UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, ET AL.,
Plaintiffs

v.

DUKE UNIVERSITY, ET AL.,
Defendants.

1:07-CV-953-JAB-JEP

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
- CORRECTED -

Plaintiffs, Ryan McFadyen, Matthew Wilson, and, Breck Archer, respond to the motion for judgment on the pleadings as to Counts 1, 2, 5, 18, and 32 ("the Motion") (ECF 335) filed by Defendants Tara Levicy ("Levicy"), Gary Smith ("Smith"), Duke University ("Duke"), and Duke University Health System, Inc. ("DUHS"), and joined by Defendant Linwood Wilson ("Wilson"), (collectively "Defendants").

BACKGROUND

Defendants previously filed Rule 12 motions to dismiss as to the same causes of action at issue in their present motion, and this Court denied their motions in its consolidated ruling on the motions to dismiss filed by all defendants in this case. (Mem. Op. at 45-71, 77-88, 143-150, and 195-198, No. 1:07CV953 (M.D.N.C. Mar. 31, 2011) (ECF 186)). Here, Defendants move again under Rule 12, for dismissal of certain claims based on the Fourth Circuit's decision on the City Defendants' interlocutory appeal of this Court's denial of their immunity defenses (ECF 322).

Plaintiffs are preparing to file a petition for a writ of certiorari to the Fourth Circuit on or before June 13, 2013, asking the Supreme Court to reverse the circuit court's decision (Dkt. No. 12A964). If the petition is granted, the rulings on which this Motion are based may be reversed, remanded, or modified, rendering the Motion moot. Thus, Plaintiffs request that the Court decide this Motion after the outcome of Plaintiffs' petition for a writ of certiorari is ruled upon and any subsequent appellate proceedings are concluded. Of course, if Plaintiffs' petition is not granted or the Fourth Circuit's decision otherwise remains unmodified, Counts 2 and ~~1~~–5 must be dismissed because this Court is bound by the Fourth Circuit's conclusion that those counts do not allege a constitutional violation. However, the Fourth Circuit's decision does not require dismissal of Plaintiffs' obstruction of justice claim against Levicy or Wilson, irrespective of further appellate proceedings, because the Fourth Circuit's ruling as to Count 18, by its own terms, applies only to "a common-law obstruction of justice claim *against police officers based on how the officers conducted a criminal investigation*." *Evans v. Chalmers*, 703 F. 3d 636, 658 (4th Cir. 2012) (emphasis added); nor does it require dismissal of Count 1 against Levicy because it did not reach the constitutional question, holding that the police defendants were entitled to qualified immunity, which Levicy does not share, *id.* 650 n.6. Furthermore, because the Fourth Circuit's decision does not require dismissal of Count 18 against Levicy, it does not require dismissal of Count 32, Plaintiffs' negligent supervision claim against Duke and DUHS.

FACTS RELEVANT TO THE MOTION

The Complaint details the facts giving rise to Plaintiffs' obstruction of justice claim against Tara Levicy. (ECF 136 ¶¶ 779-99 at 257-66; ¶ 913 at 302; and ¶¶ 1189-1202 at 390-94). Generally, Plaintiffs allege that Levicy obstructed and attempted to obstruct justice by manufacturing forensic medical records and re-

ports of Mangum's sexual assault examination at DUHS. (*Id.* ¶¶ 785-99 at 261-66; ¶ 913 at 302; and ¶ 1193 at 391). The Complaint goes on to document Levicy's misconduct in detail:

From about March 16th, 2006 through January 11, 2007, Levicy agreed to back up and cover-up the false claims and material omissions in the affidavit Gottlieb and Himan submitted to obtain the non-testimonial identification order ("NTO") that authorized the seizure and search of Plaintiffs and their teammates, compelling them to disrobe and submit to close examination and photographing of their bodies and collection of their DNA for use as evidence in a criminal investigation. (*Id.* ¶¶ 785-99 at 261-66; ¶ 913 at 302; and ¶ 1193 at 391).

