IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

JANE DOE,

I.B. by her mother and next friend, Jane Doe,

Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually,

CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services, individually,

SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services, individually,

RICHARD BENGTSSON, individually, and in his official capacity as Executive Director, El Paso County Department of Human Services, for prospective relief,

REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief,

EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS, comprised of Sallie Clark, Darryl Glen, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity,

Defendants.

COUNTY DEFENDANTS' REPLY TO PLAINTIFF'S COMBINED RESPONSE TO MOTIONS TO DISMISS (DOC. 48)

COME NOW, Defendants April Woodard ("Defendant Woodard"), Christina Newbill ("Defendant Newbill"), Shirley Rhodus ("Defendant Rhodus"), Richard Bengtsson ("Defendant Bengtsson"), and the Board of County Commissioners of the County of El Paso ("BoCC"), (collectively "County Defendants"), by and through their

attorneys, the Office of the El Paso County Attorney, and reply to Plaintiff's Response (Doc. 48) as follows:

Plaintiffs' Response is a fifty page filing containing allegations of misstated legal standards facts, comparisons of social workers to sex offenders, new fact allegations, inaccurate references to argument contained in Doc. 40 – County Defendants' Motion to Dismiss First Amended Complaint – as new facts or admissions, and references to perceived violations of state law. Out of respect for court time and resources, the majority of these items are addressed minimally, if at all, in this reply. The pleadings speak for themselves.

A. Reply Regarding Eleventh Amendment Immunity

1. Attempted *Monell*[1] claim against the BoCC.

Defendant BoCC raised Eleventh Amendment Immunity to the extent Plaintiffs seek money damages against the BoCC for setting policy, custom, or practice for County DHS. Doc. 40, p. 21. Plaintiffs correctly cite *Pierce v. Delta Cnty. Dep't of Soc. Servs.*, 119 F. Supp. 2d 1139, 1147 (D. Colo. 2000) for the factors considered in determining whether a political body is an "arm of the State." In *Pierce*, representatives of a deceased minor sued the Delta County, Colorado Social Services Department seeking damages for failure to remove the minor from the home in which she was beaten to death by her mother's live-in boyfriend. *Id.* at 1142. Citing the Colorado Court of Appeals' decision in *Wigger v. McKee*, 809 P.2d 999, 1002-1004 (Colo. Ct. App. 1990), District Judge Nottingham found that the Delta County Social Services Department was an arm of the state, immune from suit. The *Wigger* Court reasoned that

[1] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, (1978).

"unlike counties and their sheriffs, the county departments of social services have very few powers independent of the state" in that they are explicitly designated as "agents of the state department" and are charged to administer public assistance and welfare related activities "in accordance with the rules and regulations of the state Department of Human Services."[2]

In a supreme attempt to place form over substance, Plaintiffs cite language from *Wigger*[3] allowing separate claims against the Arapahoe County Board of County Commissioners to proceed, reasoning that a county is not the alter ego of the state for Eleventh Amendment purposes and is a "person" under 42 U.S.C. § 1983.[4] This reasoning ignores the fact that claims attempted against the BoCC in this case are brought in relation to the BoCC's involvement with County DHS. That relationship is governed by Title 26, C.R.S., which prescribes a substantially similar structure to that in place at the time of the *Wigger* decision. Simply naming the BoCC in place of DHS does not provide Plaintiffs with an end run around long established Eleventh Amendment law.[5] Plaintiffs cannot simply name the BOCC as a party to avoid established 10th Circuit case law that the Eleventh Amendment bars suits against the Department of Human Services.

[2] *Wigger* 809 P.2d at 1004, citing C.R.S. § 26-1-118.
[3] "In Colorado, a county is defined as 'a body corporate and politic' and has the power to sue and be sued, to enter into contracts, and to levy certain taxes. Section 30–11–101, C.R.S." *Wigger* 809 P.2d at 1003.
[4] It should also be noted that Plaintiffs cite *Buckley v. Bd. of Cnty. Comm'rs*, 2005 WL 2359475, *5 (D. Colo. 2005). In that matter, the Eleventh Amendment Immunity was neither raised nor addressed. Plaintiffs' reliance on *Buckley* is misplaced.
[5] To the extent Plaintiffs seek to form some new relationship by references to the Department of Human Services *Advisory* Commission (see First Amended Complaint, Doc. 34 ("FAC"), ¶¶ 131, 137, 213, 217), such attempts must fail as an advisory commission cannot, by its advisory nature, directly participate in depriving a person of constitutional rights. 42 U.S.C. § 1983.

