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

B.W., a minor, et al. **v.** **POWELL et al.**	**Case No. 09-cv-0286**
CONWAY et al. **v.** **CONAHAN et al.**	**Case No. 09-cv-0291**
H.T., through & with her next friend & mother, L.T., et al. **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0357**
HUMANIK **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0630** **The Honorable A. Richard Caputo**

DEFENDANT LUZERNE COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE MASTER COMPLAINT FOR CLASS ACTIONS

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Defendant County of Luzerne ("Luzerne County") hereby respectfully submits this Memorandum of Law in support of its Response To Plaintiffs' Motion For Leave To Amend the Master Complaint for Class Actions.

I. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Plaintiffs' proposed "amendments" have not amended anything as against Luzerne County. The proposed Amended Master Complaint for Class Actions ("Amended Class Action Complaint") merely adds irrelevant and gratuitous factual allegations that have no bearing on any potential liability as a matter of law on Luzerne County.

The only proposed additions into Count VIII of the Amended Class Action Complaint against Luzerne County are two (2) redundant paragraphs that allege ***the same legal conclusion previously pleaded from the Complaint*** that assistant district attorneys and public defenders are policy-makers for the County, and that their failure to uncover and stop alleged civil rights violations by Judge Ciavarella became a custom and policy of Luzerne County. This redundant "amendment" must be denied as futile as against Luzerne County. As a matter of law, assistant district attorneys and public defenders are not policy-makers for the County, especially in matters concerning state criminal prosecutions and prosecutorial discretionary acts inside the court room.

Plaintiffs do not plead any factual or legally cognizable allegation against a majority of the Commissioners of Luzerne County.

Plaintiffs' sole claim against Luzerne County is set forth in Count VIII for deprivation of Plaintiffs' right to counsel and to enter a knowing, intelligent and voluntary guilty plea. On the face of this claim, it relates to some person or entity other than Luzerne County, because Luzerne County did not and could not participate in any judicial proceedings that are at issue. Those were state court proceedings between state officials and alleged juvenile offenders.

In support of Plaintiffs' sole claim against Luzerne County, out of the five hundred and thirty seven (537) paragraphs of factual allegations in the initially filed Class Action Complaint, there was just one (1) factual allegation in ¶693 (now ¶728) against Luzerne County. Although the proposed Amended Complaint adds additional factual allegations concerning Luzerne County's contracts with PA Child Care at ¶¶648-697, they are gratuitous allegations and do not constitute the basis of Plaintiffs' sole claim against Luzerne County in Count VIII.

Paragraph 728 now adds a last sentence that is redundant with its first sentence. Both the new and the existing sentences allege that the District Attorney and the Public Defender of the Commonwealth of Pennsylvania, Court of Common Pleas of Luzerne County, are "County decision-makers," who failed to comply with the United States Constitution, the Pennsylvania Juvenile Act, or the

Pennsylvania Supreme Court Rules of Juvenile Court Procedure, merely by "participating" in the judicial proceedings before Defendant Ciavarella. This erroneous legal conclusion remains the sole "factual" allegation against Defendant Luzerne County.

"Luzerne County" is repeatedly mentioned in the proposed Amended Class Action Complaint ***as a geographic location*** or as a colloquial reference to the Luzerne County Court of Common Pleas, which is a state entity – not a county entity. It is also mentioned in two paragraphs which appear to be either typographical errors and/or as sloppy references to the Commonwealth of Pennsylvania, Court of Common Pleas of Luzerne County, that were not even corrected in the proposed Amendment. (*See* Amended Class Action Complaint at ¶¶ 434, 435.)

All of the other allegations concerning Luzerne County relate to its funding of the River Street facility; the County Commissioners allowing juvenile offenders to be housed in the Pittston PA Child Care facility; and Defendants Ciavarella and Conahan using their state court powers to cause Luzerne County to contract with PA Child Care and Western PA Child Care. (*See* Amended Class Action Complaint at ¶¶ 648-697.) None of these form the basis of Count VIII against Luzerne County.

Indeed, the irrelevance of these allegations are summarized by ¶697 of Plaintiffs' own Amended Class Action Complaint, which alleges:

> 697. In sum, Luzerne County allowed excessive amounts of public money to be paid to PA Child Care, and, in turn, its owners, Powell and Zappala, who yielded improper and excessive profits and were able to use these excess funds to pay Conahan and Ciavarella. [Underscoring in original.]

These allegations are irrelevant and are gratuitous to Plaintiffs' claim that assistant district attorneys' and public defenders' inability to stop Defendant Ciavarella from denying Plaintiffs' their constitutional rights somehow can be attributed to Luzerne County policy. Indeed, ¶¶761, 765 and other paragraphs allege that Defendants Ciavarella and Conahan did not disclose" and "hid these payments from the County of Luzerne." Plaintiffs do not plead that a majority of the Luzerne County Commissioners received any payments, or had any knowledge whatsoever that improper payments were being made to Defendants Ciavarella and Conahan. Thus, according to Plaintiffs' own allegations, Luzerne County is a ***victim*** of the other defendants' alleged scheme – not a co-conspirator.

