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

FLORENCE WALLACE, *et al.*, Plaintiffs, v. ROBERT J. POWELL, *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-286 (Judge Caputo)
WILLIAM CONWAY, *et al.*, Plaintiffs, v. MICHAEL T. CONAHAN, *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-291 (Judge Caputo)
H.T., *et al.*, Plaintiffs, v. MARK A. CIAVARELLA, JR., *et al.*, Defendants.	:	CIVIL ACTION NO. 3:09-cv-357 (Judge Caputo)

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR., *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-0630 (Judge Caputo)

REPLY BRIEF OF DEFENDANTS ROBERT K. MERICLE AND MERICLE CONSTRUCTION, INC. IN FURTHER SUPPORT OF MOTIONS TO DISMISS THE COMPLAINTS UNDER FED. R. CIV. P. 12(b)(6)

I. INTRODUCTION

As explained in the Joint Reply Brief in Further Support of Certain Defendants' Motions to Dismiss the Complaints Under Fed. R. Civ. P. 12(b)(6) (the "Common Reply"), Plaintiffs' claims pursuant to 42 U.S.C. § 1983, their RICO claims, and their claim for civil conspiracy are legally deficient with respect to all the non-judicial defendants.[1] In addition to these deficiencies, under their § 1983 claim, Plaintiffs have failed to allege the requisite *scienter* with respect to Mericle Construction, Inc. and Robert K. Mericle (the "Mericle Defendants"), in particular. They have also failed to plead the requisite state of

[1] The Mericle Defendants join in the Common Reply and incorporate by reference all of the legal arguments in the Common Reply.

mind necessary to pursue punitive damages against the Mericle Defendants. As a result and for the reasons explained more fully below, Plaintiffs' § 1983 claims and their claims for punitive damages against the Mericle Defendants should be dismissed.

II. ARGUMENT

A. Plaintiffs Have Failed to Plead the Requisite State of Mind to State a Claim for a § 1983 Conspiracy Against the Mericle Defendants.

Plaintiffs' brief concedes that, because the Mericle Defendants are not themselves state actors, Plaintiffs are required to plead that the Mericle Defendants participated in a conspiracy with someone acting under color of state law to violate Plaintiffs' constitutional rights. (Plaintiffs' Br. (doc. no. 473) at 20-31.) Pleading such a conspiracy against the Mericle Defendants necessarily requires that Plaintiffs plead that the Mericle Defendants intended to cause the deprivation of Plaintiffs' constitutional rights. The Complaints do not come close in this regard as Plaintiffs simply have not pleaded that the Mericle Defendants had such intentions.

Rather than direct the Court to specific allegations regarding the states of mind of the Mericle Defendants, Plaintiffs suggest that alleging that the Mericle Defendants knew that PA Child Care ("PACC") and Western PA Child Care ("WPACC") were being built as juvenile detention centers is tantamount to alleging an understanding on the part of the Mericle Defendants that Juvenile

Plaintiffs' constitutional rights would necessarily be violated (in order to keep the facilities full). In other words, Plaintiffs ask this Court to make the leap from the pleaded allegation that Mericle Defendants knew that PACC and WPACC would be used to detain juveniles to the inference that the Mericle Defendants should have known that Juvenile Plaintiffs' constitutional rights would be violated.

Of the approximately 50 paragraphs in the Complaints that specifically reference the Mericle Defendants, none address the issue of whether the Mericle Defendants even knew of the alleged constitutional violations. Rather, Plaintiffs allege that:

- Mr. Mericle suggested that then Judge Mark A. Ciavarella ("Ciavarella") receive a referral fee for Ciavarella's role in referring to the Mericle Defendants the PACC and WPACC construction and expansion;
- Ciavarella directed Mr. Mericle to pay the referral fees through Robert Powell ("Powell");
- Mr. Mericle knew that the referral fees were ultimately going to be received by Ciavarella and Michael T. Conahan ("Conahan"); and
- The Mericle Defendants had an interest in PACC's success because it would give the Mericle Defendants the opportunity to build WPACC.

In addition, although the fact is not alleged in the Complaints, Plaintiffs argue that the PACC facility had 38 more beds than the existing River Street, facility (60 beds vs. 22 beds). (Plaintiffs' Br. (doc. no. 473) at 29-30.)

