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

RYAN MCFADYEN, MATTHEW WILSON, and BRECK ARCHER	)	
Plaintiffs,	)	
v.	)	1:07CV953
DUKE UNIVERSITY, et al.,	)	
Defendants.	)	

ORDER

BEATY, District Judge.

This matter is currently before the Court on a Motion for Judgment on the Pleadings [Doc. #335] filed by Defendants Tara Levicy ("Defendant Levicy"), Gary Smith ("Defendant Smith"), Duke University ("Defendant Duke University"), and Duke University Health System, Inc. ("Defendant Duke Health"), (collectively "the Duke Defendants"). Also before the Court are Motions to Dismiss [Docs. #324, #330, #346] and a Motion for Judgment on the Pleadings and Motion to Grant Uncontested Motion to Dismiss [Doc. #389] filed by Defendant Linwood Wilson ("Defendant Wilson"). Finally, before the Court is a Motion for Rule 11 Sanctions [Doc. #367] filed by Defendant Wilson.[1] For the reasons set forth below, the Court will grant the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #335], grant in part and deny in part Defendant Wilson's Motion for Judgment on the Pleadings and Motion to Grant Uncontested Motion to Dismiss [Doc. #389], deny as moot Defendant Wilson's Motions to

[1] Also before the Court are a Motion for Judgment on the Pleadings [Doc. #385] and a Motion to Sever Count 41 [Doc. #395] filed by Defendant City of Durham. However, the Court will address those Motions in a separate order.

Dismiss [Docs. #324, #330, #346], and deny Defendant Wilson's Motion for Rule 11 Sanctions [Doc. #367].

I. FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant to the facts underlying the Second Amended Complaint [Doc. #136], Defendant Levicy was a sexual assault nurse examiner (SANE) in training and was employed by Defendants Duke University and Duke Health. Defendant Smith was a Duke University Police Department sergeant. Defendant Wilson formerly served as an investigator, employed by the District Attorney for the Fourteenth Prosecutorial District in North Carolina.

This case arises out of the 2006-2007 criminal investigation of members of the 2005-2006 Duke University men's lacrosse team based on the rape allegations made by Crystal Magnum against three Duke lacrosse players. All charges related to the criminal investigation were dismissed in 2007. After the criminal charges were dismissed, three separate civil suits were filed by the members of the 2005-2006 Duke lacrosse team against, *inter alia*, the City of Durham, several Durham police officers and members of the Durham Police Department, Michael Nifong ("Nifong")—the prosecutor involved in bringing charges against the three lacrosse players in the criminal investigation—, Defendant Wilson—Nifong's hired investigator—, Duke University, several Duke University board members and employees, Duke Health and Duke Health employees, the Duke University Police Department and several of its employees, and the laboratory that conducted the DNA tests related to the underlying criminal investigation. The three suits were brought by three sets of Plaintiffs termed the Evans Plaintiffs (see Case Number 1:07CV739), the McFadyen Plaintiffs (see Case Number 1:07CV953), and the Carrington

Plaintiffs (see Case Number 1:08CV119) against the various defendants. As it relates to the instant case, Plaintiffs Ryan McFadyen, Matthew Wilson, and Breck Archer ("Plaintiffs") filed their original Complaint [Doc. #1] in this matter on December 18, 2007 and subsequently filed a Second Amended Complaint [Doc. #136] on February 23, 2010 asserting 41 counts against the various defendants in this case. The Court's March 31, 2011 Memorandum Opinion [Doc. #186] and Order [Doc. #187] in this case contains a detailed summary of the Second Amended Complaint's factual allegations and thus, they will not be repeated here. However, to the extent any facts are relevant to analyzing the matters currently before the Court, the Court will address such facts in the relevant and appropriate context below.

Defendant Wilson and the Duke Defendants moved to dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6); Defendant Wilson also moved to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6) and the doctrine of absolute immunity. (See Renewed Motions to Dismiss Second Amended Complaint [Docs. #167, #175, #176, #177].) On March 31, 2011, this Court ruled on the Motions to Dismiss, completely dismissing 27 counts of the 41-count Second Amended Complaint and allowing the remaining counts to go forward against various defendants. Specifically, as relevant to the matters currently before the Court, the Motions to Dismiss were denied as to the following claims against the respective defendants: (1) Count 1 (§ 1983 Unlawful Search and Seizure claim) would go forward as to Defendant Levicy; (2) Count 2 (§ 1983 Unlawful Search and Seizure claim) would go forward as to Defendants Levicy and Smith; (3) Count 5 (§ 1983 Making False Public Statements claim) would go forward as to Defendant Wilson; (4) Count 18 (Common

