UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patrie*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and LYNNE A. VALENTI in their official capacities. Defendants.	)	Case No.: 13-5020

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER

Robert L. Morris, attorney for LuAnn Van Hunnik, Regional Manager for the South Dakota Department of Social Services Division of Child Protection Services offices in Region 1, Pennington County, Rapid City, South Dakota, and Lynne A. Valenti, Secretary of the South Dakota Department of Social Services, submits this Memorandum of Law in Support of Motion to Reconsider.

A. FRCP 59 and 60 Standards

Rule 59(e) allows a party the right to move a court to alter or amend a judgment no later than 28 days after the entry of the judgment. Fed.R.Civ.P. 59(e). Rule 60 allows a court to "correct a clerical mistake or a mistake arising from an oversight or omission whenever one is found in a judgment, order, or other part of the record." Rule 60(b)(1) allows for relief for

mistake, as long as the motion is made within one year. Rule 60(b)(6) allows for relief for "any other reason that justifies relief." Movants challenging a judgment pursuant to Rule 60(b)(6) must do so within a reasonable time after entry of the judgment or order.

The Federal Rules of Civil Procedure do not mention motions to reconsider. The Eighth Circuit has instructed courts to consider such motions either under Rule 59(e) or Rule 60(b). *Alliance Communs. Coop., Inc. v. Global crossing Telecomms., Inc.*, 690 F.Supp.2d 889, 893 (D. S.D. 2010)(citing *Sanders v. Clemco Indus.*, 862 F.2d 161 (8th Cir. 1988); and *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)(other citations omitted). Rule 59(e) refers to entry of judgment, but some authority indicates that a district court may entertain a Rule 59(e) motion before the entry of final judgment on a separate document. *Id*. Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. *Id.* District courts have broad discretion in determining whether to grant a motion for reconsideration. *Id.*

B. Basis for the Motion and Relief Sought

Ms. Valenti and Ms. Van Hunnik seek relief from the Court's March 30, 2015 Order. [Document 150]. In the Order, the Court first focused on the Plaintiffs' claims that Judge Davis allegedly initiated six policies, practices, and customs for 48-hour hearings which allegedly violate the Due Process Clause and ICWA. [Document 150, pg. 24]. The Court then focused upon claims that the "Defendants" allegedly have violated the Due Process Clause since January 1, 2010 in five different areas. [Document 150, pg. 36].

As to Judge Davis's alleged policies, the Court imposed liability as a matter of law upon Ms. Valenti and Ms. Van Hunnik for acquiescing or ratifying Judge Davis's alleged policies. [Document 150, pg. 27]. As to the Due Process claim, the Court determined that judgment as a

matter of law against the Defendants would be entered. [Document 150, pg. 42].

Ms. Valenti and Ms. Van Hunnik assert that factual and legal errors exist as to their liability. This motion is made to correct those errors and to ask the Court to reconsider its rulings and to deny the Plaintiffs' motions as to Ms. Valenti and Ms. Van Hunnik.

C. Factual Errors in the Order

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A properly supported motion for summary judgment is not defeated by self-serving affidavits. Rather, the plaintiff must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor." *Frevert v. Ford Motor Co.*, 614 F.3d 466, 473–74 (8th Cir. 2010). But, a court "must view the evidence in the light most favorable to the opposing party." *Tolan v. Cotton*, —— U.S. ——, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014) (per curiam) ("By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." (emphasis added)). *Chavero-Linares v. Smith*, __ F.3d __; No. 13-3532, 2015 WL 1610223, at *2 (8th Cir. April 13, 2015).

In the Court's March 30, 2015 Order [Document 150] there are certain factual[1] errors contained therein which these movants believe are material to the case and its eventual outcome as to these movants. Ms. Valenti and Ms. Van Hunnik respectfully submit that material factual

[1] In the Court's Order [Document 150] the Court indicated that the facts material to Plaintiffs' motions "are as follows" and then proceeded to recite the material facts prior to engaging in legal analysis. [Document 150, pgs. 10 -22]. As it is apparent that the Court's legal analysis was based upon the material facts cited, it is important to address errors in the material facts as such errors do affect the legal analysis.

errors exist and the Court reached factual inferences by weighing the evidence contrary to competent evidence submitted by the SDDSS Defendants.

