

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:08-CV-119

	)
EDWARD CARRINGTON, <i>et al.</i> ,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
DUKE UNIVERSITY, <i>et al.</i> ,	)
	)
Defendants.	)
	)

**MOTION FOR SUBSTITUTION OF DEFENDANT**

Plaintiffs respectfully file this motion pursuant to Rule 25(a) of the Federal Rules of Civil Procedure and move the Court for an order substituting Marsha Saunders Covington, in her official capacity as duly appointed executrix of the Estate of John Wesley Covington, deceased, as a Defendant in this action. In support of this motion Plaintiffs state as follows:

1. Plaintiffs, 38 members of the Duke University lacrosse team and several parents of certain members, duly commenced this action on February 21, 2008. Plaintiffs filed and served their First Amended Complaint on February 22, 2010.

2. John Wesley Covington is a named Defendant in Plaintiffs' original Complaint and Plaintiffs' First Amended Complaint.

3. Although no Statement of Death has been filed or served by any party, Plaintiffs have discovered that named Defendant John Wesley Covington died on February 2, 2010. A copy of Mr. Covington's death certificate is attached to this motion as Plaintiffs' Exhibit 1.

4. Plaintiffs' original Complaint and First Amended Complaint allege four causes of action against Defendant John Wesley Covington. Three of these causes of action are tort claims under North Carolina state law specifically: (1) Count Eleven: Constructive Fraud through Abuse of Confidential Relationship; (2) Count Twelve: Breach of Duty of Care in Conduct of Voluntary Undertaking; and (3) Count Twenty-Three: Obstruction and Conspiracy to Obstruct Public Justice. The fourth cause of action, contained in Count Twenty-Two, Violation of and Conspiracy to Violate Fourteenth Amendment Right Under 42 U.S.C. § 1983 – Malicious Investigation, is a federal civil rights claim arising under federal statutory law.

5. Because survival of claims against a deceased is governed by the law that creates the cause of action, federal courts must apply state survival statutes or other relevant state law to determine survival of state law claims. *See generally McKenna v. Pacific Rail Serv.*, 32 F.3d 820, 837 (3d Cir. 1994); *Knauer v. Johns-Manville Corp.*, 638 F. Supp. 1369, 1387 (D. Md. 1986); *Henderson v. United States Fid. & Guar. Co.*, 695 F.2d 109, 114 (5<sup>th</sup> Cir. 1983). It is also well established that the survival of federal civil rights actions under 42 U.S.C. § 1983 is governed by state law so long as the state law is not inconsistent with the Constitution and laws of the United States. *See Robertson v. Wegmann*, 436 U.S. 584, 588-593, 98 S. Ct. 1991 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 702 n. 14, 93 S. Ct. 1785 (1973).

6. North Carolina General Statute §28A-18-1 (a) provides that “upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector

of his estate.” Subsection (b) provides that, if they favor the decedent, the following rights of action do not survive: (1) causes of action for libel or slander, except slander of title, (2) causes of action for false imprisonment and (3) causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death. N.C. Gen. Stat. § 28A-18-1 (b).

7. As such, pursuant to N.C. Gen. Stat. § 28A-18-1 (b) all of Plaintiffs’ claims against the Defendant John Wesley Covington survive his death, and the personal representative of his estate is the proper party to be substituted in this action.

8. After Mr. Covington’s death, Marsha Saunders Covington was duly appointed as the legal representative and executrix of the Estate of John Wesley Covington by the Clerk of Court of Durham County, North Carolina on February 18, 2010. A certified copy of the appointment order is attached to this motion as Plaintiffs’ Exhibit 2.

9. Plaintiffs have given due notice of this motion, in the manner provided for in Rule 5 of the Federal Rules of Civil Procedure, to all parties that have appeared in this action to date. The appropriate Certificate of Service is attached to this motion.

10. In addition to service on all current parties to this action, Plaintiffs have caused this motion and a copy of the First Amended Complaint to be served on Marsha Saunders Covington, who is the executrix and legal representative of the Estate of John Wesley Covington and who is not a party to this action, in a manner that complies with Rule 4 of the Federal Rules of Civil Procedure.

11. This motion is based on all of the pleadings and papers on file in this action, on this motion and the Certificates of Service attached, the exhibits attached to

this motion, and on whatever argument and evidence may be heard at any hearing on this motion.

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an order substituting Marsha Saunders Covington, in her official capacity as duly-appointed executrix of the Estate of John Wesley Covington, deceased, as a Defendant in this action.

This the 3rd day of May 2010.

Respectfully submitted,

**COOPER & KIRK, PLLC**

By: /s/ Charles J. Cooper

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(\* motion for special appearance  
has been filed)

-and-

**THOMAS, FERGUSON & MULLINS, L.L.P.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel as required by Rule 5 of the Federal Rules of Civil Procedure:

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