Law Obstruction of Justice and Conspiracy claim) would go forward as to Defendants Levicy, Wilson, Duke University, and Duke Health; and (5) Count 32 would go forward against Defendants Duke University and Duke Health. After the Court entered its Memorandum Opinion and Order on the Motions to Dismiss, the Duke Defendants filed their Answer to the Second Amended Complaint [Doc. #195] on April 14, 2011. In late April 2011, the City of Durham and the police officer and police official defendants ("the City of Durham Defendants") filed an interlocutory appeal, appealing this Court's March 31, 2011 Memorandum Opinion and Order to the extent it denied the City of Durham Defendants' motions to dismiss, arguing that they were shielded from suit on qualified, public official, and governmental immunity grounds. Defendant Wilson was not among the defendants that filed an interlocutory appeal in this case, although the Court entered an Order [Doc. #204] on May 6, 2011 allowing Defendant Wilson to proceed on appeal *in forma pauperis*. On June 9, 2011, the Court entered an Order [Doc. #218] staying the proceedings in this case,[2] including discovery, pending resolution of the interlocutory appeal in this case. On December 17, 2012, the Fourth Circuit issued an opinion reversing in-part and affirming in-part this Court's denial of the City of Durham Defendants' motions to dismiss. See Evans v. Chalmers, 703 F.3d 636 (4th Cir. 2012) cert. denied, 134 S. Ct. 98, 187 L. Ed. 2d 33 (U.S. 2013) and cert. denied, 134 S. Ct. 617, 187 L. Ed. 2d 409 (U.S. 2013). Relevantly, the Fourth Circuit reversed this Court's order denying the City of Durham Defendants motions to dismiss Counts 1 and 2 (§ 1983 Unlawful Search and

[2] The proceedings were stayed as to all the remaining counts except for Count 21 (Breach of Contract claim) and Count 24 (Fraud claim) against Duke University and various Duke officials.

Seizure claims), Count 5 (§ 1983 Making False Public Statements claim), and Count 18 (Common Law Obstruction of Justice and Conspiracy claim).

Separately, on December 18, 2012 and January 15, 2013, Defendant Wilson filed Motions to Dismiss [Docs. #324, #330], requesting that the Court dismiss the remaining claims alleged against him, that is, Count 5 (§ 1983 Making False Public Statements claim) and Count 18 (Common Law Obstruction of Justice and Conspiracy claim) in light of the Fourth Circuit decision in this case. Similarly, on February 27, 2013, the Duke Defendants filed a Motion for Judgment on the Pleadings [Doc. #335], requesting that the Court dismiss Counts 1 and 2 (§ 1983 Unlawful Search and Seizure claims), Count 18 (Common Law Obstruction of Justice and Conspiracy claim), and Count 32[3] (Common Law Negligent Supervision, Hiring, Training, Discipline, and Retention claim) against the respective defendants based on the Fourth Circuit decision in this case. On March 25, 2013, Plaintiffs filed a Motion to Stay the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #337], which requested that the Court (1) stay any decision on the Duke Defendants' Motion for Judgment on the Pleadings pending resolution of Plaintiffs' petition for certiorari to the United States Supreme Court or, alternatively, requested that the Court (2) give Plaintiffs an additional sixty days to respond to the Duke Defendants' Motion for Judgment on the Pleadings. On May 17, 2013, the Court entered an Order [Doc. #340] denying Plaintiffs' request to stay the proceedings pending resolution of the

[3] Although Count 32 was not before the Fourth Circuit during the interlocutory appeal, as discussed in more detail below, Count 32 is derivative of Defendant Levicy's liability for Count 18 for obstruction of justice, a claim that was before the Fourth Circuit on appeal in this case.

petition for certiorari[4] but granting the request for a sixty-day extension to file a response to the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #335] and to Defendant Wilson's Motions to Dismiss [Docs. #324, #330]. Thereafter, on May 30, 2013, Plaintiffs filed their Brief in Opposition to the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #341], which (1)asserted and conceded that Counts 1 and 2 should be dismissed "because this Court is bound by the Fourth Circuit's conclusion that those counts do not allege a constitutional violation", (Br. in Opp'n to Mot. for J. on the Pleadings [Doc. #341], at 18); (2) asserted that Count 18 should proceed against the respective Duke Defendants and Defendant Wilson; and (3) asserted Count 32 should proceed against Duke University and Duke Health to the extent it is not duplicative of the respondeat superior allegations asserted in Count 18. Defendant Wilson filed a Reply Brief [Doc. #342] on June 2, 2013 and the Duke Defendants filed their Reply Brief [Doc. #343] on June 17, 2013. On November 14, 2013, Defendant Wilson filed a Renewed Motion to Dismiss [Doc. #346], which merely "renew[ed]" his previously filed Motions to Dismiss [Docs. #324, #330]. On March 27, 2014, Defendant Wilson filed a Motion for Rule 11 Sanctions [Doc. #367]. On April 20, 2014, Defendant Wilson filed an Answer to the Second Amended Complaint [Doc. #377], which requests that the Court impose sanctions against Plaintiffs and Plaintiffs' attorneys, asserting that the claims brought by Plaintiffs in this case are groundless and vexatious. On April 28, 2014, Defendant Wilson also filed a Motion for Judgment on the Pleadings and Motion to Grant Uncontested Motion to

[4] The Supreme Court denied Plaintiffs' writ of certiorari on November 12, 2013. McFadyen v. City of Durham, N.C., 134 S. Ct. 617, 187 L. Ed. 2d 409 (2013).

Dismiss [Doc. #389], which also requests that the Court dismiss the claims remaining against Defendant Wilson. The Court will address each of the pending Motions in turn.

