Docket No. 14-17384

In the

United States Court of Appeals

for the

Ninth Circuit

JAMES CHADAM and JENNIFER CHADAM,
on behalf of themselves and their minor children, A.C. and C.C.,

Plaintiffs-Appellants,

v.

PALO ALTO UNIFIED SCHOOL DISTRICT,
a governmental entity created and existing under the laws of the State of California,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:13-cv-04129-CW · Honorable Claudia Wilken, Senior District Judge

APPELLANTS' OPENING BRIEF

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TO THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Plaintiff/Appellants, JAMES CHADAM and JENNIFER CHADAM ("Chadams"), on behalf of themselves and their minor children, AC and CC, submit this Opening Brief in support of their appeal of the trial court's order ("Order") (ER1:1-26) dismissing their Second Amended Complaint ("SAC") (ER2:108-119) in this proceeding. By this appeal, the Chadams seek a reversal of the order of dismissal, a remand to the trial court for further proceedings under the SAC, their reasonable attorney fees and such other relief as this Court deems necessary and appropriate.

I.

STATEMENT OF JURISDICTION

This proceeding is an appeal from a final order of the district court dismissing plaintiff/appellant's entire case with prejudice. This court has appellate jurisdiction over all final decisions of the district courts (except in those limited cases where direct review lies with the U.S. Supreme Court) 28 USC § 1291.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court improperly and erroneously grant the PAUSD's motion to dismiss the Chadams' SAC pursuant to FRCP 12(b)(6) with prejudice?

III.

STATEMENT OF THE CASE

The plaintiffs/appellants filed this federal civil action on September 6, 2013. (Docket 1)[1]

The defendant moved to dismiss the action pursuant to FRCP 12(b)(6) – failure to state a claim upon which relief can be granted. (Docket 10, 11)

The plaintiffs/appellants thereafter filed their amended complaint. (Docket 14)

The defendant then filed a motion to dismiss the action pursuant to FRCP 12(b)(6) – failure to state a claim upon which relief can be granted (Docket 18), but withdrew it (Docket 19).

The defendant re-filed its motion to dismiss the action pursuant to FRCP 12(b)(6) – failure to state a claim upon which relief can be granted. (Docket 24).

Following briefing and argument, the court granted defendant's motion to dismiss with leave to amend. (Docket 32)

The plaintiffs/appellants then filed their Second Amended Complaint (Docket 40) (ER2:108-119)

The defendant filed a second motion to dismiss the action pursuant to FRCP 12(b)(6) – failure to state a claim upon which relief can be granted. (Docket 43).

[1] References to Docket entries refer to the Trial Court Docket Sheet (ER2:120-126)

The parties then participated in an unsuccessful mediation proceeding. (Docket 44).

After briefing and argument, the court granted defendant's motion to dismiss the entire action without leave to amend. (Docket 50) (ER:1:1).

This appeal followed (Docket 54) (ER:2:26)

IV.

FACTS PLEADED IN SECOND AMENDED COMPLAINT

For the purpose of ruling on a motion to dismiss under FRCP 12(b)(6), the trial court must regard and treat factual allegations pleaded as true. The following facts are pleaded in the SAC and, for the purpose of this appeal, are to be regarded as true. *Bell Atlantic Corp. v. Twombly* (2007) 550 US 544, 556. (ER1:5)

At the time of his birth in 2000, CC was diagnosed with a life-threatening cardiac defect which required immediate surgical intervention to save his life. (ER2:109)

As part of the newborn CC's medical treatments, a genetic screening was performed. That genetic screening revealed CC carried certain genetic "markers" associated persons who may or may not develop cystic fibrosis, a life-threatening childhood illness. A further diagnostic tests were performed on CC which revealed he did not have cystic fibrosis. (ER2:109)

Although CC's medical condition has been carefully monitored since birth and the emergency cardiac surgery which saved his life, CC has never had cystic fibrosis and, in all respects, is a healthy teenager. (ER2:110)

Prior to becoming permanent residents of Palo Alto, the Chadams resided in Singapore where James Chadam worked as a consultant for an American global consulting firm. (ER2:110)

In July of 2012, the Chadam family moved to a permanent residence in Palo Alto. A primary motivating factor for the Chadams in choosing Palo Alto as a place to reside was the reputed quality of its public education system. (ER2:110)