1. CPS Employees Do Not Prepare a Petition for Temporary Custody.

In the Order, it is stated "CPS employees under policy guidance from and the supervision of Ms. Valenti and Ms. Van Hunnik *prepare a petition*[2] *for temporary custody* and sign an Indian Child Welfare Act affidavit . . . ." [Document 150, pg. 3 – emphasis supplied]. The Order also states ". . . . CPS employees under their supervision *prepared petitions for temporary custody* . . . ." [Document 150, pg. 11 – emphasis supplied].

CPS employees do not prepare the petitions for temporary custody. The State's Attorney's office prepares a Petition for Temporary Custody and temporary custody paperwork. [Document 132-1, ¶79; 132-26, ¶32]. This material factual conclusion is erroneous and unsupported by the existing record.

2. The ICWA Affidavit and Hearing Transcript Issues[3].

The Court acknowledged that it was DSS practice, prior to June 2012, to provide a copy of the ICWA Affidavit to parents who attended the 48-hour hearing. The Court also acknowledged the existence of DSS's written policy, since June 2012, to provide the ICWA Affidavit to parents attending the hearing. [Document 150, pg. 13].

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[2] This was an allegation in the Complaint [Document 1, ¶51] but the materials filed in response to the Plaintiffs' motions showed such allegation not to be accurate.

[3] Incorporated herein by this reference is also Document 137-1 which the undersigned filed with a Motion to Defer Ruling. [Document 137]. Generally speaking, certain Tribal Orders contained Findings of Fact and Conclusions of Law that children transferred by the Oglala Sioux Tribe were in imminent danger and should not be returned to their parents. The Court determined that the Motion to Defer was moot in light of its March 30, 2015 Order. [Document 150, pg. 45]. Since that date, a Motion to Compel Discovery regarding certain Tribal Court and ONTRAC files has been filed. [Document 156]. In one representative case, the Tribal Order found that the child was in imminent danger and should not be returned to custody of the parent 46 days after the 48-hour hearing. [Document 156, pgs. 4 -6]. This information would have been probative and relevant in deciding the factual and legal issues applicable to the Plaintiffs' motions.

The Court then cited specifically to hearing transcripts[4] in A10-1119; A10-1320; A11-497; A12-36; A12-571; A13-20; and A13-49. This citation was apparently for two purposes – that the parents did not have notice of why their children were removed from their custody and that the transcript failed to indicate that the parents were in actual physical receipt of the ICWA Affidavit.

As to the alleged lack of notice as to why the children were removed from the custody of the parents, the parents could not claim ignorance of the situation. For instance, in each of the hearing transcripts specifically cited by the Court, the ICWA Affidavits[5] indicate generally[6]:

A10-1119:

> **A10-1119; BS# GQ2954 – 2956:** Child has been diagnosed with PKU (phenylketonuria) and will suffer severe brain damage if not cared for properly. Parents have been unwilling or unable to give her the best care to ensure brain damage will not occur.
>
> [Document 132-1, pg. 18]

A10-1320:

> **A10-1320; BS# GQ2389 – 2391:** Mother and Father continue to involve Children in domestic abuse situations. Father is an alcoholic and becomes out of control when he is intoxicated. Mother allows Father in the home and around the children when he is intoxicated.
>
> [Document 132-1, pg. 18]

A11-497:

> **A11-497; BS# GQ3264 – 3266:** Child was brought to the hospital with injuries sustained to his head resulting in a fractured skull and subdural hematoma. Child's injury was the result of being struck in the head by Father, who was intoxicated. Mother stated

[4] The Plaintiffs filed 57 transcripts of 48-hour hearings under seal as Exhibit 1. [Document 111, ¶2].

[5] The Plaintiffs filed 45 ICWA Affidavits under seal as Exhibit 7. [Document 111, ¶8]. Each of these affidavits has the Court File number on it and bates stamps for discovery identification.

[6] A general description of the contents of each ICWA Affidavit filed by the Plaintiffs is contained in Document 132-1, pgs. 16 – 23.

to law enforcement she does not want to press charges on Father for causing injury to Child.

[Document 132-1, pg. 19]

A12-36:

A12-36; BS# GQ2960 – 2962: Mother was arrested and incarcerated for a warrant for No Drivers License. Mother's arrest rendered her unable to care for Child, and law enforcement felt there were no appropriate caretakers for Child. Father lives in Kyle and has little contact with Child.

[Document 132-1, pg. 19]

A12-571:

A12-571; BS# GQ2519 – 2521: Child was present during an assault between Mother and Mother's boyfriend, at which time Mother was arrested for Simple Assault Domestic Violence. There is a history of domestic violence between Mother and Mother's boyfriend and this was the second law enforcement response within five days.

