CPS and APS Caseworker Liability
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NYPWA Winter Conference 2020

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               General Sections of the Social Services Law:
SSL 473(1)
SSL 423-a
SSL 424.

Other caseworker duties that are found in other sections of the statute:

Example: Social Services Law §473-c (Access Order)

1. A social services official may apply to the supreme court or county court for an order to gain access to a person to assess whether such person is in need of protective services for adults in accordance with the provisions of section four hundred seventy-three of this article when such official, having reasonable cause to believe that such person may be in need of protective services, is refused access by such person or another individual. A social services official who is refused access shall assess, in consultation with a person in a supervisory role, whether or not it is appropriate to apply for an order to gain access to such person. Such assessment must be made as soon as necessary under the circumstances, but no later than twenty-four hours after the investigating official is refused access. The determination of whether or not to apply for an order to gain access and the reasons therefor shall be documented in the investigation file.

ii. Regulations

APS:

18 NYCRR 457.1:

(d) Services.

PSA services are limited as appropriate to:

(1) identifying such adults who need assistance or who have no one willing and able to assist them responsibly;

(2) providing prompt response and investigation upon request of adults at risk or other persons acting on their behalf. At the time of referral, the local district shall make a determination as to whether a life-threatening situation exists. If a situation is designated as life-threatening, the district shall commence an investigation as soon as possible but not later than 24 hours after receipt of the referral. For potential PSA cases not designated as life-threatening situations, the district shall commence an investigation within 72 hours of receipt of the referral and shall make a visit to the client within three working days of the referral. For the purposes of this Part, a referral is defined
as any written or verbal information provided to a district in which a specific person is identified as apparently in need of PSA, or any verbal or written information provided to a district on behalf of an adult for whom the district determines that a PSA investigation and assessment is necessary;

(3) assessing the individual's situation and service needs;

18 NYCRR 457.2 PSA client case record

18 NYCRR 457.4 Staffing standards

18 NYCRR 457.5 Duties and responsibilities

18 NYCRR 457.6 Serving involuntary clients

18 NYCRR 457.11 Access Orders

CPS:

18 NYCRR 432.2 Child protective service: responsibilities and organization

18 NYCRR 432.3 Child protective service: duties concerning reports of abuse or maltreatment

18 NYCRR 432.6 Requirements for written notification

18 NYCRR 432.13 Family assessment response

All of 18 NYCRR 428, which pertains to case records, including 18 NYCRR 428.3 Uniform case record requirements.

iii. State agency directives- Administrative Directives (ADMs), and Informational letters (INFs)
Administrative Directives (ADM) are external policy statements designed to advise local service districts and voluntary agencies of policy and procedure which must be followed and require specific action.

Informational Letters (INF) are external policy statements that clarify or amplify existing procedures. They may provide general educational information, transmit a new brochure, distribute a revised list of contacts, or announce newly enacted Federal or State legislation.

These are shared with local districts and appropriate voluntary agencies.

Local Commissioners Memorandums (LCM) are external policy releases that transmit information to the local social service districts commissioners on specific topics. An LCM generally affects all local social services districts statewide. Information transmitted by an LCM may include notification of funding, statewide audit results, or instructions pertaining to existing program or administrative procedures.

iv. Experience

d) Okay, so I have done everything that you suggested above, and I diligently and competently investigated all of my referrals. Can I still get sued? If I do get sued, what do I do then?

i. Defense and indemnification

e) If I discharged my duties, and didn’t act outside the scope of my employment, and wasn’t grossly negligent and didn’t commit a crime, is there any special legal protection for me?

i. For APS

Social Services Law §473(3)

3. Any social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willful act or gross negligence of such official or his designee.

See also 18 NYCRR 457.9(a)
ii. For CPS:

Social Services Law §419

Any person, official, or institution participating in good faith in the providing of a service pursuant to section four hundred twenty-four of this title, the making of a report, the taking of photographs, the removal or keeping of a child pursuant to this title, or the disclosure of child protective services information in compliance with sections twenty, four hundred twenty-two and four hundred twenty-two-a of this chapter shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions. For the purpose of any proceeding, civil or criminal, the good faith of any such person, official, or institution required to report cases of child abuse or maltreatment or providing a service pursuant to section four hundred twenty-four or the disclosure of child protective services information in compliance with sections twenty, four hundred twenty-two and four hundred twenty-two-a of this chapter shall be presumed, provided such person, official or institution was acting in discharge of their duties and within the scope of their employment, and that such liability did not result from the willful misconduct or gross negligence of such person, official or institution.

iii. Common law immunity for both caseworkers and others.

B. Municipal liability based upon actions, or failure to act of the caseworker
   a) Vicarious liability-


C. Cases:

   Cornejo v Bell, 592 F3d 121 (2nd Cir., 2010)

   Mosey v Erie County, 117 A.D.3d 1381 (4th Dept., 2014)

   Dunlop v County of Suffolk, 148 AD3d 993 (2nd Dept., 2017)


   Brown v City of New York, 22 Misc3d 893 (Supreme Court, New York County, 2008)
D. Other Caseworker Liability Issues

1. Violations of client confidentiality

APS and CPS client case files are confidential under the Social Services Law. The unauthorized disclosure of client information may result in civil and possibly criminal liability. Caseworkers also have access to databases which contain confidential information. Unauthorized access of those databases, or unauthorized disclosure of confidential information contained in those databases, may result in civil or criminal liability, as well as employer discipline.

a. Client records in case files:

Social Services Law §473-e Confidentiality of Protective Services for Adults’ Records

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) “Subject of a report” means a person who is the subject of a referral or an application for protective services for adults, or who is receiving or has received protective services for adults from a social services district.

(b) “Authorized representative of a subject of a report” means (i) a person named in writing by a subject to be a subject’s representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney in fact and such document has not been
revoked in accordance with applicable law; (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or (iii) legal counsel for the subject.

2. Reports made pursuant to this article, as well as any other information obtained, including but not limited to, the names of referral sources, written reports or photographs taken concerning such reports in the possession of the department or a social services district, shall be confidential and, except to persons, officers and agencies enumerated in paragraphs (a) through (g) of this subdivision, shall only be released with the written permission of the person who is the subject of the report, or the subject’s authorized representative, except to the extent that there is a basis for non-disclosure of such information pursuant to subdivision three of this section. Such reports and information may be made available to:

(a) any person who is the subject of the report or such person’s authorized representative;

(b) a provider of services to a current or former protective services for adults client, where a social services official, or his or her designee determined that such information is necessary to determine the need for or to provide or to arrange for the provision of such services;

(c) a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action or the determination of an issue before the court;

(d) a grand jury upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

(e) a district attorney, an assistant district attorney or investigator employed in the office of a district attorney, a member of the division of state police, or a police officer employed by a city, county, town or village police department or by a county sheriff when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person, that there is reasonable cause to believe that the criminal investigation or criminal prosecution involves or otherwise affects a person who is the subject of a report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution;

(f) a person named as a court-appointed evaluator or guardian in accordance with article eighty-one of the mental hygiene law, or a
person named as a guardian for the mentally retarded in accordance with article seventeen-A of the surrogate’s court procedure act; or

(g) any person considered entitled to such record in accordance with applicable law.

3. The commissioner or a social services official may withhold, in whole or in part, the release of any information in their possession which he or she is otherwise authorized to release pursuant to subdivision two of this section, if such official finds that release of such information would identify a person who made a referral or submitted an application on behalf of a person for protective services for adults, or who cooperated in a subsequent investigation and assessment conducted by a social services district to determine a person’s need for such services and the official reasonably finds that the release of such information will be detrimental to the safety or interests of such person.

4. Before releasing a record made pursuant to this article in the possession of the department or a social services district, the appropriate official must be satisfied that the confidential character of the information will be maintained in accordance with applicable law, and that the record will be used only for the purposes for which it was made available.

5. In addition to the requirements of this section, any release of confidential HIV related information, as defined in section twenty-seven hundred eighty of the public health law, shall comply with the requirements of article twenty-seven-F of the public health law.

6. When a record made under this article is subpoenaed or sought pursuant to notice to permit discovery a social services official may move to withdraw, quash, fix conditions or modify the subpoena, or to move for a protective order, as may be appropriate, in accordance with the applicable provisions of the criminal procedure law or the civil practice law and rules, to (a) delete the identity of any persons who made a referral or submitted an application for protective services for adults on behalf of an individual or who cooperated in a subsequent investigation and assessment of the individual’s needs for such services, or the agency, institution, organization, program or other entity when such persons are employed, or with which such persons are associated, (b) withhold records the disclosure of which is likely to be detrimental to the safety or interests of such persons, or (c) otherwise to object to release of all or a portion of the record on the basis that requested release of records is for a purpose not authorized under the law.
b. Databases:

There are a number of local district or State agency databases that you may have access to that contain confidential information. Among these are several that you may access in the course of your work, such as WMS and APS-Net. Others, such as CONNECTIONS, and the databases related to child support, may be restricted from your access.

OCFS memorandum dated May 12, 2012 that is entitled “Confidentiality and Access to and/or Release of Information From Confidential Databases.” This memo contains the following warning:

Please remember that access to data maintained in confidential databases including but not limited to CONNECTIONS, LTS, WMS, CRS, ASAP, APS-Net, CBVH CMS, Register of the Blind, JJIS, ICPC, OCS, SSA, any and all NYSAS databases, and the Putative Father Registry is strictly limited to authorized employees and legally designated agents for authorized purposes only. This means that if you access such a case or other personally identifiable data without having an official OCFS purpose, you may be subject to civil liability and/or criminal prosecution, or disciplinary action including termination.

Cases:

People v. O’Grady, 263 A.D.2d 616 (3rd Dept., 1999)

Penal Law §156.10 Computer trespass. A person is guilty of computer trespass when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and:

1. he or she does so with an intent to commit or attempt to commit or further the commission of any felony; or
2. he or she thereby knowingly gains access to computer material.

Computer trespass is a class E felony.

Doe v Guthrie Clinic, Ltd. 22 NY3d 480 (2013)- Agency liability for data breach

For OTDA related information and databases, see 18-LCM-10.
2. Contract law

a. Legal bailment - "safekeeping client valuables"

This could arise in a situation where a client asks you to hold onto their wallet, wedding ring, watch or other jewelry, or anything else of value. This is something may not contained within your duties or the scope of your employment.

Definitions of “Bailment”

1) the act of placing property in the custody and control of another, usually by agreement in which the holder (bailee) is responsible for the safekeeping and return of the property. Examples: bonds left with the bank, autos parked in a garage, animals lodged with a kennel, or a storage facility (as long as the goods can be moved and are under the control of the custodian). While most are "bailments for hire" in which the custodian (bailee) is paid, there is also "constructive bailment" when the circumstances create an obligation upon the custodian to protect the goods, and "gratuitous bailment" in which there is no payment, but the bailee is still responsible, such as when a finder of a lost diamond ring places it with a custodian pending finding the owner.

2) the goods themselves which are held by a bailee. Thus, the "bailor" (owner) leaves the "bailment" (goods) with the "bailee" (custodian), and the entire transaction is a "bailment."

Ellish v Airport Parking Co. of America, 42 AD2d 174, 178 (2nd Dept. 1973), affirmed 34 NY2d 882 (1974):

b. Contract management

i. Contracted services for clients

ii. Contracting out of duties

iii. Contract processes

E. What's next in liability cases?

F. Questions/comments/other confidentiality questions
SALLY CORNEJO, individually and on behalf of her infant child Kevin Salas, Plaintiff-Appellant, - against - WILLIAM BELL, individually and as Commissioner,

KATHLEEN CERRITO, individually and as caseworker, JANICE HOGGS, individually and as supervisor,

JOYCE DE NICHOLSON, individually and as manager,

EUGENE WEIXEL, individually and as caseworker,

RAMON VARGAS, individually and as supervisor, MAUREEN FLEMING, individually and as deputy director and City of New York, FREDDA MONN, individually and as supervising attorney, JODI KAPLAN, individually and as supervising attorney, DAWN SCHWARTZ, individually and as attorney SUSAN SCHENKEL SAVITT, and THE CITY OF NEW YORK, Defendants-Appellees.


Prior History: [**1] Appeal from the May 20, 2008 judgment of the United States District Court for the Eastern District of New York (Brian M. Cogan, Judge), granting summary judgment to defendants, in an action involving wrongful child removal, on the grounds of absolute immunity and qualified immunity under federal and state law. Although we disagree with the district court's conclusion that the caseworker defendants are entitled to absolute immunity under federal law, we agree that they are entitled to qualified immunity and that the rest of the district court's determinations are correct.


Disposition: AFFIRMED.

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Kristin M. Helmers, Jonathan L. Pines, City of New York Law Department, New York, New York, on the brief), for Defendants-Appellees.
Judges: Before: MINER and CABRANES, Circuit Judges, and RAKOFF, District Judge. ¹

Opinion by: Jed S. Rakoff

Opinion

[*124] RAKOFF, District Judge.

For centuries, Anglo-American law has protected public officials [**2] against claims for damages arising from actions taken in the course of duty. Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." Id. In the case of legislators, judges, and certain executive officials such as prosecutors, the protection usually takes the form of absolute immunity from liability for damages. Id. at 807. In the case of most executive employees, however, the protection takes the form of "qualified immunity," i.e., immunity from liability if the employee was acting in subjective and objective good faith. Id. at 807, 815. The instant case chiefly concerns what kind of immunity attaches to actions taken by two categories of New York employees -- caseworkers and lawyers -- involved in the inherently difficult determination of whether to seek removal of a child from the custody of the child's parents on the ground of child abuse.

BACKGROUND

Plaintiff-appellant Sally Cornejo commenced these consolidated actions on behalf of herself and her infant child, Kevin Salas, alleging violations of federal and state [**3] law arising from actions taken by the employees of the New York City Administration [*125] for Children's Services ("ACS") in connection with the investigation into the death of Cornejo's other infant son, Kenny, and the resulting Family Court proceedings. The defendants-appellees, in addition to the City of New York (named only derivatively), are current or former ACS caseworkers and supervisors (collectively, the "caseworker defendants"), namely, caseworkers Kathleen Cerrito and Eugene Weixel, their supervisors Janice Hogg and Ramon Vargas, Hogg's manager Joyce De Nicholson, De Nicholson's director Maureen Fleming, and the then-acting ACS Commissioner William Bell; and current or former lawyers in ACS's Division of Legal Services (collectively, the "lawyer defendants"), namely, attorneys Dawn Schwartz and Susan Schenkel Savitt, and their supervisors Fredda Monn and Jodi Kaplan.

The pertinent facts, largely undisputed and, where disputed, taken most favorably to the plaintiff, are as follows:

On October 30, 2002, plaintiff Cornejo returned from work to find her fiance, Rothman Salas, holding their five-month-old son Kenny, who was not breathing. Kenny was subsequently brought to Schneider

[*4] Children's Hospital ("Hospital") at 11:30 PM. On the afternoon of October 31, 2002, a nonphysician Hospital employee reported (via telephone call) to the New York State Central Registry of Child Abuse and Maltreatment (the "SCR") that Kenny had suffered a broken rib, diffuse cerebral edema, and a heart attack as a result of being violently shaken by his father. The Oral Report Transmittal ("ORT") documenting the call stated that Cornejo was not present during the shaking incident. A second ORT made at approximately 5:30 PM stated that the rib fracture was several weeks old but that the parents had "failed to provide a plausible explanation" for how Kenny's rib was fractured.

¹ The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.
Upon receiving the two ORTs from SCR, ACS assigned caseworker Cerrito to investigate. Cerrito spoke by telephone with Dr. Debra Esernio-Jenssen, a pediatric specialist in charge of the Hospital's Child Protection Consulting Team, who reported that Kenny's immediate brain and heart injuries were most likely caused by Shaken Baby Syndrome. She also expressed her belief that Cornejo had "no part" in the immediate injuries, which "would happen immediately after violent shaking." Dr. Esernio-Jenssen further opined, however, **[5]** that the broken rib could have been the result of a prior shaking incident. Cerrito reported this back to Hogg, who concluded that not only Kenny but also Kevin, the couple's other, eighteen-month-old son, would have to be removed from the home pending further proceedings.

Cornejo was then informed that both her children would be removed from her custody until the ACS investigation was completed. Cerrito arranged for Kevin to be brought to the Hospital, where he was examined and then placed in temporary kinship foster care on an ex parte emergency basis. The medical examination of Kevin showed him to be healthy, with no signs of abuse. Kenny remained at the Hospital, where he died on November 7.

Meanwhile, on November 1, ACS instructed its attorneys to file petitions in Family Court accusing both parents of child abuse of both children. Kaplan filed the petitions, which were signed by Cerrito, that day. The petitions notably failed to differentiate between the two parents, Cornejo and Salas, stating that both parents had either "inflict[ed] or allow[ed] to be inflicted . . . physical injury" or "create[d] or allow[ed] to be created a substantial risk of physical injury" to the children. **[6]** [*126*] The petitions included the Hospital diagnosis of Shaken Baby Syndrome as the cause of Kenny's heart and brain injuries; as to the fractured rib, the petition alleged that the parents "failed to provide an explanation consistent with a non-abusive or nonintentional trauma." The Family Court remanded the children to ACS, and, as noted, Kenny died on November 7.

