IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	Civil Case No. 2:20-cv-00007-JPJ-PMS

PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED DECLARATION AND A SECOND AMENDED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, by and though their undersigned counsel, respectfully seek leave to amend their Amended Memorandum of Law in Support of Plaintiffs' Amended Motion for Partial Summary Judgment (the "Memorandum of Law") and the Amended Declaration of Vincent E. Glynn, Jr. (the "Declaration") filed therewith to account for certain clerical errors. Amending both the Declaration and the Memorandum of Law is necessary in order to correct the record on Plaintiffs' Amended Motion for Partial Summary Judgment.

In support of this motion, Plaintiffs state as follows:

1. Plaintiffs filed a Motion for Partial Summary Judgment on September 8, 2023.

2. All parties agreed to file and serve amended versions of their summary judgment briefing in order to correct certain clerical errors, and on September 11, 2023, Plaintiffs filed their Amended Motion for Partial Summary Judgment, Amended Memorandum of Law in Support of Plaintiffs' Amended Motion for Partial Summary Judgment, and supporting documents, including the Amended Declaration of Vincent E. Glynn, Jr. and attendant exhibits (ECF Nos. 380, 383 *et seq.*).

3. After filing and during the course of reply briefing, Plaintiffs discovered that (a) the text of the Declaration listed Bates numbers for Exhibits 37 (ECF No. 383-37) and 79 (ECF No. 383-79) that had inadvertently been switched, although the correct documents had been attached to the Declaration as Exhibits 37 and 79; (b) the text of the Declaration incorrectly described Exhibit 103 (ECF No. 383-103), even though the correct document had been attached to the Declaration as Exhibit 103; and (c) the text of the Declaration provided an incorrect case caption for *Reyes v. Clarke et al.*, No. 2:19-cv-00035-JPJ-PMS, in that the defendants were identified incorrectly (but the plaintiff and case number were correct). Plaintiffs now seek leave to file a Second Amended Declaration of Vincent E. Glynn, Jr. (the "Second Amended Declaration"), attached as Exhibit 1, to correct these clerical errors.[1]

4. After filing and during the course of reply briefing, Plaintiffs discovered that there are a number of mismatched cross-references in the Memorandum of Law to paragraphs in Plaintiffs' Amended Statement of Undisputed Material Facts (the "ASUMF") (ECF No. 383-119). A few of these mismatches were simply typographical errors, but the remaining ones were instances in which the cited paragraph was offset by one or two positions from the intended paragraph. Accordingly, Plaintiffs also seek leave to file a Second Amended Memorandum of Law in Support of Plaintiffs' Amended Motion for Partial Summary Judgment (the "Second Amended Memorandum of Law"), attached as Exhibit 3, in order to correct these clerical errors.[2]

5. Plaintiffs e-mailed copies of the Second Amended Declaration and the Second Amended Memorandum of Law to Defendants on October 21, 2023, ahead of the deadline for

[1] A redlined version comparing the Second Amended Declaration to the Declaration is attached to this Motion as Exhibit 2.

[2] A redlined version comparing the Second Amended Memorandum of Law to the Memorandum of Law is attached to this Motion as Exhibit 4.

replies on the parties' cross-motions for summary judgment, and notified Defendants of Plaintiffs' intent to file this Motion. *See* Ex. 5, Oct. 21, 2023 E-mail from V. Glynn to M. Eckstein et al. re: "Thorpe et al. v. VDOC et al. | Plaintiffs' Second Amended Filings." In that same e-mail, Plaintiffs also provided Defendants with redlined versions of the Second Amended Declaration and the Second Amended Memorandum of Law, identifying every clerical change that Plaintiffs proposed to make to the earlier-filed Declaration and Memorandum of Law. On October 23, 2023, Defendants responded by saying that in light of the impending deadline for filing summary judgment reply briefs, Defendants "do not have the time to determine the import of the changes Plaintiffs seek to make . . .," and that Defendants would take appropriate action "[o]nce Defendants have an opportunity to consider Plaintiffs' amendments." *See id.*, Oct. 23, 2023 E-mail from M. Eckstein to V. Glynn et al. re: "Thorpe et al. v. VDOC et al. | Plaintiffs' Second Amended Filings." Defendants also asked Plaintiffs to advise the Court that Defendants did not consent to the filing of any motion seeking to correct the clerical errors. *Id.*

6. On October 25, 2023, Defendants notified Plaintiffs that they would not consent to the filing because Plaintiffs' corrections allegedly "constitute substantive changes to Plaintiffs' argument," and because the corrections would allegedly be prejudicial to Defendants in that "Plaintiffs intend to . . . reference[] *different* evidence that will require Defendants to expend additional effort to determine whether further response is needed[.]" *Id.*, Oct. 25, 2023 E-mail from D. Fairbanks to V. Glynn et al. re: "Thorpe et al. v. VDOC et al. | Plaintiffs' Second Amended Filings."

