

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

**1:07cv953**

RYAN McFADYEN, et al.,  
Plaintiffs,

v.

DUKE UNIVERSITY, et al.,  
Defendants.

**BRIEF IN SUPPORT OF MOTION TO  
DISMISS UNCONTESTED MOTION TO  
DISMISS DEFENDANT LINWOOD E.  
WILSON’S RENEWED MOTION TO  
DISMISS (Doc. 346) and JUDGMENT  
ON THE PLEADINGS PURSUANT TO  
RULE 12 (c) FRCP**

Defendant Linwood E. Wilson (“Defendant Wilson”) submits this brief in support of his 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”), Defendant Wilson is entitled to judgment as a matter of law on Count 18 and uncontested motion to dismiss pursuant to L.R. 7.3(k)

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

Defendant Wilson, 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 Defendant Wilson on two counts—Counts 5 (alleging false public statements) and 18 (common law obstruction of justice and conspiracy). (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 5 and 18) against various combinations of the Durham-related defendants; a state law obstruction of justice claim (Count 18) against Defendant Wilson and others. 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 5, and the state law obstruction of justice claims against them in Count 18. *Evans*, 703 F.3d at 659.

### QUESTIONS PRESENTED

1. Whether Defendant Wilson is entitled to judgment as a matter of law on Plaintiffs’ obstruction of justice and conspiracy claim in Count 18, which is based on his 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?

2. Whether Defendant Wilson is entitled to judgment as a matter of law, on the only claim still pending against him, Obstruction of Justice and Conspiracy in Count 18, given the fact that Plaintiffs', after 5 months passing, have failed to file a response to Defendant Wilson's Renewed Motion to Dismiss, 14th day of November 2013 (Doc. 346), nor have plaintiffs requested an extension of time from the court to file. \*See Local Rules 7.3(k) and 83.4(a)(2).

3. Whether Plaintiffs' failure to file a response to the November 14, 2013 Renewed Motion to Dismiss by Defendant Wilson constitutes an untimely response and an abandonment of the claim?

4. Whether Plaintiffs' failure to file a response to Defendant Wilson's Motion To Dismiss on November 14, 2013 constitutes an uncontested motion.

5. Whether Plaintiffs' failure to file a response to Defendant Wilson's Motion to Dismiss (Doc 346) is a violation of Local Rules 7.3(k) and 83.4(a)(2).

### **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. UNDER THE FOURTH CIRCUIT’S HOLDING IN EVANS, DEFENDANT WILSON IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS’ OBSTRUCTION OF JUSTICE CLAIM.

In Count 18, Plaintiffs allege that Defendant Wilson 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 Defendant Wilson and other Duke Defendants. 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, Defendant Wilson, a District Attorney Investigator cannot, as a matter of law, be held liable for obstruction of justice based on how he conducts a criminal investigation. *See id.* The actions Plaintiffs’ allege, as to Defendant Wilson in Count 18, involve solely his work in the course of a criminal investigation. Specifically, Plaintiffs allege that Defendant Wilson and others “obstructed justice by conspiring to manufacture and manufacturing false and misleading forensic medical records and reports in the course of his investigation as an Investigator employed by the North Carolina Administrative Office of the Courts and assigned to the 14<sup>th</sup> Prosecutorial District, also a law enforcement agency as it enforces the laws within it’s respective District.

## **NORTH CAROLINA STATUTES AND CODES**

### **§ 7A-69. Investigatorial assistants.**

The district attorney in prosecutorial districts 1, 3B, 4, 5, 7, 8, 11, 12, 13, 14, 15A, 15B, 16A, 18,19B, 20A, 20B, 21, 22A, 22B, 24, 25, 26, 27A, 27B, 28, 29A, 29B, and 30 is entitled to one investigatorial assistant, and the district attorney in prosecutorial district 10 is entitled to two investigatorial assistants, to be appointed by the district attorney and to serve at his pleasure.

It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other Duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c.969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e); 1997-443, s.18.16; 1998-212, s.