Despite an intervening attempt by Cornejo to regain custody of Kevin, this was where matters stood until, on November 14, a city medical examiner informed ACS attorney Schwartz of her preliminary findings: that she "could not say" that Kenny was a victim of Shaken Baby Syndrome and that the "fractured rib" was actually a congenital rib malformation. As a result, the very next day, ACS itself sought, by Order To Show Cause, to parole Kevin to his mother. Nevertheless, the Family Court judge, after hearing testimony from Dr. Esernio Jenssen in which she maintained her conclusion that Kenny had been shaken, declined to return Kevin to his mother's care. The judge also denied subsequent applications for parole or withdrawal of the petition against Cornejo, citing ongoing disparities in the medical evidence as to the cause of Kenny's **[7]** death.

In January 2003, the medical examiner issued a final autopsy report that concluded that the actual cause of Kenny's death was a "rare and natural heart defect" and that reaffirmed the medical examiner's previous finding that there was no rib fracture but only a congenital abnormality. The Hospital staff, however, maintained its view that Kenny had been shaken. 2

On February 4, ACS sought withdrawal of the petition against Cornejo, but the Family Court judge denied the request, making clear that she would not allow withdrawal of that petition unless ACS was also willing to withdraw the petition against Salas. Nevertheless, the judge did this time allow Kevin to be paroled to Cornejo's custody. On May 20, Cornejo moved for summary judgment and dismissal of the petition against

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2 Kenny's heart was subsequently sent to two pediatric cardiologists for further evaluation. Neither specialist ultimately found a definitive cause for the heart attack, but they concluded that it was more likely that Kenny's death resulted from a congenital defect than from shaking.
her. At a court appearance on June 10, Schwartz stated that "ACS has no basis to dispute the [medical examiner's] findings," [**8] and the Family Court judge allowed both petitions to be withdrawn.

Thereafter, on January 28, 2004, Cornejo commenced, on behalf of herself and her son Kevin, the first of the two civil rights proceedings now consolidated in this case, which, as now consolidated, allege due process and search and seizure violations under 42 U.S.C. § 1983, as well as state and federal claims for malicious prosecution (the latter again under § 1983) and a state law claim for breach of the duty of reasonable care.

On May 19, 2008, the district court granted summary judgment to the defendants. See Cornejo v. Bell, No. CV-04-0341, 2008 U.S. Dist. LEXIS 89597, 2008 WL 5743934 (E.D.N.Y. May 19, 2008). In addition to concluding that none of the plaintiff's rights was violated, the district court alternatively held that both sets of defendants were entitled to absolute immunity from all the § 1983 claims, and that, even failing this, they were entitled to qualified immunity. As to the malicious prosecution and breach of duty of reasonable care claims under New York state law, the district court concluded that the lawyer defendants were entitled to absolute immunity on both claims and that the caseworker defendants were entitled to absolute
immunity as to the malicious prosecution claim and qualified immunity as to the unreasonable care claim.

DISCUSSION

We review de novo a district court's decision granting summary judgment. See, e.g., Warren v. Keane, 196 F.3d 330, 332 (2d Cir. 1999). Since we conclude that some form of immunity attaches to each of the challenged actions of each of the defendants sufficient to preclude liability, we do not reach the district court's determination on the merits.

I. Federal Claims

The federal claims are all claims for damages brought under 42 U.S.C. § 1983, which provides "a method for vindicating federal rights elsewhere conferred," including under the Constitution. Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). The conduct at issue "must have been committed by a person acting under color of state law" and "must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994). There is no dispute here that the defendants were acting under the color of state law.

A. Absolute Immunity for Lawyer Defendants

As noted, the district court held, inter alia, that both the caseworker defendants and the lawyer defendants were entitled to absolute immunity precluding liability under § 1983. This was despite well-established precedent that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." DiBlasio v. Novello, 344 F.3d 292, 296 (2d Cir. 2003) (quoting Burns v. Reed, 500 U.S. 478, 486-87, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)) (internal quotation mark omitted). However, there are certain instances where executive employees, such as prosecutors, are entitled to absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 427, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). The real distinction between whether an executive employee is entitled to absolute or qualified immunity turns on the kind of function the employee is fulfilling in performing the acts complained of. This is what the Supreme Court has called a "functional" analysis.

Briscoe v. LaHue, 460 U.S. 325, 342, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Prosecutors are entitled to absolute immunity, for example, because their prosecutorial activities are "intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." Imbler, 424 U.S. at 430.

Mutatis mutandis, absolute immunity also extends to non-prosecutor officials when they are performing "functions analogous to those of a prosecutor." Butz v. Economou, 438 U.S. 478, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). While any analogy between two kinds of executive employees is never perfect, such reasoning by analogy is at the heart of judicial thinking: things that are essentially alike should be treated essentially the same. Thus, the Butz Court held that an agency official who decides to institute an administrative proceeding is entitled in such circumstances to absolute immunity, since that decision is "very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." Id. at 515.

This Court has previously extended absolute immunity to state and federal officials initiating noncriminal proceedings such as administrative proceedings and civil litigation. See Barrett v. United States, 798 F.2d 565, 572 (2d Cir. 1986) (citing Butz, 438 U.S. at 512-17). Of particular relevance here, we have held that
an attorney for a county Department of Social Services who "initiates and prosecutes child protective orders and represents the interests of the Department and the County in Family Court" is entitled to [*12] absolute immunity. 

**Walden v. Wishengrad, 745 F.2d 149, 152 (2d Cir. 1984).** The Wishengrad Court concluded that given "the importance of the

Department's [child protection] activities, the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims," the attorney must be accorded absolute immunity from § 1983 claims arising out of the performance of her duties, Id. We conclude that the lawyer defendants in the instant case were fulfilling similar functions, and that the district court thus properly extended to those defendants absolute immunity from the § 1983 claims.

**B. Qualified Immunity for Caseworker Defendants**

However, the district court was incorrect in its conclusion that the caseworker defendants were also entitled to absolute immunity. 3 Although they undoubtedly played a substantial role in providing the information that helped initiate many of the actions here complained of, the caseworker defendants essentially functioned much more like investigators than prosecutors. Even when they made the initial decision to remove Kevin from his mother's custody, their actions were the functional equivalent of police officers' making arrests [*13] in criminal cases, which are a classic example of actions entitled to qualified, rather than absolute immunity. See, e.g., Malley v. Briggs, 475 U.S. 335, 340-44, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The caseworker defendants here were performing what was "fundamentally a police function," Robison v. Via, 821 F.2d 913, 918 (2d Cir. 1987), and as such were entitled only to qualified immunity, Id. at 920.

Even qualified immunity, however, is sufficient to shield executive employees from civil liability under § 1983 if either "(1) their conduct 'did not violate clearly established rights of which a reasonable person would have known,' or (2) n' it was objectively reasonable to believe that [their] acts did not violate these clearly established rights." Young v. County of Fulton, 160 F.3d 899, 903 (2d Cir. 1998) (quoting Soares v. Connecticut, 8 F.3d 917, 920 (2d Cir. 1993) (alteration in original) [*4] (internal quotation marks omitted)); see also Harlow, 457 U.S. at 818. Of relevance here, we have previously noted that the second Young prong provides "substantial protection for caseworkers," Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999), which is necessary because "[p]rotective services caseworkers [must] choose between difficult alternatives," id. (second alteration in original) (quoting van Emrik v. Chemung County Dep't of Soc. Servs., 911 F.2d 863, 866 (2d Cir. 1990)). The Tenenbaum Court concluded that summary judgment should thus be "readily available to these caseworkers in proper cases under the qualified immunity doctrine." Id. at 597.

Here, the gist of plaintiff's § 1983 claims against the caseworker defendants for denial of due process and unlawful seizure in [*129] the immediate removal of Kevin from Cornejo's custody is that defendants had no reason to doubt her assertion that she was not at home when Kenny became ill on October 30, nor to infer that prior abuse had occurred, and so had no basis, even by inference, to remove Kevin and pursue Family Court actions against her. But undisputed facts establish that this is not a reasonable way to

3 The district court appears to have relied for its conclusion that the caseworker defendants were entitled to absolute immunity on a district court decision, Levine v. County of Westchester, 828 F. Supp. 238, 243-44 (S.D.N.Y. 1993), that was affirmed without opinion by this Court. Such an affirmation has no precedential weight.
characterize the situation that confronted the caseworkers when they took their actions. Specifically, it is undisputed that at the time of Kevin’s removal on October 31, ACS had received two ORTs reporting a medical opinion that Kenny had suffered violent shaking and a fractured rib. Although Salas, not Cornejo, was suspected of having shaken Kenny, the rib fracture was diagnosed as several weeks old. There was thus evidence of at least two instances of apparent abuse -- one occurring at an unknown time when Cornejo may have been present -- for which neither parent had an apparent explanation. Moreover, a caseworker had confirmed the substance of the ORTs with Dr. Esernio-Jenssen, and the injuries to Kenny were extremely serious. Under these circumstances, it was objectively reasonable for the caseworker defendants to believe that immediate temporary removal of both children without prior judicial authorization was proper. See id. at 593. The caseworker defendants are thus entitled to qualified immunity on the due process and unlawful seizure claims arising from their initial removal of Kevin.

As for the subsequent actions taken in Family Court, these actions were chiefly taken by the lawyer defendants, who, as already determined, were entitled to absolute immunity. While certain of the caseworker defendants provided information to the Family Court, the heart of the complaint against them in this regard is that they failed to adequately apprise the Family Court of exculpatory information. But this Court has found no constitutional violation where caseworkers allegedly committed "sins of commission and omission in what they told and failed to tell . . . the Family Court Judge." van Emrik, 911 F.2d at 866. Indeed, it would take a much more extreme misstatement than any alleged here to override the necessary freedom of action that qualified immunity accords caseworker defendants dealing with the extreme situation when one child suffers fatal injuries while at home and another child is still at home. The caseworker defendants are thus entitled to qualified immunity on the due process claims related to the Family Court actions.

II. State-Law Claims

Plaintiff also pursues malicious prosecution claims both under New York State law and, indirectly, under § 1983. Under New York law, a malicious prosecution claim requires: "(1) the initiation of an action by the defendant against the plaintiff, (2) begun with malice, (3) without probable cause to believe it can succeed, (4) that ends in failure or, in other words, terminates in favor of the plaintiff." O'Brien v. Alexander, 101 F.3d 1479, 1484 (2d Cir. 1996) (citing Broughton v. State, 37 N.Y.2d 451, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87 (N.Y. 1975)). And § 1983, in recognizing a malicious prosecution claim when the prosecution depends on a violation of federal rights, adopts the law of the forum state so far as the elements of the claim for malicious prosecution are concerned. See, e.g., Fulton v. Robinson, 289 F.3d 188, 195 (2d Cir. 2002) ("In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and establish the elements of a malicious prosecution claim under state law." (internal citations omitted)).

[*130] The issue of immunity, however, differs as between the state and federal law claims. As to the claim for malicious prosecution under § 1983, federal law of immunity applies, see, e.g., Gross v. Rell, 585 F.3d 72, 80 (2d Cir. 2009), and thus, since the malicious prosecution claim is grounded on the same allegations as underlay the due process claims, the lawyer defendants are entitled to absolute immunity and the caseworker defendants to qualified immunity, either of which are sufficient to defeat the claim for the reasons already described in the preceding section.
As to the state law claim of malicious prosecution, however, the highest New York court to consider the issue has previously determined that in a situation comparable to the instant case, both the caseworkers and the lawyers are entitled to absolute immunity. See Carossia v. City of N.Y., 39 A.D.3d 429, 835 N.Y.S.2d 102 (App. Div. 1st Dep't 2007). Because we are bound "to apply the law as interpreted by New York's intermediate appellate courts . . . unless we find persuasive evidence that the New York Court of Appeals . . . would reach a different conclusion," we affirm the district court's ruling that all defendants here are entitled to absolute immunity on the state law claim of malicious prosecution. Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 134 (2d Cir. 1999).

Finally, as regards the breach of duty claim, New York law accords the lawyer defendants absolute immunity on such a claim, because their actions with regard to that claim "involve[d] the conscious exercise of discretion of a judicial or quasi-judicial nature." Arteaga v. State, 72 N.Y.2d 212, 527 N.E.2d 1194, 1196, 532 N.Y.S.2d 57 (N.Y. 1988). Caseworker defendants, by contrast, may be entitled only to qualified immunity on this claim. But qualified immunity is available under New York law if these defendants were "acting in discharge of their duties and within the scope of their employment, and . . . such liability did not result from the willful misconduct or gross negligence."

N.Y. Soc. Serv. Law § 419; see also Yuan v. Rivera, 48 F. Supp. 2d 335, 358 (S.D.N.Y. 1999). For the reasons previously discussed, the underlying facts establish that the caseworker defendants meet these requirements.

CONCLUSION

For the reasons stated, therefore, while we disagree with the district court's conclusion that the caseworker defendants were entitled to absolute immunity on plaintiff's claims under 42 U.S.C. § 1983, we find that they were nonetheless entitled to qualified immunity on those claims and that the rest of the district court's conclusions were correct.

In summary:

(1) The lawyer defendants are entitled to absolute immunity on plaintiff's § 1983 claims because they were performing functions analogous to those of a prosecutor. See Wishengrad, 745 F.2d at 152.

(2) The caseworker defendants are not entitled to absolute immunity on plaintiff's § 1983 claims because their actions were the functional equivalent of arresting officers in criminal cases.

(3) The caseworker defendants are entitled to qualified immunity on plaintiff's § 1983 claims because their actions were objectively reasonable under the circumstances. See Tenenbaum, 193 F.3d at 595-96.

(4) For plaintiff's state-law malicious prosecution claims, all defendants are entitled to absolute immunity under New York law. See Carossia, 835 N.Y.S.2d at 104.

[*131] (5) For plaintiff's state-law breach of duty claims, the lawyer defendants are entitled to absolute immunity under New York law because their actions involved the conscious exercise of discretion of a judicial or quasijudicial nature. See Arteaga, 527 N.E.2d at 1196. The caseworker defendants are entitled to qualified immunity
under New York law because they did not commit willful misconduct or gross negligence. See N.Y. Soc. Serv. Law § 419.

Accordingly, the judgment of the district court dismissing the case in its entirety is hereby AFFIRMED.

Mosey v County of Erie
Supreme Court, Appellate Division, Fourth Department, New York
May 02, 2014
117 A.D.3d 1381
984 N.Y.S.2d 706

Acea Mosey, as Administrator of the Estate of Laura Cummings, Deceased, Appellant

v

County of Erie, Respondent. (Appeal No. 1.)
Supreme Court, Appellate Division, Fourth Department, New York
May 2, 2014

CITE TITLE AS: Mosey v County of Erie

Connors & Vilardo, LLP, Buffalo (John T. Loss of counsel), for plaintiff-appellant.

Michael A. Siragusa, County Attorney, Buffalo (Jeremy C. Toth of counsel), for defendant-respondent.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 10, 2012. The order denied the motion of plaintiff to strike defendant’s answer, granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying defendant’s motion in part and reinstating the first, second, fifth, and sixth causes of action and as modified the order is affirmed without costs.
Memorandum: Following the death of plaintiff's decedent, who was tortured and killed at the hands of her mother and half-brother, plaintiff filed two notices of claim with the County of Erie (County), for wrongful death and tort, respectively. Thereafter, plaintiff commenced action No. 1 against the County and commenced action No. 2 against Timothy B. Howard, Erie County Sheriff (Sheriff). The complaint in action No. 1 asserts six causes of action to recover damages for the pain and suffering of decedent, and for her wrongful death, and also seeks punitive damages. The first cause of action alleges that the County, through its child protective services (CPS) and adult protective services (APS), was negligent in repeatedly failing to investigate adequately reports of abuse concerning decedent and thereby breached a duty to protect her from further abuse. The first cause of action further alleges, inter alia, that the County failed to take certain actions to protect decedent, to provide proper training and supervision for employees, and to meet standards regarding caseloads. The second cause of action alleges that the County is vicariously liable for the negligent omissions of employees of CPS and APS, and is premised upon the County's breach of the special duty it assumed to protect decedent when reports of alleged abuse were received, and decedent's justifiable reliance upon that duty. The third cause of action alleges in part that the County is vicariously liable for the actions of a Sheriff's deputy who returned decedent to her home without entering the home or investigating why decedent ran away from home. The third cause of action also alleges that the County failed to take certain actions to protect decedent, failed to provide proper training and supervision for its employees and those of the Sheriff's Office, and failed to maintain proper standards for caseloads, and by reason of these failures decedent was caused to suffer sexual, physical and emotional abuse and ultimately death from scalding and suffocation. The fourth cause of action alleges that the County is vicariously liable for the negligence of the deputy who returned decedent to her home after she ran away and breached a mandatory duty to report suspected abuse concerning decedent pursuant to the Social Services Law. The fourth cause of action further alleges that the County is vicariously liable for the negligence of employees of the Sheriff's Office who inadequately investigated reports, failed to remove decedent from her home and returned her there after she ran away. The fifth cause of action alleges that the County negligently hired, trained, supervised and retained employees in CPS, APS and the Sheriff's Office. Lastly, the sixth cause of action asserts a claim for wrongful death based upon the foregoing allegations.