Although none of the allegations above goes directly to Plaintiffs constitutional rights, Plaintiffs argue that the Court should infer from these

allegations that the Mericle Defendants should have known that the referral fees would result in the deprivation of Juvenile Plaintiffs' constitutional rights. The logical premises of this argument are that the Mericle Defendants knew or believed: (1) that the Mericle Defendants' interests depended upon the facilities being full; and (2) that constitutional deprivations were necessary to keep the facilities full. There is no reason for the Court to accept these premises, neither of which has been pleaded.[2]

None of the allegations contained in the Complaints state what is necessary to make out a § 1983 claim against the Mericle Defendants – that they acted in concert with Ciavarella and Conahan, ***with specific intent to cause Juvenile***

[2] Not only are there no specific allegations that the Mericle Defendants knew or believed that fundamental constitutional rights of juveniles would necessarily be violated in order to fill PACC – an purported 60-bed juvenile detention center that was built as a replacement for an older facility – there are reasons to question the "logic" upon which the Plaintiffs base the inferences that they invite this Court to make. The juvenile disposition statistics compiled by the Pennsylvania Juvenile Court Judges' Commission ("JCJC") that Plaintiffs reference in their Complaints and briefing (*see, e.g.*, Master Complaint for Class Actions, ¶ 688, Plaintiffs' Br. (doc. no. 473) at pp. 51 and 58, and Individual Plaintiffs' Brief (doc. no. 479) at p. 15) reveal that, from 2001-2008, there was an average of more than 1,200 new juvenile delinquency dispositions in Luzerne County each year (there are no allegations that any of the defendants did anything to increase the number of juvenile delinquency petitions that we filed each year). During that same span there was an average of more than 43,000 new juvenile delinquency dispositions each year throughout Pennsylvania. These statistics do not support the inference that a knowledgeable person (or anyone) would believe that, in order to fill a 60-bed facility, it would be necessary to deprive juveniles of their constitutional rights.

Plaintiffs' constitutional rights to be violated. *See, e.g.*, *Shuey v. Schwab*, No. 3:08-CV-1190, 2010 U.S. Dist. LEXIS 9715, at *17-18 (M.D. Pa. Feb. 4, 2010); *Williams v. Fedor*, 69 F. Supp. 2d 649, 665 (M.D. Pa. Aug. 4, 1999). The allegation that the Mericle Defendants paid money to Ciavarella and Conahan in return for Ciavarella referring the construction projects to the Mericle Defendants does not suffice because that allegation does not claim that the Mericle Defendants knew that Ciavarella would deny the Juvenile Plaintiffs their constitutional rights to fill PACC and WPACC.[3] The Complaints allege that, "[i]n return for these payments, Ciavarella and Conahan agreed to misuse their judicial offices…" (Master Class Complaint "MCC," ¶ 745), but they do not allege that the judges so "agreed" with the Mericle Defendants.

Indeed, the MCC alleges different knowledge and conduct among the Defendants, including that Powell and Mr. Mericle made a referral fee payment associated with the PACC construction, but that only Powell "understood the payments to be a quid pro quo" for the judges' sending Juvenile Plaintiffs to PACC and WPACC. (MCC, ¶ 656.) In contrast, the Complaints do not set forth any factual allegations that the Mericle Defendants had any knowledge of any conduct by Ciavarella designed to deny Juvenile Plaintiffs their constitutional rights, much

[3] Notably, the Complaints allege that many Plaintiffs were ordered detained at facilities ***other*** than PACC and WPACC. *See, e.g.*, MCC, ¶¶ 203-207, 215, 230, 280.

less that the Mericle Defendants ever agreed with Ciaveralla that referral fee payments made to the judges were given in exchange for future denials of the constitutional rights of the Juvenile Plaintiffs.

Plaintiffs' attempt to gloss over the fundamental *scienter* element required to plead a § 1983 claim against the Mericle Defendants, non-state actors, resembles a similar attempt that was rejected in *Arnold v. Int'l Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). In *Arnold*, plaintiff brought suit against IBM and several of its employees for alleged violations of his constitutional rights in connection with a criminal action taken against him for the theft of IBM documents and trade secrets. *Id.* at 1352. IBM employees met with the California Attorney General's Office to discuss the theft of documents and trade secrets and provided information to the authorities. In addition, the Attorney General's Office formed an investigative "Task Force" that included prosecutors and police officers, as well as IBM's manager of security. *Id.* Plaintiff's home was searched, and Plaintiff was ultimately arrested and charged with theft of trade secrets and other crimes. *Id.* at 1353. The criminal complaint and the affidavits supporting the search warrants of Plaintiff's home were based on information supplied by IBM and the activities of the Task Force. *Id.*

In affirming the district court's entry of summary judgment in favor of defendants, the Ninth Circuit stated:

> Here, [plaintiff's] injuries were the result of state action. State officials performed the acts of arresting, searching, and indicting about which [plaintiff] complains….In this case, however, the question before us is whether there is any evidence that the private defendants, IBM and its employees, caused those acts to occur within the meaning of sections 1983 or 1985.
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> There is nothing in the record, however, to indicate that defendants exerted any control over the decision making of the Task Force….In addition, [plaintiff] has pointed to no facts that show that even if IBM had any influence on the Task Force, IBM in fact influenced the decision to investigate [plaintiff]. We have seen no evidence that IBM ever considered [plaintiff] a suspect before it went to the authorities.

