UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGALALA 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.	)	C13-5020 **JUDGE DAVIS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ALTER, AMEND, OR RECONSIDER PURSUANT TO RULE 59 or RULE 60**

Judge Davis, by and through his undersigned counsel of record, does hereby submit his Memorandum of Law in Support of his Motion to Alter, Amend, or Reconsider.

INTRODUCTION

On March 21, 2013, Plaintiffs filed this action asserting, among other things, "defendants' policies, practices and procedures relating to the removal of Native American children from their homes during state court 48-hour hearings violate ICWA and the Due Process Clause of the Fourteenth Amendment." (Docket 1 & 150 at 8.) Plaintiffs' complaint demands prospective relief based upon 42 U.S.C. § 1983.

On May 17, 2013, Defendants' moved to dismiss Plaintiffs' Complaint because, among other reasons, Defendants' were not final policymakers, under *Monell v. Dept. of Soc. Serv's of City of New York*, 436 U.S. 658, 694 (1978). (Docket 34, at 12-13.) In his Memorandum of Law in Support of his Motion to Dismiss, Judge Davis set out the myriad ways in which Plaintiffs'

could appeal or otherwise challenge a state court judge's order on temporary custody petitions ("TCOs"). (Document 34, at 28.) Those arguments are incorporated herein by reference.

On January 28, 2014, the Court rejected Defendants' arguments in total, and denied Defendants' Motions to Dismiss. (Docket 69.) In so doing, the Court rejected Judge Davis' position that he is not a "final policymaker." (Docket 69, at 21.)

On July 14, 2014, after limited discovery, including no depositions, Plaintiffs moved for partial summary judgment on claims related to 25 U.S.C. § 1922, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Docket 108 & 110) Again, in response Judge Davis argued that he was not a "final policymaker." (Docket 129 at 19.)

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 entitled to injunctive and declaratory relief. Neither an injunction, nor a declaratory judgment has yet issued. (Docket 150 at 44-45.) Among the findings made by the Court on summary judgment, is that Judge Davis is a "final policymaker" as a matter of law in setting the policies, practices, and customs challenged in this lawsuit. (Docket 150 at 22-27.) In order to arrive at the conclusion that Judge Davis is a "final policymaker," the Court found as a matter of law that orders granting petitions for temporary custody in 48-hour hearings are not subject to appellate review. (Docket 150, at 25 (citing SDCL 15-26A-3; *Midcom, Inc. v. Oehlerking*, 722 N.W.2d 725 (S.D. 2006.) (finding "[t]here is no right of appellate review of Judge Davis' 48-hour hearing decisions because those decisions are not a final judgment subject to appellate review under South Dakota law.") Judge Davis contends that this conclusion is a manifest error of law, requiring reconsideration under Rule 59 or 60 of the Federal Rules of Civil Procedure.

"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.*

The basis for this Motion lies in the manifest error of law reached by the Court that Judge Davis is a "final policymaker" with respect to procedures employed in his courtroom because his decisions are not subject to appellate review. (Docket 150, at 25.) "Whether an individual is a final policymaker is a question of law to be resolved by the trial judge before the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); s*ee also Schlimgen v. City of Rapid City*, 2000 DSD 13, ¶ 15, 83 F. Supp. 2d 1061, 1067 (D.S.D. 2000). Under South Dakota state law, there appear to be at least four means for the South Dakota Supreme Court to review and ratify or reject "procedures" used by a circuit court judge during a temporary custody hearing. Two of those are statutory avenues of direct appeal, SDCL 15-26A-3(4) and (6), and two are extraordinary relief through writs, *i.e.* writs of mandamus/prohibition, or writs of habeas corpus. SDCL 21-20-1, SDCL 21-30-1, and SDCL 21-27-5. These channels of review deprive Judge Davis of "final policymaker" authority under *Monell*. 436 U.S. 658.

The determination of whether Judge Davis has "final policymaker authority" is a threshold issue in this case. As such, Judge Davis respectfully requests the Court reconsider its order granting Plaintiffs' Motions for Partial Summary Judgment. (Docket 108 & 110.)

LEGAL ANALYSIS

"A policy maker is one who 'speaks with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue,' that is one with 'the power to make official policy on a particular issue." (Docket 150, at 22 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). No court has concluded that a constitutionally elected state court judge is a "final policymaker" under *Monell v. Dept. of Soc. Serv's of City of New York*, 436 U.S. 658, 694 (1978). *Cf. Williams v. Butler*, 863 F.2d 1398, 1399 (8th Cir. 1988) (finding *municipal* traffic judge was final policymaker because the city had delegated to the judge the "authority to make City policy as to employment matters in his court.").