II. PRELIMINARY ISSUES

A. Timeliness of Defendant Wilson's Motion for Judgment on the Pleadings

Plaintiffs argue that Defendant Wilson's Motion for Judgment on the Pleadings was not filed early enough to delay trial. (See Pls.' Opp'n to Linwood Wilson's Mot. for J. on the Pleadings and Renewed Mot. to Dismiss [Doc. #394], at 12.) However, the Court notes that it was already in the process of considering the Duke Defendants Motion for Judgment on the Pleadings, which requested that the Court dismiss Plaintiffs' common law obstruction of justice and conspiracy claim against Defendants Levicy, Duke University, and Duke Health, which is a similar position that is the subject of Defendant Wilson's Motion for Judgment on the Pleadings. Furthermore, Plaintiffs acknowledge, (see Pls.' Opp'n to Linwood Wilson's Mot. for J. on the Pleadings and Renewed Mot. to Dismiss [Doc. #394], at 1-2), that the factual allegations supporting Plaintiffs' common law obstruction of justice and conspiracy claim against Defendant Wilson are similar to the factual allegations underlying that claim against the Duke Defendants. Additionally, as will be discussed below in further detail, Plaintiffs concede that the only other remaining claim against Defendant Wilson, Count 5, should be dismissed in light of the Fourth Circuit decision in Chalmers. Thus, in an effort to conserve judicial resources, the Court will consider Defendant Wilson's Motion for Judgment on the Pleadings [Doc. #389] in this Memorandum.[5]

[5] As Plaintiffs' do not object to the timing of Defendant Wilson's Answer to the Second Amended Complaint [Doc. #377], the Court will not address any issues regarding the timing of

B. Defendant Wilson's Motion to Grant Uncontested Motion to Dismiss

Defendant Wilson argues that the Court should grant his Renewed Motion to Dismiss [Doc. #346] because Plaintiffs did not file a response to that Motion. (See Mot. for J. on the Pleadings and Mot. to Grant Uncontested Motion to Dismiss [Doc. #389].) Ordinarily, pursuant to Local Rule 7.3(k), the Court can grant an uncontested motion as a matter of course when a party fails to respond to a motion. However, in this case, the Court notes that Defendant Wilson already filed two previous Motions to Dismiss [Docs. #324, 330], which were before the Court for review, and his Renewed Motion to Dismiss [Doc. #346] simply "renew[ed]" his previously filed Motions to Dismiss [Docs. #324, 330].[6] The Court recognizes that Defendant Wilson's repetitive motions are an attempt to advance the resolution of this litigation as an acknowledgment that this case, admittedly, has been pending for a considerable amount of time. However, given that the Court was already considering Defendant Wilson's Motions to Dismiss [Docs. #324, 330] when Defendant Wilson filed his Renewed Motion to Dismiss [Doc. #346], the Court finds that Plaintiffs' failure to respond to Defendant Wilson's Renewed Motion to Dismiss [Doc. #346] does not require dismissal of the claims asserted

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Defendant Wilson's Answer to the Second Amended Complaint.

[6] Defendant Wilson asserts in his Renewed Motion to Dismiss [Doc. #346] that "Plaintiffs in all 3 cases stated . . . 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." However, the Court finds that Defendant Wilson's assertion is incorrect. In Plaintiffs' Brief in Opposition to the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #341], Plaintiffs conceded that Counts 1 and 2, asserted against Defendants Levicy and Smith only, should be dismissed if the Fourth Circuit ruling in Chalmers were to stand; however, Plaintiffs did not make the same concession as to the claims remaining against Defendant Wilson (Counts 5 and 18) in this case.

against Defendant Wilson pursuant to Local Rule 7.3(k) and the Court will deny Defendant Wilson's Motion to Grant Uncontested Motion to Dismiss [Doc. #389] to the extent he requests that the Court grant his Renewed Motion to Dismiss pursuant to Local Rule 7.3(k).

III. DEFENDANT WILSON'S MOTIONS TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

In Defendant Wilson's Motions to Dismiss [Docs. #324, #330, #346] and Motion for Judgment on the Pleadings [Doc. #389], Defendant Wilson, *pro se*, requests that the Court dismiss the remaining claims against him, that is, Counts 5 and 18.

A. Count 5 (§ 1983 Making False Public Statements)

The Court notes that Plaintiffs did not respond to Defendant Wilson's assertion that Count 5 should be dismissed when the Court first ordered Plaintiffs' to respond to Defendant Wilson's Motions [Docs. #324, #330] in the Court's May 17, 2013 Order [Doc. #340]. Plaintiffs' response to Defendant Wilson's initial Motions to Dismiss Counts 5 and 18 [Docs. #324, #330] was due by May 30, 2013, (see May 17, 2013 Order [Doc. #340]). Although Plaintiffs' filed a Brief in Opposition to the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #341], which purported to incorporate a response to Defendant Wilson's Motions to Dismiss [Docs. #324, #330], Plaintiffs did not even mention Count 5 in their Opposition Brief and did not address Defendant Wilson's argument that Count 5 should be dismissed. Thus, the Court could grant Defendant Wilson's Motion, at least as to Count 5, as an uncontested motion under Local Rule 7.3(k). L.R. 7.3(k) ("If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice."); Holt v. United

States, No. 1:09CV122, 2010 WL 1286671, at *2 (M.D.N.C. Mar. 29, 2010) (Dixon, Mag. J.) ("Under Local Rule 7.3(k), a motion that is uncontested may be granted without further notice . . . ."), adopted, No. 1:09CV122 (M.D.N.C. Aug. 23, 2010); Wainwright v. Carolina Motor Club, Inc., No. 1:03CV1185, 2005 WL 1168463, at *13 (M.D.N.C. Apr. 27, 2005) (Sharp, Mag. J.) (finding that the plaintiff's failure to argue a claim was tantamount to abandonment of the claim under Local Rule 7.3(k)). However, Defendant Wilson has filed a subsequent Motion for Judgment on the Pleadings [Doc. #389] and Plaintiffs have conceded in their Opposition to Defendant Wilson's Motion for Judgment on the Pleadings and Renewed Motion to Dismiss [Doc. #394] that Count 5 should be dismissed against Defendant Wilson. As Plaintiffs have now conceded that Count 5 should be dismissed against Defendant Wilson, the Court will accept Plaintiffs' concession and dismiss Count 5 against Defendant Wilson.

