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' OPPOSITION TO LINWOOD WILSON'S MOTION FOR JUDGMENT ON THE PLEADINGS AND RENEWED MOTION TO DISMISS

This matter is before the Court on Defendant Linwood Wilson's Motion for Judgment on the Pleadings [ECF 389] under Fed. R. Civ. P. 12(c) and his Renewed Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). The Court should deny the Motion for Judgment on the Pleadings and the Court should deny the renewed motion to dismiss except insofar as it seeks dismissal of the Fifth Cause of Action.[1] All of Wilson's motions to dismiss Plaintiffs' common law obstruction of justice claim against him should be denied.

THE RELEVANT FACTS

Plaintiffs' Second Amended Complaint alleges that Defendant Wilson "prevented, obstructed, impeded, or hindered" public justice in North Carolina by, among other things, conspiring with

[1] Plaintiffs' Status Report [ECF 350] concedes that their Fifth Cause of Action against Wilson should be dismissed.

Gottlieb, Himan, Nifong, Steel, Dzau, Manly, Arico, Levicy, DUHS, and Duke University, to fabricate forensic medical reports and records of Crystal Mangum's SAE conducted at DUHS, and then to conceal the fabricated evidence. [ECF 136 at 391 ¶ 1193 and 257-66 ¶¶ 779-799 (Section XXXIV, "The SANE Conspiracy").] Plaintiffs allege that the conspiracy continued from the origins of the underlying investigation until Nifong transferred the case to the Attorney General, who, after reinvestigating the allegations, concluded that no crime occurred and that there was no credible evidence to the contrary. [ECF 136 at 266 ¶¶ 798-799.] While there is more, *see, e.g.,* ECF 136 at 390-94 ¶¶ 1189-1202, any one of the acts in furtherance of the SANE conspiracy is sufficient to state a common law obstruction of justice claim.

In his Answer [ECF 377] to the Second Amended Complaint, Wilson denies Plaintiffs' contention that he participated in a conspiracy to obstruct justice. But Wilson admits most, if not all, of the material facts Plaintiffs allege to support that claim. For example, Wilson admits Plaintiffs' allegation that he participated in the "interview conducted in the DA's office . . . of Nurse Levicy." [ECF 377 at 143 (Answer ¶ 788).] Wilson admits that he "met Nurse Levicy and Investigator Himan on the evening of January 10, 2007." [*Id*. at 145 (Answer ¶ 798).] Wilson admits that, during that January 10 meeting, he, Levicy, and Himan discussed how Levicy would explain the absence of any DNA belonging to any member of the Duke men's lacrosse team on the swabs, smears,

or any other evidence in the rape kit; and that "Nurse Levicy responded to multiple questions about condoms during her interview on January 10, 2007." [*Id*. at 144 (Answer ¶795).] And, Wilson admits Plaintiffs' allegation that, during the January 10, 2007, meeting, "Levicy stated that she 'wasn't surprised when [she] heard no DNA was found because rape is not about passion or ejaculation but about power.'" [*Id*. at 145 (Answer ¶796).]

THE STANDARD OF REVIEW

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is analyzed under the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Burbach Broad. Co. of Del. v. Elkins Radio Corp*., 278 F.3d 401, 405-06 (4th Cir. 2002). Thus, the factual allegations in Plaintiffs' Amended Complaint and all reasonable factual inferences that may be drawn from them are taken to be true and in the light most favorable to Plaintiffs. *See id*. at 406.

On a Rule 12(c) motion the Court may consider the Answer as well, but factual allegations in the Answer may be considered "only where and to the extent they have not been denied or do not conflict with the complaint." *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011) (quoting *Jadoff v. Gleason*, 140 F.R.D. 330, 331 (M.D.N.C. 1991)). "For the purposes of this motion [the defendant] cannot rely on allegations of fact contained only in the answer, including affirmative defenses, which contradict [the] complaint," because "Plaintiffs were not required

to reply to [the] answer, and all allegations in the answer are deemed denied." *Id.*; *see* Fed. R. Civ. P. 8(b)(6) ("If a responsive pleading is not required, an allegation is considered denied or avoided.").

In short, the question presented by a motion 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 the case can be decided as a matter of law." *Alexander*, 801 F. Supp. 2d 429, 433 (quoting *Smith v. McDonald*, 562 F. Supp. 829, 842 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427 (4th Cir. 1984), *aff'd*, 472 U.S. 479 (1985)); *see id.* (collecting authorities).