The nearest middle school to the Chadams' new residence was the Jordan Middle School, owned and operated by the defendant/appellee Palo Alto Unified School District ("PAUSD"). (ER2:110)

On or about July 22, 2012, Mrs. Chadam completed and delivered a form entitled "Student Registration" to defendant intending to enroll her sons, AC and CC at the Jordan Middle School. (ER2:110)

On or about August 1, 2012, MRS. CHADAM provided a "Report of Health Examination For School Entry" to the PAUSD regarding CC. The contents of that document contained private, personal and privileged medical information of CC. (ER2:110)

On or about August 2, 2012, the Chadams received a "Secondary Admit Slip" from the PAUSD stating that their sons, AC and CC, had been assigned to attend the Jordan Middle School. (ER2:110)

Between August 2, 2012 and August 16, 2012, the Chadams provided additional medical information and forms to the PAUSD regarding CC. This additional information was also private, personal and privileged medical information of CC. (ER2:110)

On August 16, 2012, AC and CC began attending the Jordan Middle School. (ER2:110)

On August 22, 2012, one of CC's teachers, an employee of PAUSD, contacted Mr. and Mrs. Chadam to make an inquiry regarding CC's medical condition. (ER2:110)

On or about September 11, 2012, one of CC's teachers, while conducting a parent-teacher conference with the parents of other student(s) at the Jordan Middle School ("Mr. and Mrs. X"), disclosed private, personal and privileged medical information regarding CC to Mr. and Mrs. X, specifically that CC had the disease of cystic fibrosis (ER2:111, and Footnote 1 to ER2:111).

Later the same day, September 11, 2012, the Chadams were asked to attend a meeting with Gregory Barnes, Jordan Middle School Principal, Linda Lenoir,

PAUSD District Nurse and Grant Althouse, Vice-Principal and Administrator of the Sixth Grade. The Chadams attended this emergency meeting. (ER2:111)

At this meeting, Mr. and Mrs. Chadam were informed for the first time by the PAUSD that other students at the Jordan Middle School (eventually disclosed to be the children of Mr. and Mrs. X) had active cystic fibrosis and that these "other parents" "had discovered CC's condition." (ER2:111)

During this meeting, the Chadams informed the PAUSD CC did *not* have cystic fibrosis and that he posed no health threat to any other person. (ER2:111)

During this meeting, Gregory Barnes stated to the Chadams, "We are learning as we go here." (ER2:111)

Later the same evening, Mrs. Chadam received a telephone call from Mrs. X. During this telephone call, Mrs. X aggressively interrogated, Mrs. Chadam about CC's medical history and condition, whether CC received any "home treatments," and whether CC had ever been hospitalized. Unrelated and irrelevant to any medical issue, Mrs. X also demanded to know for how long the Chadam family intended to reside in Palo Alto and whether the Chadams owned or rented their home. (ER2:111-112)

On or about September 13, 2012, Carlos Milla. MD, authored a letter to the PAUSD discussing the alleged medical issues caused by the presence of CC at the Jordan Middle School. Dr. Milla's letter states, "I have been asked to comment. . ."

Dr. Milla's letter recommends CC be removed from Jordan Middle School for the safety of the children of Mr. and Mrs. X. (ER2:112)

On September 14, 2012, Mrs. Chadam was informed by email that two employees of PAUSD, Sarah Zabel and Sarah Pierce, had been "talking to" about CC's private health issues and had inquired of CC whether he had been discussing health issues with his own parents, also private information. These discussions were held with CC by PAUSD employees without the knowledge and/or consent of either of CC's parents. (ER2:112)

On September 14, 2012, Mrs. Chadam had a conversation with Gregory Barnes during which Mrs. Chadam informed Barnes that she did not wish to have her son transferred out of Jordan Middle School. In this conversation, Barnes informed Mrs. Chadam that Mr. and Mrs. X had withdrawn their children from attending Jordan Middle School so there was no need "to make any changes" at the present time. (ER2:112)

From September 14 to September 17, 2012, there was a continuous stream of email communication between the X family and representatives of defendant PAUSD, including a statement from one of the X parents that "the ideal solution" was for CC to be removed from Jordan Middle School. Mr. And Mrs. X further complained that the privacy of their children was being compromised but expressed no concern for the privacy of CC, AC or Mr. and Chadam. (ER2:112)