In Count VIII, the Amended Class Action Complaint restates the allegations in ¶¶821-822 and 827 **against Defendant Ciavarella – not any allegation against any Luzerne County official.** Paragraph 823 rehashes Plaintiffs' legal conclusion that the District Attorney and the Public Defender are "county decision-makers"

who were "non-compliant" with case law, statutes and rules "regarding Plaintiffs' constitutional rights." Paragraphs 824 and 825 then assert legal conclusions that the inactions of the Commonwealth's unnamed assistant district attorneys and public defenders to stop the alleged practice of former state court Judge Ciavarella are somehow permanent policies attributable to the County. (Amended Class Action Complaint, ¶¶824-829.) Thus, Plaintiffs seek to create a new type of *Monell* liability, for convicted criminals and even disgruntled litigants, to sue a county or municipality because of alleged inattentiveness of state prosecutors and criminal defense lawyers allegedly resulting in an adverse order entered by a state court. Such a claim is futile, and must be rejected at this stage of the litigation before Luzerne County is required to expend any more funds defending against a bogus claim.[1]

II. STATEMENT OF QUESTION INVOLVED

Should Luzerne County be required to continue to defend this action when Plaintiffs cannot assert any claim against it as a matter of law?

SUGGESTED ANSWER: No.

[1] Counsel for the certain defendants are estimating that merely producing its documents could cost several hundreds of thousands of dollars.

III. ARGUMENT

A. PLAINTIFFS' MOTION FOR LEAVE TO AMEND MUST BE DENIED PURSUANT TO THE STANDARDS OF RULE 15

Although leave to amend is often liberally permitted, it is not allowed where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [or] futility of amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d.Cir.,1993) (*quoting Foman v. Davis*, 371 U.S. 178, 182 (1962)).

This would be Plaintiffs' third Complaint. Various individual plaintiffs have also already filed multiple complaints, and no plaintiff has ever been able to allege any actionable conduct by any Luzerne County official. Not only does this amendment come after undue delay, it is a deliberate and strategic tactic, brought in bad faith and for a dilatory motive. Plaintiffs are looking for deep pockets – and taxpayers' money.

In the Third Circuit, the touchstone for the denial of leave to amend is undue prejudice to the non-moving party. *Pride Mobility Products Corp. v. Dylewski*, 2009 WL 1044608, *3 (M.D.Pa.,2009)(citing *Lorenz*, 1 F.3d at 1413-14; *Cornell & Co., Inc. v. OSHRC*, 573 F.2d 820, 823 (1978)). The most pertinent issue here is whether Plaintiffs' proposed amendments to their Complaint are "futile." *Id.* An amendment is futile if "the complaint, as amended, would fail to state a claim upon

which relief could be granted." *Id.* (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3dCir.,1997). In making this assessment, the Court must use the same standard of legal sufficiency employed under Federal Rule of Civil Procedure 12(b)(6). *Id.*

Plaintiffs' Motion to Amend must be denied because, even after the proposed amendment, Count VIII against Luzerne County cannot survive a motion to dismiss. To survive a motion to dismiss, Plaintiff must aver "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff's obligation to provide the grounds for his entitlement to relief requires more than a legal conclusion, and a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 554; *Phillips v. Allegheny*, 515 F.3d 224, 231 (3dCir.,2008).

"[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3dCir.,1997)(citations omitted).

Here, Count VIII must be dismissed. **There is not one allegation against any Luzerne County official anywhere in any investigation, in any action, or in the proposed Amended Complaints.** Luzerne County, which can only act through its Commissioners, did not commit any actionable conduct. As a matter of

law, assistant district attorneys and public defenders are county policy-makers, especially when they are in the court room.

B. ASSISTANT DISTRICT ATTORNEYS, PUBLIC DEFENDERS AND PROBATION OFFICERS CANNOT CONVERT JUDICIAL PROCEDURES INTO COUNTY POLICIES

The United States Supreme Court has held that "the identification of policy-making officials is a question of state law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988)(plurality).

By statute, the District Attorney is responsible for supervising the employees of her Office. *See* 16 P.S. §1420. By common law, a county government has no power to supervise a district attorney. *League of Women Voters of Greater Pittsburgh v. Allegheny Cty.*, 819 A.2d 155, 157 (Pa.Commw.,2003). The same is true for public defenders. *Sasinoski v. Cannon*, 36 D & C4th 88, 93 (C.P.Allegh.Cty.,1997). Similarly, public defenders exercise independent discretion by statute in undertaking their representation. 16 Pa.C.S. §9960.1 et seq.. *See also Dauphin County Public Defenders Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1149-1150 (Pa.,2004).[2]

[2] Plaintiffs describe probation officers Brulo and Loughney as county policymakers. However, Plaintiffs do not allege that Luzerne County trains any of these state court officials. As the County does not train or supervise these employees and cannot remove them from office, *Antolik v. County of Erie*, 93 Pa. Cmwlth. 258, 501 A.2d 697, 265 (1985), their actions cannot lead to liability on the part of the County. *Bliven*, 478 F.Supp.2d at 339. Moreover, these individuals are Court, not County employees, and cannot make policy for Luzerne County or

Chief Judge Kane has squarely addressed the argument raised by Plaintiffs in this case, and recently held that a district attorney does not act as a policy-maker for a Pennsylvania county:

> The Supreme Court has held that certain officials can speak with "final policymaking authority" in the area of law enforcement. *McMillian v. Monroe County, Ala.*, 520 U.S. 781…(1997). While it is not clear, it may be that Tavenner intends to claim that the District Attorney is a final policy making official for York County and so his decisions could satisfy the requirements of *Monell* for vicarious municipal liability. But, this Court has decided that a District Attorney in Pennsylvania acts as a representative for the commonwealth when making prosecutorial as opposed to administrative decisions. *Williams v. Fedor*, 69 F.Supp.2d 649, 660 (M.D.Pa.1999). As the discussion below will show, the alleged actions of District Attorney Rebert are completely prosecutorial, so they do not represent policy of York County such that the county can be held vicariously liable under § 1983. Accordingly, all claims again York County will be dismissed.

