UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as parens patriae, to protect the rights of their tribal members; and MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LUANN VAN HUNNIK; MARK VARGO; HONORABLE JEFF DAVIS; and LYNNE A. VALENTI, in their official capacities, Defendants.	Case No.: 13-5020 **Mark Vargo's Memorandum in Support of his Motion to Alter, Amend or Reconsider Pursuant to Rule 59 or Rule 60**

INTRODUCTION.

In a three-claim complaint, plaintiffs sued Pennington County States Attorney Mark Vargo. Plaintiffs' asserted that Vargo's "policies, practices and procedures relating to the removal of Native American children from their homes during state court 48-hour hearings violate the Indian Child Welfare Act ("ICWA") and the Due Process Clause of the Fourteenth Amendment." Plaintiffs' complaint demands relief based only upon 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988).

Vargo was only sued in his official capacity. "A suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent." Parish v. Bell, 594 F.3d 993, 997 (8th Cir. 2010). But, the complaint does not allege that Vargo is an agent of a particular entity. Plaintiffs' first motion for partial summary judgment, though, states that Vargo is "in charge" of Child Protection Services for Pennington County. Document 110, p. 12. Accordingly, for purposes of this motion, Vargo assumes the claims against him in his official capacity, as stated in the complaint, are suits against Pennington County.[1]

Monell v. Department of Social Services, 436 U.S. 658, 694, (1978), holds that the doctrine of respondeat superior may not be used to fasten liability on a local government in a suit under section 1983. Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 468 (7th Cir. 2001)(Judge Posner analyzing municipal liability)(internal citations omitted). In order to prevail on a Monell claim, plaintiffs must show that "an injury [was] inflicted because of 'execution of a governmental policy or custom, ether made by its lawmakers or by those whose edicts or acts may fairly be said to represent the official policy." Monell, 436 U.S. at 694. [M]unicipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible . . . ." Eggar v. City of Livingston, 40 F.3d 312, 314 (9th Cir. 1994)(Donald P. Lay, Senior Judge of the Eighth Circuit Court of Appeals,

[1] The undersigned will endeavor to refer to the defendant as Pennington County, not Mark Vargo, unless specifically referencing Mr. Vargo as an individual.

sitting by designation in the Ninth Circuit). Put simply, "municipalities are liable as 'persons' under section 1983, but only for their own unconstitutional or illegal policies. Coleman v. Watt, 40 F.3d 255, 261 (8th Cir. 1994). But also, Congress did not intend for a municipality to be liable under § 1983 where 'causation is absent.'" Monell, 436 U.S. at 692.

RELIEF REQUESTED.

On March 30, 2015, the Court entered an order granting plaintiffs' motions (Docket 108 and 110) for partial summary judgment, concluding that plaintiffs are entitle to injunctive and declaratory relief. Neither an injunction, nor a declaratory judgment has yet issued. Pennington County respectfully contends that the Court's order represents a manifest error of law, requiring reconsideration or other relief under either Federal Rule of Civil Procedure 59 or 60.

LEGAL STANDARD.

Rule 59(e) allows a party to move a court to alter or amend a judgment. 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. Rule 60(b)(6) allows for relief for "any other reason that justifies relief."

"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.

THE ORDER.

Pennington County seeks relief from the Court's Order dated March 30, 2015. In the order, the Court acknowledged plaintiffs' allegation that Davis initiated six policies which deprived plaintiffs of their constitutional rights. The Court also acknowledged that plaintiffs only alleged that they could maintain an action against Pennington County through Mark Vargo's acquiescence to Davis's policies. In accepting the plaintiffs' argument, the Court identified three reasons why Pennington County was liable:

1. Pennington County did not offer evidence that any Deputy States Attorney sought to change any of the Davis's policies.

2. Pursuant to Coleman v. Watt, Pennington County failed to "challenge" Judge Davis's policies, adopting Davis's policies as their own.

3. Pursuant to Jett v. Dallas Indep. Sch. Dist., Pennington County acquiesced to the policies of whatever entity Judge Davis was an agent of, making those policies the "standard operating procedure" of "the Seventh Circuit Court."

Document 150, pp. 26-27.