The fabricated, sensational claims made in the NTO affidavit immediately became national news, including the false claim of corroborating medical evidence; namely, that "the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally." (*Id.* ¶ 781 at 258). In fact, sexual assault examination ("SAE") produced no evidence consistent with the violent rape described in Himan and Gottlieb's affidavit. (*Id.* ¶ 308 at 114 and ¶ 324 at 120). Yet Levicy agreed to manufacture such evidence, and did so, to back up Himan and Gottlieb's sensational claims.

That agreement became even more important when, on March 28, 2006, the SBI Lab verbally reported to Levicy's co-defendants that Plaintiffs and their teammates were excluded as possible contributors of the DNA evidence in Mangum's rape kit and clothing and there was no evidence to corroborate the violent rape Gottlieb and Himan described in their affidavit. (*Id.* ¶ 623 at 210 and ¶ 782 at 258). Without any DNA evidence to establish the fact that a crime occurred or that Plaintiffs or their teammates committed it, Nifong, Gottlieb, and Himan "collud[ed] with Tara Levicy to fabricate medical evidence of 'blunt force

trauma' where none, in fact, existed." (ECF 136 ¶ 779 at 257-58). That same day, consistent with that agreement, Nifong began a sequence of public statements asserting that his certainty that a rape occurred was based on medical evidence that Tara Levicy and DUMC produced. (*Id.* ¶ 782 at 258-60). For example:

> On March 28, 2006, Nifong told Dan Abrams of MSNBC that he was convinced there was a rape because "[t]here is evidence of trauma in the victim's vaginal area that was noted when she was examined by a nurse at the hospital. And her general demeanor was suggestive of the fact that she had been through a traumatic situation." (Id. ¶ 782(A) at 259).
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> On March 28, 2006, Nifong told Rita Cosby of MSNBC that he believed "that rape did occur... [because] the victim's demeanor and the fact that when she was examined by a nurse who was trained in sexual assault, there was swelling, and pain in the area that would have been affected by the rape. The victim gave signs of having been through a traumatic situation. She seemed to be absolutely honest about what had occurred." (Id. ¶ 782(B) at 259; id. Attachment 21).
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> On March 29, 2006, Nifong told a reporter for the Charlotte Observer reporter that Levicy produced evidence of "bruises that were consistent with a sexual assault.... [and] behavior that was consistent with having gone through a traumatic experience." (Id. ¶ 782(C) at 260).
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> On March 30, 2006, Nifong told a reporter for CBS's nationally televised The Early Show that he was convinced a rape occurred because of the medical evidence in the case. (Id. ¶ 782(D) at 260; id. Attachment 22).
>
> On April 4, 2006, a reporter for the Charlotte Observer, Mark Johnson, was interviewed about the case by Greta Van Susteren. Based on Nifong's statements to him, Johnson told the national audience "[Mangum] was examined at Duke University Medical Center, which as you know is a top flight hospital. This was a nurse who was trained in

> dealing with these types of cases and that examination is largely what the district attorney is basing his opinion on when he says that he believes an attack did occur." (ECF 136 ¶ 782(E) at 260).

Thus, after the results of the DNA tests failed to provide any evidence that Plaintiffs or their teammates had any contact with Mangum, much less violently raped her, only Levicy's manufactured medical evidence remained to back up Himan and Gottlieb's fabricated affidavits and Nifong's public claims that he was "certain" Mangum had been violently raped. (*Id.* ¶ 783 at 261).

As Nifong publicly pointed to Levicy's manufactured medical evidence, Theresa Arico, Duke's SANE program coordinator, also made false public statements backing up the false claims of corroborating medical evidence that Himan, Gottlieb, Levicy, and Nifong had made. Arico told media representatives, "[y]ou can say with a high degree of certainty" that Levicy's examination of Mangum revealed "injuries" caused by "blunt force trauma" and "consistent with the story [Manugm] told." (*Id.* ¶ 784 at 261). Arico made such statements knowing that Mangum's examination revealed no such injuries. (*Id.* ¶ 308 at 114 and ¶ 324 at 120).

