

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-61182-Civ-MARRA/JOHNSON

JOSEPH SAWCHUCK and  
RICHARD SPENCER,  
individually and on behalf  
of all others similarly situated

Plaintiffs

vs.

KEN JENNE, in his official and  
individual capacity as SHERIFF  
OF BROWARD COUNTY,  
BROWARD COUNTY, FLORIDA,  
a political subdivision, BROWARD  
COUNTY SHERIFF'S OFFICE, and  
T-NETIX TELECOMMUNICATIONS  
SERVICES, INC.

Defendants.

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**OPINION AND ORDER**

This cause is before the Court upon Broward County's Motion to Dismiss [DE 16]. The Court has carefully considered the motion, response, reply, entire court file, and is otherwise fully advised in the premises.

**Introduction**

Plaintiffs initiated this action pursuant to 42 U.S.C. § 1983 against Broward County ("County"), Broward County Sheriff, Ken Jenne, in his individual and official capacity and T-Netix Telecommunications Services, Inc. Plaintiffs argue violation of inmates' constitutional rights by allegedly tape recording privileged attorney-client communications initiated by inmates of Broward County Sheriff's Office ("BSO") detention facilities. On August 22, 2006, County served its Motion to Dismiss arguing

that Plaintiffs' claims against County are duplicitous of the § 1983 claims brought against BSO. On September 8, 2006, Plaintiffs filed their Memorandum of Law in Opposition to County's Motion to Dismiss. Plaintiffs advance two primary arguments in opposition to County's Motion to Dismiss. First, Plaintiffs allege that the authority relied upon by County does not support dismissal. Second, Plaintiffs claim that dismissal of their claim is premature at this juncture.

#### Legal Standard

It is long settled that a complaint should not be dismissed unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. See Linder v. Portocarrero, 963 F.2d 332, 334-336 (11th Cir.1992) citing Robertson v. Johnston, 376 F.2d 43 (5th Cir.1967).

#### Discussion

The Court begins its analysis with an examination of Eleventh Circuit precedent on the pivotal issue before the Court; namely, is a suit against a Florida sheriff a suit against the county that he or she represents. Neither party disputes that "a suit against a governmental official in his official capacity is deemed a suit against an entity that he represents" Brown v. Neumann, 188 F.3d 1289, 1290 (11<sup>th</sup> Cir. 1999) (internal citations omitted). The issue here is what entity does Ken Jenne, as Broward County's Sheriff, represent.

The Eleventh Circuit examined this issue in Lucas v. O'Loughlin, a case brought by a deputy sheriff against a sheriff, St. Johns County, Florida, and others pursuant to

42 U.S.C. § 1983. Lucas v. O'Loughlin, 831 F.2d 232 (11<sup>th</sup> Cir. 1987). The district court had dismissed the county from the case. Id. at 233. The deputy sheriff in that case argued that the sheriff has "absolute and unfettered authority" over his deputies and that the sheriff's acts represent the "official policy" of the county. Id. at 234. In contrast, St. Johns County argued that the sheriff's functions are "completely independent" of the county government. Id. The Eleventh Circuit held as follows:

Although elected by virtue of state law, [the sheriff] was elected to serve the county as sheriff. In that capacity, he had absolute authority over the appointment and control of his deputies. His and their salaries were paid by local taxation and according to a budget approved by the county commissioners. We conclude, therefore, that his act was the act of St. Johns County. The trial court erred in dismissing the county as a defendant.<sup>1</sup>

Id. at 235.

Here, the parties make arguments similar to those made by the parties in Lucas. Compare Def. Mot. at 5 (the internal operation of the Sheriff's Office belong uniquely to the Sheriff and as a independent constitutional officer he unilaterally determines the purpose of the office and exercises control and discretion over the organization and operations of the Sheriff's Office) and Pl. Resp. at 4 (the County is joint and severally liable for the conduct of the Sheriff and BSO for the policy of tape recording privileged attorney-client conversations, which was executed at all Broward County detention facilities) to Lucas, 831 F.3d at 234 (noting that the sheriff's salary and that of his deputies were paid out of county funds, that these salaries and the expenses of his office, including the operation and maintenance of the jail, were budgeted each year by the sheriff and submitted to the board

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<sup>1</sup> In dismissing the county, the district court in Lucas commented that the "[t]he law is screwed up in this area" and "there is no telling what the appellate court is going to do." Lucas, 831 F.2d at 236.

of county commissioners of the county). The Eleventh Circuit, however, rejected St. Johns County's arguments in Lucas, and held that the district court's dismissal of the county was erroneous. Lucas, 831 F.3d at 235-36.

Lucas was reexamined in Hufford v. Rodgers, 912 F.2d 1338 (11<sup>th</sup> Cir. 1990). The plaintiff in Hufford sued the Sheriff of Gilchrist County, Florida and a deputy sheriff in their official capacities pursuant to 42 U.S.C. § 1983. Id. at 1340. The issue in that case was whether a Florida sheriff is a state officer for Eleventh Amendment sovereign immunity purposes. Id. at 1340-41. The Hufford Court noted that a sheriff in Florida is a county officer and that the county funds the sheriff's budget and salary. Id. at 1341-42. In finding that the sheriff is a county official in Florida, the Court cited two Eleventh Circuit cases: Lucas and Lundgren v. McDaniel, 814 F.2d 600, 605 n.4 (11<sup>th</sup> Cir. 1987). Lundren, decided before Lucas, stated in a footnote that the Eleventh Amendment does not bar a recovery against a county sheriff and that any judgment against a sheriff in his official capacity is against the county sheriff's office. Id. Although both Lucas and Lundren stand for the proposition that the Eleventh Amendment does not immunize a Florida county sheriff from liability, the Hufford court did not discuss the discrepancy between Lucas, which stated that an official capacity suit against a Florida sheriff is a suit against a county, and the Lundren, which implied that an official capacity suit against a Florida sheriff is a suit against the sheriff's office.