On September 16, 2012, defendant PAUSD received an unsigned letter reciting the alleged harmful effects of individuals with cystic fibrosis have on each other. (ER2:112)

On September 16, 2012, Mrs. X sent a 10-page letter to "Linda" [Lenoir, PAUSD Nurse]" requesting that CC be removed from the Jordan Middle School so that her children can resume attending school. (ER2:113)

On September 17, 2012, defendant PAUSD received another letter from Dr. Carlos Milla, MD in which Dr. Milla reversed his recommendation that children with cystic fibrosis from "should not" be in school together. He now recommended that children with cystic fibrosis "must not be" in the same classroom or school. No explanation was provided by Dr. Milla regarding why he changed his opinion. (ER2:113)

On September 17, 2012, Gregory Barnes telephoned the Chadams and stated that based upon CC's private, personal and confidential medical information, and the demands of Mr. And Mrs. X, the PAUSD intended to transfer CC out of the Jordan Middle School to Terman Middle School. A school 3.5 miles from the Chadams' home (ER2:113)

On September 17, 2012, The Chadams sent an email letter to Charles Young, Assistant Superintendent of the PAUSD, demanding to be provided the documentation and evidence upon which the PAUSD based its decision to transfer

CC out of the Jordan Middle School. The same demand was repeated to Mr. Young in person the following morning. (ER2:113)

On or about September 20, 2012, defendant PAUSD was offered a letter from John Morton, MD, CC's last physician before the CHADAM family moved to Palo Alto. (ER2:62)

Dr. Morton states,

> "It is unfortunate this boy has been given the label of CF and is now recognized that there are probably many of these children in the community who will be diagnosed as CF carriers but have a second minor gene lurking in the background, but no disease.
>
> "I have seen this boy for the last 5 years on a regular basis to check that there is no sign of CF disease and also that there has been no progression of the symptoms and during that time he has shown no signs of progression. He has a slight asthma tendency and also some nasal allergy but nothing else evident related to CF. For this reason, I don't think that this boy is any risk whatsoever to other children with CF even if they were using the same classroom." (ER2:113)

On September 20, 2012, the Chadams met with Charles Young and Linda Lenoir. During this meeting, Mrs. Chadam s reiterated that CC did *not* have and had never had cystic fibrosis. When asked the medical basis for PAUSD's decision to transfer CC out of Jordan Middle School, Young said it was based on a letter "from a top Stanford doctor," but refused to disclose the identity of the "top Stanford doctor." When the Chadams pressed him further for the name, Young suggested making a formal "Freedom of Information" request to obtain the name of the doctor but he continued to refuse to identify the "top Stanford doctor." (ER2:114)

On September 24, 2012, Mrs. Chadam again met with Charles Young and offered to provide additional medical evidence that CC was not a health risk to anyone. (ER2:114)

On September 28, 2012, Charles Young informed Mrs. Chadam by telephone that the PAUSD had formally decided to transfer CC out of Jordan Middle School. (ER2:114)

On September 28, 2012, Charles Young wrote the Chadams formally announcing CC's involuntary transfer of schools. (ER2:114)

On October 10, 2012, while CC was attending Jordan Middle school and in the middle of a class. Jordan Middle School Principal Gregory Barnes entered the classroom, whispered to the teacher and then left. Then, in the presence of his friends and classmates, the teacher removed CC from the classroom to the hallway and informed CC that it was his last day of school at Jordan. The teacher asked CC if he wanted to go back into the classroom to say goodbye to his friends. (ER2:114) Extremely distraught, CC declined and walked home. (ER2:114)

On October 12, 2012, The Chadams brought a civil proceeding against PAUSD in the Santa Clara Superior Court, Case No. 1-12-CV-233921. That civil action sought solely injunctive relief against the PAUSD enjoining it from transferring CC out of Jordan Middle School. (ER2:114)

Prior to the time the California Superior Court action for injunctive relief was heard on its merits, the parties settled the matter and CC returned to attend Jordan Middle School. (ER2:114)

In addition to the foregoing unlawful disclosure of CC's private, personal, privileged medical information on or about September 11, 2012, Plaintiffs are informed and believe and thereupon allege that the PAUSD further provided additional private, personal and medical information regarding CC to Mr. and Mrs. X with no prior authorization, permission, notice or knowledge of any either of the Chadams. (ER2:115)

The civil action sought no monetary damages and has been since dismissed (Request for Judicial Notice; ER2:50-53)

V.