Tavenner v. Shaffer 2008 WL 4861982, 3 (M.D.Pa., Nov. 6, 2008).

In *Williams*, cited by Chief Judge Kane, Judge Vanaskie rendered the same holding:

> Application of the *McMillian* analysis to the circumstances of this case compels the conclusion that

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render it liable based upon their alleged acquiescence in the actions of the state court judges. *Court of Common Pleas of Erie County v. Pa Human Relations Comm'n*, 546 Pa. 4,7, 682 A.2d 1246, 1247 (1996); *L.J.S. v. State Ethics Comm'n*, 744 A.2d 798 (Pa.Cmwlth,2000); *Ellenbogen v. City of Allegheny*, 479 Pa. 429, 388 A.2d 730 (1978). By law, a probation officer only performs those duties **directed by the court.** 42 Pa.C.S.A. §6304.

District Attorney Gregor's prosecutorial decisions were made in his capacity as a representative of the Commonwealth of Pennsylvania, and not of the County of Monroe.…

…For example, state law, and not the county commissioners, sets the salary for district attorneys. 16 P.S. § 1401(g). And it is state law that governs the filling of a vacancy in the D.A.'s Office. 16 P.S. § 1404. Perhaps most importantly, Pennsylvania law does not confer upon the county's governing body, the county commissioners, law enforcement authority. Nor does it impose upon the county commissioners the authority to direct the district attorney's prosecutorial decisions. On the contrary, state law makes clear that the district attorney is to "conduct in court all criminal and other prosecutions, *in the name of the Commonwealth....* **"** 16 P.S. § 1402(a) (emphasis added.) Indeed, district attorneys are directed by statute to "perform all the duties which [had been] performed by [state] deputy attorneys general...." Id.[FN12] The Pennsylvania Supreme Court has remarked that "[i]f this statute means anything at all, it means that *district attorneys in this Commonwealth have the power-and the duty-to represent the Commonwealth's interests in the enforcement of its criminal laws.*" *Commonwealth. ex. rel. Specter v. Bauer*, 437 Pa. 37, 41, 261 A.2d 573, 575 (1970) (emphasis added.) The Pennsylvania Supreme Court has also remarked this district attorneys and Commonwealth attorneys are the only public officials "charged with the legal responsibility of conducting **'in court,** all criminal and other prosecutions in the name of the Commonwealth.'" *Id.* at 43, 261 A.2d at 576. Moreover, only the Attorney General, and not the county commissioners, may supersede a district attorney in connection with prosecutorial decisions. See 71 P.S. § 732-205(a)(4). It is the Attorney General of the Commonwealth of Pennsylvania, and not a county officer, who may refer to the district attorney alleged violations of the criminal laws of Pennsylvania for

> prosecution. See 71 P.S. § 732-205(b).
>
> * * *
>
> …The historical foundation for the office of district attorney-serving as a replacement for state deputy attorneys' general, with the obligation to perform the duties that had been performed by those deputy attorney's general-coupled with the district attorneys' subordinate relationship to the state's chief law enforcement officer, the Attorney General, compel the conclusion that when engaged in his or her "basic function-enforcement of the Commonwealth's penal statutes," *Bauer*, 437 Pa. at 40, 261 A.2d at 575, a district attorney in Pennsylvania represents the interests of the Commonwealth and not the County.
>
> …Thus, Williams' first theory of liability against Monroe County must fail because its major premise-that District Attorney Gregor acts as a county policymaker when acting in his prosecutorial capacity-is without merit.

Williams v. Fedor, 69 F.Supp.2d 649, 659-661 (M.D.Pa.,1999)(emphasis in bold added; footnote omitted).

Like the courts of this District, other district courts reject Plaintiffs' legal conclusion in a *Monell* claim concerning district attorneys:

> …When there are claims alleging a failure to supervise and train regarding the conduct of a trial, legal knowledge, or the exercised of related discretion, such as plea negotiations, the supervisory prosecutors are absolutely immune as well. *Van de Kamp v. Goldstein*, ---- U.S. ----, 129 S.Ct. 855, 172 L.Ed.2d 706, 2009 WL 160430, at *7-9. **Under any liberal interpretation of our case, there would be no policy implementations for Rensselaer County.** Moreover, Nugent had no policymaking authority over either the County or the Town of North Greenbush as to how the police

> department investigates and the manner in which they testify. There is not, nor can there be, a factual basis to support the claim that Nugent possessed or acted within any managerial role over anyone in this litigation. Hence, Aretakis has failed to plead or prove a failure to train and supervise claim against either Rensselaer County or Nugent.

Aretakis v. Durivage, 2009 WL 249781, *27-28 (N.D.N.Y.,Feb.3,2009)(emphasis added).[3]

A county cannot be liable for the courtroom actions or inactions of a public defender, and such actions are not cognizable "state action" for purposes of recovery under §1983. *Polk County v Dodson*, 454 U.S. 312, 317-319 (1981)(public defender essentially provides private services). Moreover, the United State Supreme Court held that government officials have a constitutional obligation to maintain the professional independence of public defenders. *Id.* at 321-22.