The complaint in action No. 2 asserts four causes of action against the Sheriff to recover for the pain and suffering of decedent, and for her wrongful death. The first cause of action alleges that the Sheriff is vicariously liable for the negligence of the deputy and the employees of the Sheriff's Office who knew or should have known that decedent was being abused at her home, failed to remove her from her home and returned her there after she ran away. The second cause of action alleges that the Sheriff is vicariously liable for the negligence of the deputy who returned decedent to her home and failed to report suspected abuse concerning decedent in violation of a mandatory duty to report pursuant to the Social Services Law. The third cause of action alleges that the Sheriff is liable for negligently hiring, training, supervising and retaining the deputy and others who were involved in returning decedent to her home and in not removing...
decendent from her home. The fourth cause of action alleges that the Sheriff is liable for decendent’s wrongful death based upon the conduct underlying the first three causes of action.

In action No. 1, following joinder of issue, plaintiff moved to compel the County to disclose certain records, and the County cross-moved for a protective order. Supreme Court granted plaintiff's motion, and the County disclosed some records to plaintiff. Plaintiff subsequently sought to depose various County employees, and the County canceled the first deposition the day before it was to occur and informed plaintiff of its intention to move to dismiss the complaint in each action.

Plaintiff thereafter moved to strike the County's answer in action No. 1 pursuant to CPLR 3126, based on the County's failure to respond to discovery demands and to comply with the court's discovery order. The County and the Sheriff moved to *1384 dismiss the respective complaints against them. The County asserted that the complaint in action No. 1 was subject to dismissal because “[p]laintiff's negligence claims . . . are based upon discretionary acts . . . and barred by governmental immunity”; “[p]laintiff cannot maintain . . . claims for negligent hiring, training, and supervision” inasmuch as she failed to include them in her notices of claim; the County is not vicariously liable for the acts or omissions of the Sheriff or his deputies; and the County cannot be held liable for punitive damages.

In moving to dismiss the complaint in action No. 2, the Sheriff contended that the “common-law claims” are barred by the plaintiff's failure to file a notice of claim naming the Sheriff; he is not vicariously liable for the acts or omissions of his deputy, as asserted in the “negligence claims and [the] alleged violation of Social Services Law”; and governmental immunity bars the “negligence claims based upon discretionary determinations and actions.”

By the order in appeal No. 1, the court denied plaintiff's motion and granted the County's motion in action No. 1 for reasons asserted by the County and, by the order in appeal No. 2, the court likewise granted the Sheriff's motion. We note with respect to appeal No. 2, however, that the court did not specifically address the Sheriff's assertion that the complaint against him was subject to dismissal because he was not named in a notice of claim, but addressed only the other *3 two grounds for dismissal asserted by the Sheriff.

We reject plaintiff's contention in appeal No. 1 that the court erred in denying her motion to strike the County's answer. The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith (see Legarreta v Neal, 108 AD3d 1067, 1070-1071 [2013]; Kimmel v State of New York, 286 AD2d 881, 882-883 [2001]). Under the circumstances here, we perceive no abuse of discretion (see CPLR 3126; Sayomi v Rolls Kohn & Assoc., LLP, 16 AD3d 1069, 1070 [2005]).

We agree with plaintiff in each appeal, however, that the court erred in granting defendants' respective motions dismissing the complaints in their entirety based on defendants' assertions that they were entitled to governmental immunity for their acts. Whether the acts in question
were discretionary and thus immune from liability “is a factual question which cannot be determined at the pleading stage” (CPC Intl. v McKesson Corp., 70 NY2d 268, 286 [1987]; see Valdez v City of New York, 18 NY3d 69, 78-80 [2011]; Bawa v City of New York, 94 AD3d 926, 928 [2012], lv denied 19 NY3d 809 [2012]; Arias v City of New York, 22 AD3d 436, 437 [2005]; see also Newsome v County of Suffolk, 109 AD3d 802, 802-803 [2013]; Delanoy v City of White Plains, 83 AD3d 773, 774 [2011], lv dismissed 17 NY3d 881 [2011]; see generally Johnson v City of New York, 15 NY3d 676, 680-681 [2010], rearg denied 16 NY3d 807 [2011]).

The court, however, properly granted defendants’ respective motions insofar as defendants asserted that they were not vicariously liable for the conduct of the deputy sheriff. “‘[A] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility’” (Trisvan v County of Monroe, 26 AD3d 875, 876 [2006], lv dismissed 6 NY3d 891 [2006]). Here, inasmuch as the County did not assume such responsibility by local law, the court properly dismissed the fourth cause of action in its entirety and those claims based on such vicarious liability in the third cause of action in action No. 1. “[[It is also well established that ‘a Sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that . . . principle precludes vicarious liability for the torts of a deputy’” (id.). Thus, the court properly dismissed the first and second causes of action in action No. 2, which are based on the Sheriff’s vicarious liability for the alleged tortious conduct of the deputy sheriff.

We further conclude that the court erred in granting the County’s motion in appeal No. 1 insofar as the County asserted that it was not liable for claims of negligent hiring, training, and supervision based upon alleged insufficiencies in her notices of claim. We agree with plaintiff that the notices of claim in that action were sufficient to notify the County “that the qualifications, knowledge, training, experience, abilities and supervision of its employees involved with [decedent] were at issue” and to apprise the County of a need to examine the personnel records of the relevant employees (see Rodriguez v New York City Tr. Auth., 90 AD3d 552, 552 [2011]; Blanco v County of Suffolk, 51 AD3d 700, 701 [2008]; see also Jones v City of Buffalo, 267 AD2d 1101, 1101 [1999]; see generally Matter of Trader v State of New York, 259 AD2d 951, 951 [1999]). Contrary to the court’s conclusion, we conclude that the claims for negligent hiring, training, and supervision as asserted in the first, third and fifth causes of action in action No. 1 were not beyond the scope of plaintiff’s notices of claim in that action (see generally Wahl v County of Wayne, 78 AD3d 1608, 1609 [2010]). We nevertheless further *1386 conclude that the claims of negligent training and supervision as alleged in the third cause of action in action No. 1 are duplicative of claims in the first cause of action, and thus the remainder of the third cause of action in action No. 1 was properly dismissed (see Dischiavi v Calli, 68 AD3d 1691, 1693 [2009]).

*4 In appeal No. 2, we agree with plaintiff that, under the circumstances herein, she was not required to file a notice of claim naming the Sheriff in his official capacity prior to commencing action No. 2 (see Bardi v Warren County Sheriff’s Dept., 194 AD2d 21, 23-24 [1993]; Bowman v
We also agree with plaintiff's contention in appeal No. 2 that the court erred in dismissing the third cause of action in action No. 2. Accepting the facts as alleged in that cause of action as true, we conclude that plaintiff has adequately stated a cause of action against the Sheriff for negligent hiring, training, supervision and retention (see generally J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 334 [2013]). The court likewise erred in dismissing the fourth cause of action, for wrongful death, to the extent that it is based upon the claims for alleged negligent hiring, training, supervision and retention asserted in the third cause of action (cf. Sanchez v United Rental Equip. Co., 246 AD2d 524, 525-526 [1998]).

We therefore modify the order in each appeal accordingly. Present—Smith, J.P., Peradotto, Lindley, Sconiers and Valentino, JJ.
ORDERED that this motion by the defendants County of Suffolk and the Suffolk County Department of Social Services for Summary Judgment dismissing the complaint is denied.

The plaintiff Jason Dunlop, as administrator of the estate of his brother, Jeffrey Dunlop, commenced this action on June 9, 2008. The complaint, as amplified by the bill of particulars, alleges that the Suffolk County Adult Protective Services (hereinafter APS) was reckless, careless, negligent and wanton in its disregard of the health and welfare of the plaintiffs decedent and in its failure to provide protective services, resulting in his death. The defendants have interposed an answer with affirmative defenses. Discovery has been completed, the case certified ready for trial and the note of issue filed.

The defendants now move for summary dismissal of the complaint on the basis that the County of Suffolk and the Department of Social Services are immune from civil liability pursuant to Social Services Law § 473. In support thereof, movants submissions include the pleadings; the verified bill of particulars; a copy of the APS file; and the deposition testimony of plaintiff Jason Dunlop, the decedent's brother, and Nirit Holtz, on behalf of the defendants.

Social Service Law § 473 requires that social services officials provide protective services for individuals who due to mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from self neglect, without assistance from others and who have no one available who is willing and able to assist them responsibly. Self neglect is defined as "an adult's inability, due to physical and/or mental impairments to perform tasks essential to caring for oneself, including but not limited to, providing essential food, clothing, shelter and medical care, obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety, or managing financial affairs." (Social Services Law§ 473 6 (f)).

Social Services Law § 473 (1) requires that the services provided by the Department of Social include:

(a) receiving and investigating reports of seriously impaired individuals persons who may be in need of protection;

(b) arranging for medical and psychiatric services to evaluate and whenever possible, to safeguard and improve the circumstances of those with serious impairments; ...

(d) providing services to assist such individuals to move from situations which are, or are likely to become, hazardous to their health and well-being.

As to the defendants' assertion of immunity from liability, Social Service Law§ 473 (3) provides that:

[any social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge ofhis duties and within the scope of his employment, and that such liability did not result from the willful act or gross negligence of such official or his designee.

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The immunity from liability provided under Social Services Law § 473 may be defeated by showing that the social services official was guilty of misconduct or gross negligence (see Rhine v Chase, 309 AD2d 796, 765 NYS2d 648 [2d Dept 2003]).

The parties' submissions establish that on September 28, 2006, the decedent’s stepmother, Virginia Miller, contacted APS, reporting that her 40 year old stepson Jason Dunlop lived alone in an apartment that he had shared with his father, who died in April of 2006. She stated Dunlop was told to find alternative housing, as he was living in a senior citizen housing complex, and his funds were being depleted. She reported that Dunlop weighed in excess of 600 pounds, his legs were black, he had difficulty ambulating, he stayed in bed all day and that his apartment was in a filthy, cluttered condition. Miller asserted that she and Dunlop’s siblings were at a loss as to how to help him and requested intervention and assistance from APS in obtaining services.

The APS intake disposition summary of September 28, 2006 indicates that the decedent was physically incapacitated and at a risk of harm due to neglect of his own basic needs, his untreated medical conditions and environmental hazards. The case notes of his caseworker, Geetha Datharti, reflect that at the first visit on October 3, 2006, Dunlop was unclothed except for a blanket covering the lower part of his body, he weighed over 600 pounds and he became emotional when discussing his father. It was also determined that Dunlop had no medical insurance and would not be eligible for Medicare for another four or five months.

In the Protective Services for Adults Assessment/Service Plan, dated December 5, 2006, Datharti noted that Dunlop was physically impaired, acutely ill due to obesity, needed a cane or walker to ambulate and could not wear “full clothes”. She also noted that Dunlop was mentally impaired due to severe isolation and that he was unable to act due to a fear or irrational belief. The APS worker documented that Dunlop had a reduced capacity for self care and protection due to self neglect of bed sores and other ulcerated sores. Finally, the worker documented that he was in danger of serious harm due to accumulated debris. The service plan provided that APS would assist Dunlop with finding proper housing and that medical services would be offered to address his self neglect including bedsores and other ulcerated sores. In addition, Dunlop was to enroll in a bariatric residential program to address his obesity.

The APS record indicates that during the five months of APS involvement with Dunlop, the two successive APS caseworkers assigned to him either visited him at his home or spoke with him by phone on approximately sixteen occasions. The record reflects that Dunlop was given the phone numbers for nurses who could perform a PRI to assess him for possible bariatric surgery. Thereafter, on February 27, 2007, the APS worker assigned to Dunlop advised him that his case was being closed.

After closing the APS case, Nirit Holtz his second APS caseworker noted on March 28, 2007 in the Protective Services for Adults Review/Update Assessment/Services Plan:

Client ambulates, and drives his own car. He manages to get to his medical appointments by himself, and shops by himself. Client has been given resources, which he has not chosen to avail himself of. Client has friends and family members, who have assisted him with both house and cleaning efforts, and future apartment referrals.
It is undisputed that on March 8, 2007, Dunlop died of congestive heart failure due to cardiomyopathy and morbid obesity.

At her deposition on January 20, 2011, Holtz admitted that although Dunlop was allegedly under the care of a Dr. Madonia, she never offered to contact his doctor regarding his medical condition or the proposed bariatric surgery and she never secured the PRI nursing assessment. She asserted that Dunlop was "lucid and intelligent enough to follow through" as evidenced by his online application for Medicare. Holtz acknowledged that for the entire duration of the APS case through the date on which his case was closed, Dunlop had no health insurance in effect. She stated that they were waiting for Medicare to be in effect to pay for the PRI, psychiatric services and for the treatment of his ulcerated sores by a physician. Although he was without medical insurance for an extended period of time, she never gave Dunlop, who was a Navy veteran, information on the availability of medical benefits through the Veterans Administration. She stated she didn’t "feel he was incapable of caring for himself".

At her deposition, Holtz acknowledged that although on occasion, Dunlop sobbed and was depressed about his father's death and that DSS has a mechanism to "bring in" a professional if a caseworker deems an individual needs psychiatric help, she never asked a social worker or other person trained in psychology, psychiatry or from the Department of Social Services to evaluate Dunlop. Notably Holtz admitted that she did not refer Dunlop for psychotherapy until February 27, 2007, the day she closed his APS case, eleven days before he died. Moreover, Holtz conceded that although she asked for the phone numbers of family members, and Dunlop provided her with the numbers for his brother, sister, and a cousin, she never called or spoke with them. When asked why she asked for the phone numbers, Holtz replied "[j]ust for the record." and "[i]ts a matter of what I do. I ask about family and got the names and phone numbers."

Here, the defendants failed to meet their burden of establishing prima facie entitlement to summary dismissal of the complaint on the basis that they were immune from liability. The immunity from liability set forth in Social Services Law § 473 (3) may be defeated by a showing that the social services official was guilty of misconduct or gross negligence (see Rhine v Chase, 309 AD2d 796, 765 NYS2d 648 [2d Dept 2003]). Here, defendants' submissions raise material issues of fact as to whether the APS caseworkers assigned to Dunlop failed to exercise "even slight care" or exhibited a "complete disregard" for his safety and well being (Carossia v City of New York, 39 AD3d 429, 835 NYS2d 102 [1st Dept 2007]), resulting in his ultimate demise. Indeed, the APS case record and the testimony of Dunlop's caseworker raise issues of fact as to whether APS extended any protective services to Dunlop within the meaning of Social Services Law § 4 73 ( 1) for the duration of its involvement with him, other than providing a turkey at Christmas, phone numbers for nurses and finally on the day it closed his case, a referral to a mental health agency. In addition, although APS noted, when closing Dunlop's case, that he had family resources available to him, this is belied by the case record which reflects that in the first instance, a lack of family resources was the impetus for the referral to APS by his stepmother, and by the caseworker's admission that she never communicated with any of Dunlop's family members. Finally, the notations in the APS case record that Dunlop was acutely ill due to morbid obesity and open ulcerated bedsores and his caseworker's admission that she never contacted his doctor or sought to assist him in securing medical or psychiatric
care, raise triable issues of fact as to whether omissions by APS amounted to misconduct or gross negligence by its alleged failure to exercise "even slight care" or a "complete disregard" for Dunlop's safety and well being, ultimately leading to his demise (see Carossia v City of New York supra).

Moreover, the immunity from liability provided in Social Service Law § 473 may be defeated by the existence of a special relationship between the plaintiffs decedent and the municipality; the elements required to establish a special relationship are: the assumption of an affirmative duty on the part of the municipality to act on behalf of the injured party; knowledge by the municipality's agents that inaction may lead to harm; direct contact between the municipality's agents and the injured party; and the injured party's justifiable reliance on the municipality's affirmative undertaking (Palaez v Seide, 2 NY3d 186, 778 NYS2d 111 (2004); Ranger v County of Suffolk, 41AD3d813, 839 NYS2d 168 [2d Dept 2007]). Here, movants failed to establish, as a matter of law, the lack of a special relationship with the plaintiffs decedent. Rather, the movants' submissions raise an issue of fact as to whether a special relationship existed and whether APS assumed, through promises or actions, an affirmative duty to act on Dunlop's behalf; whether the caseworker knew that inaction could lead to harm; and whether Dunlop justifiably relied on an affirmative undertaking by APS to assist him with his dire medical and psychological needs. (see Coleson v City of New York, 24 NY3d 476, 999 NYS2d 810 9 [2014]). The issue of whether a special relationship exists is generally a question for the jury (see, Coleson v City of New York supra,- Ranger v County of Suffolk, supra).