B. Count 18 (Common Law Obstruction of Justice and Conspiracy)

As it relates to Count 18 alleged against Defendant Wilson, the Court will address that claim in the context of the Duke Defendants' Motion for Judgment on the Pleadings because (1) the factual allegations supporting Plaintiffs' common law obstruction of justice and conspiracy claim (Count 18) against Defendant Wilson and against Defendants Levicy, Duke University, and Duke Health are sufficiently similar that they may be addressed together; (2) Defendant Wilson has filed an Answer to the Second Amended Complaint [Doc. #377] that would allow the Court to properly analyze Count 18 in the context of a motion for judgment on the pleadings; and (3) Defendant Wilson has also filed his own Motion for Judgment on the Pleadings [Doc. #389] in this case.

IV. DUKE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standard

Defendants bring their instant Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings pursuant to Rule 12(c) is analyzed under the same standard as a motion to dismiss pursuant Rule 12(b)(6). Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 405-06 (4th Cir. 2002). Accordingly, the Court will assume the facts alleged in the Second Amended Complaint are true and will draw all reasonable inferences in Plaintiffs' favor as the nonmoving parties. Id. However, while the Court " 'take[s] the facts in the light most favorable to the [P]laintiff[s], . . . [the Court] need not accept the legal conclusions drawn from the facts,' and 'need not accept as true unwarranted inferences, unreasonable conclusions or arguments.' " Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008) (quoting Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000)). Thus, the Second Amended Complaint must allege "enough facts to state a claim to relief that is plausible on its face." Id. (emphasis removed) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). Therefore, a "pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 555, 127 S. Ct. at 1955). Therefore, a motion for judgment on the pleadings " 'should only be granted if, after

accepting all well-pleaded allegations in the plaintiff[s'] complaint as true and drawing all reasonable factual inferences from those facts in plaintiff[s'] favor, it appears certain that the plaintiff[s] cannot prove any set of facts in support of [their] claim entitling [them] to relief.' " Drager v. PLIVA USA, Inc., 741 F.3d 470, 474 (4th Cir. 2014) (quoting Edward v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)).

However, " '[u]nlike on a Rule 12(b)(6) motion . . . on a Rule 12(c) motion the [C]ourt may consider the Answer as well.' " Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 725 (M.D.N.C. 2012) (quoting Alexander v. City of Greensboro, No. 1:09–CV–293, 2011 WL 3360644, at *2 (M.D.N.C. August 3, 2011)). The " 'factual allegations in the [A]nswer are taken as true to the extent they have not been denied or do not conflict with the [C]omplaint.' " Id. (quoting Farmer v. Wilson Hous. Auth., 393 F. Supp. 2d 384, 386 (E.D.N.C. 2004) (internal citations and quotation marks omitted)). For the "purposes of this motion Defendants cannot rely on allegations of fact contained only in the [A]nswer, including affirmative defenses, which contradict [the] [C]omplaint" because Plaintiffs were "not required to reply to Defendant[s'] [A]nswer, and all allegations in the [A]nswer are deemed denied." Id. (quoting Jadoff v. Gleason 140 F.R.D. 330, 332 (M.D.N.C. 1991) and Lefkoe v. Jos. A. Bank Clothiers, No. WMN–06–1892, 2008 WL 7275126, at *3 (D. Md. May 13, 2008); see Fed. R. Civ. P. 8(b)(6) ("If a responsive pleading is not required, an allegation is considered denied or avoided."). Under the foregoing standard, the Court will assess the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #335] and Defendant Wilson's Motion for Judgment on the Pleadings [Doc. #389] as it relates to the claims being asserted by Plaintiffs.

B. Counts 1 and 2 (§ 1983 Unlawful Search and Seizure claims)

As Plaintiffs have conceded that the § 1983 unlawful search and seizure claims (Counts 1 and 2) should be dismissed against Defendants Levicy and Smith as a result of the Fourth Circuit ruling in Chalmers, (see Pls.' Br. in Opp'n to Defs.' Mot. for J. on the Pleadings [Doc. #341]), the Court will dismiss Counts 1 and 2. To the extent Plaintiffs have attempted to retract their concession that Count 1 should be dismissed, for the reasons stated in the Court's April 17, 2014 Order [Doc. #375], the Court will not consider such an argument. Additionally, as further stated in the Court's April 17, 2014 Order, Plaintiffs' argument, in attempting to retract their concession that Count 1 should be dismissed, is without merit. (See April 17, 2014 Order [Doc. #375], at 13, n.7.)