[Document 132-1, pg. 20]

A13-20:

A13-20; BS# GQ3380 – 3382: Father was arrested for DUI, No Driver's License, No Seatbelt, No Child Seatbelt, Ingestion and Possession of Marijuana. Mother was arrested for an outstanding warrant and ingestion. Children were in the vehicle when Father and Mother were arrested.

[Document 132-1, pg. 21]

A13-49:

A13-49; BS# GQ3402 – 3404: Mother and Father were intoxicated and arrested. The whereabouts of Other Father are unknown.

[Document 132-1, pg. 22].

As can be seen, the parent or parents from whom the children were removed had actual knowledge of the reason(s) the children were removed by law enforcement from their custody.

It would appear that the Court made a conclusion that parents in the cited transcripts did not receive the ICWA Affidavit either because the Tribe's counsel (who also represents the Plaintiffs in this action) made "comments" in the hearing transcript that the parent allegedly did not receive the document, or that the transcript omits reference to the parent actually receiving the ICWA Affidavit. No affidavits were provided indicating that ICWA Affidavits were not provided to the parents by a DSS representative. In sum, there was no competent evidence in the summary judgment materials reviewed by the Court. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 17, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970) (unsworn statements are not admissible at summary-judgment stage of proceedings); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968–69 (6th Cir.1991) (court may not consider unsworn statements when ruling on motion for summary judgment).

Lastly, the Court goes on to conclude that the Deputy State's Attorney, DSS or the Judge failed to contradict the alleged statements of the parents or the Tribe's counsel or recess the proceedings for the purpose of reviewing the ICWA Affidavit or Petition for Temporary Custody. [Document 150, pg. 15]. Again, respectfully speaking, this is a factual conclusion reached by the Court after weighing the evidence. The Court weighed the evidence due to the "omission" in the transcript and made a conclusion by omission.

3. Valenti and Van Hunnik Understand 48-Hour Hearings are Intended to be Evidentiary Hearings[7].

The Court made a material factual conclusion that "Defendants Vargo, Valenti and Van Hunnik understand 48-hour hearings are intended to be evidentiary hearings." [Document 150, pg. 26]. There was no competent evidence in the record that could lead to such a conclusion.

[7] This factual conclusion is not contained in the material facts expressed by the Court but instead contained in the legal analysis portion of Order. [Document 150, pg. 26]. Because there is no competent evidence in the record as to what Valenti or Van Hunnik understands regarding this issue, it will be addressed.

The Court's reference to "evidentiary hearing" would seem to indicate that such a hearing is akin to an adjudicatory hearing[8] under South Dakota law. Such is not the case.

In *Cheyenne River Sioux Tribe v. Davis*, 2012 S. D. 69, 822 N.W.2d 62, one of the issues addressed was the Tribe's assertion that there was a violation of state law in the [48-hour hearing] based upon an alleged lack of evidence of a need for temporary custody as required by SDCL 26-7A-18. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶12. Essentially the Tribe was claiming there was no "evidentiary hearing" in the sense that there was no evidence presented to the Court for purposes of continued temporary custody. In rejecting the Tribe's assertion, the South Dakota Supreme Court stated:

> . . . . Tribe ignores, however, that the temporary custody hearing proceeded on State's petition for temporary custody and the accompanying police report and ICWA affidavit from a DSS specialist. The report and affidavit set forth facts concerning the need for temporary custody. While these documents might not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at a temporary custody hearing. See SDCL 26–7A–34 (stating that the Rules of Civil Procedure apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted to inform the court of the status of the child and to ascertain the child's history, environment, and condition); SDCL 26–7A–56 (stating that the Rules of Evidence apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted under rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition). ***Therefore, the police report and affidavit provided sufficient evidence of a need for temporary custody to permit the trial courts to proceed here.*** [Emphasis added].

Cheyenne River Sioux Tribe v. Davis, 2012 S. D. 69, ¶12 822 N.W.2d 62.

Such material factual conclusion led the Court to find that Judge Davis does not permit Indian parents to present evidence opposing the State's petition for temporary custody; that Judge Davis prevents Indian parents from cross examining witnesses who support the petition;

[8] "Adjudicatory hearing" a hearing to determine whether the allegations of a petition alleging that a child is abused or neglected are supported by clear and convincing evidence or whether the allegations of a petition alleging a child to be in need of supervision or a delinquent are supported by evidence beyond a reasonable doubt. SDCL 26-7A-1(2). The Rules of Civil Procedure apply to adjudicatory hearings. SDCL 26-7A-34(1).

and that Judge Davis does not require the State's Attorney or DSS to call witnesses to support removal of the children or permit testimony on immediate risk of harm if the children are returned to the parents. [Document 150, pg. 26].