ARGUMENT

I. THIS COURT PREVIOUSLY REJECTED WILSON'S ARGUMENTS FOR JUDGMENT ON THE PLEADINGS IN ITS ORDER DENYING WILSON'S MOTION TO DISMISS.

This Court consistently refuses to reconsider issues raised in a Rule 12(c) motion that it fully addressed at the Rule 12(b)(6) stage. *See*, *e.g.*, *Alexander*, 801 F. Supp. 2d 429, 434. The Court should follow that practice here. As explained below, Wilson raises nothing new in his Rule 12(c) motion. All of Wilson's arguments for dismissal under Rule 12(c) were available to Wilson in the proceedings on his motion for dismissal under Rule 12(b)(6), and all of them were waived by Wilson's failure to assert them in those proceedings or rejected by the Court.

II. WILSON'S THIRD MOTION TO DISMISS MERITS NO CONSIDERATION BECAUSE IT VIOLATED THE LOCAL RULES AND STATES NO BASIS FOR DISMISSAL OF PLAINTIFFS' OBSTRUCTION OF JUSTICE CLAIM.

Wilson's Third Motion to Dismiss [ECF 346] merits no consideration for several reasons. *First*, the motion violated LR 7.3(a), which requires motions to dismiss to be accompanied by a brief; Wilson filed no brief in support of his Third Motion to Dismiss. *Second*, the motion violated LR 7.3(b) because it failed to state "with particularity the grounds therefor." *Third*, the motion violated LR 7.3(b) because it fails to "cite any statute or rule of procedure relied upon." And by failing to file any supporting brief whatsoever, Wilson violated the entirety of LR 7.3. Among other things, Wilson failed to support his motion with "(1) [a] statement of the nature of the matter before the Court; (2) [a] concise statement of the facts . . .; (3) [a] statement of the question or questions presented; [and] (4) [t]he argument" in support of his motion. LR 7.3(a).

As for the motion itself, Wilson's only contention is that "Plaintiffs in all 3 cases stated, in their oppositions to Defendant Wilson's Motion to Dismiss (Doc 324 in 1:07cv953, Doc. 186 in 1:07cv739, Doc. 296 in 1:08cv119), that if the Fourth Circuit Court of Appeals ruling is allowed to stand then the Motions to Dismiss filed by Defendant Wilson should be granted." [ECF 346 at 1.] Wilson's contention is just plain false. In the *McFadyen* case, Plaintiffs did not concede that their common law obstruction of justice claim against Wilson should be (or could be) dismissed based upon the Fourth Circuit's ruling. *See* ECF 327

(Plaintiffs' Response to ECF 324). Thus, the only ground Wilson asserted in support of his "Third Motion to Dismiss" has no merit, and, if the Court considers it at all, the Court should deny it.

Furthermore, Wilson refers to his Motion to Dismiss [ECF 346], which is a renewal of his Motion to Dismiss [ECF 324] as uncontested. That is also false. Plaintiffs' responded to ECF 324 in their filing ECF 341. Wilson's Motion to Dismiss [ECF 346] renewed Wilson's Motion to Dismiss [ECF 324] following the Supreme Court's denial of certiorari. However, pursuant to the Court's Order [ECF 340], Plaintiffs responded to Wilson's Motion to Dismiss [ECF 324] prior to the Supreme Court's denial of certiorari. Wilson filed a reply [ECF 342] to Plaintiffs' Response [ECF 341]. There was no reason for Wilson to file ECF 346, renewing ECF 324, because ECF 324 had been responded to by Plaintiffs, replied to by Wilson, and was pending before the Court.

III. PLAINTIFFS' OBSTRUCTION OF JUSTICE CLAIM AGAINST WILSON SHOULD NOT BE DISMISSED

Wilson seeks dismissal from Count 18, which asserts a claim for common law obstruction of justice against him and several co-defendants, including Gottlieb, Himan, Nifong, Steel, Dzau, Manly, Arico, Levicy, and against Duke and/or DUHS based on Levicy's misconduct, pursuant to respondeat superior. [ECF 136 at 390-394 ¶¶ 1189-1202.] Count 18 alleges that Wilson obstructed justice by conspiring with Levicy and others to manufacture and by manufacturing false and misleading forensic medical rec-

ords and reports. [*Id.* ¶¶ 779-99 at 257-66 and ¶¶ 1189-1202 at 390-94.] In rejecting Wilson's first attempt to dismiss this claim, this Court concluded that "Plaintiffs have alleged significant misconduct in the creation of false and misleading evidence and destruction or alteration of potential evidence." [ECF 186 at 147.] 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 Wilson, and the admissions he makes in his Answer [ECF 377] only bolsters that conclusion.

