UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patrie,* to protect the rights of their tribal members; and MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFIEFLE; and LYNNE A. VALENTI, in their official capacities. Defendants.	Case No.: 13-5020 **DEFENDANT, VARGO'S, RESPONSE TO PLAINTIFFS' BRIEF IN SUPPORT OF THEIR REQUEST FOR APPROPRIATE REMEDIES**

Plaintiffs' filed a Brief in Support of their Request for Appropriate Remedies. (Docket 239). The Court ordered defendants to respond by June 27, 2016. (Docket 250). Now, Vargo, through counsel, responds.

INTRODUCTION

The plaintiffs' current brief begins by asserting that the four defendants are all ignoring this Court's prior rulings. Throughout the introduction, though, plaintiffs only discuss the actions (or inactions) of three individuals: 1) the Honorable Craig Pfeifle—who, in his official capacity as the presiding judge of the Seventh Judicial Circuit, is a defendant; 2) the Honorable Robert Mandel—who is not a defendant; and 3) the Honorable

Robert Gusinsky—who is not a defendant. Neither defendant Velenti, sued in her official capacity as South Dakota's Secretary of the Department of Social Services, defendant Fleming, sued in her official capacity as an employee of the Department of Social Services, nor defendant Vargo, sued in his official capacity as the State's Attorney for Pennington County are discussed. Indeed, throughout their brief, plaintiffs refer to the defendants collectively with no regard or description which governmental entities' actions or inactions they are referencing.

"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). [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). 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). Many of the remedies sought by plaintiffs do not appear to be directed at Vargo or Pennington County. To the extent that the Court issues prospective relief, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies in their official capacities.

THE COURT'S AUTHORITY TO ISSUE A REMEDIAL ORDER

Vargo does not dispute that "a court that finds that a § 1983 defendant is engaged in ongoing violations of federal law may grant injunctive . . . relief . . . in order to compel compliance with federal law." Martin Schwartz, Section 1983 Litigation Claims and Defenses § 16.03[B] (4th Ed. 2016-1 Supp.). However, "[a]s a factual matter, prospective relief is rarely granted against prosecutors, primarily because of (1) the broad discretion generally enjoyed by prosecutors, (2) difficulties § 1983 plaintiffs generally face in establishing standing to seek prospective relief, and (3) Younger v. Harris, abstention, which generally bars federal court relief against pending state court criminal proceeding." Id. at § 9.05[H]. "A federal court may not impose a remedy for constitutional violations against a defendant that has not ben shown to be a constitutional wrongdoer." Martin Schwartz & John Kirklin, Section 1983 Litigation Claims and Defenses § 16.3 (3th Ed. 1997)(citing Milikin v. Bradley, 418 U.S. 717, 744-745 (1974)). In order to have standing to seek injunctive relief, plaintiffs must show a "likelihood of substantial and immediate irreparable injury." Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). And a claim must be ripe in order to obtain prospective relief. See Martin Schwartz, Section 1983 Litigation Claims and Defenses § 2.02[C] (4th Ed. 2016-1 Supp.)(citing Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975)). Additionally, an injunction cannot be too vague and must give fair and precisely drawn notice of what is prohibited or what is directed. See Calvin

Klein Cosmetics Corp. v Parfums de Coeur, 8224 F.2d 665,669 (8th Cir. 1987).

Throughout this litigation, Vargo has raised several arguments and defenses. They include, but are not limited to, claims that this case should be dismissed under the Younger and Rocker-Feldman abstention doctrines, claims that plaintiffs' claims can not be vindicated under § 1983, claims that the plaintiffs lack standing, claims that Pennington County is not liable under Monell, and claims that injunctive relief is not appropriate because there is no continuing violation of federal law by Pennington County. Vargo acknowledges that the Court has issued decisions in this matter in favor of the plaintiffs. But the arguments and positions in this brief should not be construed as a waiver or relinquishment any argument or defense that exist. Also, this brief should not be interpreted as consent to any injunction, prospective relief or any other relief sought by plaintiffs or ordered by the Court. Pennington County respectfully objects to the entry of any prospective injunctive relief.