In view of the foregoing, the defendants' motion for summary dismissal of the complaint is denied.

DATED: MAY 26, 2015
March 22, 2017

CITE TITLE AS: Dunlop v County of Suffolk

Dennis M. Brown, County Attorney, Hauppauge, NY (Christopher A. Jeffreys of counsel), for appellants.

Dell & Dean, PLLC (Mischel & Horn, P.C., New York, NY [Scott T. Horn and Naomi M. Taub], of counsel), for respondent.

In an action to recover damages for wrongful death, the defendants appeal from an order of the Supreme Court, Suffolk County (Hudson, J.), dated May 26, 2015, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

On September 28, 2006, the stepmother of the plaintiff's decedent (hereinafter the decedent) contacted Adult Protective Services (hereinafter APS), a division of the Suffolk County Department of Social Services, and requested assistance for the decedent, who was then 40 years old. According to the stepmother, the decedent had lived in a senior citizen's housing complex with his father until the father died in April 2006. Upon the father's death, the decedent was no longer eligible to remain in the complex, and needed assistance in finding a new apartment. In addition, the apartment in which the decedent had been living was “in an unlivable condition due to filth and clutter.” The stepmother further informed APS that the decedent weighed more than 600 pounds and the family was at a loss as to how to help him. The plaintiff, the decedent's half-brother, testified at a hearing pursuant to General Municipal Law § 50 (h) that the decedent was mentally competent, but lacked motivation to help himself.

APS advised the stepmother and the decedent that he was eligible for services from September 28, 2006, through March 28, 2007. APS's plan was for the decedent to enroll in an in-home bariatric program. After completing the program, APS would help him find a new apartment. APS caseworkers made 12 home visits to the decedent, and 12 telephone calls to him, his family members, and medical providers. They also followed up with the decedent about scheduling an evaluation with a nurse to determine his eligibility to enter the bariatric program. The decedent never made the appointment for the evaluation, and declined a caseworker's offer to make the appointment for him.

*2 On February 28, 2007, APS closed the decedent's case, as he was found to no longer meet the criteria for services. APS's final case note indicated that although the decedent was obese, he was ambulatory, drove his own car for shopping and medical appointments, and had friends and family to assist with an apartment referral and house cleaning. Moreover, the decedent had been given resource referrals, which he had chosen not to act upon.
On March 8, 2007, the decedent died from congestive heart failure due to hypertrophic cardiomyopathy and morbid obesity. In June 2008, the plaintiff commenced this action against the County of Suffolk and the Suffolk County Department of Social Services. After discovery, the defendants moved for summary judgment dismissing the complaint based upon statutory and governmental immunity. The Supreme Court denied the motion, and the defendants appeal.

Social Services Law § 473 requires social services officials to provide services to individuals who, because of mental or physical impairments, are unable to manage their own resources or carry out the activities of daily living. Social Services Law § 473 (3) provides immunity from any civil liability that might result by reason of providing such services, provided that the municipal employees were “acting in the discharge of [their] duties and within the scope of [their] employment, and that such liability did not result from the willful act[s] or gross negligence” of those employees (Social Services Law § 473 [3]; see Shinn v City of New York, 65 AD3d 621 [2009]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that they are immune from liability pursuant to Social Services Law § 473 (3) by demonstrating that the caseworkers assigned to the plaintiff's decedent acted in the discharge of their duties and within the scope of their employment (see Shinn v City of New York, 65 AD3d at 622). In response, the plaintiff failed to raise a triable issue of fact as to whether the decedent’s death was the result of willful acts or gross negligence of those caseworkers (see Rivera v City of New York, 82 AD3d 647, 648-649 [2011]; Shinn v City of New York, 65 AD3d at 622; Carossia v City of New York, 39 AD3d 429, 430 [2007]; Rine v Chase, 309 AD2d 796, 798 [2003]).

The parties' remaining contentions are without merit.

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint. Dillon, J.P., Austin, Hinds-Radix and Maltese, JJ., concur.

[Prior Case History: 2015 NY Slip Op 31009(U).]

Shinn v City of New York
Supreme Court, Appellate Division, Second Department, New York
August 18, 2009

Cecilia Ann Shinn, Appellant

v

City of New York et al., Respondents.

29
Supreme Court, Appellate Division, Second Department, New York

August 18, 2009

CITE TITLE AS: Shinn v City of New York

Harriette N. Boxer, New York, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Barry P. Schwartz and Deborah A. Brenner of counsel), for respondents City of New York, Adult Protective Services, and the New York City Police Department.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Kerrigan, J.), dated January 15, 2008, which granted that branch of the motion of the defendants City of New York, Adult Protective Services, and the New York City Police Department which was for summary judgment dismissing the complaint insofar as asserted against them and, sua sponte, dismissed the complaint pursuant to CPLR 3215 (c) insofar as asserted against the defendant Animal Care & Control.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, dismissed the complaint pursuant to CPLR 3215 (c) insofar as asserted against the defendant Animal Care & Control is deemed to be an application for leave to appeal, and leave to appeal from that portion of the order is granted (see CPLR 5701 [c]); and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the defendants City of New York, Adult Protective Services, and the New York City Police Department.

The defendants City of New York, Adult Protective Services, and the New York City Police Department (hereinafter collectively the municipal defendants) submitted evidence demonstrating that the actions taken by their employees were taken pursuant to a court order granting access to the plaintiff as an adult person believed to be in need of protective services (see Social Services Law § 473-c). Thus, the municipal defendants were immune from civil liability, as their employees' actions were within the scope of their employment (see Social Services Law § 473 [3]; Mental Hygiene Law § 9.59 [a]). Accordingly, the municipal defendants established their prima facie entitlement to summary judgment. In opposition, the plaintiff failed to raise a triable issue of fact, and the Supreme Court properly granted summary judgment dismissing the complaint insofar as asserted against the municipal defendants (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Since the plaintiff failed to seek leave to enter a default judgment within one year of *2 the default of the defendant Animal Care & Control, and did not demonstrate that she had a reasonable excuse for that failure or that the complaint had merit (see *623 Mattera v Capric, 54 AD3d 827 [2008]; Scrimenti v Dry Harbor Nursing Home, 34 AD3d 439 [2006]), the Supreme
Court also properly dismissed the complaint insofar as asserted against the defendant Animal Care & Control (see CPLR 3215 [c]).

Rivera, J.P., Skelos, Balkin and Leventhal, JJ., concur.

Carossa v City of New York

Supreme Court, Appellate Division, First Department, New York

April 26, 2007


Lucia Carossa et al., Respondents-Appellants

v

City of New York et al., Appellants-Respondents.

Supreme Court, Appellate Division, First Department, New York

102284/99, 902, 903

April 26, 2007

CITE TITLE AS: Carossa v City of New York

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellants-respondents.

Paul O’Dwyer, New York, for respondents-appellants.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 18, 2005, which granted defendants’ post verdict motion to the extent of dismissing plaintiff’s claim for defamation and ordering a new trial as to plaintiff’s claim for negligent infliction of emotional distress, but denied so much of the motion as sought a directed verdict on the claim for negligent infliction of emotional distress, unanimously modified, on the law, so much of defendants’ motion as sought a directed verdict on the claim for negligent infliction of emotional distress granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants are entitled to immunity “for those governmental actions requiring expert judgment or the exercise of discretion. This immunity . . . is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature” (Arteaga v State of New
York, 72 NY2d 212, 216 [1988] [citations omitted]). Here, the investigation and decision by the Administration for Children's Services (ACS), resulting in the removal of plaintiffs' son and the filing of a Family Court petition against plaintiffs, constituted quasi-judicial acts entitled to such absolute immunity. Defendants' conduct in this matter is also shielded, in part, by the immunity extended by Social Services Law § 419 (see Sean M. v City of New York, 20 AD3d 146, 158 [2005]), which, contrary to the view of the trial court, was not overcome by a sufficient showing of bad faith on defendants' part (see Van Emrik v Chemung County Dept. of Social Servs., 220 AD2d 952, 953 [1995], lv dismissed 88 NY2d 874 [1996]). While the caseworker's actions in this matter were far from exemplary, she was presented with serious allegations of child sexual abuse, which were seemingly confirmed to one degree or another by the child, although apparently through a series of misunderstandings as to what the child meant. Nevertheless, there was reasonable cause to suspect that the child might have been abused when the caseworker determined to remove the child and commence the Family Court proceeding (see Rine v Chase, 309 AD2d 796, 797 [2003]). The evidence does not permit the conclusion that the caseworker failed to exercise “even slight care,” or exhibited a “complete disregard for the rights and safety of others” (Mendoza v Grace Indus., 4 AD3d 272, 273 [2004]; see also Food Pageant v Consolidated Edison Co., 54 NY2d 167, 172 [1981]).

Defendants, under common-law principles limiting municipal liability, were also entitled to the dismissal of plaintiff's claims alleging that ACS failed to take appropriate, statutorily mandated action in furtherance of the strong public policy generally favoring family reunification in removal cases. Plaintiffs failed to show the existence of a special relationship between them and the municipality rendering the alleged nonfeasance actionable. Indeed, the trial evidence showed that plaintiffs did not rely on ACS to reunite the family, and accordingly that they did not, by reason of any such reliance, forgo alternative avenues of relief (see Cuffy v City of New York, 69 NY2d 255, 260 [1987]; Badillo v City of New York, 35 AD3d 307, 308 [2006]).

The court properly dismissed plaintiff's defamation claim on the ground that the complained-of statements were made solely in the Family Court petition, and are thus entitled to absolute judicial immunity (see Levy v State of New York, 58 NY2d 733 [1982]). While defendants did not object to the defamation charge given the jury, the defamation claim should never have been submitted to the jury, and defendants did object to submitting the defamation claim, and any other claim, to the jury. Concur—Tom, J.P., Andrias, Buckley, Gonzalez and Malone, JJ.

**Rine v Chase**

Supreme Court, Appellate Division, Second Department, New York

October 14, 2003

In an action, inter alia, to recover damages for defamation and malicious prosecution, the plaintiff appeals, as limited by his brief, from so much of (1) an order of the Supreme Court, Nassau County (McCarty, J.), entered July 2, 2002, as granted those branches of the defendant's motion which were for summary judgment dismissing the causes of action alleging defamation and malicious prosecution, and (2) a judgment of the same court entered August 16, 2002, as, upon the order, dismissed those causes of action.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed insofar as appealed from; and it is further, *797

Ordered that one bill of costs is awarded to the defendant.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with entry of the judgment in the action (see Matter of Aho, 39 NY2d 241 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (see CPLR 5501 [a] [1]).

The defendant is a certified social worker who provided therapy to the plaintiff's children while the plaintiff and his wife were in the midst of divorce proceedings. In the fall of 1994, the defendant made oral and written reports to the Nassau County Department of Social Services alleging that the plaintiff had abused his children. The reports, which were based primarily upon information disclosed by the children during the course of therapy, were ultimately determined to be unfounded, and were expunged from the New York State Child Abuse and Maltreatment Register. The plaintiff subsequently commenced this action against the defendant seeking damages, inter alia, for defamation and malicious prosecution. The defendant thereafter moved for summary judgment dismissing, inter alia, those causes of action, contending that Social Services Law § 419 immunized her from liability because she had reported suspected child abuse in good faith. The Supreme Court granted those branches of the defendant's motion, and we affirm.

Social Services Law § 413 requires certain persons, including physicians, teachers, and social workers, to register a report whenever "they have reasonable cause to suspect that a child
coming before them in their professional or official capacity is an abused or maltreated child.”

Mandated reporters, such as the defendant social worker, are provided with qualified immunity from civil liability for reports of suspected child abuse which are made in “good faith” (Social Services Law § 419). The statute presumes “good faith” where the person reporting suspected child abuse is acting in discharge of his or her duties and within the scope of his or her employment, but does not shield such individuals where liability is the result of willful misconduct or gross negligence (see Social Services Law § 419). “The reporting requirements which trigger the qualified immunity provision contained in Social Services Law § 419 are not predicated upon actual or conclusive proof of abuse or maltreatment. Rather, immunity attaches when there is reasonable cause to suspect that the infant might have been abused and when the party so reporting has acted in good faith in discharging the obligations and duties imposed by the statute” *798 (Kempster v Child Protective Servs. of Dept. of Social Servs. of County of Suffolk, 130 AD2d 623, 625 [1987]).

Here, in support of her motion for summary judgment, the defendant submitted evidence establishing that the children made statements to her during therapy sessions which provided her with reasonable cause to suspect that they had been abused by the plaintiff (see Escalera v Favaro, 298 AD2d 552 [2002]), and that she acted in good faith in reporting her suspicions. Although the qualified immunity provided by Social Services Law § 419 may be defeated by a showing that the person making the report was guilty of misconduct or gross negligence, the evidence which the plaintiff submitted in opposition to the motion was insufficient to raise a triable issue of fact as to whether the defendant engaged in misconduct or gross negligence so as to render the statutory shield ineffectual (see Diaz v Montefiore Med. Ctr. Henry & Lucy Moses Div., 299 AD2d 254 [2002]). In this regard, we note that despite the fact that the reports were ultimately determined to be unfounded, “[m]andated reporters need not await conclusive evidence of abuse or maltreatment but must act on their reasonable suspicions and the law allows them a degree of latitude to err on the side of protecting children who may be suffering from abuse” (Isabelle V. v City of New York, 150 AD2d 312, 313 [1989]). Furthermore, while statements which are presumptively privileged pursuant to Social Services Law § 419 may be actionable if a plaintiff can prove that they were motivated by actual malice (see Miller v Beck, 82 AD2d 912 [1981]; see also Sclar v Fayetteville-Manlius School Dist., 300 AD2d 1115 [2002]; Escalera v Favaro, supra; Kempster v Child Protective Servs. of Dept. of Social Servs. of County of Suffolk, supra), here, the plaintiff failed to come forward with evidence raising an issue of fact as to whether the defendant acted with actual malice. Accordingly, the Supreme Court properly granted these branches of the defendant’s motion which were for summary judgment dismissing the causes of action based on defamation and malicious prosecution upon the ground that Social Services Law § 419 immunizes her from liability.

Santucci, J.P., Krausman, Townes and Cozier, JJ., concur.
Ong v. Park Manor (Middletown Park) Rehab. & Healthcare Ctr.
United States District Court for the Southern District of New York
September 30, 2015, Decided; September 30, 2015, Filed
Case No. 12-CV-974 (KMK)

Reporter
2015 U.S. Dist. LEXIS 133304 *
BIENVENIDO PILAO ONG, Plaintiffs, -v- PARK
MANOR (MIDDLETOWN PARK) REHABILITATION AND HEALTHCARE CENTER et al.,
Defendants.
Prior History: Ong v. Park Manor (Middletown Park)
Rehab. & Healthcare Ctr., 51 F. Supp. 3d 319, 2014
U.S. Dist. LEXIS 137473 (S.D.N.Y., Sept. 29, 2014)

Counsel: [*1] Bienvenido Pilao Ong, Plaintiff, Pro se, Middletown, NY.
For Park Manor (Middletown Park) Rehabilitation and
Healthcare Center, Vincent Maniscalco, Dara Conklin,
Eileen Masterson, Jennifer Small, Wendy Brewster, Jenna Green, Suzanne Forman, Lisa M.
Reyes, Ms.
Yvette, Ms. Dawn Du Bois, Ms. Tiffany, Lynn
Terwillinger, and Jennifer Brennan, Defendants:
Katherine J. Zellinger, Esq., Law Offices of Alan I. Lamer, Elmsford, NY.
For Park Manor (Middletown Park) Rehabilitation and
Healthcare Center, Defendant: Victor Carmine Piacentile, Esq., Kopff, Nardelli & Dopf, LLP,
New York, NY.
For Town of Wallkill Police Department, Police Officer Jason Farmingham, Robert Hertman,
Sergeant Mr. R.
Provak, TOW-P.O. Jefferey Gulick, TOW-P.O. Adam
Solan, Deputy Chief Anthony Spano, Sgt. Robert
McLymore, Sgt. Robert Kammarada, Sgt. Ari Moskowitz, Office Thomas Keleveno, Officer S.
Belgiovene, and P.O. A. Dewey, Defendants: James A. Randazzo, Esq., Caitlin Grace Scheir,
Esq., Gaines, Gruner, Ponzini & Novick, LLP, White Plains, NY.
For Orange County Department of Social Services,
Candice H. Crain, David Jolly, Kate Labuda, Dina M. Lacatena, and Tim Murphy, Defendants:


For Sarah Sholes, Sholes & Miller, LLP, Defendants:

Judges: KENNETH M. KARAS, UNITED STATES DISTRICT JUDGE.