At the same time, Levicy falsified the medical records of Mangum's SAE to corroborate Mangum's claim and to back up the public statements made by Nifong, Himan, Gottlieb, and Arico. (*Id.* ¶¶ 785-86 at 261-63). It was not until April 5, 2006—weeks after Levicy first produced the medical records responsive to Gottlieb and Himan's March 21 Subpoena—that Levicy produced a revised, fabricated version of Mangum's Sexual Assault Examination Report ("SAER"), which now included a fabricated transcription of an interview of Mangum and several pages containing strike-outs, additions, and revisions designed to conform the SAER to Himan and Gottlieb's affidavit, Nifong's public statements, and

what had been seized in the search of 610 N. Buchanan. (*Id.* ¶¶ 785-86 at 261-63).

By way of illustration, Levicy falsified the medical record of Mangum's SAE by fabricating a transcript of an interview of Mangum to override Mangum's multiple prior inconsistent statements, to conform Mangum's account to the incendiary facts Gottlieb and Himan fabricated in their NTO affidavit, and to tie her statement to items seized in the search of 610 N. Buchanan. (ECF 136 ¶ 785(A) at 261-62).

Similarly, Levicy changed Mangum's contemporaneous responses to the standard questions on the SAER form, again, to conform Mangum's answers to evidence seized in the search of 610 N. Buchanan. For example, the SAER form asks whether any efforts were made to conceal evidence. Mangum's original response, "no," was struck through, the "yes" blank was checked, and a notation, "wiped her off with a rag," was added. (*Id.* ¶ 785(B) at 262). These alterations were designed to conform Mangum's responses with a towel containing semen that police seized from a bathroom in 610 N. Buchanan. However, after Levicy produced the fabricated SAER, DNA tests showed that Mangum's DNA was not on the towel. (*Id.*).

Levicy gave Himan the fabricated SAER and narrative on April 5th, and they were used the next day, April 6th, to guide Mangum's first (and only) written statement in the case. Mangum's statement incorporated Levicy's fabrications. For example, Mangum's statement includes an addendum designed to match up her account with evidence of semen on a bathroom floor; the addendum states, "I would like to add that Adam ejaculated in my mouth and I spit it out onto the floor, part of it fell onto the floor [scratch out] after he pulled his penis out." (*Id.* ¶ 785(C) at 262-63). But, here too, DNA testing later showed that Mangum's

DNA could not be found the material police thought to be semen on the bathroom floor. Like the others, this fabrication was also designed to conceal the fact that Mangum had never reported any of the sensational details that Gottlieb and Himan included in their NTO affidavit and Nifong's repeated false claims of "certainty" that Mangum had been raped by Plaintiffs or their teammates. (*Id.* ¶ 786 at 263.)

The Complaint goes on to document Levicy's continuing offers to manufacture medical evidence to bolster Mangum's false allegations, to cover-up the false claims and material omissions in Himan and Gottlieb's NTO affidavit, and to back up Nifong's unsupportable public claims of certainty, and that she did so from March 16, 2006 until January 11, 2007. (*Id.* ¶¶ 786-98 at 263-66.) For example, in meetings with Nifong, Gottlieb, Himan and Wilson, Levicy agreed to testify to corroborating medical evidence that did not exist and medical findings that were never made, such as objective signs of pain and evidence of penetrating blunt force trauma on the cervix in Mangum's pelvic exam (ECF 136 at ¶¶ 788-89; 791 at 263-264), yet there was no pelvic exam, in part because Mangum refused the use of a speculum, and blunt force trauma on Mangum's cervix could not be seen without using a speculum. (*Id.*). But that is not all. To explain the absence of a pelvic exam, Levicy later claimed that Mangum was in "too much pain" to permit the use of a speculum, but the contemporaneous medical records reveal no evidence of an effort to diagnose or treat any such pain; to the contrary, the medical records document evidence that Mangum was faking symptoms of pain and that she had a history of doing so to obtain prescription narcotics. (*Id.* 136 ¶ 792 at 264; *see also id.* ¶¶ 315-16 at 115-116).

