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' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR 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 respectfully submit this brief in response to Defendants' Opposition to Plaintiffs' Motion For Leave To File Amended Summary Judgment Materials (the "Opposition"). Despite having had three specific opportunities — and seventeen days — to identify a single legitimate basis on which to oppose Plaintiffs' request to correct clerical errors in their summary judgment briefing, Defendants have been unable to do so. Accordingly, 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 (the "Motion") should be granted.

In the present Motion, Plaintiffs seek leave to file two documents in support of their Amended Motion for Partial Summary Judgment — a Second Amended Memorandum of Law (the "Second Amended Memorandum of Law"), and a Second Amended Declaration of Vincent E. Glynn, Jr. (the "Second Amended Declaration"). Each of these documents corrects clerical errors found in certain *citations* in the earlier version of the same document. In their Opposition, Defendants admit — for the first time, and contrary to their earlier position — that the Second Amended Declaration does *not* introduce any substantive changes to Plaintiffs' summary judgment arguments, and they state that they no longer oppose its filing. ECF No. 426, Defs.' Opp. Plfs.' Mot. for Leave to File Am. Summ. J. Materials [hereinafter "Opp."] at 1 & n.1 The Court should therefore grant Plaintiffs' Motion for leave to file the Second Amended Declaration as unopposed.

As to the Second Amended Memorandum of Law, Defendants have now had three specific opportunities to explain any objections that they may have to its filing: (1) in response to Plaintiffs' email dated October 21, 2023, providing a redlined copy of the document and seeking Defendants' consent to its filing; (2) in response to Plaintiffs' email dated November 1,

2023, explaining that the proposed corrections to citations are *not* substantive changes and inviting Defendants to discuss or consent to Plaintiffs' proposed corrections; and (3) in response to the present Motion, which was filed on November 3, 2023. Yet, remarkably, in the seventeen days that passed between Plaintiffs' October 21, 2023 email and the filing of Defendants' Opposition on November 7, 2023, Defendants were unable to identify a *single instance* of actual prejudice that they would suffer if Plaintiffs' proposed amendments are allowed.

Instead, Defendants' Opposition is filled with vague allegations and insinuations that Plaintiffs are nefariously citing new evidence, to change their summary judgment arguments, only after having assessed Defendants' arguments in opposition — and that allowing these corrections would cause great prejudice to Defendants. None of this is even remotely true, and Defendants' position strains credibility for several reasons.

First, Defendants have not identified even *one* instance where the corrected citation substantively changes Plaintiffs' argument, or where allowing the correction would somehow cause them prejudice. If there were any truth to Defendants' assertions, certainly they would have found many examples to support their position. Not only did they have every motivation to do so — first in response to Plaintiffs' October 21 and November 1 e-mails, and then again in their Opposition to the present Motion — but they also had seventeen full days in which to do it. The fact that they did not find even *one* such example to provide to this Court is highly revealing. Simply put, they did not because they cannot.

Second, Defendants have not identified a single example where the proposed correction cites to *new* evidence, let alone to new evidence intended to bolster or strengthen the originally cited evidence as Defendants seem to imply. As explained in Plaintiffs' opening papers, all of the proposed corrections to the Second Amended Memorandum of Law refer to paragraphs in

Plaintiffs' Amended Statement of Undisputed Material Facts (the "ASUMF") — a document that Defendants reviewed over a month ago, and also rebutted on a paragraph-by-paragraph basis in a submission filed on October 5, 2023. *See generally* ECF No. 402-1, Defs.' Resp. Plfs.' Stmt. Undisp. Material Facts Supp. Plfs.' Am. Mot. Partial Summ. J. So, none of the paragraphs referenced in the proposed corrections are new to Defendants. Furthermore, Plaintiffs are not — as Defendants suggest —trying to replace one set of supporting paragraphs with a different, and better, set of supporting paragraphs. *See* Opp. at 1–2. The erroneously cited paragraphs were either partially or entirely *irrelevant* to the propositions for which they were cited, a fact that would be readily apparent to anybody who reviewed the brief and the ASUMF. And Defendants certainly cannot have believed that Plaintiffs intended to cite clearly irrelevant evidence in support of their arguments.

