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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CLARK K., <i>et al.</i> ,)	2:06-CV-01068-RCJ-RJJ
)	
<i>Plaintiffs,</i>)	ORDER
)	
vs.)	
)	
KENNY C. GUINN, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	

INTRODUCTION.

Before the Court is Defendants’ Motion for Reconsideration (#192). The Court has reviewed Defendants’ Motion and the pleadings on file from all parties. IT IS HEREBY ORDERED that Defendants’ Motion is *denied*.

BACKGROUND.

In August 2006, Plaintiffs¹ filed suit on behalf of themselves and “all abused and neglected children who are in, or at risk of entering, the Clark County foster care system.” (#57-1 at 6). Plaintiffs bring this civil action under 42 U.S.C. § 1983 against Kenny C. Guinn, as

¹ Plaintiffs proceed under fictitious names pursuant to Federal Rule of Civil Procedure 10(a). The named Plaintiffs include Clark K. (by his next friend Sherry Anderson), Jalen, Sia, Roshaun, Caleb, and King A. (collectively the “A Plaintiffs”) (by their next friend Tarrah Logan), Toni Summer and Frank B. (collectively the “B Plaintiffs”) (by their next friend Marilyn Paikai), and Donna C. (by her next friend Jacquelyn Romero).

1 Nevada Governor (the Court dismissed Mr. Guinn from the case),² Michael Wilden (Director
2 of Nevada Health and Human Services), Fernand Serrano (Administrator of the Nevada Division
3 of Child and Family Services), John Doe (Bureau Chief of the Bureau of Services for Child Care
4 of the Division of Child and Family Services), Virginia Valentine (Clark County Manager),
5 Clark County Department of Family Services, Tom Morton (Director of Clark County
6 Department of Family Services), Louis Palma (Manager of Shelter Care for the Clark County
7 Department of Family Services), County Commissioners Bruce L. Woodbury, Tom Collins, Chip
8 Maxfield, Yvonne Atkinson Gates, Myrna Williams, Lynette Boggs McDonald, and Rory Reid,
9 and finally Clark County itself. Plaintiffs seek declaratory and injunctive relief relating to the
10 operation of Nevada's and Clark County's foster care system.

11 On May 14, 2007, this Court issued a lengthy order in which it dismissed the Governor
12 completely from this action. The Court further dismissed some of Plaintiff's claims for failure
13 to state a claim.

14 Plaintiffs now seek to certify a county-wide class consisting of all children "who have
15 been, are, or will be victims in the legal custody of Clark County Department of Family
16 Services." (#74 at 4). Plaintiffs claim that the only realistic means for redressing the injuries
17 suffered by the thousands of children who are members of the class" is to prosecute this matter
18 as a class action. *Id.* According to Plaintiffs, "reliance upon any one class member's claims will
19 not effectively remedy the class-wide issues raised in this suit." *Id.* Plaintiffs further state that
20 "if this action does not proceed as a class action, these foster children will be unable to address
21 the system-wide deficits that have caused their injuries." *Id.*

22 Defendants also seek review and reconsideration of Judge Johnston's orders compelling
23

24 ² As of today's date, Governor Guinn is no longer Governor. This fact does not dismiss the Governor's office from
25 this action. When a public officer who is sued in the officer's official capacity dies, resigns, or otherwise ceases to
hold office, the action does not abate and the successor is automatically substituted as Defendant. *Hafer v. Melo*,
502 U.S. 21, 25 (1991).

1 discovery of case files and the parties' entry into protective order. Judge Johnston ordered the
2 parties to enter into a confidentiality agreement and Defendants to disclose case files in the
3 possession of the County for the children named in the lawsuit. The case files would be
4 delivered only to the attorney representing the child.

5 On February 12, 2007, the Court stated that more discovery was needed before the Court
6 ruled on class certification. Since then disputes have arisen as to the scope of discovery required,
7 the parties took these issues before Judge Johnston.

8 On March 12, 2008, Judge Johnston ruled that the Court would allow discovery of the
9 non-privileged documents containing "(1) case records for all foster children who have been the
10 subject of an abuse or neglect [claim] while in the custody of Clark County; and (2) case records
11 for children who have died or suffered abuse while in the custody of Clark County." (#187).

12 Judge Johnston also held that the official information privilege did not apply to the documents
13 described above. *Id.*

14 **DISCUSSION.**

15 The district court may not set aside a magistrate's determination of a non-dispositive
16 pretrial matter unless it finds the order "to be clearly erroneous or contrary to law." FED. R. CIV.
17 P. 72(a) (2006); *see also Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1168,
18 1172 (D. Nev. 2005) (citing 28 U.S.C. § 636(b)(1)(A) and FED. R. CIV. P. 72(a)). In the District
19 Court of Nevada, courts have said "the district judge must affirm the magistrate judge unless it
20 is left with the 'definite and firm conviction that a mistake has been committed.'" *Premiere*
21 *Digital Access, Inc.*, F. Supp. 2d at 1172 (quoting *Burdick v. Comm'r*, 979 F.2d 1369, 130 (9th
22 Cir. 1992)). Furthermore, "[t]he reviewing court may not simply substitute its judgment for that
23 of the deciding court." *Id.*³

24
25 ³ Under Local Rule IB 3-1, a district judge may reconsider any pretrial matter referred by a magistrate judge
"where it has been shown that the Magistrate's judge ruling is clearly erroneous or contrary to law."

