

District Judge Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.L.A. and O.L.C.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:20-cv-1524-RAJ

**MOTION TO RECONSIDER ORDER
GRANTING IN PART DEFENDANT'S
MOTION TO TRANSFER AND
PARTIAL MOTION TO DISMISS**

Note on Motion Calendar: June 17, 2022

INTRODUCTION

1
2 Plaintiffs E.L.A. and O.L.C. respectfully request that the Court reconsider its June 3,
3 2022, Order (Dkt. 36) insofar as it dismisses their abuse of process claim. Defendant’s
4 employees abused process under Texas law when they used legal proceedings in E.L.A.’s federal
5 criminal prosecution *after* initiating the case to designate O.L.C. an unaccompanied minor, thus
6 separating E.L.A. and O.L.C. for months. That later use of a legal process was “collateral” to
7 E.L.A.’s criminal proceedings and was *not* required by his federal criminal prosecution. To the
8 contrary, using E.L.A.’s brief appearance in federal court as the basis to designate O.L.C.
9 “unaccompanied” in order to separate him from E.L.A. egregiously violated Plaintiffs’ due
10 process rights. *See, e.g., Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D.
11 Cal. 2018) (enjoining Defendant’s family separation policy); *D.J.C.V. v. United States*, No. 20
12 Civ. 5747 (PAE), 2022 WL 1912254, at *12–17 (S.D.N.Y. June 3, 2022) (holding in Federal
13 Tort Claims Act case that plaintiffs had adequately alleged that Zero Tolerance policy, which
14 produced family separations, violated procedural and substantive due process).

15 While this Court disfavors motions to reconsider, Plaintiffs respectfully submit that the
16 Court overlooked paragraphs 37–39 of the complaint, which include key allegations as to the
17 abuse of process claim and how they relate to the governing case law. The complaint alleges that
18 Defendant’s employees used the criminal proceedings in E.L.A.’s case to justify his separation
19 from O.L.C. And while the Court was correct that Texas case law says a proper use of legal
20 process cannot be an abuse of process, that is not what E.L.A. and O.L.C. alleged. Rather,
21 Plaintiffs alleged that parts of the legal process that followed were later improperly and
22 unlawfully used to designate O.L.C. unaccompanied. That designation was “collateral” to
23 E.L.A.’s criminal prosecution, which is what Texas courts have explained is necessary to allow
24 an abuse of process claim to proceed. Accordingly, the Court erred as a matter of law in granting

1 the Defendant’s motion to dismiss on this claim, and Plaintiffs ask the Court to correct this
 2 error.¹

3 ARGUMENT

4 I. Standard of Review

5 This Court disfavors motions to reconsider. L. Civ. R. 7(h). Such motions are, however,
 6 appropriate where a party shows a “manifest error of law.” *Chung v. Washington Interscholastic*
 7 *Activities Ass’n*, 550 F. Supp. 3d 920, 924 (W.D. Wash. 2021); *see also* L. Civ. R. 7(h).
 8 Defendant’s underlying motion to dismiss is governed by Federal Rule of Procedure 12(b)(6). To
 9 survive a motion to dismiss under Rule 12(b)(6), Plaintiffs need only show that the
 10 “complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that
 11 is plausible on its face.” *Bain v. California Teachers Ass’n*, 891 F.3d 1206, 1211 (9th Cir. 2018)
 12 (citation omitted). In conducting that Rule 12(b)(6) inquiry, the Court “presumes that the facts
 13 alleged by the plaintiff are true . . . [and] draw[s] all reasonable inferences from the complaint
 14 in [the Plaintiffs’] favor.” *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013)
 15 (citations omitted).

16 II. Defendant’s Employees Abused Process by Using E.L.A.’s Court Appearance to 17 Realize the “Collateral” Goal of Designating O.L.C. an Unaccompanied Minor.

18 As the Court stated in its decision, an abuse of process claim under Texas law contains
 19 three elements. A plaintiff must allege:

20 (1) that the defendant made an illegal, improper or perverted use of the process, a
 21 use neither warranted nor authorized by the process; (2) that the defendant had an
 22 ulterior motive or purpose in exercising such illegal, perverted or improper use of
 23 the process; and (3) that damage resulted to the plaintiff as a result of such illegal
 24 act.