Third, Defendants argue that Plaintiffs are faulting them "for not discerning Plaintiffs' citation errors," and they call it a "mystery" how Defendants "were supposed to ascertain" the mistakes. Opp. at 2. But Plaintiffs' point is just the opposite: Defendants' opposition to Plaintiffs' motion for summary judgment indicates that they *did discern and ascertain these errors*, and that they understood Plaintiffs' arguments and supporting evidence perfectly well despite the presence of incorrect citations. *See* ECF No. 423, Plfs.' Mot. for Leave to File Second Am. Decl. & Second Am. Mem. L. Supp. Plfs.' Mot. Partial Summ. J. [hereinafter "Mot."] ¶¶ 9–12. If they had not, then Defendants' opposition: (a) would have repeatedly expressed confusion over why Plaintiffs had cited to ASUMF paragraphs that have nothing to do with the propositions for which they were cited and (b) would *not* have contained passages in which Defendants identified and expressly responded to the *correct* paragraph from the ASUMF, despite the original citation incorrectly pointing to a different paragraph. *See id.* (citing ECF No.

402, Defs.' Br. Opp. Plfs.' Mot. Summ. J. at 4, 26–27, 27 n.32, 35). In short, Defendants were neither confused by the erroneous citations, nor misled by them into analyzing and responding to the wrong paragraphs of the ASUMF.[1] Plaintiffs therefore agree with the statement from the Opposition that "Defendants had a full and fair opportunity to address the support for Plaintiffs' arguments when the initial amended materials were filed."[2] Opp. at 2.

In their Opposition, Defendants argue that some of the proposed citation corrections are "far more than" instances in which the originally cited paragraphs were offset by one or two positions from the intended paragraphs. Opp. at 2. Plaintiffs acknowledged in their opening papers that while the vast majority of the errors relate to an inadvertent offset in the cited paragraph numbers, a few do involve typographical mistakes. Mot. ¶ 4. Although some of the examples cited by Defendants fall into this category, others do not — and *none* of them caused any prejudice to Defendants.

One of the proposed corrections specifically identified by Defendants is the change from ¶ 148 to ¶ 138. Opp. at 2 (citing ECF No. 423-4, Second Am. Mem. L. Redline at 6). As a result of the mistake in the second digit of the paragraph number here, the sentence to which the

[1] The one instance where Defendants' opposition to Plaintiffs' motion for summary judgment notes that the cited ASUMF paragraph does not support the statement to which it was attached relates to an error that Plaintiffs are *not* seeking to correct via the present Motion. *See* ECF No. 402 at 27 n.32 (stating that erroneously cited paragraph 53 "contains no supporting information"). Plaintiffs actually *withdrew* this proposed correction prior to filing this Motion, in an attempt to compromise with Defendants and reduce the number of issues to be presented to the Court. *See* ECF No. 423-5 at 4 (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") ("Specifically, we will no longer be seeking to make the following corrections in the brief: . . . Correcting SUF ¶ 53 to ¶ 52 on page 12 of the attached redlined version of the brief . . .").

[2] For this reason, Plaintiffs do not see any need for Defendants to have "an opportunity to submit a revised brief in opposition." Opp. at 2 n.2. Defendants fully understood and responded to Plaintiffs' arguments and the intended supporting evidence the first time around; any suggestion that the correction of certain citation errors should now give Defendants a bonus round of additional briefing — to address evidence that they already understood, and to which they already responded — should fail.

citation is attached (i.e., "The cells have a narrow rectangular window that is frosted over which prevents prisoners from actually seeing out.") has nothing to do with the originally cited ¶ 148 — which concerns VDOC's out-of-cell time policy change. *See* ECF No. 383 at 6; ECF No. 383-119, Am. Stmt. Undisp. Material Facts Supp. Plfs.' Mot. Partial Summ. J. ¶ 148. Moreover, the correct ASUMF paragraph, ¶ 138, is a *verbatim* recitation of the sentence to which the mistaken citation was attached. ECF No. 383-119 ¶ 138 ("The cells have a narrow rectangular window that is frosted over which prevents prisoners from actually seeing out." (internal quotation marks omitted)). Defendants have not claimed that they were misled or confused by this citation error, nor could they do so.