REMEDY NO. 1: NOTICE

In asking for their first remedy in their current brief, plaintiffs argue that four Judges—Davis, Pfeifle, Thorstenson, and Eklund—"never advised any Indian parent or custodian they had a right to contest the state's petition for temporary custody at the 48-hour hearing, that they had a right to call witnesses at the 48-hour hearing or that they could request a brief

continuance of the 48-hour hearing to allow the parent to retain counsel." (Docket 239 at p. 9). Pennington County understands that none of these judges are currently presiding over 48-hearings. In fact, Thorstenson is no longer a Circuit Judge. Plaintiffs request a remedial order addressing four notice issues. The plaintiffs request that the directives in a prospective order apply to "the defendants" rather than specifying particular defendants.

First, plaintiffs request that "Indian parents" be given a copy of the temporary custody petition—including any attached police report, and any "other documents the state submits in the case." Plaintiffs also seek an order requiring the judge to make certain statements on the record. Pennington County currently understands that copies of the temporary custody petition and attachments are being provided to Indian parents who attend 48-hour hearings. Pennington County also understands that other documents submitted "in the case" at that stage of litigation are provided to the Indian parents. Additionally, the request that the *court* "make a record" does not seem to be aimed at Vargo in the first place. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

Second, plaintiffs request that the state court advise Indian parents of particular rights. This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and

Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

Third, plaintiffs request that the state court give Indian parents notice of the "legal standards governing" a 48-hour proceeding. This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

Finally, plaintiffs request that the state court advise Indian parents that the have the right to request transfer of the proceeding to tribal court. This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

REMEDY NO. 2: RIGHT TO PRESENT EVIDENCE

In their brief, plaintiffs argue that Judge Pfeifle, in 2015, and other judges, prior to February of this year, never advised Indian parents that they had the right to call witnesses at a 48-hour hearing. Plaintiffs do not seem to seek any specific remedy against Vargo. Indeed, a state judge likely controls how 48-hour hearings are conducted under South Dakota law. This directive,

thus, does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

REMEDY NO. 3: THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES

Plaintiffs also request an order requiring state courts to allow Indian parents to confront adverse witnesses. This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

REMEDY NO. 4: THE RIGHT TO COUNSEL

Plaintiffs seek an order requiring the Seventh Judicial Circuit to "create a system whereby attorneys can be" appointed at 48-hour hearings. Plaintiffs also seek an order requiring Seventh Circuit judges to stop telling Indian parents that money spend on appointed counsel can be foreclosed upon. Again, Vargo is neither a seventh circuit judge nor a policymaker of the Seventh Judicial Circuit. This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely

drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

REMEDY NO. 5: THE RIGHT TO A DECISION BASED ON THE EVIDENCE

Plaintiffs request an order requiring decisions at 48-hours hearings to be based on evidence presented at 48-hour hearings. This request appears to be duplicative their other demands. But specifically, the request appears to be aimed at the DSS defendants. (Docket 239 at p. 17)("This Court's remedial order should direct DSS to introduce evidence of active efforts at the 48-hour hearing . . . ."). This directive does not appear to be directed at Vargo or Pennington County. If the Court determines otherwise, Vargo and Pennington County respectfully request that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies.

REMEDY NO. 6: THE § 1922 STANDARD

Plaintiffs seek an order that seventh circuit judges apply the § 1922 standard to 48-hour hearings. Plaintiffs request an order requiring Vargo to specifically mention § 1922 in emergency custody petitions. While Pennington County does not waive any of its arguments, this is not necessarily impracticable. Plaintiffs further request that Vargo be ordered to engage in a specific colloquy with the state court at each 48-hour and a separate colloquy with Indian parents. Without waiving any of its positions or consenting to prospective relief, Vargo and Pennington County respectfully request that the

Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as such pertains to Vargo and his deputies, should it order such colloquies to take place.

REMEDY NO. 7: SECTION 1922 AS APPLIED TO DSS

This directive does not appear to be directed at Vargo or Pennington County. It appears to be directed at DSS and the Seventh Judicial Circuit. If the Court determines otherwise, Vargo respectfully requests that the Court give fair and precisely drawn notice of what is prohibited or what is required by the Court as it pertains to Vargo and his deputies.

ADDITIONAL REMEDY: MONITOR

A monitor is not necessary under either Rule 53 or the Court's inherent authority to monitor Pennington County's participation in 48-hour hearings. Further, Pennington County should not be responsible for the cost of a monitor.

Dated: June 27, 2016.

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