

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

**CASSIE M. by Next Friend Kymberli Irons :
ALEX AND JARED C. by next friend Gregory :
C. Elliott; TERRENCE T., by next friend :
Gregory C. Elliott, TRACY L., by Next Friend :
Kymberli Irons; and DANNY B., by next friend :
Gregory C. Elliott; for themselves and those :
similarly situated :**

v. :

C.A. 1:07-cv-00241-ML-LDA

**LINCOLN D. CHAFEE, in his official :
capacity as Governor of the State of Rhode :
Island; STEVEN M. COSTANTINO in his :
official capacity as Secretary of the :
Executive Office of Health & Human :
Services; and JANICE E. DEFRANCES, in her :
official capacity as Director of the :
Department of Children, Youth and Families :**

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE CLAIMS
ASSERTED ON BEHALF OF TERRENCE T.**

Plaintiffs provide no sound reason to delay this Court's decision on Defendants' Motion for Summary Judgment on Terrence T.'s claims. Plaintiffs' opposition reveals their misunderstanding about the child welfare system in Rhode Island. The Rhode Island Family Court has determined that DCYF's legal custody and involvement with Terrence should end. Terrence's involvement with DCYF was terminated through a decree of the Rhode Island Family Court. Terrence is no longer subject to placements, visitation, services, etc. through DCYF or its case workers, which are the basis for his claims. Terrence has no legally cognizable interest in the outcome of this case. Despite Plaintiffs' arguments, they cannot demonstrate that the

dismissal of Terrence from this case will extinguish Plaintiffs' pending motion for class certification.

Furthermore, Plaintiffs fail to satisfy their burden under Fed.R.Civ.P.56(d) to support their request for additional discovery and further delay of this Court's decision on Defendants' Motion for Summary Judgment. Plaintiffs cannot demonstrate that the discovery they seek is "essential to justify its opposition" to the motion for summary judgment. Id. What they seek is irrelevant. Furthermore, Plaintiffs' argument that Terrence's claims fall within an exception to the mootness doctrine based on theories of (1) inherently transitory or (2) that DCYF's actions terminated Terrence's involvement in order to extinguish his claims and extinguish the pending motion for class certification are without merit. Defendants are entitled to judgment as a matter of law pursuant to Fed.R.Civ.P. 56.

ARGUMENT

Plaintiffs fail to cite a valid legal or factual basis to support their argument that Terrence's claims should "relate back" for the purpose of class certification even though they became moot on July 9, 2013. Plaintiffs root their "relation back" theory on their arguments that (1) Terrence's claims fall within the "inherently transitory" exception to the mootness doctrine and (2) that the Defendants intentionally mooted Terrence's claims to prevent this Court from certifying a class. The discovery Plaintiffs' counsel purport to seek is not legally essential to either theory.

A. Plaintiffs' Counsel Fail to Meet Their Burden Under Fed.R.Civ.P. 56(d)

The discovery that Plaintiffs' counsel seeks is not essential to justify their opposition to the instant motion for summary judgment. Fed. R.Civ.P. 56(d)¹ provides:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

The decision of whether to grant or deny the relief is within the sound discretion of the district court and is reviewed on appeal solely for abuse of discretion. Mir-Yepez v. Banco Popular De Puerto Rico, 560 F.3d 14, 15 (1st Cir. 2009). The party seeking Rule 56(d) bears the burden of making the required showing. “[T]he prophylaxis of Rule 56(d) is not available merely for the asking.” Mir-Yepez, 560 F.3d at 16 (citing Rivera-Torres v. Rey-Hernandez, 502 F.3d 7, 10 (1st Cir. 2007)). In order to sustain this burden, the moving party must submit an affidavit or declaration “showing (i) good cause for his inability to have discovered or marshaled the necessary facts earlier in the proceedings; (ii) a plausible basis for believing that additional facts probably exist and can be retrieved within a reasonable time; and (iii) an explanation of how those facts, if collected, will suffice to defeat the pending summary judgment motion.” Id. at 16. Plaintiffs' counsel has not sustained their burden and their request for additional discovery under Rule 56(d) should be denied.

¹ Rule 56(d) was formerly Rule 56(f). “This change in nomenclature is unimportant: the textual differences between the current Rule 56(d) and former Rule 56(f) are purely stylistic.” Jones v. Secord, 684 F.3d 1, 5 fn. 2 (1st Cir. 2012).

