UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, ET AL.,
Plaintiffs,

v.

DUKE UNIVERSITY, ET AL.,
Defendants.

1:07-CV-953-JAB-JEP

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

Plaintiffs, Ryan McFadyen, Matthew Wilson, and Breck Archer, oppose the Motion to Strike [ECF 360] directed to Plaintiffs' Corrected Brief in Opposition to the Duke Defendants' Motion for Judgment on the Pleadings [ECF 351].

The Duke Defendants' second Rule 12 motion was filed on February 27, 2013, in violation of the Court's Order [ECF 38] requiring the Duke Defendants to file their Rule 12 motions and supporting briefs over ***four years earlier***, on or before July 2, 2008. That Order also granted the Duke Defendants considerable extensions of both the page and time limitations established by the Local Rules [ECF 38]. Nevertheless, the Duke Defendants filed a second Rule 12 motion and supporting brief without leave of Court and without even acknowledging the Court's Order [ECF 38] establishing the deadline for all Duke Defendants to file

their Rule 12 motions over four years earlier or the Court's Order on June 9, 2011 [ECF 218] staying proceedings on the very claims addressed in the motion.

Plaintiffs filed a timely response to the Duke Defendants' second Rule 12 motion, and filed a corrected response following the Status Conference held on March 14, 2014 to clarify that Plaintiffs' position is that, where the Fourth Circuit held that any of Plaintiffs' § 1983 claims do not state a violation of federal law, those claims are properly dismissed against all defendants named in those claims. The Duke Defendants contention that during the Status Conference, "Plaintiffs' counsel did not advise the Court that Plaintiffs were seeking to withdraw their concession that Count 1 could not survive the decision in *Evans*" [ECF 361 at 4] is misleading. At the Status Conference, the Court asked Plaintiffs' counsel to delineate the claims they contend are going forward in this case, and Plaintiffs' counsel presented the following list of counts and defendants in response to the Court's inquiry: Counts 1 as to Levicy, Count 2 as to Levicy and Smith, Count 5 as to Wilson, Count 18 as to Levicy, Wilson, Steel, Brohead, Dzau, Burness, Duke, and Duke Health, Count 21 as to Duke, Count 24 as to Smith, Graves, Dean, Drummond, and Duke, Count 32 as to Duke and Duke

Health, and Count 41 as to the City of Durham, North Carolina. This list, including Count 1 against Levicy, was discussed during the Status Conference in terms of claims remaining and proceeding to discovery. Counsel for the Duke Defendants agreed that the list presented by Plaintiffs' counsel was an accurate list of the remaining claims and defendants in the *McFadyen* case. Plaintiffs' counsel then filed a Status Report following the Status Conference to clarify with the Court the counts and defendants among the list articulated during the Status Conference that remained in the case, but that Plaintiffs believed should be dismissed in light of the Fourth Circuit's decision.

In their Status Report, Plaintiffs clarified that, Counts 2 and 5 are subject to dismissal as to all defendants named therein because the Fourth Circuit held that Counts 2 and 5 did not state constitutional violations. However, Plaintiffs clarified that the Fourth Circuit did not hold that Count 1 failed to state a constitutional violation; rather, the Fourth Circuit held that the appealing police defendants were entitled to qualified immunity, which Tara Levicy has not asserted and could not assert. *Evans v. Chalmers*, 703 F. 3d 636, 650 n.6 (4th Cir. 2012). Specifically, the Fourth Circuit held that:

> The district court correctly noted the uncertainty as to whether North Carolina courts would interpret the state

> NTO statute "as authorizing a search and seizure . . . on less than a full showing of probable cause" and whether "such an interpretation would render the state NTO statutes unconstitutional." *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 925 (M.D.N.C. 2011); *see also State v. Grooms*, 540 S.E.2d 713, 728 (N.C. 2000). Nonetheless, the district court refused to hold that the officers' qualified immunity barred this claim. ***Given this uncertainty, we cannot conclude that clearly established law mandated "a full showing of probable cause"*** or that the state NTO statute would be held unconstitutional without such a showing. Accordingly, ***we must reverse the district court's refusal to dismiss this constitutional challenge to the state NTO statute on qualified immunity grounds***. . . . We address in text plaintiffs' arguments that NTO affidavits failed to provide the evidentiary showing required in the NTO statute.