Id. at 1356-57.

The same analysis applies here. It was a state actor – Ciavarella – who allegedly caused Plaintiffs' constitutional deprivations. The Complaints do not contain any allegation that the private Mericle Defendants had decision-making authority over, engaged in, had influence over ***or even knowledge*** of any improper adjudication or placement of juveniles by Ciavarella. If the Plaintiffs had intended to make such allegations, they could have said so in plain and unmistakable language.

Plaintiffs also rely on the phrase "intentional conspiratorial activity on the part of the underlying defendants" from this Court's decision in *Colony Insurance*

Company v. Mid-Atlantic Youth Services Corp., No. 3:09-CV-1773, 2010 U.S. Dist. LEXIS 21432, at *14 (M.D. Pa. Mar. 9, 2010), perhaps hoping that by repeating those words they can foreclose any inquiry into whether the actual factual allegations against the Mericle Defendants are sufficient to support their § 1983 claims against the Mericle Defendants. However, the Court's decisions in *Colony* and *Alea London v. PA Child Care, LLC*, No. 3:09-CV-2256, 2010 U.S. Dist. LEXIS 36674 (M.D. Pa. Apr. 14, 2010), examined the Complaints' factual allegations against PACC, WPACC, Mid-Atlantic Youth Services Corp. ("MAYS"), Powell and Gregory Zappala ("Zappala") – not the factual allegations against the Mericle Defendants – for purposes of a duty to defend coverage analysis. *Colony*'s and *Alea*'s findings regarding the Complaints' allegations as to PACC, MAYS, Powell and Zappala cannot be blindly applied to determine that a claim has been properly pleaded against the Mericle Defendants because the allegations against the Mericle Defendants are fundamentally different than those against PACC, MAYS, Powell and Zappala.

B. Plaintiffs Have Failed to Properly Plead Entitlement to Punitive Damages Against the Mericle Defendants.

In attempting to justify their pleadings with respect to punitive damages sought from the Mericle Defendants, Plaintiffs focus solely on the "reckless disregard" aspect of the punitive damages standard as delineated by the Third Circuit in *Cochetti v. Desmond*, 572 F.2d 102 (3d Cir. 1978). In so doing,

Plaintiffs contend that "these defendants knew or should have known that concealing over $2 million in payments to a president judge and a judge sitting in juvenile court would greatly compromise 'the integrity of the justice system.'" (Plaintiffs' Br. at 58.) However, under *Cochetti* and later cases, the state of mind of the particular defendant and the defendant's understanding of a violation of the rights of the plaintiffs are critical to punitive damages. The law in this Circuit is settled that punitive damages for alleged civil rights violations require "that the defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so …" *Cochetti*, 572 F.2d at 106.

The courts in this Circuit have repeatedly required that, in order for plaintiffs to pursue punitive damages for a § 1983 claim, plaintiffs must allege and prove that a defendant had the requisite intent or acted in reckless disregard to the federally-protected rights of the plaintiffs. For example, the Third Circuit recently upheld the denial of punitive damages where "the District Court instructed the jury, in part, that punitive damages could be awarded if 'you find that the conduct of defendant [] was shown to be motivated by evil motive or intent, or if it involved reckless or callous indifference to the federally protected rights of the plaintiffs.'" *Whittaker v. Fayette County*, 65 Fed. Appx. 387, 393 (3d Cir. 2003). In that case, in response to a jury request,

> the District Court gave the following instruction: 'The terms reckless and callous focus on the state of mind of a defendant. They refer to a defendant's knowledge that he may be acting in violation of federal law, the conduct of the defendant despite that knowledge and the conscious disregard or indifference of the defendant about the consequences of such conduct.'

Id. Analyzing the appropriateness of this instruction, the Third Circuit found that "the term 'reckless' focuses on the defendant's state of mind" and that "the mere existence of a civil rights violation is not a guarantee of eligibility for punitive damages because a defendant might not be aware of the federal law he violated or he might have believed that the discrimination was permissible." *Id.* (citations omitted). As a result, the court of appeals held that the district court's instruction was correct. *Id.* at 393-94.

In another case, the Third Circuit analyzed specific jury instructions and found "the court at one point correctly instructed, 'And you must find that . . . the testimony convinces you [the defendants] acted intentionally, *or* recklessly, *or* in complete disregard of the rights of other people in this case, namely, the Plaintiffs.'" *Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989); *see also Moore v. Darlington Twp.*, Civ. No. 08-1012, 2010 U.S. Dist. LEXIS 13601, at *62-*63 (W.D. Pa. Feb. 17, 2010) (finding that in order for a jury to assess punitive damages, it must be able to find either that the defendant had an "'evil motive or intent' or that the defendant acted with reckless or callous indifference to the rights of the plaintiffs.")**.** Thus, it is clear under federal law that the state of

mind of the particular defendant and an understanding by that defendant that his acts were likely to cause injury to the plaintiffs is a necessary element of a claim for punitive damages.