DISCUSSION.

A. Defendants are not Final Policy Makers.

Here, the Court concluded that defendants are all final policy makers. But the Court did not identify what municipality each defendant was a policy maker for. Also, it is important to note that an individual might be a final policy maker in respect to one function, but not another. See Pembaur v. City of Cincinnati, 475 U.S. 469, 483, n. 12 (1986). Municipalities, "spread policymaking authority among various officers." Id. So, the fact that any of the named-defendants is a policy maker isn't necessarily relevant to an inquiry of liability under Monell.

The "mere fact that a municipality enforces state law does not justify imposition of § 1983 municipal liability." Martin A. Schwartz, Section 1983 Litigation Claims and Defenses Volume 1B § 7.9 (3d ed. 1997). Here, any "policy" of Pennington County was nothing more than application of state law as blessed by the South Dakota Supreme Court. See generally Cheyenne River Sioux Tribe v. Davis, 2012 S.D. 69, 822 N.W.2d 62. Moreover, to the extent that Vargo is an agent of the State of South Dakota, liability might be rejected based on Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989)(holding that States are not proper parties under § 1983). Thus, Pennington County joins in the arguments of co-defendants as to analysis of this issue. Since Judge Davis is not liable for purposes of § 1983, then

Pennington County can not be liable under the Court's analysis. Thus, Pennington County joins in Davis's arguments as to why he is not liable and why certification to the South Dakota Supreme Court might be proper. Pennington County argues that these issues represent manifest errors of law.

B. One Municipality cannot Acquiesce to the Policy of Another.

1. Pennington County has no Duty to Change or Challenge Davis's Practices.

The Court first reasoned that Pennington County was responsible for the plaintiffs' alleged constitutional deprivations because "[t]here was no evidence any one of these defendants [Vargo, Valenti, and Van Hunnik] or their courtroom representatives, Deputy States Attorneys or case workers sought to change the practices established by Judge Davis." Document 150, p. 26. This represents a manifest error of law for two reasons.

First, the court improperly shifted the burden at summary judgment. Pennington County was the non-moving party at this stage of litigation. The Court "must view the evidence in the light most favorable to the opposing party." Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014)(per curiam). At this stage of litigation, it is plaintiffs' burden to establish the lack of a question of a material fact, not the defendants' burden to show that there is a question of material fact.

Second, Pennington County is unaware of any legal authority holding that municipal liability pursuant to § 1983 attaches when a municipality, through one of its agents, fails to "change" the practices established by a

judge in a courtroom. Indeed, other courts have held that municipalities "cannot be held liable under Monell for a section 1983 claim based solely on the actions of its judges." Rodriguez v. City of New York, 2004 U.S. Dist. LEXIS 3765; WL 444089 (S.D. N.Y. 2004)(citing Ledbetter v. City of Topeka Kansas 318 F.3d 1183, 1190 (10th Cir. 2003); Eggar v. City of Livingston, 40 F.3d 312, 316 (9th Cir. 1994)(Judge Lay holding that judge's failure to inform indigent defendants of their right to counsel did not amount to municipal policymaking); Woods v. City of Michigan City, 940 F.2d 275, 279 (7th Cir. 1991)(holding that judge was acting as part of state judicial system but not as an official policymaker); and Carbalan v. Vaughn, 760 F.2d 662, 665 (5th Cir. 1985)(finding that city not liable for judge's error merely because he is a judge)).

Here though, there is no allegation that Davis is even an agent of Pennington County. Indeed, the fact that he is separately named in his official capacity seems to suggest that he is the agent of another entity, which makes him less connected to Pennington County than a municipal judge would be connected to a city. If a municipal judge's actions does not give rise to municipal liability, how can the actions of a non-municipal judge?