C. Count 18 (Common Law Obstruction of Justice and Conspiracy)

In Count 18 of their Second Amended Complaint [Doc. #136], Plaintiffs bring claims for common law obstruction of justice and conspiracy against Defendants Levicy, Duke University, and Duke Health.[7] Plaintiffs assert that Defendant Levicy, as a SANE in training, obstructed justice by "conspiring [with others] to manufacture and manufacturing false and misleading forensic medical records and reports" with respect to the sexual assault examination (SAE) of Crystal Magnum. (Second Am. Compl. [Doc. #136], at ¶ 1193.) Plaintiffs also contend that the allegedly false and misleading medical records and reports were "designed to

[7] Count 18 also remains against Defendants Richard Brodhead ("Defendant Brodhead"), Robert Steel ("Defendant Steel"), Victor Dzau ("Defendant Dzau"), and John Burness ("Defendant Burness"), Duke University officials. However, as stated in the Duke Defendants' Motion for Judgment on the Pleadings, these Defendants intend to move for summary judgment on this claim.

conceal exculpatory witness accounts with the knowledge that these reports would be used bring [sic] and maintain criminal prosecutions against Plaintiffs." (Id.) Additionally, Plaintiffs have alleged that, as employers of Defendant Levicy, Defendants Duke University and Duke Health are also liable for obstruction of justice under the theory of respondeat theory liability, in which "the principal's liability is derivative, arising from the acts of the agent." Cameron Hospitality, Inc. v. Cline Design Assocs., PA, --- N.C. App. ---, ---, 735 S.E.2d 348, 351 (2012), review denied, 366 N.C. 564, 738 S.E.2d 370 (2013).

The Duke Defendants argue that Defendant Levicy cannot be liable for common law obstruction of justice in light of the Fourth Circuit decision in this case, Chalmers, regarding the obstruction of justice claim. In Chalmers, the Fourth Circuit held that North Carolina courts have not recognized a common law obstruction of justice claim against "a police officer for his actions relating to a criminal proceeding" and thus dismissed the obstruction of justice claim as to the police defendants that appealed this Court's decision, which had allowed such a claim to go forward against the police defendants.[8] Chalmers, 703 F.3d at 658. The Duke Defendants assert that as a result of the Fourth Circuit holding, as it relates to the obstruction of justice claim, that Defendant Levicy cannot be liable because her actions involved "the collection of evidence in aid of officers' criminal investigation" and thus the Fourth Circuit's rationale as applied to the defendant police officers similarly applies to Defendant Levicy. (Br. in Support of Mot. for J. on the Pleadings [Doc. #336], at 16.); see also N.C. Gen. Stat. § 143B-1200(i)(2)

[8] Plaintiffs do not challenge the Fourth Circuit's interpretation of North Carolina law on this point.

("A [SANE] is a licensed registered nurse . . . who obtains preliminary histories, conducts in-depth interviews, and conducts medical examinations of rape victims or victims of related sexual offenses."). However, Plaintiffs respond by contending that the Fourth Circuit holding, regarding the obstruction of justice claim, is limited to the actions of *police officers* in a criminal proceeding.[9] Therefore, Plaintiffs argue that the Fourth Circuit's rationale in this case does not extend to Defendant Levicy, a nurse, because she is not a police officer.

Although the Court accepts Plaintiffs' argument that the Fourth Circuit's holding regarding the common law obstruction of justice claim in this case was limited to the actions of police officers conducting a criminal investigation—as the claim was before the Court on interlocutory appeal based on the police officer defendants' assertion of immunity from suit[10]—the import of such a holding has a dispositive effect on the claim, as asserted against Defendant Levicy, based on the specific facts of this case. Specifically, in this case, Plaintiffs allege that Defendant Levicy, in creating false medical reports, acted pursuant to an agreement

[9] To the extent Plaintiffs assert that they alleged that a claim for common law obstruction of claim lies against Levicy based on any purported action to interfere with Plaintiffs' attempt to obtain civil remedies, the Court notes that such allegations were not asserted against Defendant Levicy for her actions in the alleged conspiracy. (See Second Am. Compl. ¶¶ 1197, 1198.)

[10] Significantly, the Court notes that the Fourth Circuit holding, regarding the claim of common law obstruction of justice asserted against the police officer defendants, was not based on the police officers' immunity from suit. Chalmers, 703 F.3d at 657 (noting that the plaintiffs avoided dismissal of the state law claims on public official immunity grounds by sufficiently pleading malicious conduct by the appealing police officers and thus, turning to the merits of each state law claim). Thus, the Court highlights that its finding that the common law obstruction of justice claim should be dismissed against Defendant Levicy is not based on any finding that she possesses immunity from suit that the appealing police officers could have possessed, as the Fourth Circuit noted that the appealing police officers were not shielded by the defense of public official immunity at the pleading stage. See id.

with, *inter alia*, police officers Benjamin Himan and Mark Gottlieb to corroborate medical evidence, albeit allegedly false corroborated evidence, for the purpose of supporting the police officers' allegations in a criminal investigation. To the extent Plaintiffs allege that Defendant Levicy's actions were part of a conspiracy to assist police officers in a criminal investigation, the Court finds that based on the Fourth Circuit holding in this case, the common law obstruction of justice and conspiracy claim should be dismissed against Defendant Levicy.[11]

Under North Carolina common law, " '[i]t is an offense to do 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 (2007) (quoting Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (citations omitted)). Additionally, the North Carolina legislature has codified several statutes that discuss obstruction of justice violations, including section 14-225 of North Carolina General Statutes, which is sufficiently analogous to the facts of this case to provide guidance on the issue before the Court. Section 14-225 of North Carolina General Statutes criminalizes making false reports to law enforcement agencies or officers. "According to the North Carolina Court of Appeals, the intent of [this North Carolina obstruction of justice law is] to 'deter only the type of false report that is designed to confound