B. Plaintiffs Cannot Demonstrate that the Defendants Intentionally Mooted Terrence's Claims to Prevent the Court from Addressing the Issue of Class Certification

Plaintiffs' assertion that Terrence's claims fall within an exception to mootness, because Defendants intentionally mooted them in order to prevent this Court from addressing class certification, is not supported by the law or the undisputed facts. In an effort to defeat the instant motion for summary judgment, Plaintiffs' counsel speculates that Defendants terminated their involvement with Terrence to remove him from this case. Document 350 at p. 2 They contend that they need additional discovery, specifically the DCYF case file from January 18, 2013 to July 9, 2013, a deposition of CASA attorney Jennifer Kelly and the documents and transcripts from the Rhode Island Family Court from January 18, 2013 to July 9, 2013, in order to prove that Defendants terminated their involvement with Terrence to moot his claims. This discovery is not necessary nor will the alleged facts² defeat the instant motion for summary judgment. Plaintiffs' lack of understanding and failure to appreciate deference due to the authority of the Rhode Island Family Court is fatal to their argument.

i. The R.I. Family Court Closed the Court Petition and Terminated DCYF's Legal Custody and Involvement with Terrence T.

Plaintiffs' counsel fails to recognize the established process regarding the termination of DCYF's legal custody. It is beyond dispute that DCYF's legal custody and involvement with Terrence T. was terminated by a decree of the Rhode Island Family Court. Exhibit B. Based on this fact alone, Plaintiffs' counsel's request for additional discovery under Rule 56(d) and claim that it was DCYF's actions that terminated Terrence from their legal custody and involvement in order to moot his claims in this case should be denied outright.

² Albeit none actually exist as DCYF never harbored such nefarious motives or intentions.

At the conclusion of Terrence's January 2013 review hearing, the Family Court scheduled his next court date as July 9, 2013.³ On July 9, 2013, the Family Court convened a hearing on Terrence's case. Present on Terrence's behalf was his CASA attorney Jennifer Kelly. Given his eighteenth birthday on July 4, 2013 the Rhode Island Family Court considered DCYF's transition plan for Terrence⁴ as R.I. Gen. Laws § 14-1-6 mandates that:

“[w]hen the court shall have obtained jurisdiction over any child prior to the child's eighteenth (18th) birthday by the filing of a petition alleging that the child is dependent, neglected and abused pursuant to §§14-1-5 and 40-11-7, including any child under the jurisdiction of the family court on petitions filed and/or pending before the court prior to July 1, 2007, the child shall, except as specifically provided in this chapter, continue under the jurisdiction of the court until he or she becomes eighteen (18) years of age; provided, that prior to a child turning eighteen (18) years of age, the court shall require the department of children, youth, and families to provide a description of the transition services afforded the child in placement or a detailed explanation as to the reason those services were not offered.”

At this time the Family Court could also determine whether a child should remain under DCYF's custody until twenty-one (21) pursuant to R.I. Gen. Laws § 42-72-5. After review and consideration of Terrence's case, the Family Court entered a decree ruling that:

DCYF's petition is hereby closed, over CASA's objection.

³ Unlike other states' court systems, the Rhode Island Family Court will review and consider a child's case a minimum of twice a year. The Family Court convenes a yearly permanency hearing, R.I. Gen. Laws §40-11-12.1, and enters an order in the best interest of the child. R.I. Gen. Laws §40-11-12.1(e). Additionally, the Family Court is vested with the authority to review and address DCYF's service plan for the child at a minimum of every six months. R.I. Gen. Laws §40-11-12.2.

⁴ Plaintiffs' counsel in their criticism of Terrence's after care service program fails to recognize the documentation that Terrence's caseworker made a “YESS” referral for Terrence and he completed the intake appointment on April 15, 2013. Plaintiff's Exhibit 4, filed under seal at TT000011412. Terrence is open to YESS. The Youth Establishing Self-Sufficiency (“YESS”) Aftercare Program is managed by the Rhode Island Council of Resource Providers and a program of the Consolidated Youth Services contract funded by the DCYF. “YESS provides individualized, youth-driven services and supports to young adults, ages 18-21, who have been closed to the state's Family Court and DCYF. By assisting former foster youth in crafting their plan for self-sufficiency, and identifying and utilizing relevant community-based resources, YESS prepares participants to live independently by their 21st birthday.”

DCYF's involvement is hereby terminated as to said child.

Exhibit B, filed under seal.