Opinion by: KENNETH M. KARAS

OPINION AND ORDER

NOTE- DUE TO THE LENGTH OF THIS DECISION, I HAVE DELETED MANY SECTIONS OF THIS CASE THAT DO NOT PERTAIN TO DSS CASE WORKER LIABILITY- MEM

KENNETH M. KARAS, District Judge:

Plaintiff Bienvenido Pilao Ong brings this Action against multiple defendants, alleging various claims under federal and state law arising out of six incidents that took place in 2010, 2011, and 2013. Before the Court are five motions to dismiss filed by four groups of Defendants. For the following reasons, the Court grants those Motions in part and denies them in part.

I. BACKGROUND

A. Factual Background

The following facts are taken from Plaintiff's Third Amended Complaint ("TAC") and Fourth Amended Complaint ("FAC"), the latter of which Plaintiff appears to have intended to supplement the TAC. (See Third Amend. Compl. ("TAC") (Dkt. No. 162); Fourth Am. Compl. ("FAC") (Dkt. No. 172.) Plaintiff is an Asian American naturalized U.S. citizen over the age of 65 who, at all relevant times, [3] was a resident of Middletown, NY. (See FAC 1, 3.) Defendants include four entities and a number of individuals employed by those entities, including a few new Defendants not previously included in Plaintiff's pleadings. (See TAC 14; FAC 3-4, 8-10.) Plaintiff groups these Defendants into five categories: (1) Middletown Park Rehabilitation and Health Care Center (formerly known as "Park Manor") ("MPRHCC"), a long-term-care facility primarily serving elderly individuals; Vincent Maniscalco ("Maniscalco"), an administrator; Darla Conklin ("Conklin"), an assistant administrator; Eileen Masterson ("Masterson"), a director of nursing; Suzanne Forman ("Forman"), a director of social services; Jenna Green ("Green"), a case manager; Jennifer Small ("Small"), a nursing manager; Wendy Brewster ("Brewster"), another nursing manager; Lisa Reyes ("Reyes"), a physical therapist; "Ms. Dawn Du Bois" ("Du Bois"), a duty nurse; "Ms. Tiffany" ("Tiffany"), a nursing aid; "Ms. Yvette" ("Yvette"), another nursing aid, new Defendant Lynn Terwillinger ("Terwillinger"), a
facility representative, new Defendant Mrilini M. Yeddu, MD ("Yeddu"), an internist, and new Defendant Jennifer Brennan ("Brennan"), a finance manager (collectively, the "MPRHCC Defendants"); (2) Town of Wallkill Police Department ("Wallkill"); Chief of Police Robert Hertman ("Hertman"); Deputy Chief Antonio Spano ("Spano"); Sergeant Robert Kammarada ("Kammarada"); Sergeant Robert McLymore ("McLymore"); Sergeant Richard Procak ("Procak"); Officer Jason Farmingham ("Farmingham"); Officer "A. Dewey" ("Dewey"); Officer Thomas Kleveno ("Kleveno"); Officer "S. Belgiovene" ("Belgiovene"); Officer Jeffrey Gulick ("Gulick"); Officer Adam Solan ("Solan"); Sergeant "A. Moskowitz" ("Moskowitz"); and Angelina Guzman ("Guzman"), a police dispatcher (collectively, the "Wallkill Defendants"); (3) "New York State Police—Troop F" ("New York State") and Timothy Mannix ("Mannix"), a New York State police officer; (4) Orange County Department of Social Services ("OCDSS"); Tim Murphy ("Murphy"), the head supervisor of Orange County’s Adult Protective Services department ("APS"); APS case workers Candice Crain ("Crain"), Kate Labuda ("Labuda"), Dina Lacatena ("Lacatena"), and Andrea Leo ("Leo"), and new Defendant David Jolly ("Jolly"), Commissioner of the OCDSS (collectively, the "Orange County Defendants"); and (5) Sholes & Miller, LLP ("Sholes"), a New York law firm, and new Defendant Sarah Sholes ("Sholes"), an attorney employed by Sholes & Miller (collectively, the "Sholes Defendants"). (See FAC 3-4; 8-10; see also TAC at 1-3.)

Plaintiff’s TAC and FAC divide Plaintiff’s allegations and exhibits into sections corresponding to separate incidents—five principle incidents and one additional incident that Plaintiff references for the first time in his TAC—which collectively constitute the events giving rise to Plaintiff’s claims. In his TAC and FAC, Plaintiff adopts and restates the Court’s summary of the facts of his case in its 2014 Opinion and Order, (Dkt. No. 144), characterizes those summaries as accurate, (see TAC 10-27 (quoting the Court’s summary of each incident verbatim); id. at 28-42 (reproducing the remainder of the Court’s 2014 Opinion and Order); id. at 65, 72, 94, 107, 140 (describing Court's summary of each incident as "accurate"); FAC 14, 16, 18, 21, 25 (stating that the Court’s summary of each incident was "ACCURATE"); id. 28-42 (reproducing the remainder of the Court’s 2014 Opinion and Order)), and adds limited additional facts, clarifications, and explanations, (see, e.g., TAC 65, 72, 94, 107, 140 (indicating that Plaintiff “explain[ed] more detail” about the incidents in question)). The Court accordingly reproduces its summary of the facts from its 2014 Opinion and Order below, adding Plaintiff’s additional allegations and clarifications as relevant.

2. August 20, 2010

On August 20, 2010, Plaintiff lived with his mother in an apartment in Middletown. (Id. ¶ 111.) That afternoon, Guzman, a 911 operator, received a call from Plaintiff’s neighbor, who reported that "Plaintiff's mother was yelling that she was being sexually assaulted and/or otherwise physically abused by Plaintiff." (Id.) Guzman then dispatched Defendants Farmingham and Kleveno to Plaintiff’s apartment. (Id.) After they arrived at the apartment and knocked on the door, Plaintiff answered and asked them why they were there. (Id.; see also id. ¶ 75.) [*11]
Initially, Farmingham asked Plaintiff if Plaintiff knew him; Plaintiff responded that he remembered Farmingham as the officer who arrested him on March 30, 2010. (Id. ¶¶ 75, 111.) Farmingham then told Plaintiff that he was there to arrest Plaintiff again, and when Plaintiff asked him why, Farmingham responded that the police had received a call from Plaintiff's neighbor reporting that Plaintiff's mother was "yelling for help" and that "it sounded as though someone [was] being raped." (Id. ¶¶ 64, 111; see also id. ¶ 75 (alleging that Farmingham told Plaintiff that he was "going to arrest [him] again because somebody heard . . . [his] mom yelling [that] she was getting or being rape[d] and [that] [someone] [was] biting [his] mother").) When Plaintiff asked about the neighbor's identity, the officers refused to tell him. (Id. ¶¶ 75, 111.)

Farmingham and Kleveno "immediately" entered the apartment and "closed the door," at which point Farmingham "push[ed] [Plaintiff] near [a] door," told him to "put [his] hand[s] up," and then told him [*12] to "start strip[ping] from head to foot." (Id. ¶ 111.) The officers, aware that Plaintiff previously possessed a handgun and a pistol license, were specifically looking for a "weapon or gun." (Id.) Farmingham then "put hand cuffs on [Plaintiff] [and] . . . start[ed] biting Plaintiff"; Kleveno saw this occur, but did not try to intervene. (Id.; see also id. ¶¶ 64, 71.) Plaintiff asserts that in the process, his stomach was bruised when he was pushed up against a door knob. (See TAC 69.)

At some point while in Plaintiff's apartment, Farmingham stated that he detected a "very strong odor of something rotting." (SAC ¶ 65.) He then "went to [Plaintiff's] refrigerator," "open[ed]" it, commented that it "smell[ed] [of] rotten food," and asked Plaintiff whether he was "feeding [his] mother" rotten food. (Id. ¶ 67.) Plaintiff responded that the officers should "not [be] searching and opening [his] refrigerator" because they were there for the "purpose" of responding to the "anonymous call," and that they were "violating [his] privacy and at the same time harassing" and "intimidating" him. [*13] (Id.) In a similar incident, while Plaintiff was in handcuffs, he asked Farmingham to "close[] [his] laptop" before the officers brought him to the police station, but Farmingham refused. (Id. ¶ 73.) Plaintiff alleges that he was later told by a friend who went to Plaintiff's apartment after Plaintiff was taken to jail that Farmingham searched Plaintiff's laptop and made a comment to Plaintiff's friend about Plaintiff's finances based on information he obtained in the search. (Id. ¶¶ 73, 111.)

While the officers were at the scene, an ambulance arrived, as well as Crain, who appeared on behalf of APS. (See id. ¶ 77.1; see also id. Ex. 2.0 (Incident Report, dated Aug. 20, 2010, indicating that Crain and a non-party nurse were at the scene); id. Ex. 2.1 (Arrest Report, dated Aug. 20, 2010, indicating same).) All Parties present entered Plaintiff's mother's bedroom and, after examining her at the scene, decided to send her to Orange Regional Medical Center for a full evaluation. (See id. Ex. 2.0.) Although the examining doctor found "[n]o information regarding sexual or psychiatric abuse" and that there were "no fracture[s]" or "signs of infection," he did determine that Plaintiff's mother suffered from [*14] "[d]ementia," "severe dehydration," and "[p]hysical abuse" in the form of "ecchymosis on the skin of upper and lower extremities and blisters." (Id. ¶ 77.1.; id. Ex. 2.14 (History and Physical, dated Aug. 20, 2010).) The doctor also noted that he would consider a "gynecological exam," possibly based on the rape allegations.
(Id. ¶ 77.1; id. Ex. 2.14.) Plaintiff alleges that Lacatena later informed him at an undisclosed time that the entire incident was "planned by . . . Murphy" and that "he sent Crain to help." (FAC 37.)

The police filed an Incident Report that day, which included [*15] an officer's account of the arrest:

On August 20, 2010, [Farmingham] was dispatched to [Plaintiff's apartment] to check the welfare of an elderly female. Upon arrival[, Plaintiff] answered the door, [Farmingham] informed [Plaintiff] that [he] and officer Kleveno were there to check the welfare of his mother. Upon [Plaintiff] answering the door there was a very strong odor of something rotting. [Plaintiff] immediately became defensive and stated to [the officers] that he had just put his mother to sleep and the [sic] he did not want us to wake her. [The officers] then informed [Plaintiff] that [they] would need to speak to his mother before leaving. [Plaintiff] agreed to let [the officers] speak to his mother. While walking in [Plaintiff] began to appear very nervous. Upon entering [the mother's] bedroom, [the officers] immediately observed several bruises on [the mother's] legs [and] arms and also that [the mother] had a black eye. [Farmingham] also observed bed sheets next to [the mother's] bed that were covered in urine. [Plaintiff] was asked to leave the room so [Farmingham] could speak to [the mother]. [Farmingham] then interviewed [the mother,] who was visibly shaking and appeared [*16] confused. [Farmingham] attempted to interview [the mother,] but due [to] a language barrier [Farmingham] was unable to obtain information from [the mother]. [The mother] also appeared to [be] frightened and afraid to speak to [the officers]. [An ambulance] was dispatched and [Farmingham] contacted [APS]. [Farmingham] spoke with Candice Crain of APS[,] who stated that she would respond to [the] location. Upon arrival of [the ambulance,] [Plaintiff] stated to [the officers] and in front of the [ambulance crew], "I tie [sic] her legs up." [The officers] then took [Plaintiff] into custody, [and Plaintiff] was then transported to [the] station for processing. Upon arrival of [Crain], [Crain] spoke with [the mother] and discovered that her legs[,] which were covered under the blankets[,] were still tied with a twisted plastic bag. [Crain] immediately removed [the mother's] legs from the restraint and informed [Farmingham]. [The mother] was transported to [the hospital] for evaluation . . . . [Crain] went to the hospital with [the mother]. Upon arrival to the hospital[,] [Crain] discovered with hospital staff further bruising on [the mother's] breast and upper thighs. [The doctor] stated that [*17] the bruising was consistent with [the mother] being physically abused. (SAC Ex. 2.0.) The police also provided Plaintiff with an official notice, required by N.Y. Crim. Proc. § 710.30, of the county's intent later to offer Plaintiff's statement, "I tie [sic] her legs down," into evidence. (Id. Ex. 2.0-2 (710.30 Notice, dated Aug. 20, 2010).) Plaintiff was charged that day with second-degree endangering the welfare of a vulnerable elderly person (a Class E felony), N.Y. Penal Law § 260.32, thirddegree assault (a Class A misdemeanor), N.Y. Penal Law § 120.00, and second-degree unlawful imprisonment (a Class A misdemeanor), N.Y. Penal Law § 135.05. (Id. ¶ 65; see also id. Ex. 2.1 (Arrest Report, dated Aug. 20, 2010).) In a misdemeanor information and felony complaint filed the same day, Farmingham offered an account of the incident that appears to be consistent with the account he gave in the Incident Report:
[Plaintiff] . . . [on August 20, 2010 at approximately 3:25 p.m.,] being the caregiver for 92 year old victim (Felicidad P[.] Rana)[,] did physically tie [the] victim's feet together and then to the bed using a plastic bag, in order to prevent said victim from being able to get out of bed. Furthermore[,] the victim was unable to stand on her own and walk to the [*18] bathroom due to the tightness in her ankles from being restrained[,] causing said victim to urinate on the floor.

(Id. Ex. 2.2 (Misdemeanor Information, filed Aug. 20, 2010).)

[Plaintiff] . . . [on August 20, 2010 at approximately 3:25 p.m.,] being the caregiver for 92 year old victim (Felicidad P[.] Rana)[,] did physically tie [the] victim's feet to the bed using a plastic bag. [Plaintiff's] actions did cause swelling and severe bruising to [the] victim's ankles and feet.

(Id. Ex. 2.3 (Felony Complaint, filed Aug. 20, 2010).)

Later that [*19] day, Plaintiff alleges that he visited the emergency room because of an asthma attack. (See TAC 70; FAC 33.) Farmingham accompanied him to the ER, and Plaintiff alleges that when he asked Farmingham to use the bathroom, Farmingham handcuffed Plaintiff to his bed and refused to allow a nurse to provide Plaintiff a plastic bag to relieve himself, causing Plaintiff to urinate on himself. (See TAC 70; FAC 33-34.) After his release from jail, Farmingham allegedly explained to a "Sheriff's Officer" that Plaintiff urinated in his pants because he "doesn't like . . . to go to [the] bathroom in ER Rooms." (TAC 70; FAC 34.) Plaintiff also alleges that Farmingham incorrectly told Plaintiff that Plaintiff's mother was not in the same hospital. (TAC 70; FAC 34.)

Following his visit to the ER, Plaintiff was kept in jail overnight, but the next morning he was released on bail with the assistance of his friend, Brent Borgmann ("Borgmann"). (SAC ¶ 64.) That same day, Plaintiff saw a doctor who completed a medical examination, which included taking numerous x-rays, and concluded that Plaintiff had bruises on his stomach and left arm. (See id. ¶ 71; id. Ex. H (prescription slip, noting that Plaintiff [*20] complained of being "bitten by police" and had "bruise[s]" on his chest and abdomen); id. Exs. I, J, K (x-ray images); id. Exs. L, M, N (photos of Plaintiff appearing to indicate bruises).)

5. November 10, 2011

The fifth incident discussed in Plaintiff's SAC involves a petition for guardianship filed on August 24, 2011, and litigated at a November 10, 2011 Surrogate's Court hearing. On August 24, 2011, Sholes & Miller, on behalf of MPRHCC, filed a petition in Orange [*31] County Surrogate's Court to determine whether Plaintiff's mother should be appointed a legal guardian. (Id. ¶¶ 24, 108.) The petition claimed that Plaintiff's sister, Victoria Chang ("Chang"), sought to become her mother's legal guardian:

Petitioner is aware that [Plaintiff's mother] had designated her son, [Plaintiff], as her health care proxy. However, due to [Plaintiff's] refusal to take our calls, respond to our letters, and discuss
his mother's care, and due to his assaults on his mother and orders of protection discussed below, we contacted [Plaintiff's mother's] alternate health care proxy, [Plaintiff's sister] Yolando Co. When our social worker spoke with Ms. Co by telephone on June 30, 2011, Ms. Co advised that she could not make health care decisions for her mother and wanted to be removed as her mother's alternate health care proxy. Ms. Co requested that all calls and decision making regarding her mother be directed to her sister, Victoria Chang, the eldest daughter of [Plaintiff's mother]. We then spoke with Ms. Chang regarding acting as a surrogate health care proxy pursuant to the Family Health Care Decision Act.

Although [Plaintiff] claims to be his mother's power [*32] of attorney, we have not seen such a document.