A. The Fourth Circuit's holding does not apply to Wilson because Wilson is not "a police officer"

Wilson contends that the Fourth Circuit's decision in *Evans v. Chalmers* requires dismissal of Plaintiffs' obstruction of justice claim for the reasons the Fourth Circuit ruled that Plaintiffs could not proceed against the three police officers named in that claim *because they were police officers*. Moreover, the panel acknowledged 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 ac-

tions *relating to a criminal proceeding*," it declined to forecast that North Carolina's Supreme Court "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)).[2]

Linwood Wilson is not a police officer, never was a police officer, and does not even allege in his Answer that he was a police officer. Therefore, Wilson cannot avail himself of a rule, if any exists, that bars a claim for obstruction of justice against police officers. But that is not all. There are several other defects in this new claim. First, Wilson's Answer denies that he was even acting "under color of law" at any time, including when he joined the conspiracy to obstruct justice. [*See, e.g.,* ECF 377 at 172 ¶ 955.] Second, Plaintiffs' claim against Wilson 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. Third, Wilson does not point to any case in any jurisdiction that, like North Carolina, recognizes a common law obstruction of justice claim, but, at the same time, bars such an action against a person employed as Wilson was, who participates in a conspiracy to manufacture medical evidence and doctors medical records for purposes of bolstering a patently false rape claim, causing criminal process to issue based on that false claim, and impeding vic-

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[2] In *Wilson*, no North Carolina court had addressed whether liability extended to an automobile manufacturer for defects in the design and manufacture of a vehicle that did not cause a collision, but exacerbated injuries sustained thereafter. 656 F.2d at 961.

tims of that misconduct from obtaining civil remedies for the harm caused by such misconduct. Fourth, 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 Wilson based on the misconduct Plaintiffs allege.

B. North Carolina courts define 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). Likewise, 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).

Wilson and his co-defendants have 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 ruled to the contrary in *In re Kivett,* which held that a sitting judge's "attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice." 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 threat-

ened). 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 of Appeals 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 common law obstruction of justice applied only civil proceedings, that would still be no basis for dismissal because that is what Plaintiffs allege.

This Court not only rejected Wilson'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 his arguments did not require the Court to view the tort more narrowly than North Carolina courts have and 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 Wilson's conduct was intended to interfere with Plaintiffs' ability to

obtain remedies in a civil action. [ECF 186 at 143-48 ("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.").] Thus, this Court has already ruled that Plaintiffs allege facts beyond mere interference with a criminal proceeding, and Wilson offers no reason for the Court to reverse itself now. Therefore, Wilson's Motion for Judgment on the Pleadings and his motions and renewed motions to dismiss should be denied as to Plaintiffs' common law claim against him for obstruction of justice.

IV. WILSON FAILED FILE HIS MOTION "EARLY ENOUGH NOT TO DELAY TRIAL."

Rule 12(c) permits a party to move for judgment on the pleadings, but only so long as the motion is filed "early enough not to delay trial." Fed. R. Civ. P. 12(c). Given that this case is now in its seventh year and that Plaintiffs have been prevented from conducting discovery of any kind on their claims against Wilson solely as a result of the Rule 12 motions already filed in this case, Plaintiffs respectfully submit that Wilson has failed to file his motion for judgment on the pleadings "early enough" as Rule 12(c) requires.

CONCLUSION

Wilson's Motion for Judgment on the Pleadings and his motions and renewed motions to dismiss should be denied as to Plaintiffs' Eighteenth Cause of Action for obstruction of justice against Wilson. Plaintiffs have already advised the Court that their Fifth Cause of Action should be dismissed to the extent that the Fourth Circuit has ruled that it fails to state a constitutional violation.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the date stamped below, the foregoing Memorandum was electronically filed with the Court's CM/ECF System, which will issue a Notice of Electronic Filing (NEF) to counsel of record for every party registered to receive NEFs through the Court's CM/ECF System as set out below. I further certify that every party to this action has at least one counsel of record registered to receive NEFs in this action, and that they only unrepresented party, Linwood Wilson, has been permitted to register to receive the NEFs issued by the Court's CM/ECF System in this action.

/s/ Robert C. Ekstrand
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