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 REPLY 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 reply brief in support of their motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ARGUMENT

While Defendants do not agree with Plaintiffs' statement of facts, for the limited purposes of this motion, those facts must be taken as true. *See Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 723 (M.D.N.C. 2012). Even when construed in the light most favorable to Plaintiffs, the allegations of the Second Amended Complaint are insufficient to state claims against Nurse Levicy on Counts 1, 2, and 18; Officer Smith on Count 2; and Duke and DUHS on Count 32.

I. THE FOURTH CIRCUIT'S DECISION IN *EVANS* FORECLOSES PLAINTIFFS' § 1983 CLAIMS.

As Plaintiffs acknowledge, the Fourth Circuit's ruling in *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), bars their remaining constitutional claims. (Pls.' Br. at 2; *see also* Defs.' Br. at 5-15). Plaintiffs thus concede that Defendants are entitled to judgment as a matter of law on Counts 1 and 2 "if Plaintiffs' petition [for certiorari] is not granted or the Fourth Circuit's decision remains otherwise unmodified." (Pls.' Br. at 2).[1]

II. UNDER *EVANS*, NURSE LEVICY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT 18.

In response to Defendants' argument that Nurse Levicy is entitled to judgment as a matter of law on Plaintiffs' obstruction of justice claim, Plaintiffs unjustifiably attempt to limit the import of the Fourth Circuit's decision and divert the Court's attention to arguments Defendants have not advanced here.

A. *Evans* Bars Plaintiffs' Obstruction of Justice Claim Against Nurse Levicy for Her Actions in Connection with a Police Investigation.

Plaintiffs assert that the Fourth Circuit's reasoning rejecting Plaintiffs' obstruction of justice claims applies strictly and solely to police officers. (*See id.* at 9-11). Nurse Levicy, of course, is not a police officer. While they imply that

[1] It is not clear what Plaintiffs mean by "otherwise unmodified," given that Plaintiffs' petition for rehearing en banc in the Fourth Circuit has already been denied. *See McFadyen v. Baker*, No. 11-1458 (4th Cir. Jan. 15, 2013).

the Fourth Circuit's reasoning is limited by its use of the words "police officer," Plaintiffs cite no authority demonstrating that the court's analysis cannot apply to other professionals participating in a police investigation. Because the defendants before the Fourth Circuit were police officers, it is unsurprising that the court stated its holding in terms of police officers. The Fourth Circuit's analysis need not be so literally confined. *See, e.g.*, *Conner v. Donnelly*, 42 F.3d 220, 227-28 (4th Cir. 1994) (analysis applied to physicians under contract to treat inmates extended to physicians not under contract but treating inmates by referral); *United States v. Melvin*, 419 F.2d 136, 141 (4th Cir. 1969) ("The Court's reasoning is not limited to those precise circumstances.").

Plaintiffs cannot avoid the Fourth Circuit's decision by now recharacterizing Nurse Levicy's alleged actions. (*See* Pls.' Br. at 11). Plaintiffs allege that Nurse Levicy "was retained by the City of Durham, to provide forensic medical evidence collection and analysis services in the investigation" of Crystal Mangum's claims. (Second Am. Compl. ¶ 38). Further, Plaintiffs distinguish their claims against Nurse Levicy from claims of medical negligence against a nurse:

> Levicy conducted the examination of Mangum . . . , having been retained to provide forensic medical evidence collection and analysis services *in conjunction with and for purposes of the police investigation of Mangum's false allegations.*

(Pls.' Opp'n to SANE 12(b)(6) at 45 [DE 76] (emphasis added)). Thus, Plaintiffs'

own descriptions of their claims reveal that their obstruction of justice claim is based on how Nurse Levicy "conducted a criminal investigation," conduct that fits squarely within the Fourth Circuit's reasoning. *See Evans*, 703 F.3d at 658.

Plaintiffs argue that no case has rejected an obstruction of justice claim "against a SANE . . . or any other . . . private actor who manufactures medical evidence . . . [,] bolstering a false claim of rape, causing criminal process to issue based on that false claim." (Pls.' Br. at 11).[2] While Plaintiffs maintain that obstruction of justice covers a wide range of conduct, they have identified no case where a plaintiff has ever actually secured a judgment on that claim. Allegations of Nurse Levicy's misconduct do not defeat the Fourth Circuit's legal reasoning, especially given that Plaintiffs lodged similar accusations against Officers Gottlieb and Himan, and the Fourth Circuit rejected Plaintiffs' obstruction of justice claim against the officers. Plaintiffs allege that "Gottlieb, Himan, . . . [and] Levicy . . . obstructed 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." (Second Am. Compl. ¶ 1193). The Fourth Circuit did not reject Plaintiffs' claims because

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[2] Plaintiffs cannot shore up their obstruction of justice claim by alluding to abuse of process given that this Court has already rejected Plaintiffs' abuse of process claims. *See McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 977-78 (M.D.N.C. 2011).