[11] In support of their argument, Plaintiffs cite to Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326, 334 (1984) and Grant v. High Point Reg'l Health Sys., 184 N.C. App. 250, 645 S.E.2d 851 (2007), which are cases that allowed civil obstruction of justice claims against defendants who destroyed evidence and fabricated medical evidence. However, the Court notes that those cases involved plaintiffs asserting claims against defendants who destroyed records to preclude the plaintiffs from bringing civil medical malpractice claims. However, they did not involve claims asserting that the defendants obstructed justice while working with law enforcement officers during the course of a criminal investigation, which was the basis of Plaintiffs' claim against Defendant Levicy in this matter.

a police investigation or otherwise squander precious law enforcement resources.' " Swick v. Wilde, 1:10CV303, 2012 WL 3780350, at *28 (M.D.N.C. Aug. 31, 2012) (quoting State v. Dietze, 190 N.C. App. 198, 201, 669 S.E.2d 197, 199 (2008), which stated the intent of a criminal obstruction of justice statute, and applying its rationale to a civil obstruction of justice claim) appeal dismissed and remanded, 529 F. App'x 353 (4th Cir. 2013). Although this statute codifies the criminal offense of obstruction of justice, the obstruction of justice criminal offense statutes have been instructive in analyzing civil claims for obstruction of justice. See Reed v. Buckeye Fire Equip., 241 F. App'x 917, 928 (4th Cir. 2007) (per curiam); Swick, 2012 WL 3780350, at *28. As is relevant to the facts of this case, the North Carolina Court of Appeals and the Supreme Court of North Carolina have noted that " 'making a false statement to the police, standing alone, . . . is not a crime.' " Dietze, 190 N.C. App. at 200, 669 S.E.2d at 199 (quoting State v. Hughes, 353 N.C. 200, 204-05, 539 S.E.2d 625, 629 (2000)). Rather, the Supreme Court of North Carolina has emphasized that "such a false report is unlawful only if it is made '*for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties*.' " Hughes, 353 N.C. at 205, 539 S.E.2d at 629 (emphasis in the original) (quoting N.C. Gen. Stat. § 14-225).[12] Applying this rationale to the specific facts of this case, although Plaintiffs allege that Defendant Levicy "collud[ed]" with police officers to create false medical

[12] Additionally, to the extent Plaintiffs allege that Defendant Levicy conspired with the police officers and others in this case to give false testimony, the Court notes that "[a] civil action may not be maintained for a conspiracy to give false testimony." Hawkins v. Webster, 78 N.C. App. 589, 592, 337 S.E.2d 682, 684 (1985); see Strickland v. Hedrick, 194 N.C. App. 1, 19, 669 S.E.2d 61, 73 (2008) (finding that a conspiracy to submit false information and false testimony in order to secure arrest warrants is not a cognizable civil claim under North Carolina law).

records, (Second Am. Compl. ¶¶ 779, 1193), Plaintiffs do not allege that Defendant Levicy's purpose in creating these false records was to hinder or obstruct those police officers from performing their duties. Cf. State v. Taylor, 212 N.C. App. 238, 241-42, 713 S.E.2d 82, 85 (2011) (finding that a police officer was properly convicted of the criminal offense of obstruction of justice when he "intervened in connection with an arrest made by another officer."). Indeed, it appears that Plaintiffs allege that Defendant Levicy acted at the behest of officers Himan and Gottlieb, and others, to assist in a criminal investigation. This is particularly true, as Plaintiffs allege that Defendant Levicy was working with police officers, Nifong, and others, in this case to "bring and maintain criminal prosecutions." (Second Am. Compl. [Doc. #136], at ¶ 1193.)

The Court finds that such a holding appears to be consistent with the Fourth Circuit holding in Chalmers. Under the specific facts of this case, where Plaintiffs allege that Defendant Levicy's actions were a result of assisting and working with police officers, allowing the obstruction of justice claim to go forward as to Defendant Levicy would likely be inconsistent with implementing the "spirit of the [Fourth Circuit's] mandate in this case." Cf. United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993) ("Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is controlling as to matters within its compass . . . . [I]t compels compliance on remand . . . foreclose[ing] relitigation of issues expressly or *impliedly* decided by the appellate court." (emphasis added) (internal citation and quotation marks omitted)). Thus, the Court accepts the Duke Defendants' argument that because Plaintiffs' allegations against Defendant Levicy only revolve around Defendant Levicy's actions to aid

police officers, among others, in a police investigation, that Defendant Levicy is "entitled to judgment as a matter of law under the Fourth Circuit ruling in [Chalmers]." (See Joint Reply Br. in Supp. of Mot. for J. on Pleadings [Doc. #343], at 8.) As such, the Court will dismiss Count 18, the obstruction of justice and conspiracy claim, as to Defendant Levicy. As Count 18 will be dismissed as to Defendant Levicy, Count 18 will also be dismissed as to Defendants Duke University[13] and Duke Health, to the extent Plaintiffs have alleged respondeat superior allegations against Duke University and Duke Health in their capacity as Defendant Levicy's employer. Cameron Hospitality, Inc., --- N.C. App. ---, ---, 735 S.E.2d at 351 ("Accordingly, where the agent has no liability, there is nothing from which to derive the principal's liability under the doctrine [of respondeat superior].").