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[3] *See also Fenters v. Yosemite Chevron*, 2006 WL 2016536, *7 (E.D.Cal.,2006)(county cannot be held vicariously liable under *Monell* for the acts of an assistant district attorney and investigator); *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir.1995)(neither a state district judge nor a county district attorney acts as a local policy-maker when performing their respective official duties); *Eisenberg v. District Atty. of County of King*, 1996 WL 406542, 6 & 8 (E.D.N.Y.,1996)("Indeed, it would be a violation of a district attorney's ethical obligations as counsel for the State in a criminal proceeding to permit himself to be influenced in the performance of his duties by so-called policies of a county….If the district attorney is deemed to be a policymaker at all, the authority discussed would suggest that he is a State rather than a City policymaker."); *Schertz v. Waupaca County*, 683 F.Supp. 1551, 1563 (E.D.Wis.,1988)("Under Wisconsin law neither a sheriff nor a district attorney is a "policymaking official" of a county.")

The allegations of the Amended Class Action Complaint seek to convert the mere presence of state court judicial officers, observing state court Judge Ciavarella's purported courtroom practice, into Luzerne County policy. A county simply has no role in criminal prosecutions or in judicial procedures inside of a courtroom. As a matter of law, these state court judicial officers are not Luzerne County policy-makers. Accordingly, Plaintiffs' proposed amendment is futile because Count VIII must be dismissed.

C. THE COMMISSIONERS DO NOT HAVE THE AUTHORITY TO REGULATE THE CONDUCT OF STATE JUDICIAL OFFICERS OR LAWYERS

Luzerne County is a Pennsylvania county of the Third Class. *See* 16 P.S. §210(3). As such, it is governed by Pennsylvania's County Code. *See* 16 P.S. §102. Section 202 of The County Code fixes the general powers of the County, which include the "capacity as a body corporate to...sue and be sued and complain and defend in all proper courts by name of the county[.]" 16 P.S. §202(2). The County Code then vests that corporate power "in a board of county commissioners." 16 P.S. §203; *see also* 16 P.S. §501 (providing for election of a three-member Board of Commissioners).

Case law going back well over a century establishes that the Commissioners possess only those powers that are expressly delegated to them by statute, under relevant provisions of the applicable County Code. *See, e.g.*, *McCloskey v. Kunes*,

142 Pa. 241, 21 A. 823 (1891)(county commissioners "have only such powers as are conferred upon them by statute. Any act or covenant upon their part in excess of this authority is *ultra vires*, and void"); *Pittsburgh & Lake Erie Railroad Co. v. Lawrence Cty*., 198 Pa. 1, 3, 47 A. 954, 955 (1901)("The authority of county commissioners to build a county bridge is derived from statutes, and the steps prescribed for this purpose must be pursued with at least reasonable strictness and diligence."); *Com. v. Henderson*, 113 Pa. Super. 348, 349, 173 A. 868 (1934)("[t]he authority of the county commissioners is limited by statute and can be enlarged and extended only by legislative action").

Thus, Pennsylvania is among the jurisdictions adopting "Dillon's Rule," which confirms the limited powers of local government. *See In re Valley Deposit and Trust Co.*, 311 Pa. 498, 167 A. 42, 43 (1933).

The Pennsylvania Supreme Court has held that "[n]othing is better settled than" Dillon's Rule, which is that "a municipal corporation does not possess and cannot exercise any other than the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." *In re Valley Deposit*, 311 Pa. at 498, 167 A. at 43. *See also* Black's Law Dictionary, p. 469 (7th ed.,1999)(defining Dillon's Rule as "[t]he doctrine that a unit of local government may exercise only

those powers that the state expressly grants to it, the powers necessarily and fairly implied from that grant, and the powers that are indispensible to the existence of the unit of local government").

Under Dillon's Rule, "[a]ny fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the [municipal] corporation, and therefore denied." *Kline v. Harrisburg*, 362 Pa. 438, 443-44, 68 A.2d 182, 184-85 (1949). The rationale of Dillon's Rule is that local governments are not sovereign bodies with inherent powers, but creatures of the state and as such, authorized to do only those things which the legislature has placed in its power. *See In re Borough of Ambridge*, 53 Pa. Commw. 251, 417 A.2d 291, 292 (1980).

There is no provision of The County Code that grants the Commissioners or Luzerne County the power to supervise or regulate the conduct of judicial officers or the District Attorney, or those of any other County Row Office. To the contrary, Pennsylvania's Constitution establishes the court system as a separate branch of government. The Constitution also establishes a Unified Judicial System, meaning that even though the judges here sat in the Court of Common Pleas of "Luzerne County," that court is not a part of Luzerne County government, but rather a state court in a unified court system. Pa. Const., Art. V. Furthermore, only Pennsylvania's Supreme Court, established in the Constitution as the state's highest court, has the power to exercise general supervisory and administrative

authority over all the courts. Const., Art. V, §10. The Constitution thus acknowledges that the operation of the courts involves administrative as well as purely judicial functions.

Significantly, under the separation of powers doctrine, a county government cannot infringe upon the court's authority and has no supervisory authority over the courts. *Kremer v. State Ethics Comm'n*, 503 Pa. 358, 361, 469 A.2d 593, 595 (1983). The President Judge (the position held by Conahan) is "the executive and administrative head of the court," who has the responsibility to "supervise the judicial business of the court, promulgate all administrative rules and regulations…" 42 Pa. C.S.A. §325(e)(1).

Only the Supreme Court of Pennsylvania has the authority under the Judicial Code to supervise or alter the duties, powers or authority of the President Judge. *Blake v. Papadakos*, 953 F.2d 68, 70 (3dCir.,1992).