Even after Levicy could no longer falsify the medical records of Mangum's examination further (because they had been produced in the criminal discovery

process), Levicy continued to offer false and fabricated evidence to contradict facts that appear in those records. For example, Mangum's report that no condoms were used by her assailants appears in three different places on the SAER. (*Id.* ¶ 793 at 264-65). Yet, when Nifong made false public statements that Mangum's attackers used condoms to explain why no DNA from Plaintiffs or their teammates could be found in Mangum's rape kid, Levicy offered to contradict her own SAER and testify that Mangum did not and could not have known whether condoms were used or not. (*Id.* ¶ 794 at 265). Then, to avoid those contradictions with her own SAER, Levicy offered that Mangum could not have been sure no condoms were used (*id.* ¶ 795 at 265), even though Levicy did not check the option labeled "not sure" in memorializing Mangum's response to the question whether condoms were used. (ECF 136 ¶ 793 at 264-65). Similarly, where the SAER form calls for a "[b]rief account of the assault us[ing] the patient's own words," Levicy wrote "No condoms used." Levicy also offered to explain that she "wasn't surprised" that no DNA matching plaintiffs or their teammates was found in Mangum's rape kit "because rape is not about passion or ejaculation but about power." (*Id.* ¶ 796 at 265). Of course, the Y-STR testing used to examine Mangum's rape kit does not depend upon an ejaculatory event, as Levicy assumed; it can detect male-sourced human tissue of all kinds, including a skin cell. (*Id.* 136 ¶ 796 at 265-56).

Levicy's participation in the conspiracy continued to the very end, as late as the evening of January 10, 2007, when she offered to provide fraudulent testimony that the absence of DNA could be explained by the use of condoms (*id.* ¶ 793 at 265), and also manufactured claims to save Mangum's identifications from suppression at an upcoming hearing on the issue (*id.* ¶ 798 at 266). In that regard, there was evidence that Mangum was suffering from a "break from reality" and suffering from delusions in the early morning hours of March 14th. (*Id.* ¶ 797 at

266). Thus Mangum's ability to identify her "attacker" was subject to challenge based on her inability to attend to or accurately recall events occurring around the time in question. (ECF 136 ¶ 797 at 266) To rebut that evidence, Levicy offered the false claim that Mangum "could always speak articulately" and that she was "very alert," and that she "knew what she was missing (meaning her money, her bag and her phone.)." (*Id.* ¶ 797 at 266).

Two days after Levicy's last acts in furtherance of the conspiracy, Nifong turned the case over to the Attorney General. (*Id.* ¶ 798 at 266). And when the Attorney General directed his Special Prosecutors to "re-investigate" the entire matter, Levicy called Nifong's office "to clarify"—for the first time—that all of the evidence contradicting Mangum's claims, including the lack of any DNA matching Plaintiffs or their teammates, could be explained by the fact that the rape "didn't happen." (*Id.* ¶ 799 at 266). Of course, the Attorney General's Special Prosecutors thoroughly re-investigated the matter and concluded that there was "no credible evidence" that Mangum was raped.

ARGUMENT

I. Plaintiffs' Obstruction of Justice Claim Against Levicy Should Not Be Dismissed

Defendant Tara Levicy seeks dismissal from Count 18, which asserts a claim for common law obstruction of justice against her and several co-defendants, including Gottlieb, Himan, Wilson, Lamb, and against Duke and/or DUHS based on Levicy's misconduct, pursuant to *respondeat superior*. (ECF 136 ¶¶ 1189-1202 at 390-394). Count 18 alleges that Levicy obstructed justice by conspiring to manufacture and by manufacturing false and misleading forensic medical records and reports. (*Id.* ¶¶ 779-99 at 257-66 and ¶¶ 1189-1202 at 390-94). In rejecting Levicy's first attempt to dismiss all claims against her, this Court concluded that,

as to Levicy, "Plaintiffs have alleged significant misconduct in the creation of false and misleading evidence and destruction or alteration of potential evidence." (Mem. Op. at 147, No. 1:07CV953 (M.D.N.C. Mar. 31, 2011) (ECF 186)). For the reasons explained below, the Fourth Circuit's decision in *Evans* v. *Chalmers* does not alter the analysis of Plaintiffs' common law obstruction of justice claim against Levicy, and the admissions of Duke, DUHS, and Levicy in their pleadings only underscores that conclusion.