Ms. Chang attended an initial care plan meeting at our facility on July 15, 2011. Ms. Chang indicated that she wanted to be in charge of her mother's health care decision making process, and also wanted her mother to reside in a nursing home closer to her own home, which is located in New Jersey. (Id. Ex. 18 (apparent excerpt from guardianship petition).) Along with the petition, Sholes & Miller filed a number of supporting documents, including (1) a "Family Health Care Decision Information" form signed by Green and dated June 29, 2011, noting that Plaintiff's mother had an existing Health Care Proxy, that she did not have a guardian, but that she did have two daughters (Victoria Chang and Eloisa Kern), (see id. Ex. 12); (2) a "Consent by Surrogate to DNR Order" form signed by Plaintiff (as his mother's surrogate), witnessed by Green, and dated March 31, 2011, indicating Plaintiff's consent for a physician to issue a do-not resuscitate order ("DNR"), (see id. Ex. 14); (3) supporting documentation regarding the DNR consent form, (see id. Exs. 15-17); and (4) a New Jersey police report memorializing a domestic dispute in November 2007 involving [*33] Plaintiff's mother (as the offender), Chang (as the complainant), and a third-party witness, (see id. Ex. 19).

A judge issued an Order To Show Cause the same day the petition was filed. (See id. Exs. 5.0, 5.0-1 (Order To Show Cause, dated Aug. 24, 2011).) Moreover, at some point, Plaintiff's mother was appointed a temporary guardian from the OCDSS, a "court evaluator," and an attorney from Mental Hygiene Legal Services, Inc. to represent her in connection with the guardianship petition. (See id. Ex. Index No. 2011-08338 ("Guardianship Order") (Order & J. Appointing Guardian of the Person and Property, dated Dec. 12, 2011).) A hearing was originally scheduled to take place in October, but it was rescheduled to November 10. (See id. Ex. 13 (Letter from Sarah E. Sholes, Esq., to Plaintiff and others (Oct. 14, 2011).)

At the hearing, Sholes appeared on behalf of petitioner; the court evaluator appeared on behalf of the court; Plaintiff's mother's attorney appeared on behalf of Plaintiff's mother; and David Medford of the Orange County Attorney's Office appeared on behalf of OCDSS. (See id. Ex. 5.1 ("Hrg Tr.") (Hrg Tr., dated Nov. 10, 2011).) In support of the petition, Sholes called a [*34] number of witnesses, including the court evaluator, and Masterson, Forman, Smalls, Farmingham, and Crain. (See id. (Index page).) Plaintiff's mother's attorney also called a number of witnesses, including Plaintiff's mother, Chang, and Plaintiff. (See id.) The court was also presented with a number of exhibits, including the court evaluator's report, Plaintiff's
mother's medical records, and exhibits from the Wallkill Police Department. (See Guardianship Order 2.)

At the hearing, Plaintiff alleges that Crain, with Murphy's coaching, offered false testimony at the guardianship hearing. (TAC 37, 40 (brackets omitted); FAC 10, 35, 37.) Plaintiff also alleges that Sholes submitted "falsified/altered documents" with the assistance of Murphy and Jolly. (TAC 7.) Maniscalco, Masterson, Small, Murphy, Crain and Sholes also allegedly did not intervene when Farmingham prevented Plaintiff from giving his mother a "hug and kiss" at the hearing, or even going near her, warning Plaintiff that he would be "handcuff[ed] [and] arrested again" if he did so. (FAC 8, 33.)

II. DISCUSSION

A. Standard of Review

The Supreme Court has held that although a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the 'grounds' of his [or her] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (second alteration in original) (citations omitted). Instead, the Supreme Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level," see id., and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," id. at 563. A plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. But if a plaintiff has "not nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed." Id.; see also Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("Determining whether [*60] a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))).

For the purposes of Defendants' Motions To Dismiss, the Court is required to consider as true the factual allegations contained in the Complaint. See Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008) ("We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." (internal quotation marks omitted)); Gonzalez v. Caballero, 572 F. Supp. 2d 463, 466 (S.D.N.Y. 2008) ("On a Rule 12(b)(6) motion to dismiss a complaint, the court must accept a plaintiff's factual allegations as true and draw all reasonable inferences in his favor."). "In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial [*61] notice may be taken." Leonard F. v. Isr. Disc. Bank of N.Y., 199 F.3d 99, 107 (2d Cir. 1999)
Because Plaintiff is proceeding pro se, the court construes his "submissions... liberally" and interprets them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks omitted). Furthermore, for the same reason, it is appropriate to consider "materials outside the complaint to the extent that they are consistent with the allegations in the complaint," see Alsafillah v. Furco, No. 12-CV2907, 2013 U.S. Dist. LEXIS 110398, 2013 WL 3972514, at *4 n.3 (S.D.N.Y. Aug. 2, 2013) (internal quotation marks omitted), including "documents that a pro se litigant attaches to his opposition papers," Agu v. Rhea, No. 09-CV-4732, 2010 U.S. Dist. LEXIS 132706, 2010 WL 5186839, at *4 n.6 (E.D.N.Y. Dec. 15, 2010) (italics omitted); see also Walker v. Schult, 717 F.3d 119, 122 n.1 (2d Cir. 2013) (noting that a court may consider "factual allegations made by a pro se party in his papers opposing the motion") (italics omitted); Rodriguez v. Rodriguez, No. 10-CV-891, 2013 U.S. Dist. LEXIS 130029, 2013 WL 4779639, at *1 (S.D.N.Y. July 8, 2013) ("Although the Court is typically confined to the allegations contained within the four corners of the complaint, when analyzing the sufficiency of a pro se pleading, a court may consider factual allegations contained in a pro se litigant's opposition papers and other court filings." (citations and internal quotation marks omitted)).

B. Analysis

Plaintiff makes several claims in his TAC and FAC. In the TAC, those claims include § 1983 claims for false arrest, false imprisonment, [*62] "strip search," "conspiracy," failure to intervene, and malicious prosecution, (TAC 6), state law claims for malicious abuse of process, violation of the New York Civil Rights Act, false arrest and imprisonment, assault, battery, conspiracy, "coercion and intimidation," "intentional torts," and "intentional infliction of emotional distress. (See, e.g., id. at 6.) In the FAC, Plaintiff removed his "intentional torts" and "coercion and intimidation" claims, and added claims for negligence and negligent infliction of emotional distress. (See, e.g., FAC 2-3.) The Court will proceed by liberally construing the most recent explanation of Plaintiff's claims, namely included in the FAC, and therefore dismisses any claims for "coercion and intimidation" or "intentional torts." Given that Plaintiff has clearly laid out the claims he wishes to allege, the Court also, except as otherwise noted below, will not consider claims that Plaintiff merely makes passing reference to in his TAC, FAC, and Opposition because, as discussed in the 2014 Opinion and Order, those claims fail to meet Rule 8's fair notice requirement in that the FAC and TAC do not allege facts that specifically support those claims. (See, e.g. [*63], FAC 40, 46 (discussing defamation); Aff'n in Opp'n to Mot. (Pl.'s Opp'n) (Dkt. No. 198) (noting that "Plaintiff[] will be claiming 'Defamation of Character' on several Defendants"); Reply Mem. of Law in Supp. of the County Defs.' Mot. To Dismiss 4 ("Orange County Reply") (Dkt. No. 201) (listing several new claims contained Plaintiff's Opposition).) See Park Manor, 51 F. Supp. 3d at 350; see also Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) ("When a complaint does not comply with the requirement that it be short and plain, the court has the power, on its own initiative or in response to a motion by the defendant, to strike any portions that are redundant or immaterial . . ."); Ceparano v. Suffolk Cty., No. 10-CV-2030, 2010 U.S. Dist. LEXIS 134605, 2010 WL 5437212, at *3 (E.D.N.Y. Dec. 15, 2010) ("[P]rolif,
unintelligible, speculative complaints that are argumentative, disjointed[,] and needlessly ramble have routinely been dismissed in this Circuit." (collecting cases); cf. Rajagopala Sampath Raghavendra v. Trustees of Columbia Univ., Nos 06CV-6841, et al., 2012 U.S. Dist. LEXIS 124597, 2012 WL 3778714, at *11 n. 20 (S.D.N.Y. July 11, 2012) n.20 (noting that the pro se plaintiff's mere "passing references" to age discrimination claims without supporting factual allegations beyond the plaintiff's approximate age are insufficient), adopted by 2012 U.S. Dist. LEXIS 124598, 2012 WL 3778823 (S.D.N.Y. Aug. 31, 2012); Windley v. Leonardo, No. 89-CV-7839, 1990 U.S. Dist. LEXIS 9108, 1990 WL 106774, at *2 (S.D.N.Y. July 24, 1990) (noting that the pro se plaintiff's "passing references" to the Fourteenth Amendment without reference to any case law were inadequate to give notice of a Fourteenth Amendment claim). [*64]

4. OCDSS as a Suable Entity

The Orange County Defendants argue, in their Motion, that OCDSS is not a suable entity. (Mem. of Law in Supp. of County Defs.' Mot. To Dismiss ('Orange County Mem.'|n) 8 (Dkt. No. 181).) They are technically correct: Under Federal Rule of Civil Procedure 17(b), "an entity can only be sued in federal court if it would be suable under the laws of the state where it was created," New York law in this case. MetroPCS N.Y., LLC v. City of Mount Vernon, 739 F. Supp. 2d 409, 419 (S.D.N.Y. 2010). "In New York...agencies of a municipality are [*72] not suable entities because they are merely administrative arms of a municipality, [and] do not have a legal identity separate and apart from the municipality." Id. (alteration in original) (internal quotation marks omitted); see also Schweitzer v. Crofton, 935 F. Supp. 2d 527, 551 (E.D.N.Y. 2013) (dismissing claim against the Suffolk County Department of Social Services "because it is not a suable entity"), aff'd, 560 F. App'x 6 (2d Cir. 2014). While this would normally be sufficient for the Court to dismiss Plaintiff's claims against OCDSS, on May 27, 2014, counsel for the Orange County Defendants requested that Orange County be substituted for OCDSS, presumably because OCDSS is not a suable entity, as discussed at the May 21, 2014 pre-motion conference. (See Dkt. No. 96.) Accordingly, in light of Plaintiff's pro se status, rather than dismiss Plaintiff's claims against OCDSS on this ground, the Court will construe Plaintiff's claims against OCDSS as claims against the Orange County, per counsel for the Orange County Defendants' previous request.

c. Other Claims Against the Orange County Defendants

The Court also finds that Plaintiff's claims stemming from conduct alleged to have occurred as part of the March 30-31 and August 20, 2010 incidents are untimely as to the Orange County Defendants. As discussed above, Plaintiff's federal claims are governed by a three-year statute of limitations, his state intentional tort claims are governed by a one-year statute of limitations, and the Orange County Defendants were added in Plaintiff's SAC on September 24, 2013, more than three years after misconduct alleged to have occurred as part of these incidents. (See Orange County Mem. 8-10.) Therefore, because the addition of the Orange County Defendants does not relate back to the initial Complaint, the Court dismissing Plaintiff's federal claims, and state law claims other than negligence and negligent infliction of emotional distress, against the
Orange County Defendants, with prejudice, insofar as they stem from conduct [*83] that occurred on March 30-31 or August 20, 2010.

6. Absolute Immunity

Second, the Orange County Defendants argue that Murphy, Crain, and Jolly are absolutely immune from suit because they were "performing duties within the scope of their employment" under New York Social Services Law § 473(3). (Orange County Mem. 10-13.) New York Social Services Law § 473(3) provides that

[a]ny social services official . . . shall have immunity from any civil [*85] liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willful[] act or gross negligence of such official or his designee.

N.Y. Soc. Serv. Law § 473(3); see also Shinn v. City of New York, 65 A.D.3d 621, 884 N.Y.S.2d 466, 467 (App. Div. 2009) (affirming grant of summary judgment to defendants, including New York City Adult Protective Services, because they were immune from civil liability under this statute when they acted "pursuant to a court order granting access to the plaintiff as an adult person believed to be in need of protective services"). In support of their immunity contention, the Orange County Defendants argue that "the alleged conduct occurred while the Orange County Defendants were executing their duties and responsibilities as employees of the Department of Social Services," which include "reporting, investigation, and providing . . . protective services to Plaintiff's mother, who was determined to be an adult person in need of protection." (Orange County Mem. 12.) However, under the plain language of the law, if Plaintiff plausibly alleges that Murphy, Crain, and Jolly are liable by virtue [*86] of a willful act, were grossly negligent, or acted outside the scope of their employment, then they are not entitled to immunity. See Van Cortlandt v. Westchester Cty., No. 07-CV-1783, 2007 U.S. Dist. LEXIS 80977, 2007 WL 3238674, at *910 (S.D.N.Y. Oct. 31, 2007) (finding that the defendants were not be immune from suit under § 473 because the plaintiff alleged that they acted in a grossly negligent manner and contrary to the requirements of the Mental Hygiene Law). Alternatively, the Orange County Defendants argue that, under New York Social Services Law § 473-b, Murphy, Crain, and Jolly are immune from civil liability for their testimony at the guardianship proceeding. (Orange County Mem. 13.) New York Social Services Law § 473b provides that[a]ny person who in good faith believes that a person . . . may be an endangered adult or in need of protective or other services . . . testifies in any judicial or administrative proceeding arising from such report or referral shall have immunity from any civil liability that might otherwise result [from the] . . . giving of such testimony. N.Y. Soc. Serv. Law § 473-b. In support of this contention, the Orange County Defendants argue that Crain was "clearly . . . testifying at a guardianship hearing as an employee of" the Department of Social Services, which is "well within the scope of her employment," that Murphy's presence at the hearing was similarly "within the scope of [*87] his employment," and that under Social Services Law § 473(5), Murphy, Crain, and Jolly are "mandatory reporters" such that they must "report and/or investigate any allegation of abuse," which, "as part of their duties and responsibilities," requires "testify[ing] at
judicial proceedings." (Orange County Mem. 13.) However, under the plain language of the law, if Plaintiff plausibly alleges that Murphy, Crain, and Jolly testified in bad faith, then they are not entitled to immunity.

While the Court notes that it has already dismissed most of Plaintiff's claims against the Orange County Defendants as untimely, and all claims against Jolly for failure to serve, it evaluates the Orange County Defendants' claim of immunity in the alternative. First, it is impossible for the Court to evaluate Jolly's entitlement to immunity because Plaintiff makes almost no allegations against him, as discussed below. Second, with regard to Murphy and Crain, the Court finds that they are not, at this stage, entitled to immunity from Plaintiff's claims.

On their face, both § 473(3) and § 473-b appear to apply. With regard to § 473(3), while the cases that the Orange County Defendants cite are not particularly persuasive, (see Orange County Mem. 12-13), [*88] Murphy and Crain do appear to have been acting within the scope of their employment here when testifying (or, in Murphy's case, accompanying a subordinate who was testifying) at a hearing consistent with their reporting requirement under New York Social Services Law § 473(5). With regard to § 473-b, as discussed above, Crain, at least, was clearly "testifying in [a] judicial or administrative proceeding" arising from a "report or referral." (TAC 19; FAC 25.) See Marilyn S. v. Indep. Grp. Home Living Program, Inc., 73 A.D.3d 895, 904 N.Y.S. 2d 70, 72 (App. Div. 2010) (granting the defendants immunity for "act[ing] in good faith when they reported allegations of sexual abuse made by the Plaintiffs' son"). The central question, though, is whether Murphy and Crain are liable by virtue of a "willful[] act or gross negligence," N.Y. Soc. Serv. Law § 473(3), or otherwise testified in "good faith," id. § 473-b. Plaintiff alleges that that Crain, with Murphy's coaching, testified falsely at the hearing with a "malicious" motive, namely the "intent to harm Plaintiff[]." (FAC 10, 37.) While not backed by the sort of factual underpinning to render Plaintiff's allegations particularly compelling, they do suggest the sort of "bad faith" or "willful act" that vitiates immunity. See Cortlandt, 2007 U.S. Dist. LEXIS 80977, 2007 WL 3238674, at *9-10 (denying motion to dismiss on immunity grounds because the plaintiff alleged that the social services officials [*89] acted in a "grossly negligent manner"); Recant v. N.Y. Presbyterian Hosp., 25 Misc. 3d 1219[A], 901 N.Y.S.2d 910, 2009 NY Slip Op 52195[U], 2009 WL 3490940, at *4 (N.Y. Sup. Ct. Oct. 15, 2009) (denying motion to dismiss on immunity grounds because the plaintiff alleged that the defendant made allegations in bad faith, and the defendant "fail[ed] to come forward with evidence of her good faith"). Accordingly, the Court declines to dismiss Plaintiff's claims against Murphy, Crain, and Jolly on immunity grounds.