The importance of pointing out this material factual error cannot be understated. Such error led to this Court to conclude that Judge Davis's authority in conducting 48-hour hearings was as a policy maker. Which in turn led this Court to conclude that when Vargo, Valenti, and Van Hunnik did not challenge Judge Davis's alleged "policies" – his "policies" became the official policy governing the Pennington County State's Attorney and the South Dakota Department of Social Services. But there was no "policy" of Judge Davis for Vargo, Valenti, and Van Hunnik to challenge, so it could not become the "official policy" of the Pennington County State's Attorney and the South Dakota Department of Social Services.

The procedure regarding "evidence" at a 48-hour hearing has been expressed by the South Dakota Supreme Court in *Cheyenne River Sioux Tribe v. Davis*, 2012 S. D. 69, 822 N.W.2d 62. *Cheyenne River Sioux Tribe*[9] and the applicable statutory law expressed the "rule of law" which was to be followed at the 48-hour hearing.

D. Legal Errors

1. The Order

The Court's Order [Document 150] determined the liability of Valenti and Van Hunnik for two reasons. One, the Court concluded Valenti and Van Hunnik were final policy makers. Second, the Court concluded that because Valenti and Van Hunnik did not challenge Judge

[9] Request is made to the Court to take judicial notice that the Tribe did not appeal the South Dakota Supreme Court's decision to the U.S. Supreme Court. Thus, this Court's decision effectively overrules *Cheyenne River Sioux Tribe v. Davis*, 2012 S. D. 69, 822 N.W.2d 62 and violates the *Rooker-Feldman* doctrine. The *Rooker–Feldman* doctrine prohibits lower federal courts from exercising appellate review of state court judgments. *Rooker v. Fidelity Trust Co*., 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983).

Davis's alleged policies, the alleged policies became the official policy governing the State of South Dakota and the Department of Social Services (State/DSS). In essence, Valenti and Van Hunnik in their official capacities acquiesced and ratified Judge Davis's alleged policies.

Omitted from the Court Order is any material fact determination or legal conclusion (1) that the State/DSS had an official policy or custom that caused a constitutional violation; and (2) that the State/DSS official policy or custom that caused a constitutional violation was the moving force behind the violation. In addition, the Court adopted the Plaintiffs' assertion that Valenti and Van Hunnik were final policy makers, without any factual or legal analysis asserted by the Plaintiffs as required by applicable law.

2. The Summary Judgment Motions Should Have Been Denied as to Ms. Valenti and Ms. Van Hunnik.

a. There is no Evidence or Claim in the Motions for Summary Judgment That the State/DSS had an "Official Policy" or "Custom" Which Violated the Plaintiffs' Rights.

In the Plaintiffs' summary judgment submissions, they submitted no evidence of, nor did Plaintiffs identify, an "official policy" of the State/DSS involving a deliberate choice to follow a course of action made among various alternatives by an official who has the final authority to establish governmental policy. *See, Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 645 (8th Cir. 1990). Also, the Court's Order [Document 150] does not address or identity any such "official policy."

Plaintiffs' summary judgment submissions fail to proffer or identify the existence of any "governmental custom" by the State/DSS. There was no evidence or proffer of: the existence of a continuing, widespread, persistent pattern of constitutional misconduct by the governmental entity's employees and deliberate indifference to or tacit authorization of such conduct by the governmental entities policy-making officials after notice to the officials of that misconduct.

Most importantly, there was no evidence or proffer that the Plaintiffs were injured by any "governmental custom" that was the moving force behind any alleged constitutional violation. *See Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 645 (8th Cir. 1990). Also, the Court's Order [Document 150] does not address or identity any such "official policy," or address and identity any such "governmental custom" or a determination that the "governmental custom" was the moving force behind any alleged violation of law.

Therefore, any grant of summary judgment to the Plaintiffs as against Ms. Valenti or Ms. Van Hunnik, is in error based upon the lack of evidence, proof, or identification of an "official policy" or "governmental custom" of the State/DSS.

b. The Plaintiffs Asserted a Legal Conclusion that Ms. Valenti and Ms. Van Hunnik Were Policy Makers Which Led This Court to Adopt the Plaintiffs' Legal Conclusion Without Any Legal Analysis or Authority.