A. The Fourth Circuit's holding does not apply to Levicy because Levicy is not "a police officer" and DUHS and Levicy "specifically deny" that Levicy acted "under color of law" when she engaged in the misconduct alleged in the Complaint.

Levicy contends that the Fourth Circuit's decision in *Evans v. Chalmers* requires dismissal of her for the same reason the Fourth Circuit ruled that Plaintiffs could not proceed against the three police officers named in that claim. (Defs.' Br. at 15-17 (ECF 336)). But the Fourth Circuit panel ruled that the claim could not be maintained against the three police officers *because they were police officers.* Specifically, the *Evans* decision acknowledges the breadth of common law obstruction of justice under North Carolina law, which has been held to include, *inter alia*, a sitting judge's attempt to interfere with grand jury proceedings, *In re Kivett*, 309 S.E.2d 442 (N.C. 1983), a medical provider's fabrication of medical evidence, *Henry v. Deen*, 310 S.E.2d 326, 334 (N.C. 1984), and the destruction of evidence, *Grant v. High Point Reg'l Health Sys.,* 645 S.E.2d 851, 855 (N.C. Ct. App. 2007). *Evans*, 703 F.3d at 658. However, because the panel could not find "any case from any jurisdiction recognizing a common-law obstruction of justice claim *against a police officer* for his actions relating to a criminal proceeding," it declined to forecast that "North Carolina would recognize such an action." *Evans*, 703 F.3d at 658 (emphasis added) (citing *Wilson v. Ford Motor Co.*, 656 F.2d 960, 960 (4th Cir. 1981).)

Tara Levicy, a registered nurse, now seeks to avail herself of that holding by claiming to be a *de facto* police officer. (Defs.' Br. at 15-17 (ECF 336)). There are several defects in this new claim. First, Levicy is not a police officer; she is a registered nurse. In fact, Levicy was not even a SANE at the time she allegedly conducted Mangum's sexual assault examination (she was a "SANE-in-Training"). (ECF 136 ¶ 38 at 31). Second, the pleadings show that Levicy, Duke, and DUHS all admit that Levicy was acting as a private person and they all "specifically deny that Levicy was a person acting under color of law" at the time Levicy engaged in the misconduct alleged in the Complaint. (Answer ¶ 38 at 23 (ECF 195)). Third, Plaintiffs' claim against Levicy is not "a common-law obstruction of justice claim against police officers based on how the officers conducted a criminal investigation." *Evans*, 703 F. 3d at 658. Fourth, Duke, DUHS, and Levicy 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, his or her employer, or any other a private actor who manufactures medical evidence and doctors' medical records for purposes of bolstering a false claim of rape, causing criminal process to issue based on that false claim, and impeding the victims of that misconduct from obtaining legal remedies from the private actor and her employer for the harm caused by such misconduct. Fifth, as explained below, common law obstruction of justice has been interpreted broadly enough by North Carolina's Courts to include a right of action against Levicy based on the misconduct Plaintiffs allege as well as a right of action against Levicy's employer (Duke or DUHS) based on *respondeat superior* and negligent supervision.

B. North Carolina courts have defined common law obstruction of justice to include the misconduct Plaintiffs allege.

"Obstruction of justice" is a criminal offense under North Carolina General Statutes § 14-221 through §14-227, and it is also a tort under North Carolina's