Liverman v. Payne-Hall, 486 S.W.3d 1, 5 (Tex. App. 2015) (citation omitted); *see also* Dkt. 36 at

¹ Plaintiffs do not ask the Court to reconsider its decision denying the negligence claim.

1 11. The Court found that Plaintiffs pleaded the second and third elements of this claim, but not
2 the first element: “an illegal, improper, or perverted use of the process.” Dkt. 36 at 12 (internal
3 quotation marks omitted). The Court explained that this was “because ELA was properly charged
4 with illegal entry,” stating that Plaintiffs’ allegations focused only on the “reason for charging
5 ELA, not [the] process” that followed. *Id.*

6 The Court is correct that Plaintiffs do not contest E.L.A. was properly charged with
7 illegal entry. However, it was error to overlook Plaintiffs’ allegations that Defendant then made
8 an illegal, improper, or perverted used of that criminal proceeding. Paragraphs 37–39 of the
9 complaint are the central allegations regarding the abuse of process claim, but are not discussed
10 or referenced in the Court’s decision. Those paragraphs explicitly allege that Defendant’s
11 employees used a legal process in a way *collateral* to the prosecution and *after* the prosecution
12 was initiated to bring about Plaintiffs’ separation, even though E.L.A.’s federal prosecution did
13 not require that separation. Specifically, Plaintiffs explained that Defendant’s employees used
14 E.L.A.’s court hearing, which lasted only a few hours, to designate O.L.C. an unaccompanied
15 minor under 6 U.S.C. § 279(b). Dkt. 1 ¶ 38. Defendant did so even though E.L.A. never entered
16 the Bureau of Prisons’ custody and received only a sentence of time served. *Id.* ¶ 37. Indeed, he
17 was brought from DHS custody to the hearing and immediately returned to DHS custody after
18 the hearing. *Id.* These allegations do not concern “the reason for charging ELA,” as the Court
19 determined. Dkt. 36 at 12. Instead, these allegations explicitly reference Defendant’s employees’
20 corrupt use of the legal process (after that process was initiated) for a “collateral” purpose. Dkt. 1
21 ¶¶ 37–39.

22 Plaintiffs’ allegations sufficiently state the first element of an abuse of process claim
23 under Texas law. Texas courts have explained that *even if the process itself was lawful*, an abuse
24 of process claim is proper where a plaintiff alleges the defendant took “collateral” actions that

1 the process itself did not warrant or authorize. *See, e.g., Rodriguez v. Carroll*, 510 F. Supp. 547,
2 553 (S.D. Tex. 1981) (“Overt acts done to obtain a *collateral and unlawful objective* to that
3 appearing on the face of the instituted action may amount to abuse of process.” (emphasis
4 added)); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 469 (W.D. Tex. 1999) (“The tort
5 compensates a plaintiff when process is used against him *for a collateral purpose*, such as
6 obtaining property or the payment of money—something which is not the proper subject of the
7 proceeding itself.” (emphasis added)); *Blackstock v. Tatum*, 396 S.W.2d 463, 468 (Tex. Civ.
8 App. 1965) (“The improper purpose usually takes the form of coercion to obtain a collateral
9 advantage, not properly involved in the proceeding itself. . . .”).

10 For example, in *Duffie v Wichita County*, a Texas federal court allowed an abuse of
11 process claim to proceed precisely because the plaintiffs “adequately allege[d] . . . that [the
12 defendant] made improper use of process *after* it was issued.” 990 F. Supp. 2d 695, 720 (N.D.
13 Tex. 2013). Like here, *Duffie* involved a criminal prosecution. *Id.* The *Duffie* plaintiffs were
14 nurses who had filed a complaint with the Texas Board of Nursing against defendant Smith, the
15 Wichita County Jail’s Health Services Administrator. *Id.* at 702–04. Smith retaliated in part by
16 working with the district attorney, who filed a criminal information against the nurses. *Id.* at 705.
17 The nurses were found not guilty. *Id.* Later, in federal court, the plaintiffs alleged that Smith had
18 informed the Board of the arrest warrants issued in that criminal case to thwart the Board’s
19 investigation of Smith. *Id.* at 720. Those allegations—which, like here, involve using a criminal
20 legal process to pursue an improper objective outside of that process—stated an abuse of process
21 claim. *Id.* (distinguishing between an improper motive in securing the process, which would not
22 state a claim, and improper use of the process after it issued, which did state a claim).