Plaintiffs did not plead enough misconduct—the court held, as a matter of law, that obstruction of justice did not reach a criminal suspect's complaints as to how officers conducted a police investigation. *See Evans*, 703 F.3d at 658. Plaintiffs cannot salvage their obstruction of justice claim by repeating these allegations, which apply equally to Officers Gottlieb and Himan and Nurse Levicy.

Public policy dictates that the Fourth Circuit's rationale extend to personnel retained to assist in a police investigation. Plaintiffs acknowledge the "law enforcement purpose" of a sexual assault examination. (Pls.' Opp'n to SANE 12(b)(6) at 46 (quotation omitted)). SANE nurses are specifically trained to collect evidence of sex crimes. *See* N.C. Gen. Stat. §§ 90-171.38(b), 143B-1200(i)(2). In the qualified immunity context, the Supreme Court has acknowledged that, when private individuals work closely with public employees, they will "face threatened legal action for the same conduct." *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012). If private individuals are held liable where public employees are not, private individuals "might think twice before accepting a government assignment." *Id.* Such inconsistent liability hinders the government's ability to engage private individuals with specialized knowledge—such as SANE nurses—to support government operations. *See id.* at 1665-66. If obstruction of justice does not apply to the conduct of Officers Himan and Gottlieb in their investigation, it should not apply to Nurse Levicy's conduct in connection with the same investigation.

Finally, Plaintiffs point out that Defendants denied that Nurse Levicy acted under color of law. (Pls.' Br. at 11; *see* Answer ¶ 38). Plaintiffs alleged that Nurse Levicy acted under color of law as a predicate for their now-rejected § 1983 claims. (*See* Second Am. Compl. ¶¶ 905, 919). The Fourth Circuit reasoned that Plaintiffs' common law obstruction of justice claims against Officers Gottlieb and Himan fell beyond the contours of that cause of action. *See Evans*, 703 F.3d at 658. Whether the officers acted under color of law did not factor into the analysis. *See id.* Because the issue of whether a person is acting under color of law calls for a legal conclusion, Defendants properly denied Plaintiffs' allegation that Nurse Levicy acted under color of law. *See Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 354 (4th Cir. 2003) (action under color of law is an issue of law); *Farrell v. Pike*, 342 F. Supp. 2d 433, 440-41 (M.D.N.C. 2004) (defendant required to respond to legal conclusion).

B. Plaintiffs' Remaining Arguments Are Unresponsive to This Motion.

Plaintiffs protest that Defendants "do not point to any case in any jurisdiction *that recognizes a common law obstruction of justice claim* but bars such an action against a SANE." (Pls.' Br. at 11 (emphasis added)). In fact, Defendants have been unable to identify any other jurisdiction that recognizes a common law tort claim for obstruction of justice. *See, e.g.*, *Horn v. California*, No. CIVS050814MCEKJM, 2005 WL 1925917, at *5-6 (E.D. Cal. Aug. 10, 2005)

(unpublished) (rejecting civil action for obstruction of justice); *Culberson v. Doan*, 125 F. Supp. 2d 252, 279-80 (S.D. Ohio 2000) (same); *Amariglio v. Nat'l R.R. Passenger Corp.*, 941 F. Supp. 173, 180 (D.D.C. 1996) (same); *Hawk v. Perillo*, 642 F. Supp. 380, 385-86 (N.D. Ill. 1985) (same). Further, Plaintiffs have not pointed to any case that *allows* an obstruction of justice claim against a SANE nurse acting in aid of a criminal investigation.

Next, Plaintiffs copy and paste, with minor alterations, a portion of this Court's opinion on Defendants' motions to dismiss. (*Compare* Pls.' Br. at 11-13 *with McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 974-75 (M.D.N.C. 2011)). Plaintiffs apparently attempt to refute an argument Defendants have not advanced in support of this motion—Defendants' argument at the motion to dismiss stage that obstruction of justice is limited to interference with a civil remedy. (*See* SANE Defs.' 12(b)(6) Br. at 41-45 [DE 48]). Defendants have not reargued that defense in connection with this motion. (*See also* Pls.' Br. at 13-14 (arguing that Plaintiffs adequately alleged interference with a civil remedy although Defendants have not reargued that issue)).