common law that is actionable upon "any act which prevents, obstructs, impedes or hinders public or legal justice." *Jones v. City of Durham*, 183 N.C. App. 57, 59, 643 S.E.2d 631, 633 (N.C. Ct. App. 2007) (quoting *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (N.C. Ct. App. 2003)); *see* 67 C.J.S. Obstructing Justice § 1 ("obstructing justice" means "impeding or obstructing those who seek justice in a court or those who have duties or powers of administering justice in courts"). Thus, the tort is exceptionally broad and includes, for example, claims that "[d]efendants attempted to impede the legal justice system through [a] false affidavit," *Jackson v. Blue Dolphin Commc'ns of N.C., L.L.C.*, 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002), and claims that defendants "conspired to impede [the] investigation of this case by destroying … records and by falsifying and fabricating records." *Henry v. Deen*, 310 N.C. 75, 86, 310 S.E.2d 326, 333 (N.C. 1984); *see also Reed v. Buckeye Fire Equip.*, 241 Fed. Appx. 917, 928 (4th Cir. 2007) (collecting cases); *Henry*, 310 N.C. at 86, 310 S.E.2d at 333 (recognizing a potential claim for obstruction of justice where the plaintiff alleged that the defendant had destroyed and falsified medical records and thus impeded plaintiff's claims in that action). The North Carolina Court of Appeals recently held that "any action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice." *Blackburn v. Carbone*, 703 S.E.2d 788, 796 (N.C. Ct. App. 2010) (noting that falsification of evidence could be a proper basis for liability for common law obstruction of justice), *rev. den.*, *appeal dismissed*, 710 S.E.2d 52 (N.C. 2011).

Levicy previously argued that a claim for obstruction of justice may be based only on conduct in connection with a civil lawsuit, not criminal investigations or proceedings. This Court rejected that contention, noting that the North Carolina Supreme Court resolved that question in *In re Kivett* by holding that a sitting

judge's "attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (N.C 1983); *see also State v. Wright*, 696 S.E.2d 832, 835 (N.C. Ct. App. 2010) (noting that "common law obstruction of justice extends *beyond interference with criminal proceedings*") (emphasis added)); *Henry*, 310 N.C. at 87, 310 S.E.2d at 334 (recognizing that an obstruction of justice claim could arise even if conduct occurred while no legal proceedings were pending or even threatened). Since the Court's Order, the North Carolina Court of Appeals has held that common law obstruction of justice applies to acts in connection with a criminal investigation. *State v. Taylor*, 713 S.E.2d 82, 88 (N.C. Ct. App. 2011), *rev. den.* 2011 N.C. LEXIS 707 (N.C., Aug. 25, 2011) (holding that common law obstruction of justice includes interfering with the arrest and collection of evidence from a person suspected of driving while impaired). And, in *State v. Wright*, the North Carolina court held that common law obstruction of justice included a candidate's filing of "incomplete and false disclosure forms with the State Board of Elections … for the purpose of obstructing or hindering the proper enforcement of the campaign finance reporting laws of this state." *Wright*, 696 S.E.2d 832, 838 (finding no error in jury instructions containing quoted language, affirming that common law obstruction of justice can occur in connection with *no civil or criminal proceedings at all*).

C. Even If Obstruction of Justice Were Limited to Conduct Interfering with Civil Proceedings, Plaintiffs Allege that Levicy's Conduct Was Intended to Interfere with Plaintiffs' Civil Remedies

This Court not only rejected Levicy's arguments for dismissal because they were wrong on the law but also because they were wrong on the facts. The Court explained that even if her arguments did not require the Court to view the tort more narrowly than North Carolina courts have, even if the conduct occurred as

part of a criminal investigation, it would still be was actionable under North Carolina law because Plaintiffs allege that Levicy's conduct was intended to interfere with Plaintiffs' ability to obtain remedies in a civil action against her and her employer. (Mem. Op. at 143-48, No. 1:07CV953 (M.D.N.C. Mar. 31, 2011) (ECF 186)("even if the state courts would ultimately require that the alleged obstruction of justice occur in connection with a civil proceeding, Plaintiffs assert that the obstruction of justice alleged in this case included destruction and fabrication of evidence to prevent its use in future lawsuits or to "cover-up" misconduct and hinder Plaintiffs' ability to bring a future claim.")).

II. Plaintiffs' Negligent Supervision Claim Should Not Be Dismissed Unless the Court Deems it Redundant Because Levicy, Duke, and DUHS Admit Plaintiffs' *Respondeat Superior* Allegations in Their Answer.