7. Defendants' position is without merit. *First*, as explained above, the corrections to the Declaration are inarguably clerical. The edits seek only to correct Bates numbers and minor descriptions of the exhibits *as they were already filed*. Plaintiffs are not attempting to add

new statements, introduce new evidence, or add new exhibits to the Declaration. Rather, all Plaintiffs seek to do is make sure that the *citations* in the Declaration accurately describe the cited, and attached, exhibits. There can be no reasonable argument that Defendants would be prejudiced by these corrections. Indeed, in the e-mail correspondence between the parties, Defendants' counsel failed to identify any such actual prejudice that would be caused through the corrections to the Declaration.

8. *Second*, the corrections that Plaintiffs seek to make to the Memorandum of Law are also entirely clerical. The proposed corrections relate exclusively to inadvertent errors found in the *citations* to paragraphs in the ASUMF. As noted above, a few of these errors are typographical mistakes, but the rest are instances in which the cited paragraph numbers from the ASUMF were offset from the intended paragraph numbers by a mere one or two positions. Thus, here again, Plaintiffs are not attempting to change the substantive text in the Memorandum of Law, add any new arguments, or introduce new evidence. Rather, all Plaintiffs are attempting to do is to make sure that the *citations* in the Memorandum of Law accurately refer to the correct paragraph(s) in the ASUMF. Under these circumstances, there is simply no credible support for Defendants' claim that the proposed corrections somehow amount to "substantive changes to Plaintiffs' argument."

9. Defendants have argued that they "expended considerable effort to respond timely to Plaintiffs' motions as filed, including examining the evidence as cited by Plaintiffs and responding to that evidence." If Defendants had truly looked only at the erroneously cited evidence, then Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 402) would have been filled with statements pointing out that the cited material does not support the assertion for which it was cited. That, however, is not the case; in fact, Plaintiffs could find

only *one* instance in Defendants' Opposition where Defendants noted that the cited ASUMF paragraph did not support the proposition for which it was offered. *See* ECF No. 402 at 27 n.32 (stating that erroneously cited paragraph 53 "contains no supporting information").

10. Moreover, every single corrected citation in Plaintiffs' Second Amended Memorandum of Law points to an ASUMF paragraph that Defendants *have already reviewed, considered, and analyzed in depth*. This is evident from Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Amended Motion for Partial Summary Judgment, in which Defendants prepared a response to each and every paragraph in the ASUMF. *See* ECF No. 402-1.

11. Furthermore, Defendants' Opposition includes several instances in which Defendants seem to have understood and responded to Plaintiffs' arguments and the supporting evidence without any issue, notwithstanding the presence of an erroneous citation. *See, e.g.*, ECF No. 402 at 4 (citing Defendants' response to ASUMF ¶¶ 147–48, despite Plaintiffs' inadvertently erroneous citation to ¶ 1148), 26–27 (responding to Plaintiffs' argument on mandatory minimum time periods in the Step-Down Program for IM and SM prisoners, and correctly identifying ASUMF ¶ 49 as the relevant paragraph despite Plaintiffs' erroneous citation to ¶ 50), 35 (referencing pages 32–36 of Plaintiffs' Memorandum of Law and stating Defendants' view that the factors identified there are "perfectly legitimate," despite the fact that these pages contain several incorrect citations that Plaintiffs now seek to correct).

12. In sum, there is no conceivable prejudice to Defendants from the corrections that Plaintiffs seek to make in this motion. Defendants have now had ample time to "determine whether further response is needed" to address Plaintiffs' corrections, and they have identified not a single example in which they relied on an erroneous citation, reviewed the wrong evidence,

and/or made an argument or took a position that would need to be revised if the proposed corrections to clerical errors were permitted. To the contrary, it appears that Defendants were not misled by any of the citation errors, and that they understood exactly what was intended. In sum, Defendants' suggestion that Plaintiffs are seeking to make substantive changes or offer new arguments through this motion is entirely baseless, and Defendants have failed to identify any actual prejudice resulting from even one of these changes.

13. On November 1, 2023, Plaintiffs again e-mailed Defendants about this motion, noting the above-referenced inconsistencies in Defendants' position and urging that Defendant consent to Plaintiffs' request so that the parties would not need to trouble the Court with another contested motion. *See* Ex. 5, Nov. 1, 2023 E-mail from V. Glynn to D. Fairbanks et al. re: "Thorpe et al. v. VDOC et al. | Plaintiffs' Second Amended Filings." Plaintiffs also withdrew some of their originally proposed corrections to the Memorandum of Law, in an effort to reduce the number of corrections to be presented to the Court in this motion. *See id.* Defendants still have not consented to this motion.

14. Given that Plaintiffs' corrections to both the Declaration and the Memorandum of Law are clerical in nature, and in the absence of any evidence that these corrections would somehow prejudice Defendants, Plaintiffs respectfully move that the Court grant Plaintiffs leave to file the Second Amended Declaration and the Second Amended Memorandum of Law.

Dated: November 3, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 3rd day of November 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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