With respect to the state law claims for which Plaintiffs purport to be seeking punitive damages,[4] the Supreme Court of Pennsylvania has also explained that a party seeking punitive damages, even under the "recklessness" standard, cannot simply rely on the "reasonable man standard"; rather "an appreciation of the risk [of harm] is a necessary element of the mental state required for the imposition of punitive damages." *Hutchison v. Luddy*, 870 A.2d 766, 772 (Pa. 2005) (citation omitted). The *Luddy* Court further explained that "in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant has a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in

[4] Although Plaintiffs brief seems to suggest that all plaintiffs are seeking punitive damages from the Mericle Defendants under state law claims (Plaintiffs' Br. at 60), Plaintiffs in the putative class action may not pursue punitive damages under this theory because they do not have any state law claims against the Mericle Defendants. Only the multi-plaintiff complaint has a claim for violation of state law (Civil Conspiracy) against the Mericle Defendants. However, because this state law claim is deficient as a matter of law (*see* Common Reply Br., 29-31), these Plaintiffs also are not entitled to seek punitive damages under a state law standard.

conscious disregard of that risk." *Id.*[5] Another Pennsylvania Court previously explained that punitive damages were not available against a landlord for the provision of inadequate security where "there was no evil motive or a reckless indifference to the safety of the tenants." *Feld v. Merriam*, 485 A.2d 742, 748. Thus it is clear that, like federal law, Pennsylvania law focuses on the knowledge of a particular defendant with respect to the plaintiffs who are making a claim for punitive damages.

Plaintiffs in this case do not allege that the Mericle Defendants committed an act that violated the Plaintiffs' rights with the subjective knowledge that those rights were at risk. Furthermore, in their response, Plaintiffs cannot quote a single paragraph of their complaints in which they actually allege that the Mericle Defendants acted with evil motive or intent to cause constitutional injuries or with reckless or callous indifference to the federally protected rights of the Plaintiffs or

[5] In reaching this conclusion, the Court noted that it had specifically rejected a "reasonable person" analysis when applying the reckless standard to punitive damages claims. The *Luddy* Court explained that in an earlier analysis it had embraced a standard allowing punitive damages "where the 'actor knows, or has reason to know, …of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to that risk," but rejected a lower standard "where the 'actor had such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.'" *Luddy*, 870 A.2d at 771. In their brief, Plaintiffs assert that "the Defendants should have known" that their alleged acts "would greatly compromise 'the integrity of the juvenile justice system.'" Such allegations are clearly insufficient under Pennsylvania law.

anyone else. Instead of making such allegations, they ask the Court to infer such an allegation against the Mericle Defendants based on publicly available information not included in their complaint and from allegations in their complaints primarily relating to other defendants and what those other defendants purportedly knew. Not only do Plaintiffs ask the Court to infer such allegations from the complaints and other documents, but they also urge the Court to allow them to pursue punitive damages improperly under a negligence standard, claiming that "Mericle's conduct set in motion a series of actions by others which the Mericle Defendants knew or should have known would cause Plaintiffs' constitutional injuries." (Plaintiffs' Br. at 61.) Even assuming all allegations of the complaints are true, there is no claim in any of the complaints, nor any reason to believe, that the Mericle Defendants knew or had any reason to know that the rights of any juvenile would be violated. Absent such allegations, Plaintiffs claims for punitive damages against the Mericle Defendants should be dismissed.

III. CONCLUSION

For the foregoing reasons, Plaintiffs § 1983 claims against the Mericle Defendants should be dismissed for failure to plead the appropriate state of mind of the Mericle Defendants. Additionally, Plaintiffs have not sufficiently pleaded a claim for punitive damages against the Mericle Defendants and, as a result, their claim for punitive damages should be dismissed.

Respectfully Submitted,

/s/ Joseph B.G. Fay

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Dated: June 1, 2010

CERTIFICATE OF SERVICE

I, Matthew J.D. Hogan, do hereby certify that a true and correct copy of the Foregoing Reply Brief Of Defendants Robert K. Mericle And Mericle Construction, Inc. in Further Support of Motions to Dismiss the Complaints Under Fed. R. Civ. P. 12(b)(6) was filed electronically on this 1st day of June 2010 and is available for viewing and downloading from the ECF system. A copy is also being delivered by ECF or U.S. mail to all counsel of Record and any *pro se* parties.

Dated: June 1, 2010

/s/ Matthew J.D. Hogan

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