Another proposed correction identified by Defendants is the change from ¶¶ 99–104 to ¶¶ 86–92. Opp. at 2 (citing ECF No. 423-4 at 36). This correction relates to an inadvertent offset in the paragraph numbers, although the cited range is admittedly off from the intended range by more than the one or two positions that is more typical. But here again, it is worth noting that the proposition to which the citation is attached (which pertains to the *BMC's* review of a prisoner's adherence to disciplinary charge requirements) has nothing to do with the erroneously cited ASUMF paragraphs (which describe facts relating to the *ICA* review and the reclassification of a prisoner from Level S to Level 6). *See* ECF No. 383, Am. Mem. L. Supp. Plfs.' Am. Mot. Partial Summ. J. at 35; ECF No. 383-119 ¶¶ 99–104. The proposed correction refers to the ASUMF paragraphs in the section "Response to Disciplinary Infractions." *See* ECF No. 383-119 ¶¶ 86–92. The fact that Defendants understood the intended evidence is evident from their opposition to the summary judgment motion, in which Defendants explained that, "The factors considered *by the BMC* in evaluating an inmate's privilege level—an inmate's time at each level, completion of required programming, *adherence to behavioral expectations, and avoidance of*

disciplinary charges, see Pls.' Br. at 32–36—are perfectly legitimate." ECF No. 402 at 35 (emphasis added). Defendants have not claimed that they were misled or confused by this citation error, nor could they do so.

The third proposed correction that Defendants identify is the change from ¶ 13 to ¶ 81. Opp. at 2 (citing ECF No. 423-4 at 36 n.8). The statement to which the citation is attached regards the failure of VDOC staff to consistently fill out prisoners' status rating charts, whereas erroneously cited ¶ 13 concerns VDOC's system of security levels. *See* ECF No. 383 at 34 n.8; ECF No. 383-119 ¶ 13. The correct ASUMF paragraph, ¶ 81, on the other hand, describes evidence that "VDOC personnel sometimes fail to record participants' ratings on their status rating charts." ECF No. 383-119 ¶ 81. Defendants have not claimed that they were misled or confused by this citation error, nor could they do so.[3]

Finally, Plaintiffs are completely baffled by Defendants' complaint about the timing of Plaintiffs' filing of the present Motion. As explained above, Plaintiffs e-mailed Defendants a copy of the proposed citation corrections on October 21, anticipating that Defendants would consent to the filing given that the changes were non-substantive and clerical in nature. *See* ECF No. 423-5 at 7–8 (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"), 6 (Oct. 23, 2023 E-mail from V. Glynn to M. Eckstein et al. re: "Thorpe et al. v. VDOC et al. | Plaintiffs' Second Amended Filings").

[3] Defendants also identify a fourth correction that they claim, instead of involving an offset, introduces "an entirely new citation." *See* Opp. at 2 (citing ECF No. 423-4 at 12). But Defendants are wrong. In this instance, the mistakenly cited paragraphs 247, 253, 261, 263 were each offset by two positions from what was intended, such that they need to be replaced with paragraphs 245, 251, 259, 261. *Compare* ECF No. 383 (Plaintiffs' Amended Memorandum of Law) at 11 ("SUF ¶¶ 247, 253, 261, 263") *with* ECF No. 423-3 (Plaintiffs' Second Amended Memorandum of Law) at 11 ("SUF ¶¶ 245, 251, 259, 261"). In other words, this is just an ordinary two-position offset, and Plaintiffs are not attempting to add a new paragraph.

When Defendants refused to consent, Plaintiffs went back to *reexamine* their proposed changes — just to confirm that they were not, in fact, substantive in any way. Having done that, Plaintiffs decided to approach Defendants one more time before burdening the Court — hoping that a more thorough explanation of Plaintiffs' position might cause Defendants to reconsider, or at least engage in a meaningful meet and confer. Defendants simply ignored Plaintiffs' invitation to respond, Opp. at 3, thus necessitating this Motion.

For the reasons stated above and in Plaintiffs' opening brief, this Court should grant Plaintiffs' Motion.

Dated: November 9, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 9th 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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