Pursuant to *Monell*,

> municipal liability will attach when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." . . . Less formal governmental actions may also result in liability if "practices of state officials [are] so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Williams, 863 F.2d at 1400 (8th Cir. 1988) (citations omitted).

> In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional under this Court's decisions. Without attempting to draw the line . . . between actions taken pursuant to official policy and the independent actions of employees . . . and agents, the *Monell* Court left the "full contours" of municipal liability under § 1983 to be developed further on "another day."

City of St. Louis v. Praprotnik, 485 U.S. 112, 122-23 (citations omitted). At a minimum, the governmental official must have "*final* policymaking authority," which is a question of state law. *Id.* at 123 (emphasis added).

I. Errors of Law

On this record, the Court has concluded that Judge Davis was a "final policymaker" as a

matter of law because there is "no right of appellate review of Judge Davis' 48-hour hearings." (Docket 150, at 25.) However, the South Dakota Supreme Court has never addressed the ability of a parent to take a direct appeal of a temporary custody order in the context of a 48-hour hearing. Moreover, a "right to direct appeal" is not dispositive of whether Judge Davis has "final policymaking authority." "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Praprotnik*, 485 U.S. at 127 (emphasis in original).

The South Dakota Constitution provides:

> The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature, and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court. The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.
>
> The circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law.

S.D. Const. Art. 5, § 5. *See also* S.D. Const. Art. 5, § 11. The South Dakota Legislature has provided for at least four avenues for the South Dakota Supreme Court to review and ratify or reject the rules or procedures used by a circuit court judge during a temporary custody hearing. SDCL 15-26A-3(4) and (6) SDCL 21-20-1, SDCL 21-30-1, and SDCL 21-27-5. These avenues of appeal deprive Judge Davis of "final policymaker" authority. *Praprotnik*, 485 U.S. at 127.

In other words, these avenues of review achieve an incomplete delegation of authority to Judge Davis from the South Dakota Supreme Court. The Eight Circuit has explained that

> a very fine line exists between delegating final policymaking authority to an official, for which a municipality may be held liable, and entrusting discretionary authority to that official, for which no liability attaches. The distinction, we believe, lies in the amount of authority retained by the authorized policymakers. A clear message from *Praprotnik* is that an incomplete delegation of authority-i.e., the right of review is retained-will not result in municipal liability, whereas an absolute delegation of authority may result in liability on the part of the municipality.

Williams v. Butler, 863 F.2d 1398, 1402 (8th Cir. 1988). Here, there is an incomplete delegation of authority. *See e.g. Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. As such, the South Dakota Supreme Court, and not Judge Davis, has "final policymaking authority" with respect to the procedures used in 48-hour hearings.

1. SDCL 15-26A-3(4) May Afford Appellate Review As a Matter of Right for Temporary Custody Orders ("TCOs").

The South Dakota Supreme Court has analyzed the issue of the finality of TCOs in the other domestic arenas. *See Saint-Pierre v. Saint Pierre*, 357 N.W.2d 250, 254 (S.D. 1984). In *Saint-Pierre v. Saint-Pierre,* the South Dakota Supreme Court was reviewing a divorce decree, which included a TCO, granting custody of the parties' child to the father. *Id.* In challenging the decree, the father argued that the TCO was not reviewable because the order was not final, and therefore, could only be appealed pursuant to SDCL 15-26A-13. *Id.* at 254.

The South Dakota Supreme Court disagreed. *Id.* The court explained that "[i]n a technical sense . . . all custody orders are temporary inasmuch as they are always subject to being modified . . ." *Id.* "Though temporary in this sense, custody orders do not lapse or become ineffective merely by the passage of time." *Id.* Therefore, the court concluded that TCO's resulting from divorce decrees can fall "within the classification of those judgment and orders

that are appealable as a matter of right under the provisions of SDCL 15-26A-3(4)." *Id.*

This is also true of TCO's issued in child abuse and neglect cases. Although TCOs are required to be reviewed every sixty days, SDCL 26-7A-19(c), any lapse of this requirement does not automatically result in the restoration of the child to his or her parents. *See* SDCL 26-7A-16 (stating "an apparent, alleged, or adjudicated abused or neglected child . . . may be held in temporary custody until released by order of the court.") Unquestionably, the court in *Saint-Pierre* was looking at a different type of TCO, but the rationale applied merits equal consideration in the context of child protection cases. Such orders *may* be appealed as a matter of right, pursuant to SDCL 15-26A-3(4).

