IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,	)	EXPEDITED REVIEW REQUESTED
	)	
Plaintiffs,	)	**JOINT REPLY BRIEF IN**
	)	**SUPPORT OF MOTION TO**
v.	)	**STRIKE PLAINTIFFS'**
	)	**UNTIMELY AND**
DUKE UNIVERSITY, et al.,	)	**UNAUTHORIZED**
	)	**"CORRECTED" RESPONSE**
Defendants.	)	**BRIEF**

Defendants Tara Levicy ("Nurse Levicy"), Gary Smith ("Officer Smith"), Duke University ("Duke"), and Duke University Health System, Inc. ("DUHS"), (collectively, "Defendants") respectfully submit this reply brief in support of their motion to strike Plaintiffs' untimely and unauthorized "corrected" response brief pursuant to Local Rules 7.3(k) and 83.4(a)(2).

ARGUMENT

As shown in Defendants' opening brief, Plaintiffs' "corrected" response brief is properly stricken where it violates the Local Rules and Plaintiffs waived the right to advance a new and contradictory position. Plaintiffs offer no argument to the contrary and make no attempt to show they could be excused from waiver.

Instead, Plaintiffs mischaracterize their "corrected" response, asserting that they filed it only to "clarify" their initial response. [*See* DE 368 at 2, 3, 5].

Plaintiffs cite no authority, and Defendants are aware of none, allowing parties to file additional papers out of time and without leave of court to clarify their positions. Even so, in their "corrected" brief, Plaintiffs do not clarify some earlier vague statement of their position. They strike out their explicit concession that, if the Supreme Court denied certiorari to review *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), "Counts 1 and 2 must be dismissed because this Court is bound by the Fourth Circuit's conclusion that those counts do not allege a constitutional violation." [DE 341 at 2, 18]. Plaintiffs' new assertion of the opposite position as to Count 1—that "the Fourth Circuit did not hold that Count 1 failed to state a constitutional violation"—contradicts rather than clarifies Plaintiffs' earlier concession. [DE 368 at 3]. Nor did Plaintiffs clarify their position for the Court by manipulating the redline function to create a "corrected" brief that Plaintiffs now admit reflects only selected changes to Plaintiffs' initial brief. [*See id.* at 6 n.1; DE 361 at 12-13].

Defendants' arguments in support of the motion to strike stand unrebutted. Those arguments support the relief sought, as Plaintiffs' failure to offer any contrary authority confirms. Defendants thus respectfully request that the Court strike the "corrected" response brief from the docket. In the alternative, Defendants seek leave, consistent with the Local Rules, to file a supplemental reply

brief to rebut Plaintiffs' new contentions. [*See* DE 361 at 17-18].

I. PLAINTIFFS' "CORRECTED" RESPONSE BRIEF IS PROPERLY STRICKEN WHERE PLAINTIFFS DO NOT DISPUTE THAT THE "CORRECTED" BRIEF IS IN VIOLATION OF THE LOCAL RULES.

As Defendants have shown, Plaintiffs' "corrected" response brief is properly stricken for violation of the Local Rules. [*Id.* at 10-13, 16-17]. Plaintiffs do not argue that their brief complies with the Local Rules, nor do they cite any authority to rebut Defendants' argument that the brief is properly stricken. [*See* DE 368 *passim*]; *see also* LR 7.2(a) (response brief must contain "argument, which shall refer to all statutes, rules and authorities relied upon").

Rather than addressing Defendants' arguments, Plaintiffs suggest for the first time that the Court's 30 April 2008 order setting a briefing schedule for Rule 12 motions ought to foreclose Defendants' motion for judgment on the pleadings. [DE 368 at 1-2 (citing DE 38 at 2)]. To the contrary, the scheduling order contemplates only pre-answer Rule 12 motions—it requires all of the defendants to file "[m]otions *or [a]nswers*" by 2 July 2008. [DE 38 at 2 (emphasis added)]. Consistent with the Court's order, Defendants timely filed pre-answer motions to dismiss under Rule 12(b)(6). [*See* DE 45-50, 135, 175-77]. After the Court dismissed twenty-seven counts of the Second Amended Complaint, Defendants timely filed an answer to address the remaining claims. [DE 187, 195].