Duke seeks dismissal of Plaintiffs' negligent supervision claim because, they contend, this claim "may proceed against Duke and DUHS only to the extent that an underlying tort claim remains against Levicy." (Defs.' Br. at 19 (ECF 336)). This argument fails for two reasons and is moot for still another reason. First, a negligent supervision claim does not require, as Duke asserts, that "an underlying tort claim remain[]" pending against an employee; rather, all that is required is allegations of "underlying tortious conduct" of an employee, which Plaintiffs allege in detail. Second, even if North Carolina courts required plaintiffs to maintain a separate claim against an employee in order to assert a negligent supervision claim (and they do not), the argument would still come to nothing because active claims against Levicy remain, including Plaintiffs' claim for obstruction of justice, and neither Duke nor DUHS seek dismissal from that claim, which is based upon their respondeat superior liability for Levicy's conduct. Third, the argument will be moot if the Court concludes, as it should, that Duke, DUHS, and Levicy have admitted in their pleadings that Levicy was acting in the

course and scope of her employment when she engaged in the tortious conduct giving rise to Plaintiffs' obstruction of justice claim against them.

A. Plaintiffs' Negligent Supervision Claim Against Duke And DUHS is Based on the Tortious Conduct of Tara Levicy, Among Others

Duke and DUHS ask to be dismissed from Count 32 of Plaintiffs' Complaint (ECF 136 ¶¶ 1318-1325 at 425-27). Count 32 asserts a claim for negligent supervision against Duke and DUMC, as employers of Tara Levicy, who was a "SANE-in-training" when Duke assigned her to conduct a Sexual Assault Examination of Mangum, as well as other employees "involved in the preservation of the records relating to Mangum's SAER." (*Id.* ¶¶ 1318-1325 at 425-27). In Count 32, Plaintiffs bring a state law claim for negligence against Duke and DUHS, alleging negligent hiring, retention, supervision, training and discipline of their employee, Tara Levicy. (*Id.*). Plaintiffs allege that Duke and DUHS owed them a duty of care with respect to the hiring, training, supervision, discipline, and retention of sexual assault examiners and other personnel involved in the records reporting evidence relating to Mangum's claims and the preservation of those records. (*Id.*). Plaintiffs further allege that DUHS or Duke negligently supervised Levicy by failing to monitor her conduct or performance, failing to provide her with proper training, and ignoring evidence of Arico and Levicy's misconduct in making false statements to the public, to representatives of the media and to law enforcement. (*Id.*).

B. The Argument Is Moot Because Duke, DUHS, and Levicy Admit Plaintiffs' *Respondeat Superior* Allegations.

As a general matter, Plaintiffs assert their negligent supervision claim as a means of holding Levicy's employer (Duke and/or DUHS) liable for Levicy's conduct as an alternative to their *respondeat superior* theory of imposing liability on Duke and DUHS for the harms caused by Levicy's tortious conduct, in the event

that Levicy's misconduct is deemed not to be within the scope of her employment. "North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another" outside of the scope of the employee's employment. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (N.C. Ct. App. 1986). This type of claim "becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." *Id.* 495, 340 S.E.2d at 124. In that context, to hold the employer liable, a "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.* Thus, under North Carolina law, an employer may be held liable for the tortious acts of its employees, based on either a theory of (1) *respondeat superior* if the employee was acting in the scope of his or her employment, or (2) negligent supervision if, "prior to the [tortious] act, the employer knew or had reason to know of the employee's incompetency" even if "the act of the employee either was not, or may not have been, within the scope of his employment" *Id.* 495, 340 S.E.2d at 124.