South Dakota Codified Law, section 15-26A-3(4) allows for an appeal as a matter of right from "[a]ny final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment." The South Dakota Supreme Court has confirmed this right in *Saint-Pierre*. *Saint-Pierre*, 357 N.W.2d at 254. There is no reason to believe that the South Dakota Supreme Court would treat TCO's resulting from an abuse and neglect case any differently from a TCO's resulting from a divorce decree. After all, temporary custody is temporary custody. Despite the different settings, the issue is the same, and appears to be controlling. Furthermore, this Court "may not engage any presumption 'that the [South Dakota Supreme Court] will not safeguard federal constitutional rights.'" *Neal v. Wilson*, 112 F.3d 351, 357 (8th Cir.1997) (quoting *Middlesex County Ethics Committee*, 457 U.S. at 431).

If the Court deems *Saint-Pierre* as non-controlling on this issue, then at a minimum, the issue, as it relates to 48-hour hearing decisions, should be certified to the South Dakota Supreme Court.

> Certification is within the federal court's discretion. Certification is "appropriate when the state court's construction of an uncertain state law could make resolution of federal constitutional questions unnecessary." The South Dakota Supreme

> Court may answer questions of law certified to it "which may be determinative of the cause pending in the certifying court and [when] it appears ... that there is no controlling precedent in the decisions of the Supreme Court of [South Dakota]."

Bone Shirt v. Hazeltine, 2005 S.D. 84, ¶ 6, 700 N.W.2d 746, 749 *opinion after certified question answered*, 387 F. Supp. 2d 1035 (D.S.D. 2005) *aff'd*, 461 F.3d 1011 (8th Cir. 2006) (citing *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 209 (8th Cir.1987); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1463 (8th Cir.1995); SDCL 15–24A–1.). Having not been certified to the South Dakota Supreme Court, pursuant to SDCL 15-24A-1, the parties, and more importantly the Court, are left to guess as to the limitations of Judge Davis' authority. Given that this issue is also paramount to the scope of South Dakota Supreme Court's authority, it would be appropriate to allow the high court to be final speaker on the scope of its own constitutional authority.

Judge Davis would respectfully request the Court reconsider, and alter its judgment in light of a parent's ostensible right to direct appeal of temporary custody orders issued at the conclusion of 48-hour hearings.

2. SDCL 15-26A-3(6) Affords Discretionary Appellate Review of TCO's.

In addition to the foregoing, SDCL § 15-26A-3(6) can be used for a discretionary appeal to the South Dakota Supreme Court from "[a]ny other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding[.]" SDCL § 15-26A-3(6).

Through a discretionary appeal, parties at 48-hour hearings may have TCO's reviewed by the South Dakota Supreme Court.

> An appeal from an intermediate order made before trial as prescribed by subdivision 15-26A-3(6) may be sought by filing a petition for permission to appeal, together with proof of service thereof upon all other parties to the action in circuit court, with the clerk of the Supreme Court within ten days after notice of entry of such order. When a petition is forwarded to the clerk for filing by mail it shall be accompanied by an affidavit of mailing or certificate of service of mailing and shall be deemed to be filed as of the date of mailing . . .

SDCL 15-26A-13. This procedure would further deprive Judge Davis of "final policymaking" authority, because the South Dakota Supreme Court, through the legislature, has "retained the authority to measure the official's conduct for conformance with [its] policies." *Praprotnik*, 485 U.S. at 127.

In *Saint-Pierre* the South Dakota Supreme Court discussed the use of SDCL 15-26A-3(6) and SDCL 15-26A-13, as a means of challenging a TCO. *Saint-Pierre*, 357 N.W.2d at 254. Although the court in *Saint-Pierre* declined to compel a party to follow SDCL 15-26A-13, for purposes of a *discretionary* appellate review, there is no reason to assume it could not be used for such purposes. TCO's are, after all, an "intermediate order made before [adjudication]." Plaintiffs cannot dispute that the "ends of justice [would] be served by determination of the questions involved without awaiting the final determination of the action or proceeding." *Id.* Thus, it would be logical to assume that parties to 48-hour hearings would retain the right to discretionary appeals pursuant to SDCL 15-26A-3(6) and 15-26A-13. If such an appeal is taken, Judge Davis would be deprived of "final policymaking authority" on the issue. It would also provide yet another reason why Judge Davis is not, and cannot, be a "final policymaker" because his decisions are subject to appellate review.

3. Parties to Child Custody Proceedings May Seek a Writ of Habeas Corpus.

In addition to the parties' statutory rights of appeal, parties to any child abuse and neglect proceeding retain the right to petition the circuit court for a writ of habeas corpus. *See Application of G.K.*, 248 N.W.2d 380, 382-83 (S.D. 1977) (citing SDCL 21-27-5); *see also* S.D.