Plaintiffs also point to *State v. Taylor*, 713 S.E.2d 82 (N.C. Ct. App. 2011), asserting that *Taylor* "held that common law obstruction of justice applies to acts in connection with a criminal investigation." (Pls.' Br. at 13). *Taylor*, however, concerns the common law *criminal offense* of obstruction of justice. *See* 713

S.E.2d at 87-88 (discussing felonious common law obstruction of justice).

Because all of Plaintiffs' allegations concern Nurse Levicy's actions in connection with a police investigation, Nurse Levicy is entitled to judgment as a matter of law under the Fourth Circuit's ruling in *Evans*.

III. PLAINTIFFS' NEGLIGENT HIRING, SUPERVISION, AND RETENTION CLAIM CANNOT SURVIVE THE DISMISSAL OF THE OBSTRUCTION OF JUSTICE CLAIM AGAINST NURSE LEVICY.

In response to Defendants' motion for judgment on Count 32, Plaintiffs (1) attempt to broaden the basis of their claim; and (2) misdirect the Court's attention to a discussion of the distinctions between the tort of negligent supervision and the theory of respondeat superior liability. (*See* Pls.' Br. at 14-18).

A. Count 32 Is Based Solely on Plaintiffs' Obstruction of Justice Claim Against Nurse Levicy.

Contrary to what Plaintiffs now represent, Count 32 is not based on "the [t]ortious [c]onduct of Tara Levicy, *[a]mong [o]thers*." (*See id.* at 15 (subheading) (emphasis added)). Instead, Count 32 rests on the allegedly tortious conduct of Nurse Levicy alone. *See McFadyen*, 786 F. Supp. 2d at 1002 ("claim asserted in Count 32 . . . for negligent supervision of Levicy"); Pls.' Br. at 15 ("DUHS or Duke negligently supervised Levicy").

Ignoring the purpose of this dispositive motion, Plaintiffs argue that this Court should not dismiss Count 32 because "active claims against Levicy remain,

including Plaintiffs' claim for obstruction of justice." (Pls.' Br. at 14). Defendants have not argued that the Court should dismiss Count 32 in spite of the remaining obstruction of justice claim against Nurse Levicy. Instead, Defendants contend that *because* Nurse Levicy is entitled to judgment on Count 18, Duke and DUHS are entitled to judgment as a matter of law on Count 32. (*See* Defs.' Br. at 18).

Plaintiffs' statement that "active claims . . . including" obstruction of justice remain wrongly implies that claims other than obstruction of justice may support Count 32. (*See* Pls.' Br. at 14). Nurse Levicy moved for judgment on all three remaining claims against her. (Defs.' Br. at 1). Plaintiffs concede that two of those claims fail. *See supra* section I. In any event, Plaintiffs' § 1983 claims could not support Count 32, because "North Carolina law requires a common-law tort to underl[ie] a negligent retention and supervision claim." *Jackson v. FKI Logistex*, 608 F. Supp. 2d 705, 708 (E.D.N.C. 2009); *see* Defs.' Br. at 19 n.3.

As this Court has explained, Plaintiffs' negligent supervision claim survives only "to the extent that other underlying claims are proceeding in this case as to Levicy." *McFadyen*, 786 F. Supp. 2d at 1002. Count 18 against Nurse Levicy is the sole remaining claim that can support Count 32. Count 32, therefore, cannot survive if this Court grants judgment for Nurse Levicy on Count 18.

B. Respondeat Superior Liability Is Irrelevant to This Motion.

Plaintiffs correctly note that Duke and DUHS did not move for judgment on

the pleadings as to all of Count 18. (Pls.' Br. at 14). Apart from Nurse Levicy, there are four remaining Defendants, Robert Steel, Richard Brodhead, Victor Dzau, and John Burness, whom Plaintiffs have alleged obstructed justice in the course and scope of their employment for either Duke or DUHS. (*See* Second Am. Compl. ¶¶ 22, 23, 26, 28). Taking Plaintiffs' allegations as true for the purposes of this motion, Duke and DUHS remain defendants under Count 18 because of Plaintiffs' respondeat superior allegations as to those remaining Defendants.

In contrast, Count 32 rests entirely on Nurse Levicy's actions. If this Court grants Nurse Levicy's motion as to Count 18, the Court will have rejected an essential element of Plaintiffs' claim—underlying claims "going forward as to Defendant Levicy." *See McFadyen*, 786 F. Supp. 2d at 1002. Neither Duke nor DUHS may be held liable for Nurse Levicy's non-actionable conduct, regardless of whether she acted in the course and scope of her employment.

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 17th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on 17 June 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 17th day of June, 2013.

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