16.21; 1999-237, s. 17.9; 2004-124, s.14.7(a); 2005-276, s. 14.2(p); 2007-323, s. 14.25(n).)

**Job Description for District Attorney Investigator in the State of North Carolina  
14<sup>th</sup> Prosecutorial District:**

Duties may include but are not limited to:

Prepare felony cases by reading case files, examining files for proper reports, determining sufficient evidence for prosecution, identifying areas lacking in information, advising appropriate personnel of trouble spots such as gaps in information, evidence, and witness credibility. Respond to Requests for Discovery by retrieving and preparing information required by the statute and delivering same to defense counsel; complete motions as directed; and prepare and issue court orders and subpoenas for records of all types (e.g., telephone, medical, utility, etc.). Locate or relocate witnesses; and interview witnesses, including special expert witnesses. Serve subpoenas.

Provide diagrams, photographs, and other exhibits required for prosecution of cases.

Conduct special background investigations of witnesses, defendants, and potential jurors as directed by the District Attorney.

Participate in case evaluations regarding disposition of cases.

Conduct investigations or fact-finding projects as requested by Judges, District Attorney or Assistants and write reports.

Serve as a liaison between law enforcement agencies and the DA's office by assisting other agencies with investigation of crimes, preparation of warrants, court orders, and other documents; and provide training to law enforcement agencies on various topics such as legal updates.

Manage extraditions by inquiring of other states defendants' intentions to waive the right

to extradition, making arrangements for pick up, and processing necessary documentation required to extradite defendant.

This position reports to the Administrative Assistant and requires approximately 10% overnight travel.

**Knowledge, Skills and Abilities / Competencies:**

**Knowledge of:** evidence collection, investigative techniques and procedures; elements of criminal law; processes and procedures of the judicial system; basic human psychology; and social, cultural and economic fabric of the community.

**Skills in:** observation; analysis; information gathering; fact finding; interviewing; and report writing.

**Ability to:** make pertinent observations and to analyze those observations against the charges in a specific case or situation; effectively communicate with people of diverse backgrounds; establish effective working relationships with law enforcement agencies; write detailed, clear, and concise reports; coordinate and share information; and work as a team member.

Must possess a valid NC Driver's License and reliable transportation.

Because Plaintiffs' allegations are directed at such investigative work in aid of law enforcement, Defendant Wilson is entitled to judgment as a matter of law on Count 18.

See Evans, 703 F.3d at 658.

II. UNDER L.R. 7.3(k), DEFENDANT WILSON IS ENTITLED TO JUDGMENT AS  
A MATTER OF LAW ON PLAINTIFFS' UNCONTESTED RENEWED MOTION  
TO DISMISS FILED ON NOVEMBER 14, 2013 BY DEFENDANT WILSON.

As a result of Plaintiffs' failure to respond to Defendant Wilson's Renewed Motion to Dismiss (Doc. 346) the Court must grant the Uncontested Motion to Dismiss.

\*See 1:13cv29, TRICIA IRENE GILBERT, vs. ATHENE ANNUITY & LIFE ASSURANCE COMPANY (Exhibit 1) and See L.R. 7.3(k); see also Fed. R. Civ. P. 6(b)(1)(B) excusable neglect\*.

Plaintiffs' absence of Responding, not requesting an extension of time and not stating any excusable neglect, after 5 months, is in itself inexcusable and is absolutely reason for this Court to GRANT Defendant Wilson's Renewed Motion to Dismiss and award costs and fees pursuant to L.R. 83.4(a)(2).

#### CONCLUSION

For the reasons stated above, Linwood E. Wilson respectfully requests that the Court enter judgment on the pleadings as to Count 18 and Defendant Wilson's Renewed Motion To Dismiss (Doc. 346).

This the 28<sup>th</sup> day of April, 2014

/s/ Linwood E. Wilson  
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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing pleading, motion, affidavit, notice, or other document/paper has been electronically filed with the Clerk of Court using the CM/ECF system, which system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the NEF will be transmitted.

This the 28<sup>th</sup> day of April 2014.

By: /s/ Linwood E. Wilson  
Linwood E. Wilson  
*Pro Se*