By statute, the unified state court system includes a domestic relations section with probation officers to handle cases involving juveniles. 42 Pa. C.S.A. §961. Statewide standards for the filing of complaints against juveniles, and the processing and adjudication of such complaints, make clear that the administrative judge of the juvenile court and the probation department jointly develop procedures, and any policymaking authority is wholly within the court system,

regardless of whether the actions are termed administrative or judicial. [4]

Significantly, the Third Circuit has held that a county domestic relations section "is merely a **part** of the court of common pleas for that county and 'thus, *not* a county agency.'" *Haybarger, supra*, 551 F.3d at 201, *citing Rogers v. Bucks County Domestic Relations Section,* 959 F.2d 1268, 1271 n.4 (3dCir.,1992)(emphasis added).

Accordingly, Plaintiffs' proposed amendment is futile because, as a matter of law, Luzerne County had no ability or power to stop "Ciavarella to proceed without counsel in the absence of a constitutionally-mandated waiver of counsel and to enter unconstitutional guilty pleas." (Amended Class Action Complaint, Count VIII, ¶824.)

Plaintiffs' counsel is well aware that Judge Ciavarella's courtroom practices are subject to supervision by the Pennsylvania appellate courts. Indeed, Plaintiffs' counsel in this case previously and successfully appealed to reverse the identical courtroom practices by Judge Ciavarella more than eight (8) years ago. *In re A.M.*, 766 A.2d 1263 (Pa.Super,2001).

[4] *See* "Standards Governing Juvenile Court Intake," http://www.portal.state.pa/server.pt/gateway/PTARGS_0_152425_404286_0_0_.

D. COUNT VIII DOES NOT AND CANNOT EVER STATE A CLAIM AGAINST LUZERNE COUNTY

1. Plaintiffs Fail To Identify Authorized Policies Or A Custom Under *Monell*.

Even if assistant district attorneys or criminal defense lawyers could be county policy-makers, which they cannot be, and even if Luzerne County had the power and ability to stop state courtroom practices, which it does not, Plaintiffs can ***never*** plead a §1983 claim against Luzerne County.

The amendment is futile since Count VIII must be dismissed because Plaintiffs cannot establish governmental liability as required by *Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, the United States Supreme Court held that local governments could only be sued under §1983 if "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." *Id.*, 436 U.S. at 690. Here, there is no allegation anywhere that Luzerne County implemented or executed an official edict to fail to stop state court Judge Ciavarella from depriving juveniles of their constitutional rights.

Without any official edict, Plaintiffs are left to argue that the assistant district attorneys and public defenders had a "custom" of being deliberately indifferent to Judge Ciavarella's alleged deprivation of Plaintiffs' constitutional

rights, that they are "County policy-makers," and that their lack of action can somehow be deemed to be an official County policy or custom. (Amended Class Action Complaint, ¶728, Count VIII, ¶¶823-825, 829.) Plaintiffs' pleading is based on parsing out the second portion of the Supreme Court's holding in *Monell* that "although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 'person,'…may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U.S. at 690-91.

However, *Monell* also rejected government liability based on the doctrine of *respondeat superior*. *Id.* at 694. Therefore, a government body may be liable only for conduct that ***implements*** such a custom of government. *Id.* *See also Thomas v. Ashcroft*, 2006 WL 618423, *1 (M.D.Pa.,2006). A custom may form the basis of a §1983 claim when it has not been formally approved only if is so permanent and well settled as to constitute a custom or usage **with the force of law**. *Young v. City of Philadelphia*, 1996 WL 287315 *4, (E.D.Pa.,1996), *citing, Monnell, supra,* 436 U.S. 658, 694 (1978) (additional citations omitted). Here, the force of law was a state judge implementing state court procedures – not a County custom.

Liability can only arise when "a policymaker for the [government] authorized policies that led to the violations or permitted practices that were so permanent and well settled as to establish acquiescence." *Id.* (*quoting Baker v. Monroe Township*, 50 F.3d 1186, 1191 (3dCir.,1995). However, a County government cannot, as a matter of law, "acquiesce" to the court room practices of a state judge. Although a state court judge can issue orders against a county, a county cannot order a state court to do anything. *See, e.g., PA ChildCare LLC v. Flood*, 887 A.2d 309, 310-311 (Pa.Super.,2005)("We first recite the pertinent background facts. In a prior proceeding, the Luzerne County Juvenile Detention Center (the "Center") was closed **by order of the trial judge** in the present matter.")(emphasis added).[5]

Additionally, to impose liability under §1983, a plaintiff must plead the existence of a defendant's personal involvement by a showing of "personal direction or of actual knowledge and acquiescence." *Thomas*, 2006 WL 618423 at *1 (*citing Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3dCir.,1988); *Pansy v. Preate*, 870 F.Supp. 612, 630 (M.D.Pa.1994), *aff'd mem.*, 61 F.3d 896 (3dCir.,1995)). *See also Simmons v. City of Philadelphia*, 947 F.2d 1042, 1062

[5] The Amended Complaint's allegation at ¶657 that the facility was "effectively" closed by the Commissioners' removal of funding is false. As recited by the Superior Court, it was closed by Judge Conahan's Order. Indeed, **by definition** pursuant to Pennsylvania statute, a juvenile facility can only be designated by a state court and must be approved by a state agency – not a county. Pa.R.Juv.P. 120.