23 Plaintiffs’ similar claims fit comfortably within Texas law. As noted, the complaint
24 explicitly alleged that Defendant’s employees made use of legal process after E.L.A.’s

1 prosecution was initiated to obtain some other improper purpose, even if the prosecution itself
2 was proper. The designation of O.L.C. as an unaccompanied minor was “collateral” to E.L.A.’s
3 prosecution, as nothing about the criminal proceedings required designating O.L.C. an
4 unaccompanied minor (indeed, Defendant has never claimed otherwise). And it involves a “use
5 of [the] process *after* it was issued,” *Duffie*, 990 F. Supp. 2d at 720, because the claim focuses on
6 the legal proceedings following the criminal complaint. *See* Dkt. 1 ¶ 38 (“E.L.A.’s court hearing
7 for his illegal entry took a matter of hours. However, despite never entering BOP custody and
8 having only a single, brief court appearance, CBP and Immigration and Customs Enforcement
9 (ICE) used E.L.A.’s federal court proceedings and prison sentence [of time served] to designate
10 O.L.C. an ‘unaccompanied minor.’”). “[D]rawing all reasonable inferences from the complaint in
11 [Plaintiffs’] favor,” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010)
12 (en banc), these allegations sufficiently demonstrate that Plaintiffs have alleged Defendant’s
13 employees used legal process after E.L.A.’s prosecution was initiated to achieve a collateral and
14 improper purpose that was “not the proper subject of the proceeding itself,” *Andrade*, 65 F.
15 Supp. 2d at 469; *see also Rodriguez*, 510 F. Supp. at 553; *Blackstock*, 396 S.W.2d at 468; *Luna*
16 *v. United States*, No 20-cv-1152-RSL, 2021 WL 673534, at *4 (W.D. Wash. Feb. 22, 2021)
17 (dismissing abuse of process claim involving Texas law because, unlike here, Plaintiffs had “not
18 alleged that [the plaintiff] was served with process of any sort or that defendant *subsequently* and
19 improperly used plaintiff’s *compelled appearance* to achieve a purpose not contemplated by the
20 process” (emphasis added)).

21 In sum the Court overlooked key allegations in Plaintiffs’ complaint and the law that
22 Plaintiffs cited to show how these allegations satisfied the first element of an abuse of process
23 complaint. Dkt. 36 at 11–12. That was manifest error, and the Court should therefore grant
24 Plaintiffs’ motion for reconsideration and deny Defendant’s motion to dismiss with respect to the

1 abuse of process claim.

2 **CONCLUSION**

3 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion
4 and amend its order to deny Defendant’s partial motion to dismiss as to the abuse of process
5 claim.

6 DATED this 17th day of June, 2022.

7 s/ Matt Adams
8 Matt Adams
matt@nwirp.org

9 s/ Aaron Korthuis
10 Aaron Korthuis
aaron@nwirp.org

11 s/ Margot Adams
12 Margot Adams
margot@nwirp.org

13 **NORTHWEST IMMIGRANT RIGHTS**
14 **PROJECT**
15 615 Second Avenue, Suite 400
16 Seattle, Washington 98104
17 Tel: +1.206.957.8611
18 Fax: +1.206.587.4025
19 matt@nwirp.org
20 aaron@nwirp.org

s/ Susan Baker Manning
Susan Baker Manning*

MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, D.C. 20004
Tel: +1.202.739.3000
Fax: +1.202.739.3001
susan.manning@morganlewis.com

Elizabeth M. Chiaviello*
Nicholaus E. Floyd*
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Tel: +1.713.890.5000
Fax: +1.713.890.5001
elizabeth.chiaviello@morganlewis.com
nicholaus.floyd@morganlewis.com

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 17th day of June, 2022.

s/ Aaron Korthuis
Aaron Korthuis
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 816-3872
(206) 587-4025 (fax)