SUMMARY OF ARGUMENT

Plaintiffs/Appellants contend as follows:

(1) By dismissing the Chadams' Second Amended Complaint without leave to amend, the trial erred and misconstrued the purpose, intent and legal application of the Americans With Disabilities Act and the Federal Rehabilitation Act;

(2) By dismissing the Chadams' Second Amended Complaint without leave to amend, the trial court erred by inappropriately making express and implicit

factual finding, determinations and conclusions which are the sole and exclusive providence of a jury to decide;

(3) The trial court erred by failing to state a valid, rational or reasonable basis under the law for dismissing the Chadams' causes of action for violation of their son's (CC's) constitutional rights of privacy and Section 1983 claims with prejudice.

VI.

ARGUMENT

A. Introduction to Argument

This case raises critical legal, medical, ethical and moral issues of apparent first impression. With the accelerating advance of genetic technology and genetic information increasingly available to greater sectors of the public, legal disputes over access to and use of genetic information are inevitable. While this case involves the alleged wrongful disclosure and use of genetic information by a public school district, it raises broader issues of who gets to know private genetic information and what uses can be made with that knowledge. Should employers, insurance companies or prospective spouses know genetic information regarding employees, insureds or proposed marital partners?

The legal question to be answered by this Court in this case will invariably suggest an answer to all those questions. Specifically, this Court will decide whether

a person perceived or regarded as disabled solely on account of him or her possessing certain genetic markers falls within the class of persons protected by the American with Disabilities Act ("ADA") and the Federal Rehabilitation Act.

B. Standard of Review

In ruling on an appeal of the granting of a motion to dismiss by a trial court, the standard of review is a *de novo* analysis of the issue by the appellate court. *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1127 (9th Cir. 2012); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 526 (9th Cir. 2008).

C. Legal Standard Governing 12(b)(6) Motions

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). This language imposes "two easy-to-clear hurdles." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) (quoting *E.E.O.C. v. Concentra Health Services*, Inc., 496 F.3d 773, 776 (7th Cir. 2007)). Dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In considering whether the complaint sufficiently states a claim, the court must take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.

1986). Further, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Id*. It is not, however, a "probability requirement." *Id*. Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A complaint states a plausible claim for relief if its "factual content ... allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 594 (8th Cir. 2009) (citations omitted).

The Chadams' SAC dismissed by the trial court easily exceeds the minimum criteria required to survive defendant's FRCP 12(b)(6) motion to dismiss. The trial court's dismissal of the case with prejudice was plain error,

D. The Scope of This Appeal

While the trial court's Order discusses all the Chadam's causes of action pleaded in their SAC, it declines to rule on multiple grounds asserted by in the

District's 12(b)(6) motion. The trial court's dismissal of the Chadam's SAC rests upon the following rulings, all of which the Chadams contend are error:

(1) The PAUSD's conduct attempting to involuntarily remove CC from his school over the strident protests and opposition of his parents and based upon mistaken and erroneous medical facts did not violate the ADA because the PAUSD acted in what it claims was its good faith belief in the truth of a letter from a "top Stanford doctor" who had never seen CC or spoken to his parents. (ER1:15-16) [The Chadams] "have not alleged facts sufficient to support the accusation that PAUSD excluded C.C. from, or denied him access to, any service, program or activity because it regarded him as disabled, rather than because it believed, based on medical evidence, that his condition was "a physical impairment" which posed a health risk to other students" thus requiring the Chadams' ADA Title II cause of action to be dismissed with prejudice (ER1:15-16);

(2) The Chadams' assertion of a constitutional right of privacy under the First Amendment fails because it was not asserted pursuant to 42 U.S.C. §1983 (ER1:21);

(3) The Chadams failed to comply with the California Tort Claims Act (ER1:23, 25);

E. CC Was Perceived or Regarded by PAUSD As Disabled and Was Within The Class of Persons Protected By The ADA and Federal Rehabilitation Act.