The "policy maker" term arose from *Monell* due to the use of the term "official policy" and was addressed more definitively in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The U.S. Supreme Court noted that "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' – that is acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480 – 481. [emphasis in original].

The *Pembaur* Court went on to discuss that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances, when action is taken once or repeatedly. *Pembaur*, 475 U.S. at 480 – 481. The Court then went on to

emphasize that not every decision by municipal officers automatically subjects the municipality to liability. Of import was the holding that:

> . . . . Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. [citation omitted]. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable . . . .

Pembaur v. City of Cincinnati, 475 U.S. 469, 481 – 482 (1986).

Final policy making authority is determined by whether an official has the authority to make official policy or custom regarding the action alleged to have caused the particular constitutional violation at issue. *Schlimgen v. City of Rapid City*, 83 F.Supp.2d 1061, 1067 (D. S.D. 2000). Whether an individual is a final policy maker is a question of law to be resolved by the trial judge. *Id.*(citing, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)). Relevant legal materials, including state and local law, as well as "custom" and "usage" having the force of law, must be considered by the trial judge while identifying "those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Schlimgen,* at 1067.

In this case, the Plaintiffs asserted no evidence or legal argument with "relevant materials" to address whether Ms. Valenti or Ms. Van Hunnik were "final policy makers." Plaintiffs merely offered a legal conclusion that they were "final policymakers" and unfortunately created the situation where the Court accepted that conclusion without addressing any "relevant legal materials" or "identifying those officials or governmental bodies who speak with final policy making authority."

Therefore, any conclusion that Ms. Valenti and/or Ms. Van Hunnik are "final policymakers" is in error and the summary judgment motions should have been denied.

c. Even if Ms. Valenti and/or Ms. Van Hunnik are Policymakers, They Could Not Acquiesce or Ratify Judge Davis's Alleged Policies as He is Not a Subordinate to Ms. Valenti and/or Ms. Van Hunnik.

The Court's Order [Document 150] contains no liability determination as against Ms. Valenti and Ms. Van Hunnik except as follows:

> . . . . There is no evidence any one of these three defendants [Vargo, Valenti, and Van Hunnik] or their courtroom representatives, Deputy State's Attorneys or case workers sought to change the practices established by Judge Davis. When these defendants did not challenge Judge Davis' policies for conducting 48-hour hearings, his policies became the official policy governing their own agencies. *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994). '[B]y acquiescence in a long standing practice' of Judge Davis 'which constitutes the standard operating procedure' of the Seventh Circuit Court, these defendants [Vargo, Valenti, and Van Hunnik] exposed themselves to liability. *Jett*, 491 U.S. at 37.

Order [Document 150, pgs. 26 – 27.]

Coleman v. Watt, 40 F.3d 255 (8th Cir. 1994), was an appeal to the Eighth Circuit from a motion to dismiss by the District Court for failure to state a claim. The Eighth Circuit reversed and remanded. *Coleman*, 40 F.3d at 257. Part of Coleman's claim surrounded his allegation that Municipal Judge Watt, Municipal Court, Traffic Division, issued an "Order" directing the officers of the Little Rock Police Department to impound vehicles for certain state statute violations. *Id*. Due to the "Order" Coleman's car was impounded and he ultimately sued Municipal Judge Watt and the City of Little Rock. *Coleman*, 40 F.3d at 258.

Relevant to this matter, the Eighth Circuit, in *Coleman* at pg. 262, stated:

> We need not decide whether a municipal court judge acts as an official policymaker for the City of Little Rock because Coleman has alleged that both the City and its chief of police "adopted" Judge Watt's general order as an official

> policy governing the conduct of the Little Rock Police Department. The police chief is alleged to be "an official policymaker for the City of Little Rock."
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> *********
>
> . . . . To recover on his claimed due process violation, Coleman must meet his burden of proof on each of these assumptions: He must prove that the chief of police or some other official policymaker adopted Judge Watt's order as an official policy, and that the execution of that policy in fact caused his asserted injury. . . . .

Coleman v. Watt, 40 F.3d 255, 262 (8th Cir. 1994).

With due respect to the Court, nothing in the cited case stands for the proposition of law that liability flows to Ms. Valenti and/or Ms. Van Hunnik for "not challenging" Judge Davis's alleged policies, or that by not challenging his alleged policies, the alleged policies became the official policy governing the State/DSS.