Const. Art 6, § 8. The South Dakota Supreme Court has explained that "[i]llegal detention is the basis for issuance of a writ of habeas corpus. When custody of a child is involved, however, the scope of the writ is enlarged and the court's equitable powers over the child are invoked." *Application of G.K.*, 248 N.W.2d at 382-83 (citations omitted).

Any decision made by any circuit court judge on a petition for habeas corpus is subject to review by the South Dakota Supreme Court. *See* SDCL 21-27-18.1. Although this procedure is not a direct right of appeal, the ability of parents to seek a writ of habeas corpus provides yet another means of review before the body with "final policymaking authority," *i.e.* the South Dakota Supreme Court. Therefore, there has not been a complete delegation of authority to Judge Davis, and he lacks "final policymaking authority."

4. Parties to Child Custody Proceedings May Seek a Writ of Mandamus.

The final manner of reviewing the procedures in 48-hour hearings is the procedure used in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. There, the Cheyenne River Sioux Tribe applied for a writ of mandamus or prohibition, pursuant to SDCL 21-20-1, and SDCL 21-30-1. The Cheyenne River Sioux Tribe applied for the writ, contending that Judge Davis' 48-hour hearing violated the Tribe's federal and state rights, and that it was "irreparably harmed by the lack of any mechanism to contest the trial court's failure to fully follow ICWA at the temporary custody stage." *Cheyenne River*, 2012 S.D. 69, ¶ 8, 822 N.W.2d 62.

In order to prevail, on a writ of mandamus or prohibition, the petitioner must show a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty. *Krsnak v. South Dakota Dept. of Environment and Natural Resources*, 2012 S.D 89, ¶ 9, 824 N.W.2d 429. In *Cheyenne River*, the Tribe, as a party to the 48-hour hearing, had the opportunity to contest many of the procedures determined by the Court on summary judgment (Docket 150) before the body with actual

policymaking authority in South Dakota.

This procedure allows the South Dakota Supreme Court to review, and ratify or reject the decisions made by circuit court judges. All parties to 48-hour hearings retain this right. *Cheyenne River* illustrates a clear example of a pronouncement from the body that speaks with "final policymaking" authority for the state of South Dakota on the procedures used at 48-hour hearings. That body is the South Dakota Supreme Court, not Judge Davis. This extraordinary remedy divests Judge Davis of "final policymaking authority," under *Monell*, because it vests the ultimate decision-making authority in the South Dakota Supreme Court, not the circuit court.

Finally, it is also worth noting that, in addition to direct challenges, the parties also may make an intermediate appeal regarding an order of adjudication with the permission of the court in accordance with the rules of appellate procedure. *See* SDCL 26-7A-87. Plaintiffs would further have the right to appeal after the final disposition of the matter. *See* SDCL 26-7A-90. These channels of review further deprive Judge Davis of "final policymaking" authority.

II. Errors of Fact

Finally, Judge Davis also objects to several factual findings made by the Court with respect to Judge Davis' alleged "policies" (Docket 150, at 24 and 36). 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). 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, 1868, 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).

Specifically, the Court found that Judge Davis stated that no testimony is permitted at the 48-hour hearing. (Docket 150, at 41.) This is different from Judge Davis' actual statement that no oral testimony is taken. (Docket 130 at 5.) This led the Court to conclude that Judge Davis did not permit the 48-hour hearings to be conducted as "evidentiary hearings." *Cf.* SD Guidelines at p. 35 (stating "**RULES OF EVIDENCE DO NOT APPLY** SDCL 26-7A-56. Instead the Court may design its own rules of evidence to fully inform the Court.)

In *Cheyenne River*, one of the core 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.***

Cheyenne River, 2012 S. D. 69, ¶ 12 (emphasis added).

The material factual conclusion that the 48-hour hearing is an "evidentiary hearing" 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; and that Judge Davis does not require the States 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. (Docket 150, at 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, as discussed above, he is not.

CONCLUSION

Because Judge Davis' decisions in 48-hour hearings are subject to review before the South Dakota Supreme Court by statute, as well as extraordinary measures, he is not, and cannot, be a "final policymaker" under *Monell*. In this case, through SDCL 15-26A-3(4) and (6), SDCL 15-26A-13, and other extraordinary remedies, the South Dakota Supreme Court has "retained the authority to measure [Judge Davis'] conduct for conformance with [its] policies." *Praprotnik*, 485 U.S. at 127. Accordingly, Judge Davis respectfully requests the Court reconsider its order on Plaintiffs' Motions for Partial Summary Judgment (Docket 150).

Dated this 27th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2015, I electronically filed the foregoing document 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.

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