The trial court's reasoning is internally inconsistent and has been expressly disapproved and rejected by the Supreme Court. Reduced to its fundamental holding, the trial court in this case rules that a person against whom adverse actions are taken solely on account of that person being a carrier of certain genetic markers is not within the class of disabled persons or persons perceived or regarded as disabled who are protected by Title II of the ADA and Section 504 of the Federal Rehabilitation Act ("FRA"). In dismissing the Chadams' claims under Title II of the ADA and Section 504 of the Rehabilitation Act, the trial court draws an impermissible distinction between (a) whether CC was *perceived or regarded by the PAUSD as being disabled* (an issue on which the trial court did not rule) and (b) *whether CC had "a physical impairment" which rendered him a danger to other students in the district* (the basis for the dismissal) but is not disabled under the ADA and FRA.

But that is a distinction without a difference and constitutes a judicial error as a basis for dismissing the Chadams' ADA Title II and Section 504 claims. If the PAUSD's action were based upon its belief CC had a physical impairment which made him a danger to other students, that "physical impairment" could only be the presence of certain genetic markers carried by CC and nothing else.

The trial court's reasoning in its Order on this issue has been directly rejected by the United States Supreme Court:

> "It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment **Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others**." *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). [emphasis added]

In this instance, the PAUSD engaged in exactly the manner of conduct expressly prohibited by the Supreme Court. With no credible medical evidence or basis, PAUSD asserts it *perceived* CC to be a danger to other students and used that claimed perception as a pretext to try to remove him from his school without notice, forcing him to abandon his friends, teachers and stable educational environment with no explanation.

The PAUSD cannot have it both ways, *i.e.*, first claim CC was denied access to his school, peers, teachers and education due to his genetic makeup and dangerous condition to others and - at the same time - claim CC does not meet the disability criteria required to be "qualified individual" under the ADA/Section 504. The PAUSD believed CC had *some form* of cystic fibrosis-related illness or impairment. This perception motivated the defendant to disregard CC's constitutional right to privacy, deprive CC of his fundamental right to an education and severely impair a

major life function, CC's opportunity and ability to learn and receive public education. The trial court's illogical and conflicted reasoning is contrary to established law and should be rejected by this Court.

F. The Trial's Court's Order Improperly Makes Factual Judgments at the Pleading Stage Exclusively Reserved For a Jury or Trier of Fact.

In ruling on PAUSD's 12(b)(6) motion, the trial court makes improper multiple determination of factual issues which must be made by a jury or trier of fact - not by the court at the initial pleading stage. The trial court states, "The question is whether PAUSD treated C.C. as if he had a physical impairment." (ER1:12) But that is an issue to be determined by a jury, not by the court in a 12(b)(6) motion. In granting the motion to dismiss, the trial court improperly makes further multiple factual determinations itself. The trial court's rulings deprived the Chadams of their right and opportunity to have a jury make the following factual determinations, all of which relate directly to the trial court's "physical impairment" analysis and conclusion:

(1) Aside from "a letter from a top Stanford doctor," exactly what reliable scientific and medical information did the PAUSD have in its possession upon which to base its attempt to remove CC from his school?

(2) How much influence and pressure was put upon the PAUSD by Mr. and Mrs. X to cause the PAUSD to try to remove CC from the Jordan Middle School and to what degree did that influence and pressure result in the PAUSD's actions as

opposed to a genuine concern for the physical safety of others? In other words, was the PAUSD's stated reasons for its actions *a pretext* in order to pander to and comply with the wishes and demands of Mr. and Mrs. X?

(3) Prior to removing CC from the Jordan Middle School, what medical and scientific investigation and due diligence were first conducted by the PAUSD to ascertain whether a person with CC's genetic markers actually posed any danger to any other student or staff at the Jordan Middle School, *i.e.*, what efforts were made to discover the truth of the statements made by the "top Stanford doctor" in his letter.

(4) What were the facts and circumstances surrounding the writing of the letter by "a top Stanford doctor?" Who requested the letter be written? Did the "top Stanford doctor" ever see or examine CC or even speak to his parents prior to sending his letter? How did the letter come to be received by the PAUSD?

(5) How did the classroom teacher who disclosed CC's private and privileged genetic information come to have that knowledge? What was her motive or intent for disclosing that information to Mr. and Mrs. X?