1 **I. Judge Johnston’s Order Is Not Clearly Erroneous.**

2 Defendants contend that Judge Johnston’s orders are erroneous in that they exceed the
3 scope of discovery required to fulfill this Court’s directive that further discovery be conducted
4 to determine whether Plaintiffs “presented representative claims that represent the violations that
5 you’re [plaintiffs] talking about class wide.” (Transcript of Feb. 12, 2007 Hearing, at 60–61).

6 **A. Judge Johnston’s Orders Are in Harmony with the Court’s Statements
7 Relating to Class Certification.**

8 Defendants focus on the Court’s use of the words “a little bit of discovery” to argue that
9 Judge Johnston exceeded the scope of the intended discovery. Under the Federal Rules of Civil
10 Procedure, “the scope of discovery is broad and should be allowed unless the information had
11 no conceivable bearing on the case.” *Jackson v. Montgomery Ward & Co. Inc.*, 173 F.R.D. 524,
12 528 (D. Nev. 1997). The Court did not give any specific direction regarding the scope of the
13 discovery, only that discovery was needed to insure that claims were representative across the
14 class. Judge Johnston directed County Defendants to produce the case records of other foster
15 children whom may have suffered abuse or neglect similar to that suffered by the named
16 Plaintiff. The Orders granting the Plaintiffs’ Motions to Compel are in harmony with the
17 Court’s mandate that further discovery be conducted regarding the class and the claims of the
18 class.

19 **B. Pre-Certification Discovery is Proper for Class Issues.**

20 In the Ninth Circuit plaintiffs are entitled to discovery on class issues before the class has
21 been fully certified. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007). In *Dukes*, six
22 women filed a class action suit alleging employment discrimination. *Id.* at 1174. In preparation
23 for their motion for class certification, the plaintiffs conducted “extensive” and wide-ranging pre-
24 certification discovery. *Id.* at 1175. The discovery included detailed expert testimony and
25 statistical data. To establish class certification, plaintiffs presented information on potential

1 class members and statements from individual class representatives. *Id.* at 1182 & n.11. The
2 Ninth Circuit held that the information presented on potential class members was significant in
3 supporting commonality and must be considered. *Id.* at 1177 n.2, 1182.

4 When a court concludes, as this Court has, that it requires factual support before it can
5 effectively address class certification, class-related discovery is essential. *Gray v. First Winthrop*
6 *Corp.*, 133 F.R.D. 39, 40–41. As to any overlap between class-related discovery and the merits
7 of the case, the Ninth Circuit visited that issue in *Dukes*. *Dukes*, 509 F.3d at 1178 n.2 (stating
8 that even if the evidence relates to the underlying merits of the case, the district court must allow
9 discovery addressing the class certification requirements).

10 **II. The Orders Are Not Contrary to Law.**

11 Defendants claim that Judge Johnston erred in holding that the Plaintiffs’ attorneys in this
12 case are “attorneys” within the meaning of Nevada Revised Statute § 432B.290(1)(g). The
13 statute states:

14 Except as otherwise provided in subsections 2 and 3 and NRS 432B.165,
15 432B.175 and 432B.513, data or information concerning reports and
16 investigations thereof made pursuant to this chapter may be made
17 available only to . . . [t]he attorney and the guardian ad litem of the child.

18 N.R.S. § 432B.290(1)(g) (2007). In this case Judge Johnston ordered certain files to be turned
19 over to Plaintiffs’ Counsel. For the purposes of this case, Plaintiffs’ Counsel is proposing that
20 they serve as counsel for the class of persons in the Complaint. Courts follow the plain language
21 of the statute when the language is clear. *McKay v. Board of Supervisors of Carson City*, 730
22 P.2d 438, 441 (Nev. 1996). Based on the language of the statute, counsel may be considered to
23 be the child’s attorney. Other interpretations would bar the discovery needed for the class to be
24 certified.

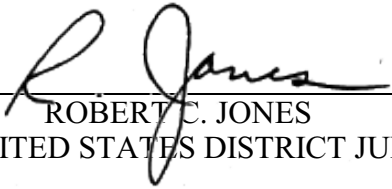
25 Furthermore, Judge Johnston correctly interpreted Nevada Revised Statute § 432B.290(2)
(which governs information made available to the general public). Judge Johnston held that the

1 “plaintiffs are not requesting the information in an attempt to disclose it to the public” and he
2 concluded that Nevada Revised Statute § 432B.290(2) does not apply. Defendants rely on an
3 order by Judge Herndon interpreting the same statute. But Judge Johnston held that the statute,
4 which provides a lengthy list of exceptions allowing for the disclosure of confidential files, does
5 not merit the broad reading preferred by Defendants. Furthermore, Judge Herndon’s
6 interpretation is moot due to the 2007 amendment of Nevada Revised Statute § 432B.290(2).

7 **CONCLUSION.**

8 IT IS HEREBY ORDERED that Defendants’ Motion for Reconsideration (#192) is
9 *denied*. Judge Johnston’s Orders are consistent with the Court’s orders and the law.

10 DATED: October 24, 2008

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14 ROBERT C. JONES
15 UNITED STATES DISTRICT JUDGE
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25 (mr/nk)