(3dCir.,1991), *cert.denied*, 503 U.S. 985 (1992); *Wesley v. Dombrowski*, 2004 WL 1465650 at *4 (E.D.Pa.,2004); *Young*, 1996 WL 287315 *4; *Payton v. Vaughn*, 798 F. Supp. 258, 260 (E.D.Pa.,1992).

Here, there is neither personal direction nor even acquiescence by Luzerne County of the alleged scheme to deprive juveniles of constitutional rights in exchange for cash. Plaintiffs do not allege that the Luzerne County Commissioners had any knowledge of the other Defendants' alleged scheme. To the contrary, Plaintiffs plead that Defendants Ciavarella and Conahan concealed their scheme. (*E.g.*, Amended Class Action Complaint, ¶¶659-670.)

As a matter of law, an assistant district attorney's or public defender's failure to object to Judge Ciavarella's courtroom procedures cannot constitute County policy. Only where an authorized policymaker approves **a subordinate's** decision does the approval constitute a ratification of the policy for purposes of §1983. *Praprotnik*, 485 U.S. at 127. Nothing in the factual allegations in the complaints, the Pennsylvania constitution or the Judicial Code supports Plaintiffs' inference that a lawyer is a superior official in the courtroom to a sitting judge and has the authority to approve judicial actions or policies on behalf of a County.

Judge Posner in the Seventh Circuit characterizes ratification as follows: "that by adopting an employee's action as its own (what is called 'ratification'), a public employer becomes the author of the action for purposes of liability under

section 1983." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7thCir.,2001). The Ninth Circuit's Model Civil Jury Instructions explain the concept this way: "(the superior) had final policymaking authority from defendant (county) concerning the act[s] of (the inferior employee) and (the superior) ratified (the inferior's) act and the basis for it, that is, (the superior) knew of and specifically approved the employee's act[s]." *Model Civ. Jury Instr., Federal Jury Practice and Instructions Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit*, 9.6 (2007). Moreover, the final policymaker must ratify not only the decision itself, but also the unconstitutional basis for it. *Matthews v. Columbia County*, 294 F.3d 1294, 1297-98 (11thCir.,2002).

Under the Third Restatement of Agency, in order for ratification to occur, there must be a ratifiable act and **capacity** to ratify the act. Restatement (Third) of Agency, §§ 4.01-08. "A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf." *Id.*, §4.03 (2006). The capacity to ratify the act can only be by a principal. *Id.*, §3.04 & 4.04. Potential liability by ratification is limited to persons or entities that could ***authorize*** the act in question. Restatement (Third) of Agency §4.04, Cmt. b, Reporter's Notes a (2006).

Here, State Court Judge Ciavarella was not acting on behalf of the assistant district attorneys when he implemented his purportedly unconstitutional courtroom policies. The assistant district attorneys and public defenders did not have the

capacity to ratify his acts. They were not his principal, even assuming *arguendo* that they could bind Luzerne County, which, as set forth above, they also could not do as a matter of law.

As the Juvenile Court Rules state, the state court judge has sole authority over the procedures in the courtroom and the judge could not have been acting on behalf of either Luzerne County, which was not a party to any of the juvenile proceedings, or the lawyers that appeared before the Court. Pa.R.Juv.P., 100, 101, 120, 121, 151, 152.

No one in the courtroom could constitutionally or procedurally have any superior authority over Judge Ciavarella concerning any claim asserted in County VIII.

Moreover, and significantly, here there is no Luzerne County official or even an employee who has been named as an individual defendant. Accordingly, Plaintiffs' proposed amendment is futile.

2. Plaintiffs Fail To Plead Any Failure To Train Or Supervise Luzerne County Officials Or Employees In Such A Manner So As To Amount To A Deliberate Indifference To Rights Of Plaintiffs

Plaintiffs' "deliberate indifference" claim fails to plead any failure by Luzerne County to properly train and supervise district attorneys, public defenders or other identifiable officials or employees. In *City of Canton v. Harris*, 489 U.S. 378,388 (1989), cited by Plaintiffs in their Amended Class Action Complaint, the

United States Supreme Court addressed the question of inadequate training ***of police officers*** by a local government entity. It held that a local government entity may only be liable for constitutional violations caused by its failure to train its police officers if the failure amounts to deliberate indifference to the rights of persons with whom those officers come into contact. *Id.* 388. **Counties do not train or supervise lawyers.**

In order to maintain a cause of action under their theory, Plaintiff must plead that the need for more or different training must have been **so obvious**, and the inadequacy of the current training so likely to result in the violation of constitutional rights, that the policymakers could reasonably be said to have been deliberately indifferent to the need. *Id.* at 390. Therefore, Plaintiff must plead and prove that (1) the failure to train amounted to a deliberate indifference to the rights of persons with whom Luzerne County officials come in contact and (2) Luzerne County's policy actually caused a constitutional injury. To meet the deliberate indifference standard, the failure to train must reflect a deliberate or conscious choice made by the policymaker for the County, which is the Luzerne County Commissioners. *City of Canton*, *supra*, at 389.[6]

[6] In *City of Canton*, the Court made it clear that on remand the Plaintiff would have to identify a particular deficiency ***in the training program*** and prove that the identified deficiency was the actual cause of her constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, or that there was negligent administration of an otherwise adequate program, or that the

Such liability cannot rest on constructive knowledge of a non-policymaker, but requires that the official "responsible for establishing final policy with respect to the subject matter in question" **make a deliberate choice among competing alternatives** that causes the violation of constitutional rights. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986)(emphasis added).