(6) Was it *medically* necessary to embarrass and humiliate CC in front of his classmates by removing him from a class in session?

In order to reach its rulings dismissing this case with prejudice the trial court has treated the PAUSD's FRCP 12(b)(6) motion as a motion for summary judgment. But, instead of construing the factual issues in the light most favorable to the

plaintiffs as is required in adjudicating a motion for summary judgment, the trial court does exactly the opposite and implicitly determines them all in favor of the PAUSD. A reasonable jury could reach the opposite conclusion on each issue. By doing so the trial erred by exceeding its role in adjudicating a FRCP 12(b)(6) motion and the Order dismissing the case must therefore be reversed.

G. Plaintiffs Properly Assert First Amendment and Section 1983 Claims

The fundamental right of privacy flowing from the Constitution is beyond dispute. *Griswold v Connecticut*, 381 U.S. 479 (1965), *Roe v Wade*, 410 U.S. 113 (1973). CC's First Amendment right to personal privacy is unquestionably a fundamental right by any measure. The District's wrongful disclosure of CC's private medical information violated that fundamental right and was the sole and direct factual cause of the PASUD's immediately subsequent violations of the ADA and Section 504 as alleged in the SAC. Finally, it is not the law that an aggrieved plaintiff be required to sacrifice a constitutional-level claim of a privacy violation on an alleged non-substantive procedural defect.

In dismissing the Chadams' claim for a violation of CC's constitutional right of privacy under the First Amendment, the trial court previously held the Chadams' only remedy was to sue individuals, not the PASUD, because the PASUD is not a person for Section 1983 purposes. That ruling is reiterated again in the Order under appeal.

Section 1983 embraces the actions of "persons" acting under the color of state law. "It is beyond dispute that a local governmental unit or municipality can be sued as a "person" under section 1983." *Hervey v. Estes* 65 F.3d 784, 791 (9th Cir. 1995) (citing *Monell v. Department of Social Servs.,* 436 U.S. 658, 690 (1978)).

To establish liability, a plaintiff must show:

1. he was deprived of a constitutional right;
2. the defendant had a policy or custom;
3. the policy or custom amounted to "deliberate indifference" to plaintiffs' constitutional right; and
4. the policy was the "moving force" behind the constitutional violation.

Burke v. County of Alameda, 586 F.3d 725, 734 (9th Cir 2001) (citing *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.,* 237 F.3d 1101, 1108 (9th Cir. 2001)).

Under prevailing Ninth Circuit law, the trial court's virtually unexplained summary dismissal of the Chadams' First Amendment and Section 1983 claims must be reversed. In this context it is critical to recall that *Griswald v Connecticut* and *Roe v Wade, supra* involve the privacy of **medical** information, as is CC's private information in this case. Here, CC was deprived of his constitutional rights to both personal privacy and a public education by agents of the PASUD who knew revealing CC's private medical information to hostile and unauthorized third persons

and transferring him to a new school distant his home, separating him from his brother and dangerous for him to access would deprive him of those rights.

Moreover, no public policy or purpose was served by CC's classroom teacher by gratuitously and inexplicably disclosing CC's personal and private genetic information to Mr. and Mrs. X; a legitimate inquiry into the motive for that disclosure would be a relevant and appropriate topic to be made in the trial court.

The dismissal of the First Amendment and Section 1983 claims must be reversed by this Court.

H. Plaintiffs Satisfied The California Tort Claims Act

The trial court rules that because plaintiffs did not file a California Government Code Sec 900 *et seq*. tort claim against the District, they are barred from their pendant state claims for negligence. Section 900 requires tort claimants provide certain specified kinds of information to allow a public entity to accept or reject a claim prior to a civil court action being filed. However, Section 900 does not require the information be provided in any particular form or format.

It is profoundly disingenuous for the PAUSD to feign ignorance of the facts underlying the Chadams' negligence claim. The information required to be provided by Section 900 *et seq*. was provided to and well known by the defendant prior to the commencement of this lawsuit in the form of the detailed pleadings, allegations, documents, declarations and exhibits filed in the now-dismissed state court

injunctive relief action. The defendant's assertion that plaintiffs failed to comply with Section 900 *et seq.* is a pure form over substance argument. The defendant has been on notice of the facts and legal claims of the plaintiffs since the filing of the Superior Court case.