Finally, as far as the Orange County Defendants are concerned, with regard to Leo, Plaintiff only alleges that she "took" Plaintiff's mother's "case," that she was at one point "called" by Masterson, and that she was somehow "involved" the conspiracy at issue. (See TAC 17, 89; FAC 19, 36, 40.)
As was true in the Second Amended Complaint, the ["94] problem with Plaintiff's allegations against Green, Yeddu, Terwillinger, Brennan, McLymore, Belgiovene, and Leo, is that they either are, once again, only "assertion[s] of liability without any explanation as to [each Defendant's] role in harming Plaintiff," Park Manor, 51 F. Supp. 3d at 350, or contain no allegations of liability at all. Accordingly, acknowledging that the Court has already dismissed claims against some of these Defendants for other reasons, the Court nonetheless dismisses Plaintiff's claims against Green, Yeddu, Terwillinger, Brennan, McLymore, Belgiovene, and Leo for failure to allege personal involvement, with prejudice.

The Wallkill Defendants and Orange County Defendants also argue that Plaintiff failed to allege personal participation of certain supervisory Defendants. A plaintiff does not state a claim against a defendant under § 1983 when he asserts that an official is liable solely because he or she has a supervisory role or a position of authority. See Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996) ("We see no error in the dismissal of the claim against Coughlin for lack of personal involvement, since a defendant in a § 1983 action may not be held liable for damages for constitutional violations merely because he held a high position of authority."); Canner v. City of Long Beach, No. 12-CV2611, 2015 U.S. Dist. LEXIS 108980, 2015 WL 4926014, at *2 (E.D.N.Y. Aug. 18, 2015) ("[A] defendant in a § 1983 action may not be held liable for damages for constitutional violations merely because he held a position of high authority."); Kee v. Hasty, No. 01-CV2123, 2004 U.S. Dist. LEXIS 6385, 2004 WL 807071, at *2 (S.D.N.Y. Apr. 14, 2004) ("Conclusory accusations regarding a defendant's personal involvement in the alleged violation, standing alone, are not sufficient, and supervisors cannot be held liable based solely on the alleged misconduct ["96] of their subordinates." (citations omitted)). A plaintiff is personally involved as a supervisor when he or she "(1) . . . participate[s] directly in the alleged constitutional violation, (2) . . . after being informed of the violation through a report or appeal, fail[s] to remedy the wrong, (3) . . . create[s] a policy or custom under which unconstitutional practices occurred, or allow[s] the continuance of such a policy or custom, (4) . . . [is] grossly negligent in supervising subordinates who commit[] the wrongful acts, or (5) . . . exhibit[s] deliberate indifference . . . by failing to act on information indicating that unconstitutional acts were occurring." Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995); see also Black, 76 F.3d at 74 ("We have construed personal involvement for these purposes to mean direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates.").

In the same vein, the Orange County Defendants contend that Plaintiff failed to allege sufficient personal involvement of Murphy and Jolly. (See Orange County Mem. 14-16.) With regard to Defendant Murphy, Plaintiff alleges, in relevant part, that he coached Crain to offer false testimony at the guardianship hearing with "malicious intent," (TAC 37, 40 (brackets omitted); FAC 10, 35, 37), and that he "assist[ed]" Sholes in submitting of "falsified/altered documents" at the Guardianship hearing, (TAC 7, 43). With regard to Defendant Jolly, Plaintiff only alleges that Jolly "assist[ed]" ["99] Sholes in submitting "falsified/altered documents" at the Guardianship hearing. (TAC 7, 43.) In this context, the Court finds that Plaintiff has alleged sufficient personal involvement with respect to Murphy, but insufficient personal involvement with respect to Jolly.
While Murphy's acts of "coaching" certainly allege personal involvement, it is not clear from the TAC and FAC how Jolly "assisted" Sholes in the filing of falsified documents, what such assistance entailed, and which documents were false. Cf. Leeds v. Meltz, 85 F.3d 51, 55 (2d Cir. 1996) (noting that the "bare conclusion . . . that various . . . employees somehow 'prevented' publication" of the plaintiff's advertisement in the school newspaper were insufficient)). Accordingly, acknowledging that the Court has already dismissed Plaintiff's claims against Jolly for failure to serve, it nonetheless once again dismisses Plaintiff's claims against Jolly.

The Orange County Defendants argue that Plaintiff failed to allege the personal involvement of Crain and Orange County. (See Orange County Mem. 14.) Plaintiff alleges that Crain, in relevant part, together with other Defendants as part of a conspiracy, made false statements under oath at the November 10, 2011 guardianship hearing, "resulting in Plaintiff losing certain rights related to his mother," (TAC 37, 40; FAC 4, 10, 35, 37). As the Court found in its 2014 Opinion and Court, these allegations establish sufficient personal involvement with respect to Crain's participation in the November 10, 2011 guardianship hearing. See Park Manor, 51 F. Supp. 3d at 354. With regard to the personal involvement of Orange County, because that involvement directly implicates Monell v. Dep't of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Court will address the viability of Plaintiff's claims against Orange County in a separate section.

b. Federal Claims

Prior to considering the Plaintiff's individual claims, it is worth taking stock of those Defendants and claims that the Court has already dismissed, and those that remain. While the Court will detail exactly which claims were dismissed, and whether those dismissals are with or without prejudice, at the conclusion of this Opinion, the Court notes that it has dismissed all claims against Defendants Conklin, Green, Tiffany, Yvette, Terwillinger, [*104] Yeddu, Brennan, Spano, Kammarada, McLymore, Proca, Belgiovene, Moskowitz, Guzman, New York State, Mannix, Labuda, Lacatena, Leo, Jolly, and Sholes.

Accordingly, at this point, Plaintiff only has viable claims against nineteen Defendants: MPRHCC, Maniscalco, Masterson, Forman, Small, Brewster, Reyes, Du Bois, Orange County, Murphy, Crain, Wallkill, Hertman, Farmingham, Dewey, Kleveno, Gulick, Solan, and Sholes & Miller. The Court has explicitly limited the scope of these claims as to five Defendants: Plaintiff's claims against Sholes and Miller are viable except for intentional infliction of emotional distress, his claims against Orange County, Murphy, and Crain are viable only with regard to the August 20, 2010 incident and except for intentional infliction of emotional distress, and his claims against Farmingham are viable except with regard to the November 10, 2011 guardianship hearing.

vii. Conspiracy

The Orange County Defendants and Wallkill Defendants also argue that Plaintiff has failed to plead a conspiracy. To state a § 1983 conspiracy claim, a plaintiff must plead "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in
concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999); see also Brooks v. Cty. of Nassau, 54 F. Supp. 3d 254, 258 (E.D.N.Y. 2014) (same). Similarly, to state a § 1985(3) conspiracy claim, a plaintiff must plead

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured [*126] in his person or property or deprived of any right of a citizen of the United States. See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993); see also Brooks, 54 F. Supp. 3d at 258-59 (same). Further, a § 1985(3) conspiracy must "be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." Mian, 7 F.3d at 1088 (quoting United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 829, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983)). In both cases, a plaintiff must also allege a factual foundation for a "meeting of the minds" among the Defendants. See Webb v. Goord, 340 F.3d 105, 111 (2d Cir. 2003) (dismissing conspiracy claim where the plaintiffs alleged only "in the most conclusory fashion[] that any such meeting of the minds occurred among any or all of the defendants") (2d Cir. 2003); Bermudez v. City of New York, No. 11-CV-750, 2013 U.S. Dist. LEXIS 20371, 2013 WL 593791, at *8 (S.D.N.Y. Feb. 14, 2013) ("[A] plaintiff must allege facts that plausibly suggest a meeting of the minds such as that [the] defendants entered into an agreement, express or tacit, to achieve the unlawful end." (internal quotation marks omitted)). Both the Orange County Defendants and the Wallkill Defendants contend that Plaintiff has not included sufficient allegations to plausibly state a conspiracy claim under §§ 1983 and 1985. The Court agrees. Mere "conclusory allegations of conspiracy are insufficient to survive a motion to dismiss." Bermudez, 2013 U.S. Dist. LEXIS 20371, 2013 WL 593791, at *8 (alterations and internal quotation marks omitted); see also Ciambriello v. Cty. of Nassau, 292 F.3d 307, 325 (2d Cir. 2002) ("[C]omplaints containing only conclusory, vague, [*127] or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." (internal quotation marks omitted)). Yet Plaintiff's claims are largely this ilk: other than using the word "conspiracy" several times in the TAC and FAC, (see, e.g., TAC 16 ("Very simply, Plaintiff[ ]is alleging/asserting that there was a conspiracy . . . ."), 137 ("Defendants conspired against Plaintiff throughout the court of the June 10, September 13, and November 10 incidents."); FAC 10 (same)), and stating the elements of a conspiracy claim, (see, e.g., FAC 7-8), Plaintiff alleges simply that Defendants "conspired to defame and setup Plaintiff" in the context of all of the misconduct alleged, (FAC 7).

The only allegations that arguably establish an element of the "meeting of the minds" are the allegations and Murphy and Maniscalco coached others, (see, e.g., FAC 10, 33, 35, 37), and Plaintiff's allegation that Lacatena told Plaintiff that the August 20, 2011 incident was "planned by . . . Murphy" and that the statements made [*128] at the guardianship hearing were "rehearse[d] with Crain and "planned . . . together with . . . Maniscalco," (FAC 36-37). Plaintiff's
allegations are flawed in several ways, however. First, Plaintiff fails to allege "at what point the meeting of the minds occurred," namely when the conspiracy came to be. Bermudez, 2013 U.S. Dist. LEXIS 20371, 2013 WL 593791, at *9 (dismissing the plaintiff's conspiracy claim in part for this reason). Indeed, the bulk of Plaintiff's allegations regarding a meeting of the minds refer to the guardianship hearing, the last incident in the series of incidents alleged. Second, the mere fact of "planning" or "coaching," as the Court recognizes is common before any witness testifies at a hearing, does not plausibly establish the existence of a conspiracy among the Defendants. Accordingly, the mere allegation of joint planning or decision-making does not establish that the planning was in furtherance of a conspiracy. See id. (finding conspiracy allegations insufficient because, inter alia, the plaintiff did not allege how the Defendants "conspired together" when he alleged that they "intentionally elected not to call" a witness, or that the decision "was based on a conspiracy . . . rather than" prosecutorial discretion). Third, [*129] Plaintiff fails to provide any detail about his alleged conversation with Lacatena, including when it occurred and what the alleged end of the conspiracy was. Indeed, the lack of supportive facts renders this portion of Plaintiff's TAC and FAC devoid of any hint of plausibility. Accordingly, the Court dismisses Plaintiff's § 1983 and § 1985(3) conspiracy claims with prejudice.

The Court also notes that to the extent that Plaintiff is attempting to allege a § 1986 failure-to-intervene claim, that claim is also dismissed with prejudice because it must be premised on a valid, underlying § 1985 claim. See Brown v. City of Oneonta, 221 F.3d 329, 341 (2d Cir. 1999) ("[A] § 1986 claim [*130] must be predicated on a valid § 1985 claim . . . ." (internal quotation marks omitted)).

III. CONCLUSION

In light of the foregoing, the Court holds that Defendants Motions are granted in part and denied in part. Plaintiff's claims against the MPHRC Defendants, New York State, Mannix, the Orange County Defendants, and the Sholes Defendants are dismissed in their entirety, with prejudice. Plaintiff's claims against Farmingham and Kleveno are dismissed except for Plaintiff's § 1983 for false arrest, false imprisonment, malicious prosecution, and failure to intercede claims stemming from the August 20, 2010 incident. Because Plaintiff has had several chances to amend his complaint, the Court makes clear that Plaintiff may not amend his Complaint at this stage without prior leave of the Court.

The Clerk of the Court is directed [*148] to terminate the pending motions. (Dkt. Nos. 178, 183, 188, 191.)

SO ORDERED.

Dated: September 30, 2015

White Plains, New York

/s/ Kenneth M. Karas
Plaintiff in this negligence action, Anastasia Joliet Renee Brown, is a minor represented by her adoptive mother Myrtle Brown. Defendant Harlem Dowling-Westside Center for Children and Family Services (HDWC) is an agency that contracts with the City of New York to provide foster care services. Defendant Administration for Children's Services is a nonjusticiable agency of defendant City of New York, the real party in interest (together the City). HDWC and the City each move for summary judgment and dismissal of the complaint. HDWC relies on attorneys' affirmations and exhibits, including the transcript of plaintiff's examination before trial (EBT), progress notes of agency caseworkers, and various documents regarding the drug rehabilitation and training of plaintiff's birth mother. The City relies on an attorney's affirmation and exhibits, including transcripts of plaintiff's EBT and EBTs of two witnesses for the City, and an operations manual for city caseworkers in the Division of Adoption and Foster Care Services. Plaintiff relies on an attorney's affirmation, an affidavit of psychiatrist Richard J. Francis, M.D., additional affidavits and numerous exhibits, including: transcripts of EBTs of plaintiff and two witnesses for the City, plaintiff's bills of particulars, HDWC progress notes, HDWC and City notes and documents, toxicology and lab reports, Family Court documents, and school records. The motions are consolidated for disposition.
I. Background and Undisputed Facts

Plaintiff filed her complaint on or about June 26, 1998, seeking damages for severe injuries caused by her natural mother (mother or Rhonda) after being permanently discharged by HDWC into her mother's custody at the age of six. Plaintiff makes the following allegations: (1) HDWC and the City were grossly negligent in their acts, omissions and decisions in returning custody of plaintiff and her older sister to their mother; (2) HDWC and the City were grossly negligent in their acts, omissions and decisions in failing to maintain and execute the permanency goal of adoption for plaintiff and her sister; and (3) the City was grossly negligent in its acts, omissions and decisions with respect to the investigation of reports the City received of Rhonda's abuse of plaintiff and negligent supervision of all three children then in her custody.

Both HDWC and the City claim their employees have immunity from suit, both under Social Services Law § 419 and the common law, for discretionary acts of public officials. Defendant agencies also claim that the undisputed evidence shows they and their employees are not liable for gross negligence or willful misconduct as a matter of law. Plaintiff argues in response that neither agency can claim statutory immunity under Social Services Law § 419 because their activities were not within the class of activities the statute was meant to immunize, that is the investigation of child abuse and removal of abused children to protective custody. Plaintiff also argues that defendants are not immunized because defendant agencies undertook a special duty to plaintiff and breached that duty, their caseworkers were grossly negligent and failed to do nondiscretionary investigative work, and the defendant agencies are riddled with systemic and known failures placing vulnerable children at serious risk of harm. With respect to HDWC, plaintiff further argues that its motion should be denied because it was filed late and is only supported by an attorney's affirmation.

The parties seriously dispute the actions undertaken by the defendant agencies in relation to the return of plaintiff and her sister to Rhonda, but there is agreement at least to the following facts:

HDWC is authorized to operate, supervise, assist and provide foster care services in the City of New York. Defendant Administration for Children's Services (ACS) is responsible for the child welfare divisions of the Human Resources Administration/Department of Social Services in the City of New York. The agency was previously known as the Child Welfare Administration. It is responsible for the investigation of child abuse complaints and for the removal of children and placement in protective custody. A foster care placement and temporary discharge of custody to a parent was monitored by HDWC (or another foster care agency under contract with the City), and a child permanently placed back into the custody of a parent, post-foster care, was monitored by ACS.

Rhonda gave birth to plaintiff in 1989. Plaintiff was two months premature, weighed approximately two pounds, and tested positive for crack cocaine. Two months later, plaintiff and her four-year-old sister were placed in foster care with Helen Hickman, with whom they remained until being returned to Rhonda in 1995. HDWC supervised the foster care placement. While her girls lived in the home of Helen Hickman, Rhonda continued to struggle with her
addiction to crack cocaine. It appears that she was not cooperative with drug testing or programs, and she disappeared in April 1991.

Mrs. Hickman wanted to adopt the girls, but Rhonda resurfaced in February 1992 before her parental rights were terminated. Plaintiff's opposing papers include a form filled out by a city attorney after a Family Court appearance by plaintiff's law guardian and two caseworkers on October 15, 1991. The following is written in the section captioned “RESULT OF COURT PROCEEDING”: “CWA & Harlem Dowling ordered to file TPK forthwith.” A “TPK,” according to the affirmation of psychiatrist Richard J. Francis, is a termination of parental rights. This order was issued approximately 3½ months before Rhonda resurfaced. Once Rhonda reappeared, HDWC shifted from working toward adoption, to working toward a permanent placement with Rhonda, the birth mother. What ensued is subject to dispute, but HDWC's papers reflect an ongoing effort to reunite the girls with their mother, who resisted random drug testing and other counseling, but eventually managed a few negative urine tests and to attend an outpatient drug rehabilitation program and a parenting skills class. In June 1995, the girls were temporarily discharged into the custody of their mother and went to live with her, her boyfriend Thomas White Sr. (not the girls' father), and their toddler Thomas White Jr. Three months later, the temporary discharge was made permanent, and HDWC ended its supervision of plaintiff's welfare.