Id. (emphasis added, parallel citations omitted). The Fourth Circuit went on to hold that the partially corrected NTO Affidavits "meet the NTO [statute's] 'reasonable ground' standard" even though they "might not demonstrate probable cause." And, as Plaintiffs explained in their prior briefings in this Court, their briefing to the Fourth Circuit, and their briefing in support of their Petition for a Writ of Certiorari to the Supreme Court, probable cause is clearly required for the seizures, station house detentions, and searches Plaintiffs allege.

By contrast, the Fourth Circuit held that Count 2, which asserts a § 1983 claim arising out of the search of Plaintiff McFadyen's dorm

room, does not state a constitutional violation. Specifically, the Fourth Circuit held that because, in its view, "the corrected affidavit would provide adequate support for a magistrate's finding of probable cause . . . we cannot say that the false statements in the affidavit were 'material' under the second *Franks* prong." *Evans*, 703 F.3d 636, 653-654.

Thus, Plaintiffs corrected their response to the Duke Defendants' second Rule 12 motion to clarify that that the Fourth Circuit's decision does not require dismissal of Count 1 as to Tara Levicy because the Fourth Circuit did not reach the question of whether it states a constitutional violation, holding only that Ms. Levicy's co-defendants were protected by qualified immunity, to which Ms. Levicy is not entitled, as she conceded long ago. The City of Durham agrees with Plaintiffs' position that the Fourth Circuit did not reach the question of whether Count 1 states a constitutional violation in their brief to the Supreme Court stating, "[g]iven the uncertainty in the law, the court of appeals determined that, even if the [NTO] statute were unconstitutional, the police officers would be protected by qualified immunity because the unconstitutionality of the law was not 'clearly established.'" [ECF 361-3 at 19-20]. Likewise, Plaintiffs' Corrected Brief clarified that the claims that the Fourth Circuit held did not state a constitutional viola-

tion are subject to dismissal as to the defendants named in those claims regardless of whether or not they are entitled to qualified immunity.

What is glaringly absent from Defendants' brief is any showing of prejudice that they might suffer as a result of Plaintiffs' Corrected Brief. Nor could they; Plaintiffs' Corrected Brief merely corrects Plaintiffs' brief in opposition to the Duke Defendants' second motion to dismiss under Fed. R. Civ. P. 12 [ECF 341].[1] Moreover, Plaintiffs' Corrected Brief is also consistent with what Plaintiffs reported to the Court at the Status Conference held the same day. Despite being represented at the Status Conference by multiple attorneys, not one of Duke's attorneys stood up to object or articulate anything at all in connection with Plaintiffs' position regarding the claims going forward.

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[1] It should be noted that Duke Defendants' contentions based on their exhaustive typographical analysis of the mark-up that Plaintiffs submitted to show the material changes to the corrected brief are meritless. Defendants complain that words such as "and" are not shown as crossed out and reinserted elsewhere on the same line. Perhaps Defendants are confusing Plaintiffs' mark-up with what might be produced by an automated redline, which is not what Plaintiffs submitted. Rather, Plaintiffs' mark-up merely highlights in red the primary changes in the document. To the extent Defendants suggest that Plaintiffs' Corrected Brief was somehow misleading, they fail to show how.

CONCLUSION

Plaintiffs' Corrected Brief in response to Defendants' second Rule 12 motion should not be struck from the record; Plaintiffs have not waived their right to assert that Count 1 remains pending against Tara Levicy; and Plaintiffs object to Ms. Levicy's request to file a supplemental reply brief concerning her continuing liability under Count 1 on the grounds that this Court's Order – which Ms. Levicy herself requested – required her to file her Rule 12 motions and related briefing more than four years ago.

Respectfully submitted.

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March 31, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the date stamped below, I electronically filed the foregoing Memorandum in Opposition to Defendants' Motion to Strike with the Clerk of Court using the CM/ECF System, which will send notice of the filing to counsel of record for Defendants and to Defendant Linwood Wilson, who appears pro se in this matter, all of who are CM/ECF users who are registered to receive NEFs in this action.

/s/ Robert C. Ekstrand
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