After the pleadings were closed, the Fourth Circuit issued its decision in *Evans*. Plaintiffs now dispute which counts are affected by *Evans*. However, there is no dispute that the *Evans* court held that Plaintiffs failed to state a claim upon which relief can be granted as to certain of the counts that survived Defendants' Rule 12(b)(6) motions and that Defendants are entitled to judgment on the pleadings on those counts. [*See* DE 368 at 2-3, 5-6].

A Rule 12(c) motion for judgment on the pleadings is a post-answer motion, filed "after the pleadings are closed." Fed. R. Civ. P. 12(c). Such a motion is the proper post-answer vehicle for asserting failure to state a claim. *See* Fed. R. Civ. P. 12(g)(2), 12(h)(2)(B); *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011) (Rule 12(c) motion proper even where defense was available at Rule 12(b)(6) stage). Defendants thus filed a Rule 12(c) motion asserting failure to state a claim based on a change in the law of the case—the Fourth Circuit's holding that Plaintiffs failed to state a claim as to certain counts of the Second Amended Complaint. [DE 336 at 5-6]. If such a motion were not permitted, the disposition of a claim that the Fourth Circuit has rejected as a matter of law would be delayed until after the parties engaged in needless discovery.

Plaintiffs apparently agreed that a Rule 12(c) motion was the proper vehicle to seek dismissal based on *Evans*, as they responded by conceding that if *Evans*

stood, Counts 1 and 2 must be dismissed against all remaining Defendants. [DE 341 at 2, 18]. Plaintiffs have never attempted to withdraw their concession of Count 2, and that concession undermines any suggestion that Defendants' Rule 12(c) motion is not the proper mechanism to seek dismissal based on *Evans*. [*See* DE 351 at 2, 18]. In any event, by failing to challenge the timing of the Rule 12(c) motion in their initial response to that motion, Plaintiffs waived any argument that the motion was untimely. [*See id. passim*]; LR 7.2(a), 7.3(k).

II. PLAINTIFFS FAIL TO REBUT DEFENDANTS' ARGUMENT THAT PLAINTIFFS WAIVED THE RIGHT TO ADVANCE A NEW AND CONTRADICTORY POSITION.

In response to Defendants' argument that Plaintiffs waived the right to assert that *Evans* did not foreclose Count 1 against Nurse Levicy, Plaintiffs offer only the conclusory assertion that "Plaintiffs have not waived their right to assert that Count 1 remains pending against Tara Levicy." [DE 368 at 7 (conclusion)]. Plaintiffs cite no authority to support their assertion and make no attempt to distinguish the cases, cited in Defendants' brief, holding that a party abandons an argument by failing to raise it in a response brief. [*See id.*]. Nor do Plaintiffs explain why the waiver provision of Local Rule 7.3(k) should not apply here. [*See id.*; DE 361 at 15-17]; *see also* LR 7.2(a) (response brief must contain "argument, which shall refer to all statutes, rules and authorities relied upon").