2. Attempted claim against Defendant Bengtsson for prospective relief.

Plaintiffs have failed to state a claim for an injunction under Fed.R.Civ.P. 65 and have failed to allege an underlying constitutional violation, as discussed in Doc. 40 at pp. 24-25. Further, Plaintiffs' argument that the FAC alleges a continuing injury sufficient to establish standing is unfounded. To establish Article III standing, a plaintiff must show:

> (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested.

Tandy v. City of Wichita, 380 F.3d 1277, 1283 (10th Cir. 2004).

As discussed in Doc. 40, constitutional injury has not been alleged, and even assuming injury, Plaintiffs' allegations only establish conjectural or hypothetical ongoing injury in that they believe DHS *might* conduct further investigations, that photographs of I.B. *might* be accessed by unauthorized persons, and that these possibilities *might* beget potential danger and risks in the form of trauma, child pornography, and sexual abuse.[6] These allegations squarely fit within the definitions of conjecture and hypothesis. No actual ongoing or imminent harm has been articulated. As merely hypothetical harm, Plaintiffs' theories cannot be traced to actions of Defendant Bengtsson, nor can this speculative harm be redressed by an injunction. To allow prospective relief to go forward under allegations of legal conclusions and factual possibilities would open the litigation floodgates for all variety of conspiracy theories.

[6] Doc. 48, p. 3; Doc. 34, ¶¶ 73-79.

Plaintiffs have not alleged facts sufficient to support an injunction, whether considered from the perspective of Fed.R.Civ.P. 65 or Plaintiffs' proffered pleading for "prospective relief."

B. Reply Regarding Qualified Immunity.

1. Standards

The Parties are in agreement regarding the two-step inquiry to determine qualified immunity. Plaintiffs, however, provide an incomplete description of the law regarding the proximity of facts between prior decisions and the fact pattern at issue in determining whether the right is clearly established. County Defendants are not arguing the Fourth Amendment is *inapplicable* to social workers. In a qualified immunity context, County Defendants argue, instead, that it is not clearly established that the Fourth Amendment applies to social workers taking photographs of visible injuries on minor children that are suspected victims of child abuse under the circumstances alleged. The cases cited are inapposite, inapplicable and or misleading.

Specifically, Plaintiffs cite:

- *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010): The publisher of an online satirical publication challenged the warrant-based search of his residence and seizure of his computer and personal written materials. In determining whether the publisher alleged facts sufficient to state a claim after the qualified immunity defense was raised, the Court considered long established contours of free speech protections in determining that the publisher's claim could go forward.
- *Shroff v. Spellman*, 604 F.3d 1179 (10th Cir. 2010): An arrestee (Shroff) challenged her arrest and alleged that she was unlawfully strip searched after

being arrested for violating a restraining order prohibiting her child's father (not Ms. Shroff) from coming within 100 yards of Ms. Shroff. Basing its analysis on whether or not the police officer (Spellman) was on fair notice that arresting Ms. Shroff for violating the order (to which she was not subject), the Court denied qualified immunity.

- *Becker v. Bateman*, 709 F.3d 1019 (10th Cir. 2013): An arrestee brought an excessive force claim alleging that after he suffered a head injury from being thrown to the ground as a result of resisting arrest. The Tenth Circuit, applying a sliding scale requiring less specificity in prior case law for obviously egregious conduct, determined that the plaintiff had not established violation of clearly established law based on the circumstances. Summary judgment dismissal was upheld.

The common vein in all of these cases is the standard that a plaintiff must cite a Supreme Court or Tenth Circuit case on point or the clearly established weight of authority, with less specificity required for *obvious* constitutional violations. This standard falls in line with the long established qualified immunity standard of whether or not a reasonable government official was on notice that his or her action violated a known right. *See Wilson v. Layne*, 526 U.S. 603, 609, (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982).

Additionally, Plaintiffs cite *Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008) to support their assertion that Defendants "appear to concede, even if qualified immunity shields the individual defendants, it does not bar claims against the governmental entity…" Doc. 48, p. 14.

For clarification, claims against the governmental entity still need to be supported by an actual constitutional violation by a final policymaker. *See Simmons v. Uintah Health Care Special Serv. Dist.*, 506 F.3d 1281, 1284-85 (10th Cir. 2007); Section C, below.