Additionally, as Plaintiffs allege that Defendant Wilson's conduct in the underlying criminal proceeding was akin to the conduct of Defendant Levicy, in that Defendant Wilson committed acts that were in furtherance of a criminal investigation while working with police officers, (see Second Am. Compl. [Doc. #136], ¶¶ 1189-1202), for the reasons discussed above, the Court also finds it appropriate to dismiss the obstruction of justice claim against Defendant Wilson.[14]

[13] As previously stated, supra note 7, Plaintiffs have also alleged an obstruction of justice and conspiracy claim–Count 18–against Defendants Steel, Brodhead, Dzau, and Burness, Duke University officials and these Defendants have not moved to dismiss this claim. Thus, to the extent Plaintiffs also allege respondeat superior allegations against Defendant Duke University as the employer of the cited Duke University officials, Count 18 will go forward against Duke University for just that limited purpose.

[14] To the extent Plaintiffs assert that Defendant Wilson made false public statements that were intended to "dissuad[e] Plaintiffs from petitioning the federal or state courts for civil redress", (see Second Am. Compl. [Doc. #136], at ¶ 1197), the Court notes that such statements were

D. Count 32 (Common Law Negligent Supervision, Hiring, Training, Discipline, and Retention)

In Count 32, Plaintiffs bring a state law claim for negligence, alleging negligent hiring, retention, supervision, training, and discipline of Defendant Levicy. As the basis for this claim, Plaintiffs allege that Defendants Duke University and Duke Health owed Plaintiffs a duty of care with respect to the hiring, training, supervision, discipline, and retention of sexual assault examiners and other personnel involved in the investigation of the claims made in the underlying criminal investigation and the preservation of records. Additionally, Plaintiffs allege that Defendants Duke University and Duke Health negligently supervised Defendant Levicy by failing to monitor her conduct or performance, failing to provide her with proper training, and ignoring evidence of Defendant Levicy's misconduct regarding the underlying criminal investigation in this case. In their Motion for Judgment on the Pleadings [Doc. #335], the Duke Defendants argue that if the Court dismisses Count 18 (Common Law Obstruction of Justice and Conspiracy claim), the Court must also dismiss this Count because there are no remaining

made in connection with his assistance in the criminal investigation in this case. (See, e.g., Second Am. Compl. [Doc. #136], at ¶ 956(D) ("Wilson's published statements falsely asserting as fact that Magnum's account of the number of 'attackers' did not change.").) As such, the Court finds that such allegations, to the extent they are assertions that Defendant Wilson obstructed justice, fall within the purview of the Fourth Circuit holding, regarding the obstruction of justice claim, in this case. Additionally, Plaintiffs argue that Defendant Wilson, in his Answer to the Second Amended Complaint, admitted to "most, if not all, of the material facts Plaintiffs allege in support [of their obstruction of justice] claim." (See Pls.' Opp'n to Linwood Wilson's Mot. for J. on the Pleadings and Renewed Mot. to Dismiss [Doc. #394], at 2-3.) However, the Court finds that the extent of Defendant Wilson's admissions, in the paragraphs cited by Plaintiffs, only concede that Defendant Wilson had meetings and conversations with Defendant Levicy and officer Benjamin Himan and that they discussed the criminal investigation. Thus, the Court does not find Plaintiffs' reference to Defendant Wilson's Answer to the Second Amended Complaint helpful in the resolution of this matter.

underlying torts that would serve as a basis of Count 32. Plaintiffs in turn argue that North Carolina courts do not require a separate, underlying tort claim as the basis for a negligent supervision claim, but only underlying tortious conduct. However, the Court finds both North Carolina courts and courts interpreting North Carolina negligent supervision claims require an underlying tort to maintain a claim for negligent supervision.

Specifically, "North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986). "To support a claim of negligent retention and supervision against an employer, the 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.' " Smith v. Privette, 128 N.C. App. 490, 494-95, 495 S.E.2d 395, 398 (1998) (quoting Graham v. Hardee's Food Sys., 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996) (quoting Hogan, 79 N.C. App. at 495, 340 S.E.2d at 124))). In Foster v. Nash-Rocky Mount County Board of Education, 191 N.C. App. 323, 331, 665 S.E.2d 745, 750 (2008), a case that involved a negligent supervision claim asserted against the Nash-Rocky Mountain School Board because of the alleged negligent supervision of a teacher-employee, the Court of Appeals of North Carolina determined that because the plaintiff's negligence claim against the teacher-employee was dismissed, the plaintiff could not prove that the School Board negligently supervised the teacher because the underlying negligence claim was dismissed. Id. Specifically, the court stated that because it dismissed the underlying negligence claim asserted against the

teacher-employee, plaintiff could not satisfy the first element of the negligent supervision claim, that an underlying negligent act was committed by an employee. Id.; see Phillips v. Sheetz, Inc., No. 5:11-CV-00090-RLV-DSC, 2013 WL 5567423, at *2 (W.D.N.C. Oct. 9, 2013) (dismissing negligent retention and supervision claim because underlying emotional distress and wrongful discharge claims were dismissed); Kimes v. Lab. Corp. of Am., Inc., 313 F. Supp. 2d 555, 569 (M.D.N.C. 2004) (granting summary judgment on negligent supervision claim after underlying emotional distress claims were dismissed). Therefore, the Court will dismiss the negligent supervision claim asserted against Defendant's Duke University and Duke Health, because any underlying claims asserted against Defendant Levicy have been dismissed.