Nor did the 1990 decision of Wright v. Sheppard shed light on this issue. In that case, the plaintiff sued the Sheriff of Highland County, Florida and a deputy sheriff in their

individual and official capacities pursuant to 42 U.S.C. § 1983.<sup>2</sup> Wright v. Sheppard, 919 F.2d 665, 666-67 (11<sup>th</sup> Cir. 1990). No county was named as a defendant. In examining the claim brought pursuant to 42 U.S.C. § 1983, the Eleventh Circuit implied that the entity being sued was the sheriff's department. Id. at 673-75. There was no discussion as to how this conclusion was reached nor did it discuss Lucas or Lundren.

The Eleventh Circuit recognized this inconsistency in Brown v. Nuemann, 188 F.3d 1289 (11<sup>th</sup> Cir. 1999). In that case, the plaintiff sued the Sheriff of Palm Beach County, Florida in his official capacity. Id. at 1290. The Court noted that a suit against the sheriff was a suit against the governmental entity that he or she represents. Id. at 1290. As a footnote, the Court stated:

We recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County). Compare Lucas v. O'Loughlin, 831 F.2d 232, 235 (11<sup>th</sup> Cir.1987) (County) with Wright v. Sheppard, 919 F.2d 665, 674 (11<sup>th</sup> Cir.1990) (implying that the Sheriff's Department would be the relevant entity). We do not address this point because our holding today is that whatever the relevant entity was, it is not liable under Monell.

Id. at 1290 n.2 (internal citations partially omitted).

Most recently, the Eleventh Circuit addressed this issue in Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092 (11<sup>th</sup> Cir. 2005). In Cook, the plaintiff sued the Sheriff of Monroe County, Florida pursuant to 42 U.S.C. § 1983, but did not name Monroe County as a co-defendant. In addressing the claim brought pursuant to 42 U.S.C. § 1983, the Court stated “[w]hen, as here, the defendant is the county sheriff,

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<sup>2</sup> The plaintiff in Wright also brought claims pursuant to federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § § 1961 et seq., and Florida RICO, Fla. Stat. § § 895.01 et seq.

the suit is effectively an action against the governmental entity he represents - in this case, Monroe County.” Id. at 1115. Significantly, there was no discussion of the inconsistency previously noted in Brown. This holding was re-affirmed in an unpublished decision, Adcock v. Baca, 157 F.App’x. 118 (11<sup>th</sup> Cir. 2005). There, a claim was brought against a Polk County Florida Sheriff pursuant to 42 U.S.C. § 1983. Id. at 119. The Eleventh Circuit cited Cook and stated that this action was “effectively an action against the government entity he represents - in this case, Polk County.” Id.

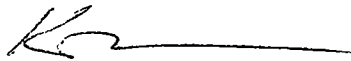
Based on the foregoing, the Court rejects the County’s motion to dismiss it from this action. Although the law in this area lacks clarity, this Court is persuaded by Lucas that the dismissal of the County as a defendant may constitute reversible error, given that the Eleventh Circuit reversed a district court for dismissing the county in Lucas. Significantly, Lucas is the only case that addressed the dismissal of a county defendant in a claim brought against a sheriff and a county pursuant to 42 U.S.C. § 1983. Moreover, although Wright and Lundren implied that the entity that represents the county sheriff is the sheriff’s office, those cases did not state that Lucas was no longer good law nor did they state unequivocally that the sheriff did not represent the county. Indeed, Brown noted this inconsistency between Wright and Lundren in contrast with Lucas, but did not resolve it. When faced with conflicting panel decisions, the law in the Eleventh Circuit holds that the earlier decision is binding until the court decides the issue en banc. Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co., Inc., 106 F.3d 970, 975 (11<sup>th</sup> Cir. 1997); Clark v. Housing Auth. of City of Alma, 971 F.2d 723, 726 n.4 (11<sup>th</sup> Cir. 1992). Finally, the last word from the Eleventh Circuit, as stated in Cook and Adcock, convince this Court that the County should not be dismissed from this lawsuit. That stated, the Court recognizes that

the language in Cook and Adcock may simply be dicta. After all, neither Cook nor Adcock resolve the inconsistency discussed in Brown. However, these recent cases provide additional support that Lucas should be followed, and no reading of these cases suggest that it is improper to find that a Florida sheriff represents the county. Accordingly, the Court concludes that there is no basis to dismiss the County from this case.

**Conclusion**

It is hereby **ORDERED AND ADJUDGED** that Broward County's Motion to Dismiss [DE 16] is **DENIED**.

**DONE AND ORDERED** in Chambers at West Palm Beach, Palm Beach County, Florida, this 30<sup>th</sup> day of March, 2007.



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KENNETH A. MARRA  
United States District Judge

copies to:

All counsel of record

**Nyla Libhart**

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