It is not sufficient merely to show that a particular lawyer acted improperly or that better training would have enabled an lawyer to avoid the particular conduct causing injury. *See Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir., 2000); *Garcia v. County of Bucks*, 155 F.Supp.2d 259, 269 (E.D.Pa.,2001). *See, also, Gabrielle v. City of Plain*, 202 F3d 741,745 (5thCir.,2000).

Plaintiff failed to plead that the Luzerne County Commissioners had notice of the need for additional training, and has failed to identify a training policy that was unconstitutional. Indeed, they pleaded that Luzerne County had no such knowledge because Defendants Ciavarella and Conahan concealed their scheme. (*E.g.*, Amended Class Action Complaint, ¶¶659-670.)

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conduct resulting in the injury could have been avoided by more or better training. The Court noted that federal courts are not to become involved "in an endless exercise of second guessing municipal employee training programs." *City of Canton*, 489 U.S. 390-91 (1989). **Here, there is no training program because counties do not train lawyers.**

3. Plaintiffs Fail To Establish A Causal Connection.

Assuming, *arguendo*, that this Court could find that Plaintiffs have pleaded a policy or custom based on a failure to train or supervise lawyers in state criminal juvenile prosecutions, Plaintiffs fail to plead and identify a causal connection between any alleged failure to train and their injury. Any such alleged failure to train lawyers did not cause Plaintiffs' alleged injuries.

Under §1983, plaintiffs must allege that the County "subject[ed] or cause[d them] to be subjected" to a deprivation of some federally protected right. 28 U.S.C. §1983. The statute does not allow liability against a government vicariously, or merely on the basis of a relationship with a tortfeasor. *Monell*, 436 U.S. at 690-95; *Jett v. Dallas Indp. Sch. Dist.*, 491 U.S. 701, 735 (1989). The touchstone of §1983 liability is personal participation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11thCir.,1986). In the absence of such participation, and in the case of the liability of a governmental entity, Plaintiffs must establish a clear causal connection between the conduct of a high level government official and the constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Where there is no affirmative link between the actions giving rise to the alleged deprivation and a governmental plan or policy, Plaintiffs have failed to meet the requisites for a claim. *Id.*

The mere description of an act as "policy" or "procedure" does not meet the threshold for a §1983 claim. *Timko v. City of Hazelton*, 665 F.Supp. 1130, 1137 (M.D.Pa.,1986)(*citing, Estate of Bailey v. County of York*, 768 F.2d 503, 506 (3dCir.,1985)).

As noted earlier, Plaintiffs failed to plead how any identifiable County employees were inadequately trained or supervised. They failed to plead that any identifiable County employees participated in any alleged illegal activity. Plaintiffs' Amended Complaint is not that Luzerne County had any custom or policy – they complain that individual lawyers paid out of Luzerne County budget failed to stop the custom and policy of a state court judge. Not only have they failed to identify any custom or policy by Luzerne County, they failed to plead any affirmative acts by any identifiable County employees, and they failed to plead any causal connection between it and any alleged harm.

More importantly, any alleged observations by assistant district attorneys and public defenders of Judge Ciavarella's courtroom procedures did not directly *cause him* to deprive Plaintiffs of their Constitutional rights. *See Polk County v. Dodson*, 454 U.S. 312, 326 (1981). In order for Luzerne County to be liable for a state actor's constitutional tort, the official action in question must be the "moving force behind the constitutional violation." *Sample v. Diecks*, 885 F.2d 1099, 1118 (3dCir.,1989)(*citing City of Canton*, 489 U.S. at 389). Furthermore, Luzerne

County was not in a position where it came into contact with or exercised supervision over the procedures used in the courtroom – the procedures alleged to have effectuated the constitutional deprivations – thereby destroying any causal link between its actions and the injuries Plaintiffs are claiming here. *See Whitt v. Stephens County*, 529 F.3d 278, 284 (5thCir.,2008). To hold a county responsible for a state court judge's courtroom practices would lead to a decision "collapsing municipal liability…into respondeat superior liability" without requiring Plaintiffs to establish the link between the funding decision and the actual constitutional deprivations alleged.

E. A COUNTY GOVERNMENT CANNOT BE HELD LIABLE FOR ALLEGED CONSTITUTIONAL DEPRIVATIONS IN A STATE JUDICIAL PROCEEDING AND WHERE STATE JUDICIAL OFFICERS THEMSELVES HAVE ABSOLUTE IMMUNITY

As more fully set forth in Luzerne County's July 27, 2009 Brief concerning judicial immunity (Doc.218), Luzerne County cannot be held liable for the immune actions (or as here, alleged *inactions*) of judicial officers who themselves are immune. Judicial officers are immune from damage suits arising out of their official duties. *Stump v. Sparkman*, 435 U.S. 349, 359-360 (1978); *Figueroa v. Blackburn*, 208 F.3d 435, 440 (3dCir.,2000).

Here, Plaintiffs' claims against Luzerne County arise from actions undertaken by the court or an officer of the court. Accordingly, "such claims

cannot proceed against the County in its executive capacity." *Kelly v. County of Montgomery*, 2008 WL 3408123 *3 (E.D.Pa.,2008). Nothing alleged relates to the functions of county government or to any action of any county commissioner or any employee appointed or authorized by county governmental officials with authority to determine the outcome of the juvenile delinquency proceedings.