The Court goes on to find that Ms. Valenti and Ms. Van Hunnik exposed themselves to liability by acquiescence, citing *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). The context of *Jett* is discovered by reviewing *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

It is clear that liability for acquiescence or ratification, can only be done by a policymaker regarding a subordinate within that policymaker's entity. This conclusion is buttressed by the *Praprotnik* Court recognizing that the *Pembaur* Court recognized that the authority to make policy is necessary to the authority to make *final* policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). [emphasis in original]. *Praprotnik* further holds that a municipality can be liable for an isolated constitutional violation if the final policy maker "ratified" a subordinate's action. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

It should be obvious and go without saying - even assuming that Ms. Valenti and/or Ms. Van Hunnik are *final policy makers* - Judge Davis is not a subordinate of Ms. Valenti and/or Ms.

Van Hunnik. If he is not a subordinate, Ms. Valenti and/or Ms. Van Hunnik cannot "ratify" his actions.

Therefore, the Court committed legal error in determining that Ms. Valenti and Ms. Van Hunnik exposed themselves to liability for acquiescing or ratifying Judge Davis's alleged policies.

d. The Court's Conclusion That "Defendants" Violated Plaintiffs' Due Process Rights Does Not Describe What Conduct of Ms. Valenti and Ms. Van Hunnik Caused the Alleged Violation of Due Process and There is no Continuing Violation of Federal Law

The Due Process allegations were lumped against the "Defendants" by the Plaintiffs and the Court addressed the Due Process issue also by collectively referring to the "Defendants" and concluding the "Defendants" violated the Plaintiffs' due process rights. The Court also did not specifically address what alleged policies, alleged customs, or alleged conduct of Ms. Valenti and Ms. Van Hunnik caused them to be liable for the alleged due process violations.

This is important as the Court apparently intends to issue an injunction against Ms. Valenti and Ms. Van Hunnik, in their official capacities, for prospective injunctive relief to prevent future violations of federal law. See, *Ex Parte Young*, 209 U.S. 123. The Court points to no policies or customs of DSS that lead to liability of Ms. Valenti and/or Ms. Van Hunnik. If the conduct is that those under Ms. Valenti's and Ms. Van Hunnik's supervision prepare the Petition for Temporary Custody and fail to provide it to the parents, that conduct has been shown to be incorrect. DSS case workers do not prepare the Petition for Temporary Custody. If the conduct is that DSS case workers do not provide a copy of the ICWA Affidavit to parents, there is no competent evidence or proof of any such conclusion. The DSS written policy indicates otherwise.

All that would remain is that Ms. Valenti and Ms. Van Hunnik are vicariously liable for Judge Davis's alleged conduct. Yet, such conclusion would be in error as the Eighth Circuit in *Parrish v. Ball*, 594 F.3d 993, (8th Cir. 2010) stated:

> "Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, ***through the official's own individual actions, has violated the Constitution.***" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1948, 173 L.Ed.2d 868 (2009). Thus, "each Government official, his or her title notwithstanding, ***is only liable for his or her own misconduct.***" *Id*. at 1949. As we have held, a supervising officer can be liable for an inferior officer's constitutional violation only " 'if he directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation.' " *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir.1997) (*quoting Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 806 (8th Cir.1994)); see also *Wever v. Lincoln County*, 388 F.3d 601, 606–07 (8th Cir.2004).(footnote omitted). [emphasis supplied].

Parrish v. Ball, 594 F.3d 993, 1001 (8th Cir. 2010).

Lastly, none of the factual or legal justification for the Court's decision indicates that Ms. Valenti and/or Ms. Van Hunnik, or individuals under their supervision, are engaging in ongoing or continuing violations of federal law. Injunctive relief is unavailable when there is no continuing violation of federal law. *Green v. Masour*, 474 U.S. 64, 70 (1985). In addition, since there is no ongoing or continuing violation of federal law that can be attributed to Ms. Valenti and/or Ms. Van Hunnik, a declaratory judgment as to them would also be improper. *Green*, 474 U.S. at 72 – 73.

Therefore, as there is no appropriate factual or legal finding of conduct on the part of Ms. Valenti and/or Ms. Van Hunnik which allegedly violated the Plaintiffs' due process rights, the Plaintiffs' motions should have been denied.

E. Conclusion

Ms. Valenti and Ms. Van Hunnik would respectfully request the factual errors addressed above be remedied by the Court. Once those factual errors are remedied, it is respectfully requested that the errors of law addressed above be also remedied and that the Court issue an Order denying the Plaintiffs' motions as to Ms. Valenti and Ms. Van Hunnik.

Dated: April 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2015, I electronically filed **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER** with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: */s/ Robert L. Morris*