Here, Plaintiffs allege that Levicy was a registered nurse employed as "a member of the DUHS and Duke University nursing staff and the DUHS SANE program as a SANE-in-Training," (ECF 136 ¶ 38 at 31) and, "at all times relevant to this action" was acting "in the course and scope of [her] agency or employment with Duke University, and in furtherance of the University's business interests." (*Id.* ¶ 10 at 19) In its Answer, Duke affirmatively admits that "on March 14, 2006," Duke employed Levicy "as a registered nurse who was working as a staff nurse in the Emergency Department at DUHS." (Answer ¶ 38 at 23 (ECF 195)). Further, Levicy, Duke, and DUHS all deny the allegation that Levicy was "acting in the course and scope of [her] agency or employment with Duke University and

in furtherance of the University's business interests," but only because, they contend, the allegation "calls for a legal conclusion." (*Id.* ¶ 10 at 6). But whether Levicy was acting in the course and scope of her employment or agency relationship with Duke when engaging in the misconduct alleged in the Complaint is a factual question, and, to the extent that there is a legal issue involved in resolving that question, Duke, DUHS, and Levicy waived any right to assert it by failing to raise it in their prior Rule 12 motions and briefings. (*See*, *generally*, ECF Nos. 47, 48, 49, 50, 175, 176, and 177) (Duke Defendants' briefs supporting their motion to dismiss).

Therefore, the Court may rule that Duke, DUHS, and Levicy have admitted in their Answer that Levicy was acting in the course and scope of her employment or agency relationship with Duke when she engaged in the conduct alleged in the Complaint. In that event, Duke and DUHS's admission that Levicy was acting in the scope of her employment when she engaged in the misconduct alleged in the Complaint would render the liability of Duke and DUHS for Levicy's misconduct under Count 32 redundant to their *respondeat superior* liability for Levicy's misconduct in Count 18. *See Hogan*, 340 S.E.2d at 124. On the other hand, should the Court decline to treat DUHS, Duke, and Levicy's response to the allegations in ¶ 10 as an admission of that fact, then Count 32 should not be dismissed because it would not yet be certain that the liability it seeks to impose is redundant to Plaintiffs' respondeat superior theory of liability for Levicy's misconduct. In sum, should the Court rule that Duke, DUHS, and Levicy's Answer admits that Levicy was acting in the course and scope of her employment with Duke or DUHS when she engaged in the misconduct alleged in the Complaint, Count 32 may be dismissed as redundant to their liability for Levicy's conduct based on *respondeat superior*. Otherwise, Count 32 should not be dismissed because

it remains a means of holding Duke and/or DUHS liable for Levicy's misconduct in the event that it was not within the scope of her employment. *See id.*

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court decide this Motion as to Plaintiffs constitutional claims after Plaintiffs' petition for a writ of certiorari is ruled upon and any subsequent appellate proceedings are concluded. If the petition is not granted or the Fourth Circuit's decision otherwise remains unmodified, Counts 2 and ~~1~~–5 must be dismissed because this Court is bound by the Fourth Circuit's conclusion that those counts do not allege a constitutional violation. However, irrespective of further appellate proceedings, the Fourth Circuit's decision does not require dismissal of Plaintiffs' obstruction of justice claim against Levicy or Wilson, because the Fourth Circuit's ruling, by its own terms, applies only to "a common-law obstruction of justice claim *against police officers based on how the officers conducted a criminal investigation*," *Evans v. Chalmers*, 703 F. 3d 636, 658 (4th Cir. 2012) (emphasis added); nor does it require dismissal of Count 1 against Levicy because it did not reach the constitutional question, holding that the police defendants were entitled to qualified immunity, which Levicy does not share, *id.* 650 n.6. Furthermore, because the Fourth Circuit's decision does not require dismissal of that claim against Levicy, it does not require dismissal of Count 32, Plaintiffs' negligent supervision claim against Duke and DUHS. Finally, to the extent that the Court agrees that Duke and DUHS have admitted Plaintiffs' *respondeat superior* allegations, their liability under Count 32 would be duplicative of their admitted vicarious liability for Levicy's misconduct in Count 18.

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Respectfully submitted by:

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, ET AL.,
Plaintiffs

v.

DUKE UNIVERSITY, ET AL.,
Defendants.

1:07-CV-953-JAB-JEP

CERTIFICATE OF SERVICE

Plaintiffs' Corrected Response was served on all parties to this action via the Court's CM/ECF System, which will send a notice to counsel of record for all parties to this action, and undersigned counsel certifies that all parties are represented by counsel registered to receive such notices from the Court's CM./ECF System, including Defendant Linwood Wilson, who appears *pro se* in this action.

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