The Third Circuit takes a functional approach to the determination of this immunity: if an official "performed a function integral to the judicial process," absolute immunity from §1983 claims attaches. *Williams v. Consovoy*, 453 F.3d 173, 178 (3dCir.,2006). Furthermore, imposition of liability on a county on the basis of such attenuated claims would violate the cardinal rule against imposing liability for harms a municipality does not commit. *Monell*, 436 U.S. at 694-95.

F. THE COURT MUST STRIKE IMPERTINENT AND SCANDALOUS "BACKGROUND INFORMATION" ALLEGATIONS

The proposed amendment must also be denied as futile because it pleads *ad nauseum* factual allegations concerning Luzerne County leases that must be stricken. (*E.g.*, Amended Complaint, ¶¶657-697.)[7] After approximately 15 pages, Plaintiffs sum up their gratuitous allegations in one sentence:

[7] Plaintiffs paint the County with the same brush as those indicted for breaking the law and accused through the Judges' actions of becoming a co-conspirator in their enterprises and liable as a full participant. Additionally, the Plaintiffs refer to news reports characterizing the enormity of the illegal scheme, reports which quote Plaintiffs' own counsel as the source of such characterizations, using the reporter's

> 697. In sum, Luzerne County allowed excessive amounts of public money to be paid to PA Child Care, and, in turn, its owners, Powell and Zappala, who yielded improper and excessive profits and were able to use these excess funds to pay Conahan and Ciavarella.

In other words, and "in sum," Luzerne County was also a victim of the other defendants' alleged scheme.[8]

The Federal Rules of Civil Procedure provides that '[u]pon motion made by a party…the court may order stricken from any pleading any…scandalous matter." Fed.R.Civ.P. 12(f). *See* 5A C. Wright and A. Miller, *Federal Practice and Procedure (Civil)2d* §1382m at 712 (1990)("'Scandalous' matter is that which improperly casts a derogatory light on someone, most typically a party to the action.")(footnote omitted). Moreover, although courts generally disfavor motions to strike, they are permitted when a part of a pleading is gratuitous and is not a valid basis for proceeding. *Downing v. York County Dist. Atty.*, 2005 WL 1210949 (M.D.Pa.,2005). In *Downing*, the Court struck lengthy "factual allegations of improper or criminal conduct to such an extent at the pleading stage" pursuant to Fed.R.Civ.P. 8(a). *Id. See also Waste Mgmt Holdings v. Gilmore*, 252 F.3d 316,

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reference as some kind of established fact or universal truth to repeat their own allegations.

[8] The complaint, however, does not plead any cause of action remotely related to these allegations. Plaintiffs do not seek a remedy as taxpayers or parties damaged by the excessive cost of the contract the County had the bad judgment to approve.

347 (4thCir.,2001); *Metrokane, Inc. v. The Wine Enthusiast*, 160 F.Supp.2d 633, 641-42 (S.D.N.Y.,2001). Moving to strike is particularly appropriate when the irrelevant matter is scandalous, and hence calculated to cause prejudice to the party about whom it is written. *See Downing*, 2005 WL 1210949*; Nault's Automotive Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 30 (D.N.H.,1993) (material scandalous if irrelevant or, if relevant, if gone into in unnecessary detail).

The allegations relating to the cost and audit of the lease do not relate to the constitutional rights asserted to be at issue here. They serve no purpose other than to reflect negatively on the County. The paragraphs should be stricken for failure to plead simply, directly and concisely as required by Fed.R.Civ.P. Rule 8. "Unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." 5 Wright & Miller, *Federal Prac. and Proc. (Civil)* §1281, at 522 (1990). These allegations and any references in Plaintiffs' brief to the County aiding and abetting the Judges' criminal enterprise must be stricken from this record.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Leave to File an Amendment must be denied. There is nothing in the Amended Class Action Complaint that is necessary to for Plaintiffs to proceed against any of the other

Defendants. All that is required to proceed is a short and plain statement pursuant to Fed.R.Civ.P. 8. Under Plaintiffs' excuse that they have learned new facts as against other Defendants, they would be repeatedly amending their complaints through the course of this litigation.

There are no new facts as pleaded against Luzerne County. Plaintiffs merely tweaked the language of Count VIII by adding three paragraphs that re-state the identical erroneous legal conclusion: Plaintiffs' theory is that a county can be liable because state court lawyers failed to prevent a state court judge from implementing a certain unconstitutional practice in a state courtroom during state court juvenile prosecutions. This amendment is futile, and is intended to delay Luzerne County's Rule 12(b)(6) Motion disposing of Count VIII.

Respectfully submitted,

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Dated: September 28, 2009

CERTIFICATE OF NON-CONCURRENCE

I, Timothy T. Myers, Esquire, counsel for the County of Luzerne, hereby certify that the parties have conferred and that Plaintiffs do not concur in this Motion.

/s Timothy T. Myers
Timothy T. Myers

CERTIFICATE OF COMPLIANCE

I, Timothy T. Myers, Esquire hereby certify that this Brief complies with Rules concerning the length of this brief. The Brief contains 7,443 words of text, excluding captions, tables and certifications, as counted by the word-processing software system used to prepare this Brief.

/s Timothy T. Myers
Timothy T. Myers

CERTIFICATE OF SERVICE

I, Timothy T. Myers, Esquire, hereby certify that on this date all counsel of record were served with the forgoing pursuant to the electronic service provisions of this Court. I further certify that Defendant Mark A Ciavarella, 585 Rutter Ave., Kingston, PA 18704 was served by U. S. mail, first class, postage pre-paid.

/s Timothy T. Myers
Timothy T. Myers

DATED: September 28, 2009