V. DEFENDANT WILSON'S MOTION FOR RULE 11 SANCTIONS

Also before the Court is Defendant Wilson's Motion for Rule 11 Sanctions [Doc. #367]. The basis of Defendant Wilson's request for sanctions is that he believes that the claims brought by Plaintiffs in this case are groundless and vexatious and that the Court should impose sanctions in this case. However, the Court finds Defendant Wilson's Motion itself to border on being vexatious given that it largely consists of copied and pasted paragraphs from the March 31, 2011 Order [Doc. #187] issued by this Court, the Fourth Circuit opinion in Chalmers, the Federal Rules of Civil Procedure, and Plaintiffs' Second Amended Complaint. The Court notes that although many of Plaintiffs claims in this case were dismissed, the Court does not find that they were frivolous or vexatious so as to warrant the imposition of Rule 11 sanctions. As stated in the Morris v. Wachovia, 448 F.3d 268, 277 (4th Cir. 2006), a legal argument contravenes Rule 11, thus warranting sanctions, when such an argument has "absolutely no chance of success

under existing precedent." Id. (quoting Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002). Although a claim may not survive a motion to dismiss, "such a flaw will not in itself support Rule 11 sanctions." Hunter, 281 F.3d at 153. The Fourth Circuit has "recognized that '[c]reative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment.' " Id. (quoting Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991) (citation omitted)). Additionally, the Court notes that Plaintiffs in this case have conceded that Count 5, which is alleged against Defendant Wilson and was reversed as to the City of Durham Defendants that appealed, should be dismissed against Defendant Wilson, although Defendant Wilson was not among the defendants to appeal to the Fourth Circuit in this case. Defendant Wilson fails to address why Plaintiffs' concession that Count 5 should be dismissed against him is sanctionable. Finally, as to Count 18 (the common law obstruction of justice claim), which Plaintiffs have still asserted is a valid claim against Defendant Wilson despite the Fourth Circuit dismissing that claim as to the officers that appealed, the Court does not find that Plaintiffs' position had "absolutely no chance of success under existing precedent." Rule 11 and other procedural defects aside, Defendant Wilson has not provided an adequate basis for imposing sanctions against Plaintiffs, or their attorneys. As such the Court will deny Defendant Wilson's request to impose any of the requested sanctions in this case.

VI. CONCLUSION

For the reasons set forth herein, the Court will grant the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #335]. The Court will also grant in part and deny in part Defendant Wilson's Motion for Judgment on the Pleadings and Motion to Grant Uncontested

Motion to Dismiss [Doc. #389]. Specifically, the Court will grant Defendant Wilson's Motion to the extent he requests that the Court dismiss Counts 5 and 18 pursuant to Federal Rule of Civil Procedure 12(c), however, the Court will deny Defendant Wilson's Motion to the extent he requests that the Court dismiss Counts 5 and 18 pursuant to Local Rule 7.3(k). Additionally the Court will deny as moot Defendant Wilson's Motions to Dismiss [Docs. #324, #330, #346] and deny Defendant Wilson's Motion for Rule 11 Sanctions [Doc. #367].[15]

For the reasons set forth herein, IT IS THEREFORE ORDERED that the Duke Defendants' Motion for Judgment on the Pleadings [Doc. #335] is hereby GRANTED.

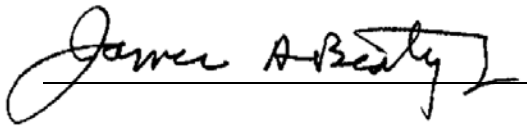
IT IS FURTHER ORDERED that Defendant Wilson's Motion for Judgment on the Pleadings and Motion to Grant Uncontested Motion to Dismiss [Doc. #389] is hereby GRANTED IN PART and DENIED IN PART. Specifically, the Court will GRANT Defendant Wilson's Motion to the extent he requests that the Court dismiss Counts 5 and 18 pursuant to Federal Rule of Civil Procedure 12(c), however, the Court will DENY Defendant Wilson's request to the extent he requests that the Court dismiss Counts 5 and 18 pursuant to Local Rule 7.3(k).

[15] The following claims and parties remain in this case after the Court's entry of the instant Order: (1) Count 18 (Common Law Obstruction of Justice and Conspiracy to Obstruct Justice) against Defendants Robert Steel, Richard Brodhead, Victor Dzau, John Burness, and Duke University; (2) Count 21 (Breach of Contract) against Defendant Duke University; (3) Count 24 (Fraud) against Defendants Gary Smith, Aaron Graves, Robert Dean, Matthew Drummond, and Duke University; and (4) Count 41 (Violations of Art. I and Art. IX of the North Carolina Constitution) against Defendant City of Durham. The remaining Defendants have not yet filed motions with respect to the remaining claims asserted against them by Plaintiffs, with the exception of Defendant City of Durham regarding Count 41, which was previously discussed above, see supra note 1.

IT IS FURTHER ORDERED that Defendant Wilson's Motions to Dismiss [Docs. #324, #330, #346] are hereby DENIED AS MOOT.

IT IS FINALLY ORDERED that Defendant Wilson's Motion for Rule 11 Sanctions [Doc. #367] is DENIED.

This, the 20th day of May, 2014.



United States District Judge