In Rodriguez, District Judge Shira Scheindlin concluded, "Thus, even if the judge's actions amounted to that of a policymaker, the City would not be liable under Monell. Rodriguez, 2004 U.S. Dist. LEXIS 3765 at *14. And courts in this Circuit have held similarly. See Granda v, City of St. Louis,

2006 U.S. Dist. LEXIS 23037; 2006 WL 1026978 (E.D. Mo. 2006). In Granda, a plaintiff sued a municipality and its municipal judge for violations of her constitutional rights when the judge incarcerated her due to her daughter's truancy. The court determined that it was the judge's

> independent decision to incarcerate violators of the Truancy Ordinance. Other judges who knew of [judge's] conduct were no more policy makers than the [judge]. Although the Mayor and other judges allegedly knew of [judge's] conduct, mere awareness does not create a custom or policy on the part of the [municipality]. Indeed, no city official including the Mayor or other judges had control over [judge's] judicial acts; they did not have authority to stop [judge] from incarcerating persons who violated the Truancy Ordinance. Under such circumstances, it cannot be said that the Mayor and other judges were deliberately indifferent to or tacitly authorized [judge's] conduct in such a manner as to create a custom or policy.

Id.(citing Russell v. Hennepin County, 420 F.3d 841,849 (8th Cir. 2005).

Here, like in Granda, Vargo and his courtroom deputies did not have the authority to stop Judge Davis's conduct, regardless of whether or not it was in violation of plaintiffs' constitutional rights. And it is unclear why Vargo or his deputies should have "sought to change" Judge Davis's practices, when the South Dakota Supreme Court declined to reject Davis's practices in Cheyenne River Sioux Tribe v. Davis. There is no authority to suggest that Monell liability attaches to a county when its prosecutor fails to predict that a federal court might interpret the practices of the judges they appear in front of as violative of § 1983. This is especially troublesome when a state Supreme Court has previously declined to reject the practice at issue.

Accordingly, the Court's conclusion that Monell liability attaches to Pennington County as a result of its States Attorney s Office's failure to seek "to change" the practices established by the co-defendant is a manifest error of law.

2. Reliance on Coleman is a Manifest Error of Law.

The Court also concluded that "When [Valenti, Van Hunnik, and Vargo] did not challenge Judge Davis's policies for conducting 48-hour hearings, his policies became the official policy governing their own agencies." Document 15, p. 26. To support this statement, the Court relies on Coleman v. Watt, 40 F.3d 255, 262 (8th Cir. 1994). But Coleman does not stand for the proposition that a municipal policy maker like Vargo always creates a policy that fairly represents official policy of the municipality when she "does not challenge" the policies of a non-municipal judge.

First, Coleman was a case at a different stage of litigation. In Coleman, a plaintiff sued a municipal judge, Watt, and the City of Little Rock, Arkansas. Here, plaintiffs have moved for summary judgment, but in Coleman, defendants moved to dismiss. Coleman, at best, holds that the possibility that a municipality "adopted" something its municipal judge did as its own official policy is a sufficient reason to resist the municipality's motion to dismiss a plaintiff's Monell claim. It does not stand for the proposition that, at summary judgment, a defendant municipality is liable as a matter of law under Monell when one if its agents—even one with final policymaking

authority—is present when a state court judge violates an individual's constitutional rights. Unlike the municipal judge in Coleman, Judge Davis is not an agent of Pennington County, nor is he a subordinate of Vargo or his deputies.

Second, the Coleman Court acknowledged that even though Coleman survived the municipality's motion to dismiss, he still faced "several evidentiary hurdles." Id. Particularly, the Coleman Court concluded that, even though he survived the motion to dismiss, Coleman still needed to establish that some policy maker actually did adopt the policy, and he would need to prove that the execution of the policy actually caused his injury. At summary judgment, Coleman is unhelpful to plaintiffs. Even if a Pennington County policy maker could adopt, ratify or acquiesce to the final policy of another entity, plaintiffs would still need to prove that Pennington County's execution of the adopted policy caused their injury. Here, causation has not even been addressed. Without causation, liability can not attach to Pennington County and an injunction is improper. In fact, injunctive relief might be unavailable because there is no continuing violation of federal law by Pennington County. See Green v. Masour, 474 U.S. 64, 71 (1985).

3. Reliance on Jett is a Manifest Error of Law.

The Court also held that "'[B]y acquiescence in a longstanding practice' of Judge Davis 'which constitutes the standard operating procedure' of the Seventh Circuit Court, these defendants exposed themselves to liability."