2. Plaintiffs have not alleged a violation of clearly established law.

Plaintiffs have not cited and cannot cite clearly established authority prohibiting the actions alleged. Reviewing law cited in Plaintiff's Response illustrates this point:[7]

Fourth Amendment

The cases cited by Plaintiff and summarized by County Defendants in Appendix A regarding Fourth Amendment Law do support that the alleged constitutional violations by County Defendants were "clearly established." The FAC does not allege genital examinations and blood tests being conducted on a group of children in an open classroom. It does not allege warrantless entry and search of a home, or a seizure of any kind. It does not allege retaliation or false or misleading affidavits in support of warrants. It does not allege an inappropriate and unnecessary strip search of a detainee in a jail setting. It does not allege that a police officer conducted a warrantless search of a home and vaginal search of a young child. The cases cited do not provide general guidance for scenarios similar to that alleged in the FAC, much less clearly establish a right. There is no obvious or predictable constitutional violation for case workers and their supervisors contained in the facts alleged. County Defendants acted reasonably

[7] Plaintiffs also extensively cite Title 19 of Colorado Revised Statutes. It is unnecessary to address the majority of state statutory arguments as there are no state claims. To the extent C.R.S. § 19-3-306(1), allowing photographs of visible trauma, is raised in the context of Defendants' reliance on statute for qualified immunity purposes, Plaintiffs' proposed reading, allowing photographs of trauma in "plain view" (Doc. 48, p. 30) would remove all meaning from the statute, as *anyone* can take photographs of what is in plain view.

under actually established law. All Fourth Amendment claims should be dismissed with prejudice for failure to state a claim, or at a minimum, due to operation of qualified immunity. *See* Appendix A – Summary and Review of Fourth Amendment law cited.

Fourteenth Amendment:

Plaintiffs' reliance on the cases cited regarding the Fourteenth Amendment and summarized in Appendix B[8] are misplaced; the cases simply do not support that the alleged constitutional violations by County Defendants were "clearly established." Not one of these cases contains facts similar to those alleged. The FAC comes nowhere close to alleging court proceedings stemming from medical or psychological issues, police employment disputes, grandparent visitation, inappropriate burdens for parental termination, or service of a restraining order. The contours of the "right" are not clear under these facts. Plaintiffs have failed to state a Fourteenth Amendment claim. *See* Appendix B– Summary and Review of Fourteenth Amendment law cited.

C. Reply regarding Entity and Supervisory Claims.

County Defendants stand on arguments in Doc. 40 and in this Reply regarding (1) Eleventh Amendment Immunity, (2) failure to allege an underlying constitutional violation, (3) supervisory liability, (4) failure to train, and (5) other possible claims.

Also discussed in Doc. 40 is the fact that Plaintiffs allege that the BoCC was aware of its "unconstitutional policies" by way of a prior lawsuit filed by Plaintiffs' attorneys against the County – *Doe v. McAfee*, 13-CV-01287-MSK-MJW. The "strip search" related claims were dismissed for failure to state claims, and the entire matter

[8] Some of the cases cited in support of Plaintiffs' Fourth Amendment arguments are repeated in support of their Fourteenth Amendment arguments; the facts and claims of those cases are addressed above.

was dismissed with prejudice on September 22, 2015 (*see* Case No. 13-CV-01287-MSK-MJW, Doc. 206).

Essentially, Plaintiffs have attempted to manufacture a pattern of unconstitutional policies by referencing failed claims from a now dismissed lawsuit which were tangentially related to the untested theory they now assert. This reasoning cannot create unconstitutional policies out of thin air and is insufficient to state an entity liability claim. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 396, (1989).

D. Conclusion.

DHS and its employees have a straightforward mission: they protect children. Despite attempts to blur the roles, DHS caseworkers are not police officers. The law and rights that Plaintiffs claim are clearly established simply are not established under the facts alleged. Their proposed new precedent ignores the state's compelling interest in protecting children and increases the potential for fact scenarios such as that addressed in *Pierce.* Plaintiffs have failed to state a claim for a constitutional violation, or, at a minimum, qualified immunity warrants dismissal of all Fourth and Fourteenth Amendment claims and related entity claims.

Further, the FAC has not circumvented Eleventh Amendment immunity and has not established a policy, practice or custom under *Monell*.

Finally, Plaintiffs' conjecture and speculation that they might be subject to additional investigation does not warrant a claim for prospective relief.

WHEREFORE, it is respectfully requested that this Honorable Court dismiss County Defendants with prejudice, and enter such other and just relief to include costs and reasonable attorney's fees for defending this action.

Respectfully submitted this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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