The Rhode Island Family Court's considered decision as reflected in the decree is the basis for the instant motion seeking to dismiss Terrence's claim based on mootness. It is the Rhode Island Family Court's ruling that Terrence, who had reached the age of majority, was no longer to be in DCYF's foster care custody. Based on these undisputed facts, Plaintiffs' counsel cannot demonstrate that DCYF mooted Terrence's claims to prevent class certification.

ii. D.G. v. Henry

Plaintiffs' counsel leveled the same accusation of intentional mootness before the United States District Court for the Northern District of Oklahoma in D.G. v. Henry, 2009 WL 1011595 (N.D. Okla. April 15, 2009). Oklahoma filed a motion for summary judgment with respect to plaintiff child D.G. on the grounds that his claim became moot upon his adoption. D.G., 2009 WL 1011595 at *1. Plaintiffs' counsel, Children's Rights, objected claiming D.G. should remain a "named plaintiff because of two exceptions to the mootness doctrine: first, they allege[d] plaintiffs' claims are inherently transitory and second, plaintiffs assert defendants purposefully expedited the adoption for force D.G. out of the suit." Id. The District Court found neither argument persuasive and granted the motion for summary judgment. Id. at *2-3. In addressing the intentionally mooting argument, the District Court explained:

"Similarly, plaintiffs have failed to present evidence plaintiff is no longer in DHS custody because of 'purposeful action of the defendants.' The purpose of this exception is to preclude defendants from 'picking off' named plaintiffs' claims before the issue of certification can be reached. Owen v. Regence BlueCross BlueShield of Utah, 388 F.Supp2d. 1318, 1332 (D.Utah 2005). Although plaintiffs contend DHS gave D.G. "special treatment not available to other foster children in DHS custody because he was a named plaintiff in this case," [Doc. No. 224, p. 1], they present no evidence in support of this claim. According to case contact notes, the adoption of D.G. was initiated by his foster parents in October 2007. [Doc. 239, Ex.2, DGKIDS-4-00032]. The adoption took over a

year to finalize. Evidence shows plaintiff's adoptive parents and guardian ad litem, as opposed to DHS workers, attorneys or any legal strategy, were the driving force behind the effort to complete the adoption process. The case contact notes are replete with discussions of the adoptive parents' and guardian ad litem's repeated inquiries about what they perceived to be delays in the adoption and requests that the process be expedited."

Id. at *2. Plaintiffs' counsel level a similar accusation against the Defendants in this case; an accusation that is directly contradicted by the Rhode Island Family Court decree [Exhibit B].

iii. The Discovery Plaintiffs' Counsel Seeks is Irrelevant to Defendants' Motion for Summary Judgment

As it was the decision of the Rhode Island Family Court that terminated Terrence from DCYF's legal custody and involvement, the discovery Plaintiffs' counsel seeks is irrelevant and unnecessary to the issue of mootness before this Court. Plaintiffs' motion for additional discovery under Rule 56(d) should be denied and the instant motion addressed by this Court.

The Plaintiffs' counsel asks this Court for three (3) weeks to conduct discovery to determine whether "Defendants terminated their involvement with Terrence T. in order to remove him from this action." Document 350 at p.5. As stated, any discovery would be irrelevant because it was by decision of the R.I. Family Court that terminated DCYF's legal custody and involvement with Terrence. The discovery Plaintiffs' counsel has articulated to this Court as it is not "essential to justify its opposition" to this motion for summary judgment as required by Fed.R.Civ.P.56(d).

Plaintiffs' counsel contends the discovery they seek can be completed within three (3) weeks. They claim that the DCYF case file may show that his caseworker had "misgivings about DCYF's decision to terminate Terrence's case." Document 350 at p.7. Even if such questions existed, it is the R.I. Family Court that terminated DCYF's legal custody of Terrence; the DCYF case record sought is irrelevant. Plaintiffs' counsel claim they need to conduct the deposition of Terrence's CASA attorney to reveal "the reasons why she objected to his exit from

custody.” Document 350 at p. 7. It is evident from the Family Court decree that the Court considered and was not persuaded by CASA’s objection. It is not within the jurisdiction of this Honorable Court to sit in appellate review of the Rhode Island Family Court’s ruling or the basis for it. Based on the principles of comity and the Younger Abstention Doctrine, this Court should abstain from questioning or re-litigating the Family Court’s decision. Younger v. Harris, 401 U.S. 37 (1971).

Lastly, Plaintiffs’ counsel contends that it needs all documents, including transcripts, of Family Court proceedings from January 18, 2013 to July 9, 2013. Again, these records are not necessary as the Rhode Island Family Court’s decision and decree should be afforded full faith and credit. Moreover, Family Court records of Terrence T. are confidential pursuant to R.I. Gen. Laws § 8-10-21. Plaintiffs’ counsel would have to seek the permission of the Rhode Island Family Court to obtain its records and order transcripts of the hearing; a decision that would be made according to that Courts’ calendar.

The discovery Plaintiffs’ counsel has proposed is simply not “essential to justify its opposition” to the instant motion for summary judgment. The discovery and events that Plaintiffs’ counsel speculate exist in these three forums, would not suffice to prove that that DCYF terminated Terrence from its legal custody to moot out his claim and thwart this Court from addressing class certification. The discovery sought would not lead to evidence to defeat the pending summary judgment motion and Plaintiffs’ request should be denied.

