IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH MORT and ALEX RODRIGUEZ, Plaintiffs, v. LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES; LAWRENCE COUNTY; CHRISSY MONTAGUE, Lawrence County Children and Youth Services Caseworker; and JAMESON HEALTH SYSTEM, INC., Defendants.	**ELECTRONICALLY FILED** Civil Action No. 2:10-cv-01438-DSC Judge David S. Cercone

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs Elizabeth Mort and Alex Rodriguez ("Plaintiffs"), by and through their undersigned counsel, submit this Reply Brief in further support of their Motion for Leave to File Second Amended Complaint and in opposition to Defendants Lawrence County, Lawrence County Children and Youth Services (collectively referred to as "LCCYS") and Chrissy Montague's (collectively referred to as the "Lawrence County Defendants") Memorandum in Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint ("Memorandum in Opposition").

I. ARGUMENT

A. The Lawrence County Defendants Ignore the Liberal Standard for Granting Motions for Leave to Amend.

Aside from a brief citation to Federal Rule of Civil Procedure 15(a) in their Memorandum in Opposition, the Lawrence County Defendants disregard the liberal standard for granting leave to amend. While they admit that under Rule 15(a) leave to amend pleadings should be "freely given" in the interest of justice, they fail to address the fact that undue delay and "substantial" prejudice are required to deny such an amendment. Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1203 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); *Justofin v. Metropolitan Life Insurance Co.*, 372 F.3d 517, 526 (3d Cir. 2004). In fact, "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell and Company, Inc. v. Occupational Safety and Health Administration*, 573 F.2d 820, 823 (3d Cir. 1978). Despite this requirement, at no point in their Memorandum in Opposition do the Lawrence County Defendants state how they will be prejudiced if the Plaintiffs are permitted to amend their complaint *within the deadline set by court*. They are unable to make such a showing.

B. Plaintiffs Should be Granted Leave to Amend to Add Director Jane Gajda as a Defendant.

The crux of the Lawrence County Defendants' argument in opposition to the Plaintiffs' request to add Director Jane Gajda as a defendant is based on the faulty premise that Ms. Gajda will be sued in her official capacity. (Memorandum in Opposition [No. 53], p.4.) In the Second Amended Complaint attached to the Motion, Ms. Gajda is named in her individual capacity. (*See* Motion [No. 51], Ex. 1, ¶12) As Ms. Gajda may be found personally liable in her capacity as a supervisor because she approved the policy at issue in this case, such a claim is clearly

proper. *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 586 (3d Cir. 2004) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir.1989)) ("[i]ndividual defendants who are policymakers may be liable under §1983 if it is shown that such defendants, with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused constitutional harm."). *See also*, *Jackson v. Beard,* No. 09-541, 2009 U.S. Dist. LEXIS 103802, at *6, 2009 WL 3747874, at *2 (W.D.Pa. Nov. 5, 2009) (Ambrose, J.) ("a supervisory defendant sufficiently involved with a policy or practice that caused constitutional harm may support a Section 1983 claim.").

Thus, contrary to the claims of the Lawrence County Defendants, a suit against Ms. Gajda is **not** the same as a suit against the entity itself. What is more, unlike LCCYS, if Ms. Gajda is found to be personally liable to the Plaintiffs, punitive damages may be assessed against her. *Smith v. Wade*, 461 U.S. 30, 56 (1983). Therefore, the Lawrence County Defendants' assertion that there is "no real benefit" to the Plaintiffs if Ms. Gajda is added as a Defendant is also without merit. (Memorandum in Opposition [No. 53], p.4.)

Finally, the Lawrence County Defendants' assertion that the identity of Ms. Gajda and her status is not "newly revealed information" is wholly irrelevant to the resolution of this matter. (Memorandum in Opposition [No. 53], p.4.) Plaintiffs are not required to make such a showing, and the Lawrence County Defendants have cited no case law to the contrary. In fact, "[d]elay alone ... is an insufficient ground to deny an amendment, unless the delay unduly prejudices the non-moving party." *Cornell & Co.*, 573 F.2d at 823. Similarly, defendants' threat to burden this Court with "another round of Motions to Dismiss" also misses the mark. (Memorandum in Opposition [No. 53], p.4.) Whether the Lawrence County Defendants choose to proceed with a motion to dismiss that raises many of the same issues that this Court has

already decided in favor of Plaintiffs has no bearing upon Plaintiffs' right to amend their complaint. In short, as the Lawrence County Defendants have proffered no valid reason to the contrary, the Plaintiffs should be granted leave to amend the Second Amended Complaint to add Ms. Gajda as a defendant.

