuit explained that “logic would seem to compel [the] conclusion” that “criminal suspects (like the plaintiffs) cannot allege a common-law obstruction of justice claim against police officers based on how the officers conduct a criminal investigation.” *Evans*, 703 F.3d at 658. By the same logic, a SANE nurse cannot, as a matter of law, be held liable for obstruction of justice based on how the nurse conducts a criminal investigation. *See id.* The actions Plaintiffs allege as to Nurse Levicy in Count 18 involve solely her work in the course of a criminal investigation. Specifically, Plaintiffs allege that Nurse Levicy and others “obstructed justice by conspiring to manufacture and manufacturing false and misleading forensic medical records and reports with respect to the SAE conducted at DUHS.” (Second Am. Compl. ¶ 1193). SANE nurses create “forensic medical records and reports” based on sexual assault examinations as part of their work in collecting evidence in furtherance of criminal investigations. *See* N.C. Gen. Stat. § 90-171.38(b). Because Plaintiffs’ allegations are directed at such investigative work in aid of law enforcement, Nurse Levicy is entitled to judgment as a matter of law on Count 18. *See Evans*, 703 F.3d at 658.

IV. DEFENDANTS DUKE AND DUHS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' NEGLIGENT HIRING, RETENTION, SUPERVISION, TRAINING, AND DISCIPLINE CLAIM BECAUSE NO CLAIM REMAINS AGAINST NURSE LEVICY.

In Count 32 of their Second Amended Complaint, Plaintiffs allege that Defendants Arico, Manly, Private Diagnostic Clinic, PLLC, Duke, and DUHS are liable in negligence based on their allegedly inadequate supervision of Nurse Levicy. (Second Am. Compl. ¶¶ 1318-25). This Court dismissed Count 32 as to all Defendants except Duke and DUHS. *McFadyen*, 786 F. Supp. 2d at 1003. Because Nurse Levicy is entitled to judgment as a matter of law on each Count remaining against her (Counts 1, 2, and 18), Defendants Duke and DUHS are entitled to judgment as a matter of law on Plaintiffs' negligence claim in Count 32.

As this Court has explained, "North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." *Id.* at 1001 (quoting *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986)). "However, before the employer can be held liable, plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." *Id.* (quoting *Hogan*, 79 N.C. App. at 495, 340 S.E.2d at 124). The employee's "underlying tortious conduct is 'an essential element of this claim.'"

Id. at 1002 (quoting *Kimes v. Lab Corp. of Am., Inc.,* 313 F. Supp. 2d 555, 569 (M.D.N.C. 2004)).

In this case, Plaintiffs' negligent supervision claim may proceed against Duke and DUHS only to the extent that an underlying tort claim remains against Nurse Levicy. *See id.* This Court allowed Plaintiffs' claim to go forward against Duke and DUHS at the motion to dismiss stage only because Plaintiffs were proceeding on at least one underlying tort claim against Nurse Levicy, the obstruction of justice claim in Count 18. *See id.* n.84.[3] Because Nurse Levicy is entitled to judgment on the pleadings as to Count 18, *see supra* section III, there is no underlying tort by Nurse Levicy to form the basis of Plaintiffs' negligent supervision claim. Therefore, Duke and DUHS are entitled to judgment as a matter of law on Count 32. *See Hogan*, 79 N.C. App. at 496-97, 340 S.E.2d at

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[3] While this Court also recognized that Plaintiffs were proceeding on their § 1983 claims against Nurse Levicy in Counts 1 and 2, it questioned the viability of a state law negligent supervision claim based on underlying conduct that violates § 1983. *See McFadyen*, 786 F. Supp. 2d at 1002 n.84. In similar contexts, courts have held that a common law negligent supervision claim may not be predicated on a federal statutory claim. *See Bond v. Rexel, Inc.*, No. 5:09-CV-122, 2011 WL 1578502, at *8 (W.D.N.C. Apr. 26, 2011) (unpublished) (Title VII claims could not support negligent supervision claim because they were not common law torts); *Greenan v. Bd. of Educ. of Worcester Cnty.*, 783 F. Supp. 2d 782, 791 (D. Md. 2011) ("[N]egligent supervision . . . may only be predicated on common law causes of action."). Even if a negligent supervision claim may arise from a § 1983 claim, Plaintiffs' negligent supervision claim fails. For the reasons stated above, Nurse Levicy is entitled to judgment as a matter of law on Counts 1 and 2. *See supra* sections I, II.B.2. Thus, there is no underlying claim against Nurse Levicy on which Plaintiffs may base a negligent supervision claim.

124-25 (holding that defendants were entitled to summary judgment against negligent supervision claim where plaintiffs failed to establish underlying tort); *Kimes*, 313 F. Supp. 2d at 568-69 (same).

CONCLUSION

For the reasons stated above, Tara Levicy respectfully requests that the Court enter judgment on the pleadings as to Counts 1, 2, and 18; Gary Smith respectfully requests that the Court enter judgment on the pleadings as to Count 2; and Duke University and Duke University Health System, Inc., respectfully request that the Court enter judgment on the pleadings as to Count 32.

This the 27th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on 27 February 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This the 27th day of February, 2013.

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