C. Plaintiffs' Counsel Fail to Demonstrate Terrence's Claims Fall Within the Inherently Transitory Exception to the Mootness Doctrine.

Plaintiffs' counsel claim that Terrence's claim falls into the inherently transitory exception to the mootness doctrine is without support.⁵ Plaintiffs' counsel base this argument on generalities that a "number of unpredictable factors' control how long a child remains in DCYF custody", [i]t is impossible to predict how long any child will remain in foster care before they exit custody, and thus impossible to predict how long their individual claims will survive" and that the "foster care population in Rhode Island is extremely flawed, with a median length of stay of 13.3 months as of federal fiscal year 2011." Plaintiffs' counsel identify that 11 out of the 15 children they selected to be plaintiffs have exited foster care. Ten of these children were adopted; ironic given that Plaintiff's counsel filed a constitutional claim against DCYF for failure to achieve permanency for these children. The last three children dismissed from this case based on mootness were with Plaintiffs' counsel's assent and a stipulation submitted to the Court. Document 350 at p. 9. Plaintiffs' counsel does not address how Terrence's claim falls within the inherently transitory exception.

The Supreme Court has carved out a narrow exception to mootness in a class action context, where the claims of the class representatives would ordinarily be mooted out but are nevertheless allowed to proceed because of the inherently transitory nature of the putative class. See Gerstein v. Pugh, 420 U.S. 103 (1975). Gerstein involved prisoners in pretrial detention, where no class representative remained in pretrial custody for long enough to bring the class to

⁵ Plaintiffs' attempt to distinguish 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003), Carson P. ex rel Foreman v. Heineman, 240 F.R.D. 456 (D.Neb. 2007) and D.G. v. Henry, 2009 WL 1011595 (N.D. Okla. April 15, 2009) and the respective Federal Court's rejection of their "inherently transitory argument" is legally unsound and ignores this Court's decision to address the individual claims on October 15, 2013. Similarly, counsel's claims that Defendants' stated reliance on Marek v. State of Rhode Island, 702 F.3d 650, 655 (1st Cir. 2012) is misplaced fails to recognize the plain language of that opinion.

the certification stage and challenge the allegedly unconstitutional procedures. Id. Under these facts, the Court reasoned that the claim was distinctly capable of repetition yet evaded review. Id. As such, the Court recognized an “inherently transitory” exception to mootness if “[i]t is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.” Gerstein v. Pugh, 420 U.S. 103 (1975), see also, Olson v. Brown, 594 F.3d 577 (7th Cir. 2009) (if the exception applies, the case is not moot for the purpose of class certification).

This exception cannot be shown for the claim of Terrence T. when named Plaintiffs Cassie M. and Danny B., remain in the legal custody of DCYF, have a live controversy and a legally cognizable interest. The Gerstein exception only saves a claim from mootness if no class representative will have a live claim at the time of class certification. It is not generally conferred on any plaintiff that was a member of a putative class that was by its nature temporary. Finding the claim of Terrence T. moot is not dispositive to this case or any future determination of class certification. Moreover, the three remaining named Plaintiffs assert identical claims and seek identical relief.

The narrow exception articulated in Gerstein would only be triggered if, at a later date, the remaining named Plaintiffs were in the process of being adopted or aging out. At that juncture, this Court could consider whether such claims fit within the confines of the inherently transitory exception. As long as one named Plaintiff has a live controversy, this Court is not precluded from deciding class certification.

Terrence was not added as a plaintiff to this lawsuit until April 2012 when he was 16½ years old and had been in foster care for much more than 13.3 months. Plaintiffs’ counsel cannot dispute that their motion for class certification remains regardless of Terrence’s dismissal from

the suit as Cassie and Danny remain. Moreover, Plaintiffs' counsel's claim that all children may exit foster care prior to a determination on their motion for class certification ignores this Court's expedited consideration of the children's individual claims scheduled to begin on October 15, 2013. Terrence T's claims do not fall within the inherently transitory exception to the mootness doctrine.

CONCLUSION

The State Defendants are entitled to Fed.R.Civ.P. 56 judgment as a matter of law on the claims of Terrence T. By Order and Decree of the R.I. Family Court, the petition that brought Terrence into foster care and legal custody of DCYF is closed and DCYF's involvement has been terminated. Terrence's claims are moot and there is no live case or controversy between Terrence and the State Defendants. Wherefore, State Defendants pray that this motion is granted and Terrence's claims are dismissed with prejudice.

Respectfully submitted

DEFENDANTS
By their Attorney,

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/s/ Brenda D. Baum

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CERTIFICATION

I, the undersigned, hereby certify that I filed the within Reply Memorandum of Law in support of Defendants' Motion for Summary Judgment with respect to the claims of Terrence T. via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF System to the following attorneys of record on this 9th day of August 2013.

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