The district court's Order dismissing the Chadams' negligence claim on the ground of noncompliance with the California Tort Claims Act essentially holds the Chadams provided all the required information to the PAUSD to assess the claim but, because they did so on the wrong kind of form or paper, their case must be dismissed with prejudice.

Plaintiffs have met the substantive requirements of Section 900 *et seq.* and the trial court's order of dismissal based on non-compliance should be reversed.

I. Strong Public Policy Compels a Reversal of the Trial Court's Order

The trial court order suggests that, under the factual circumstances presented in this case, a school district's real or imagined concern over potential safety issues overrides any countervailing constitutional consideration to be given to an individual's First Amendment rights to the privacy of his medical and other personal information. That is a dangerous holding against which a strong contrary public policy exists.

It is beyond dispute that genetic research is critical to the continued discovery of the causes and treatment of virtually every human disease and ailment. For that

research to be possible, the public must have confidence in the privacy and sanctity of the genetic information collected from it. Every legal exception to that privacy lessens the public's confidence and has a chilling effect on the public's willingness to participate in genetic research or even to allow themselves to be genetically screened when it is deemed medically necessary. Therefore, such exceptions to the privacy of genetic information must be intensely scrutinized and sparingly allowed by the courts.

In this case, the PAUSD took action against CC because it came to know genetic information about CC and allowed it to be improperly disclosed. But the truth is that no one knows what percentage of CC's classmates or children at the Jordan Middle School carry the same genetic markers as CC which prompted the PAUSD to act. Therefore, having been genetically screened in 2000 (a rare event in that year) caused CC to be the target of stigmatization and being removed from his school. Had there been no genetic screening of CC, this case would not exist.

Although theoretically medically relevant, it is unreasonable and presently illegal for a school district to require all its students to be genetically screened so the district can determine who in the student population poses a danger to other students, as it wrongfully concluded in CC's case. But the converse also logically follows: a student who *has been* genetically screened should not be penalized for having had the screening.

Affirming the district court's ruling in this case will open a wide gap in the wall of privacy protection the law presently affords personal genetic information. It will implicitly permit unqualified non-medical persons such as school districts, insurance companies and employers to base life-altering decisions on private genetic information. It will cause the public to hesitate or refuse to get genetically screened when to do so may be in their best interests or would assist medical research. The negative ripple effect of the trial court's holding below is almost infinite in the possibilities of its adverse consequences and variations.

Aside from the legal reasons asserted, *supra,* this Court should reverse the trial court's Order of dismissal as a matter of public policy.

VII.

CONCLUSIONS AND REQUESTS FOR RELIEF

As is established above in this Opening Brief, the plaintiff/appellants, James Chadam and Jennifer Chadam, on behalf of themselves and on behalf of their minor children AC and CC, submit that the trial court engaged in reversible judicial error by dismissing their Second Amended Complaint in all of the following respects:

(1) The trial court erred by misconstruing the purpose, intent and legal application of the ADA and FRA under established Supreme Court law;

(2) The trial court erred by making impermissible express and implicit factual determinations and conclusions which are the sole and exclusive providence

of a jury to decide and upon which the trial court bases its dismissal of the Second Amended Complaint;

(3) The trial court erred by failing to state any rational basis or reason for dismissing the Chadams' causes of action for violation of their son's (CC's) constitutional rights of privacy and Section 1983 claims.

(4) Strong public policy reasons compel the reversal of the trial court's dismissal of the Second Amended Complaint.

The plaintiff/appellants, James Chadam and Jennifer Chadam, therefore request this Court grant them the following relief:

(1) Reverse the trial court's Order dismissing their Second Amended Complaint;

(2) Order the remand of this action to the trial court for further proceedings under the Second Amended Complaint;

(3) Award plaintiff/appellants their reasonable attorney fees and costs incurred in this appeal; and

(4) Order such other and further relief as the Court may need fair, just and equitable.

Dated: January 14, 2016

Respectfully submitted,

THE JAFFE LAW FIRM

By: /s/ Stephen R. Jaffe
Stephen R. Jaffe

Attorney for Appellants,
JAMES CHADAM and
JENNIFER CHADAM

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 5,820 words.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS, INC.