C. Plaintiffs Should be Granted Leave to Amend to Add Supervisor Sandy Copper as a Defendant.

The Lawrence County Defendants argue that if the Plaintiffs are permitted to add Ms. Copper as a defendant, then their claims against Ms. Montague should be dismissed. To support this assertion, the Lawrence County Defendants first argue, without any legal support, that because Ms. Montague claims to have been following a directive by her supervisor, Ms. Copper, Ms. Montague is relieved from liability. (Memorandum in Opposition [No. 53], p.5.) However, Ms. Montague is not entitled to immunity simply because she states that she was directed to file the petition by her supervisor. Indeed, government employees cannot evade liability for unconstitutional actions even if they are directed to engage in those actions by supervisors. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority.").[1]

Next, the Lawrence County Defendants claim that in light of Ms. Copper's involvement, the issue of Ms. Montague's liability should be revisited given this Court's previous holding that

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[1] At any rate, it should also be noted that Ms. Copper has yet to be deposed and may or may not provide testimony that is entirely consistent with Ms. Montague regarding their respective roles and actions. Contrary to defendants' implication, Plaintiffs are not required at this juncture to prove their case against these defendants. Thus, the defendants' concept of "revisiting" this Court's prior denial of defendants' Motion to Dismiss is misguided.

Ms. Montague is not entitled to absolute immunity because of her failure to investigate the allegedly positive drug screen of Plaintiff Elizabeth Mort ("Ms. Mort"). (Memorandum in Opposition [No. 53], pp.5-6.) The Lawrence County Defendants fail to acknowledge, however, that neither Ms. Montague nor Ms. Copper investigated Ms. Mort's positive drug screen at any time. This investigation could have been conducted by either or both of them prior to taking Baby Isabella Rodriguez ("Baby Rodriguez") into custody, or after Baby Rodriguez was removed from her parents' home. Had any such investigation occurred, Baby Rodriguez could have been returned to the Plaintiffs immediately, rather than after five days of her being held in custody. Plaintiffs have pleaded claims against both Ms. Copper and Ms. Montague based on their respective failure to investigate. (*See* Motion [No. 51], Ex. 1, ¶101.) Consequently, there is no merit to the Lawrence County Defendants' assertion that their claims of immunity for Ms. Montague should be revisited.

Similarly, while the Lawrence County Defendants suggest that it may be appropriate to raise the issue of immunity and/or liability with respect to Ms. Copper in the event that she directed Ms. Montague to investigate the allegedly positive drug screen of Plaintiff Mort, their arguments improperly rest on factual disputes that are not appropriate for resolution in a motion to dismiss. (Memorandum in Opposition [No. 53], p.6.) Even if Ms. Copper did direct Ms. Montague to conduct such an investigation, she failed to ensure that the investigation was, in fact, conducted. Moreover, Ms. Copper cannot obtain immunity or avoid liability for her failure to conduct her own investigation merely by instructing Ms. Montague to do so, and defendants fail to cite any authority to the contrary.

II. CONCLUSION

Plaintiffs respectfully request that their Motion for Leave to Amend be granted and that they be permitted to file an Amended Complaint substantially in the form of Exhibit 1 attached to Plaintiffs' Motion for Leave to File Second Amended Complaint.

MEYER, UNKOVIC & SCOTT LLP

By: */s/ Patricia L. Dodge*
Patricia L. Dodge
PA ID No. 35393
Antoinette Oliver
PA ID No. 206148
535 Smithfield Street
Suite 1300
Pittsburgh, PA 15222-2315
(412) 456-2800
pld@muslaw.com
aco@muslaw.com

By: */s/ Sara J. Rose*
Sara J. Rose
PA ID No. 204936
Witold J. Walczak
PA ID No. 62976
AMERICAN CIVIL LIBERTIES FOUNDATION OF PENNSYLVANIA
313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7864
srose@aclupa.org
vwalczak@aclupa.org

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Reply Brief in Support of Motion for Leave to File Second Amended Complaint was served this 31st day of October, 2011, via the Court's electronic transmission facilities pursuant to Fed. R. Civ. P. 5(b)(3) and Local Rule 5.5 upon the following:

John C. Conti, Esquire
Richard J. Kabbert, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburgh, PA 15222
(*Counsel for Defendant Jameson Health System, Inc.*)

Marie Milie Jones, Esquire
Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.
U.S. Steel Tower, Suite 4850
600 Grant Street
Pittsburgh, PA 15219
(*Counsel for Defendants Lawrence County, Lawrence County Children and Youth Services and Chrissy Montague*)

By: */s/ Patricia L. Dodge*