As Defendants have demonstrated, Plaintiffs' concession of Count 1 was not a mistake. [DE 361 at 13-16]. Count 1 is Plaintiffs' 42 U.S.C. § 1983 claim based on an alleged Fourth Amendment violation associated with the issuance of the non-testimonial order ("NTO"). [*Id.* at 3-4]. The *Evans* court held that Plaintiffs "failed to state Fourth Amendment claims." 703 F.3d at 654 n.12. Despite multiple opportunities to argue otherwise, Plaintiffs have consistently affirmed their understanding of that holding. In this Court, Plaintiffs correctly conceded that Count 1 would fail against Nurse Levicy if *Evans* stood unmodified, given the Fourth Circuit's holding that Count 1 "do[es] not allege a constitutional violation." [DE 341 at 2, 18]. Plaintiffs next sought a writ of certiorari to review *Evans*, arguing that the Fourth Circuit erred in holding that Plaintiffs failed to allege a constitutional violation based on the issuance of the NTO. [*See* DE 344-1 at 12-13, 39]. In their reply brief in support of the petition, Plaintiffs reiterated their position that *Evans* foreclosed Count 1 against Nurse Levicy, explaining that summary reversal of *Evans* "would *restore* [Plaintiffs'] Section 1983 claim against the private parties who conspired with [police officers] to violate [Plaintiffs'] Fourth Amendment rights." [DE 361-2 at 24 (emphasis added)].

Nor did Plaintiffs attempt to retract their concession of Count 1 at the 14 March 2014 status conference. Plaintiffs incorrectly contend that the parties

discussed Counts 1, 2, 5, 18, 21, 24, 32, and 41 as the "claims remaining and proceeding to discovery." [DE 368 at 2-3]. Plaintiffs' inclusion of Count 2 in that list belies the assertion that it is a list of claims "proceeding to discovery," as Plaintiffs continue to acknowledge that Defendants are entitled to prevail on their Rule 12(c) motion as to Count 2. [*Id.* at 3]. Plaintiffs' claim that Defendants did not object to "Plaintiffs' position regarding the claims going forward" is likewise incorrect. [*Id.* at 6]. Defendants' counsel expressly stated that "there is a pending 12(c) motion with respect to" Counts 1, 2, 18, and 32. [DE 364 at 20:13-17].

Relying on the Durham Defendants' brief in opposition to the certiorari petition, Plaintiffs claim that 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." [DE 368 at 5]. As shown above, that has never been Plaintiffs' position. Plaintiffs' new characterization of the Fourth Circuit's ruling is based on a footnote where the *Evans* court declined to rule on an alternative argument that the NTO statute itself is unconstitutional. [*See* DE 351 at 2 (citing *Evans*, 703 F.3d at 650 n.6)].[1] As Defendants noted in their opening brief, the Durham Defendants argued in their opposition to the certiorari petition that the plaintiffs in a related case raised the alternative argument that prompted that

[1] The correct citation is *Evans*, 703 F.3d at 649 n.6.

footnote in *Evans*; Plaintiffs never raised that argument. [*See* DE 361 at 16; DE 361-3 at 16-20]. Plaintiffs do not contend otherwise.

Finally, Plaintiffs imply that they can revive Count 1 because Defendants have not made an affirmative showing of prejudice. [DE 368 at 6]. In fact, under Local Rule 7.3(k), Plaintiffs may avoid waiver only if they make a "showing of excusable neglect," which they cannot and have not attempted to do. LR 7.3(k); *see Morris-Belcher v. Hous. Auth. of Winston-Salem*, No. 1:04CV255, 2005 WL 1423592, at *4 (M.D.N.C. June 17, 2005) (Beaty, J.). Because the burden is on Plaintiffs to show that they should be excused from waiver, Plaintiffs are unable to cite any rule or case that would require Defendants to make a showing of prejudice as a prerequisite to waiver. [*See* DE 368 *passim*]. In any event, Plaintiffs expressly conceded more than nine months ago that Count 1 could not survive against Nurse Levicy if the Supreme Court denied certiorari. [DE 341 at 2, 18]. Certiorari was indeed denied, and therefore Defendants have relied on Plaintiffs' concession of Count 1 in evaluating the status of their case and preparing their litigation strategy. *See McFadyen v. City of Durham*, 134 S. Ct. 617 (2013).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court strike Plaintiffs' "corrected" response brief. If the Court should deny the motion to

strike, Defendants respectfully request leave to file a supplemental reply brief to address matters newly raised in the "corrected" response brief.

This the 3rd day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on 3 April 2014, 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 3rd day of April, 2014.

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