Document 150, p. 27 (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989)). The Court's reliance on Jett is misplaced. This is the pertinent portion of Jett:

> Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur**,** or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.

Jett, 491 U.S. at 737(emphasis added)(internal citations omitted). This is unhelpful to plaintiffs for two reasons.

First, even though Vargo might have final policymaking authority for Pennington County—as a matter of law—a jury must determine causation and whether Judge Davis's practices constituted the standard operating procedures of Pennington County. Whether this constitutes the standard operating procedure of the Seventh Circuit Court is inconsequential to whether there is Monell liability as to Pennington County. By granting summary judgment, the Court took these questions away from a jury, without even addressing them.

Second, plaintiffs do not even allege that the "Seventh Judicial Court" is an entity subject to Monell liability. And there is no allegation that any—or all—of the named defendants are agents of that the "Seventh Circuit Court" in a Monell sense. As stated above, the record suggests that the suit against Vargo in his official capacity is a suit against Pennington County. There is no allegation that the "Seventh Circuit Court" is an entity within Pennington

County. There is also no allegation that Vargo is a policy maker for the "Seventh Circuit Court."

This is important because Pennington County is not aware of any authority—including Jett—that suggest that the final policy maker of a municipality can create an official municipal policy through inaction when they acquiesce to, or ratify the policy of another entity. Put simply, if Davis created a policy pursuant to Monell, it is the policy of whatever entity of which he is an agent, not Pennington County. There is nothing in the record to suggest the Davis's policy—to the extent he created one—became the policy of Pennington County solely as a result of Davis's actions. Rather, the argument of the plaintiffs and the conclusion of the Court seems to be that Davis's practices only became a policy of Pennington County through Vargo's—or his deputies'—inaction. But Pennington County understands that inaction can only create an official policy when the original implementer of the practice is an employee, subordinate or otherwise a member of the same governmental entity as the policy maker—in this case, Vargo. See generally, George M. Weaver, Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?, 89 NEB L. REV. (2010). Vargo and Davis are not alleged to be part of the same governmental entity.

In Coleman, it was alleged that the municipality adopted the policy of its own municipal judge. In Christie v. Iopa, 176 F.3d 1231, 1235-1241 (9th Cir. 1999), the Ninth Circuit discussed a prosecutor's "ratification" of another's

action, repeatedly referencing the acts of "subordinates." ("a plaintiff must prove that the policymaker approved of the subordinate's act."). The Second Circuit has explained that "acquiescence" can create Monell liability under the Jett framework through "subordinate employees." Patterson v. County of Oneida, 375 F.3d 206, 226 (2nd Cir. 2004)("It is sufficient to show, for example, that a discriminatory practice of municipal officials was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law,' or that a discriminatory practice of subordinate employees was 'so manifest as to imply the constructive acquiescence of senior policy-making officials . . . .'")(internal citations omitted)(emphasis added). And the Eighth Circuit, has said that, "Before a municipality can be held liable, however, there must be an unconstitutional act by a municipal employee." Russell v. Hennepin county, 420 F.3d 841, 846 (8th Cir. 2005); see also Speer v. City of Wynne, 276 F.3d 980, 986 (8th Cir. 2002)("concluding that a municipality may be held liable only if the conduct or its employees directly caused a violation of a plaintiff's constitutional rights")(citing Trigalet v. City of Tulsa, 239 F.3d 1150, 1156 (10th Cir. 2001)(emphasis added).

Simply put, Jett contemplates that an entity's policy maker can—theoretically—create a policy through acquiescence to the standard operating procedure of the entity. It does not contemplate creation of a policy through acquiescence to another entity's standard operating procedure.

CONCLUSION.

Pennington County does not concede that any of the defendants in this case violated plaintiffs' constitutional rights or that Monell liability attaches to any of them. But even if Davis created a policy that deprived plaintiffs of their constitutional rights, Pennington County is not liable under Monell simple because its employees failed to "challenge" or "Change" Davis's policies. Monell liability can only attach to Pennington County through its own agents' actions, not through Davis's. Vargo respectfully requests the Court reconsider its order on Plaintiffs' Motions for Partial Summary Judgment (Docket 150),

Dated: April 27, 2015.

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