Approximately 18 months later, Rhonda stripped plaintiff, then seven, and forcibly held her on a hot radiator. Plaintiff sustained severe burns to her hand, the back of her legs, her buttocks and other parts of her body. When she went to school with visible burns, they called the police and all the children were removed from the home and placed into protective custody. Plaintiff was returned to Helen Hickman, her former foster mother, and eventually was adopted by Myrtle Brown and changed her name.

At her EBT, plaintiff testified that while in Rhonda's custody, the latter repeatedly beat her with fists, brooms and other hard objects, tortured her in various ways, such as forcing her to sit naked on a chair in a room with all the windows open during winter, to stand up all night on one leg for prolonged periods, holding her head under water or suffocating her with a pillow, and spraying air freshener in her eyes. She threatened to kill plaintiff if she told anyone what was going on. She kept plaintiff out of school for prolonged periods, and forced her to clean house, cook and do other chores. Plaintiff became increasingly hungry and dirty, and she and her sister had to care for themselves. City caseworkers came to the apartment to check a few times after people complained, but they never spoke with plaintiff alone. When asked within earshot of Rhonda, plaintiff denied that anything bad was going on. She went to school once badly injured on the back and legs and the school nurse and principal called Thomas Sr. When he came to the school, he threatened to kill them and carried plaintiff out.

II. Discussion and Rulings

A. HDWC's Motion
HDWC filed its summary judgment motion on or about November 2, 2007, approximately 147 days after the June 8, 2007 note of issue. CPLR 3212 (a) provides that a motion for summary judgment must be filed within 120 days of the note of issue unless “good cause” can be shown for the late filing. HDWC’s motion is untimely, and it has failed to establish the requisite good cause for its delay. (See e.g. Brill v City of New York, 2 NY3d 648, 652-653 [2004].) As the Court of Appeals held in Brill and underscored in Miceli v State Farm Mut. Auto. Ins. Co. (3 NY3d 725, 726-727 [2004]), the court must deny an untimely summary judgment motion without considering it on the merits if the movant fails to comply with the statutory requirement that “good cause” be shown for the late filing. In both those cases, the Court reversed the lower court’s grant of summary judgment on the merits and denied the motions for procedural default.

HDWC argues that good cause exists for the late filing because additional discovery has been done since the note of issue was filed and that plaintiff “admits” more discovery needs to be done. The reference to taking of nonparty depositions post-note of issue, fails to specify dates or identify the witnesses and does not establish any connection between the factual content of the depositions and the delay in bringing the summary judgment motion. Additionally, the motion is based primarily on the legal claims of statutory immunity under Social Services Law § 419 and common-law qualified immunity for discretionary acts of public officials, and the agency has not identified any relationship between those legal issues and the factual information yet to be discovered.

The only other basis cited by HDWC is an e-mail from plaintiff’s counsel dated September 20, 2007, purportedly indicating that further discovery will be necessary. The e-mail refers to a “recent NYC DOI report” and states only that “I may need limited post-note discovery based on matter[ ] there not previously available.” There is no connection made between this statement and the resulting further delay in seeking summary judgment. Indeed, plaintiff denies that discovery was sought after that date, and defendants argue that the NYC DOI report referred to in the e-mail, submitted by plaintiff as exhibit H in opposition to summary judgment, is irrelevant to this case. This tends to undercut HDWC’s position that “good cause” in the form of additional discovery caused the delay.

Nor is HDWC’s motion based on sufficient evidence. The only affidavit supporting the motion is that of an attorney without personal knowledge, and the EBT of plaintiff does not establish undisputed facts warranting summary judgment. CPLR 3212 (b) provides that a summary judgment motion “shall be supported by affidavit” of a person “having knowledge of the facts” as well as other admissible evidence. (See GTF Mktg. v Colonial Aluminum Sales, 66 NY2d 965, 967 [1985].) A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden. (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 384 [2005].)

The court, therefore, denies HDWC’s motion for summary judgment as untimely and without sufficient evidentiary support.
B. The City's Motion

The City's motion, although filed at the last minute (approximately the 117th day after the note of issue), is nevertheless timely. The motion, however, suffers from the same evidentiary weakness as the motion filed by HDWC; the only affidavit filed in support is that of an attorney without personal knowledge. (Id.) Nonetheless, the court will briefly discuss the motion on the merits insofar as it is based on EBTs of not only plaintiff, but also two witnesses for the City.

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law, in directing judgment in its favor. (CPLR 3212 [b].) It must do so by tender of evidentiary proof in admissible form. (Zuckerman v City of New York, 49 NY2d 557, 562-563 [1980].) Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. (Id. at 560; CPLR 3212 [b]; see also GTF Mktg. v Colonial Aluminum Sales, supra, 66 NY2d 965 [1985] [complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit].) The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. (Bray v Rosas, 29 AD3d 422 [1st Dept 2006].) Moreover, the parties' competing contentions must be viewed “in a light most favorable to the party opposing the motion.” (Lakeside Constr. v Depew & Schetter Agency, 154 AD2d 513, 514-515 [2d Dept 1989].)

The City has failed to establish its entitlement to statutory immunity under Social Services Law § 419 with respect to: (1) acts, omissions and decisions in returning custody of plaintiff and her older sister to their mother; and (2) acts, omissions and decisions in failing to maintain and execute the permanency goal of adoption for plaintiff and her sister. (See Sean M. v City of New York, 20 AD3d 146, 156 [1st Dept 2005] [claims that city failed to adequately supervise foster care not barred by section 419 as statute does not apply to failures to provide services required by Social Services Law].) Immunity pursuant to section 419 extends to all acts undertaken by persons providing child protective services under section 424, which covers the “duties of the child protective service concerning reports of abuse or maltreatment.” The underlying policy for immunizing persons engaged in child protective services under section 424 is to encourage the reporting of child abuse situations, and thereby afford children greater protection. (See Van Emrik v Chemung County Dept. of Social Servs., 220 AD2d 952 [3d Dept 1995], lv dismissed 88 NY2d 874 [1996].) The decision not to terminate parental rights and finalize the adoption of plaintiff and her sister, and instead to return them to their mother, had nothing to do with investigating child abuse reports or removing a child from the parents. Accordingly, section 419 does not apply to these claims.

The First Department's decision in Carossia v City of New York (39 AD3d 429 [1st Dept 2007]) does not require a different conclusion. In that case the agency had removed a child and filed a petition in Family Court against the parents concerning suspected sexual abuse. The parents sued for defamation and negligent infliction of emotional distress. The First Department concluded that the agency had immunity under Social Services Law § 419 because the acts of...
the officials involved the “removal or keeping” of a child. The Court (at 430) also found the agency had absolute immunity because the discretionary decisions of the agency personnel were of a “judicial or quasi-judicial nature,” in that they invoked the jurisdiction of the Family Court. That is an entirely different scenario. Here, suit has been brought on behalf of the abused child, not the parent, and the acts complained of involve the returning of a child to the abusive parent, apparently contrary to a Family Court order to terminate parental rights.

Section 419 does, however, apply to the City’s investigation of child abuse complaints against plaintiff’s mother. Regardless, there are issues of material fact regarding whether the City’s caseworkers committed gross negligence or willful misconduct in their handling or mishandling of plaintiff’s case, which would override the claim of statutory immunity. (See Van Emrik v Chemung, 220 AD2d at 953.) Starting with the fact that one of the City’s caseworkers was disciplined for his failure to remove the children, the record submitted by the City, scanty as it is, paints the picture of an overburdened and disorganized agency that failed to protect plaintiff and her siblings. The court cannot decide as a matter of law, based on the record submitted by the movant, that the City’s failure did not result from gross negligence or willful misconduct.

The City also claims common-law immunity for the discretionary acts of its child welfare workers. Municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents. (See Lauer v City of New York, 95 NY2d 95, 100-101 [2000].)

*6 Where a public official undertakes a ministerial, as opposed to a discretionary act, there is no basis for claiming governmental, or common-law immunity. (Haddock v City of New York, 75 NY2d 478, 484 [1990] [explaining that a ministerial act is conduct requiring adherence to a governing rule, with a compulsory result].)

*901 The City has failed to establish, as a matter of law, based on undisputed material facts, that its welfare workers engaged in discretionary, as opposed to ministerial acts. The City’s witnesses testified at their EBTs to the existence of “high risk checklists” that a case manager would complete during a managerial review or supervisory conference of a case, to evaluate the risk to the child of returning to the family’s home, and to assess the family’s need for postdischarge support services. (Williams EBT at 12, City motion, exhibit C.) The City did not submit the checklists used in evaluating the risk to plaintiff. The City also failed to submit additional guidelines (described at the EBTs) addressing the duties of child welfare workers in investigating and following up on complaints of abuse and mistreatment by parents after a final discharge. These documents are particularly material in light of the EBT testimony of one of the City’s caseworkers that he was disciplined for his failure to remove plaintiff and her siblings from their mother’s custody after the City received complaints of abuse. (Thom EBT at 42-43, City motion, exhibit D.)

Accordingly, it is ordered that the motion for summary judgment of defendant Harlem Dowling-Westside Center for Children and Family Services is denied; and it is further ordered that the motion for summary judgment of defendants Administration for Children’s Services and City of New York is denied.
Nieves v. County of Monroe
United States District Court for the Western District of New York
January 25, 2011, Decided; January 25, 2011, Filed
08-CV-6538L
761 F. Supp. 2d 48 *; 2011 U.S. Dist. LEXIS 6866 **
PABLO NIEVES and TELANA NIEVES, Plaintiffs, v.
THE COUNTY OF MONROE, THE CITY OF
ROCHESTER, CATHERINE LUCCI, individually and as a Rochester Police Department Investigator, Badge No. 353, THE MONROE COUNTY OFFICE OF CHILD PROTECTIVE SERVICES, ELIZABETH OPP, and BRICE MEADE, individually and as C.P.S. INVESTIGATORS, and other known or unknown members of the CITY OF ROCHESTER POLICE DEPARTMENT and THE MONROE COUNTY OFFICE OF CHILD PROTECTIVE SERVICES, Defendants.

Case Summary
Overview
A husband and wife alleged a civil rights violation, under 42 U.S.C.S. § 1983, based upon malicious prosecution by a county, a city, a police investigator, and a child protective services agency and two of its investigators regarding the husband's felony indictment for counts of rape. Because a federal malicious prosecution cause of action was not adequately pleaded, and because the child protective services investigators were entitled to qualified immunity under N.Y. Soc. Serv. Law § 419, dismissal of the complaint against the county, the agency, and the investigators was appropriate.

Outcome
The motion to dismiss by the county, the child protective services agency, and the two investigators was granted and the complaint was dismissed, in its entirety, as to those parties, with prejudice.

Counsel: [**1] For Pablo Nieves, Telana Nieves, Plaintiffs: Jeffrey Wicks, LEAD ATTORNEY, Jeffrey Wicks, PLLC, Rochester, NY.

For The County of Monroe, The Monroe County Office of Child Protective Services, Elizabeth Opp, Brice Meade, individually and as C. P. S. Investigators, and other known or unknown members of the City of Rochester Police Department and The Monroe County
Office of Child Protective Services, Defendants: James L. Gelormini, LEAD ATTORNEY, Monroe County Attorney, Rochester, NY; Paul D. Fuller, Monroe County Law Department, Litigation Division, Rochester, NY.

For The City of Rochester, Catherine Lucci, individually and as a Rochester Police Department Investigator, Badge No. 353, Defendants: Igor Shukoff, LEAD ATTORNEY, City of Rochester, Rochester, NY.

Judges: DAVID G. LARIMER, United States District Judge.

Opinion by: DAVID G. LARIMER

Opinion

[*50] DECISION AND ORDER

Plaintiff, Pablo Nieves ("Nieves") and his wife commenced this action against the County of Monroe (the "County"), the City of Rochester, New York,

Rochester Police Investigator Catherine Lucci, the Monroe County Office of Child Protective Services and two of its investigators, Brice Meade and Elizabeth Opp. Nieves alleges a civil rights violation, pursuant [*2] to 42 U.S.C. § 1983 and alleges malicious prosecution by defendants relative to his felony indictment for three counts of rape.

The County, Child Protective Services, Meade and Opp (collectively "the County defendants") now move to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(c).

Because I find that plaintiff has failed to adequately plead a federal malicious prosecution cause of action against any of the defendants, and because I believe the two child protective services investigators are entitled to qualified immunity, their motion to dismiss the complaint (Dkt. #11) is granted, and the complaint as against them is dismissed.

DISCUSSION

The relevant facts are, for the most, part not in dispute. Nieves' daughter, Evelyn, made certain statements to a probation officer in Reading, Pennsylvania, accusing Nieves of several instances of child abuse and molestation over the course of several years. Because some of the activities had occurred in Monroe County, the matter was referred to Monroe County Child Protective Services and both defendant Meade and Opp became involved. A written statement was taken from Evelyn Nieves, the alleged victim, and the matter was eventually referred [*3] to the Monroe County District Attorney's Office. That office determined that the complaint should be submitted to the Monroe County Grand Jury, but that Nieves not be arrested until the matter had been presented to the Grand Jury.

Apparently efforts were made to contact Nieves concerning the allegations made by his daughter. He advised investigators that he had retained counsel and, therefore, [*51] they did not seek to interview Nieves at that time.
It does not appear that either investigators Meade or Opp testified before the Monroe County Grand Jury or provided any information to that body. Nieves' lengthy complaint does not allege anything to the contrary. It appears that the evidence submitted to the Grand jury consisted of Evelyn Nieves' statements to the Reading Police Department, and statements made to Rochester Police Department Investigator Lucci.

Nieves was aware of the charges and, along with his counsel, met with investigators. It does not appear that Nieves testified before the Monroe County Grand Jury. On September 25, 2006, Nieves was indicted and charged with three counts of rape of his minor daughter. The case was tried by a jury, and on May 18, 2007, Nieves was acquitted [**4] of all charges. This action followed.

HN1[ ] The applicable standard for determining motions to dismiss now requires the plaintiff's pleading to set forth sufficient facts that the claim is plausible on its face. The prior requirement that a motion to dismiss would be granted if there was any set of facts upon which relief could be granted is no longer operative since the United States Supreme Court decision in Bell Atlantic v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The County Defendants contend that plaintiff has failed to meet this test of plausibility, and further argue that in any event, the Child Protective Service defendants are entitled to qualified immunity.

Plaintiff references several documents and reports in the complaint, and defendants have included some of those in its motion to dismiss. HN2[ ] This Court may consider such statements or documents when ruling on a Rule 12(b)(6) motion especially to the extent plaintiff relied on such information and documents in framing the complaint. See Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) ("[a] complaint is deemed to include any written instrument attached to it as an exhibit, [**5] materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint") (internal citations omitted). See also Johnson v. Univ. of Rochester Med. Ctr., 686 F. Supp. 2d 259, 264 (W.D.N.Y. 2010); Savino v. Fiorella, 499 F. Supp. 2d 306, 2007 U.S. Dist. LEXIS 43284 at *10-*11 (W.D.N.Y. 2007).

HN3[ ] A malicious prosecution claim consists of four elements: (1) the commencement or continuation of a criminal proceeding by the defendant(s) against the plaintiff; (2) the termination of the proceedings in plaintiff's favor; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice. In addition, a "plaintiff asserting a Fourth Amendment malicious prosecution claim under §1983 must ... show some deprivation of liberty consistent with the concept of 'seizure,'" in order "to ensure that the §1983 plaintiff has suffered a harm of constitutional proportions." Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995).

One of the principal grounds for defendants' motion to dismiss is that plaintiff has failed to adequately plead a malicious prosecution cause of action. First of all, plaintiff must plead that the named defendants "initiated" [**6] a criminal prosecution against the plaintiff. HN4[ ] Simply reporting a crime, or providing facts relating to a potential crime to law enforcement, is
insufficient to allege or establish the "commencement or continuation" of criminal proceedings against a plaintiff. Manganiello v. City of New York, 612 F.3d 149, 163 [*52] (2d Cir. 2010) ("[t]o initiate a prosecution, a defendant must do more than report the crime or give testimony. He must 'play[ ] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act""), quoting Rohman v. New York City Transit Authority, 215 F.3d 208, 217 (2d Cir. 2000).

Thus, a jury may permissibly find that a defendant initiated a prosecution where he "fil[ed] the charges," signed a criminal complaint against the defendant, or "prepar[ed an] alleged false confession and forward[ed] it to prosecutors." Id., quoting Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 130 (2d Cir. 1997).

Here, all that plaintiff alleges the named Child Protective Services investigators did was to "forward" the matter to the Monroe County District Attorney's Office. No further follow-up or prosecutorial involvement by the investigators is [*7] alleged or evidenced in the record. Rather, evidence was submitted to the Monroe County Grand Jury, and that body determined that there was probable cause and, therefore, returned the three-count indictment against Nieves. It appears that the evidence before the grand jury consisted mainly in the testimony of the victim Evelyn. The decision to submit the case to the grand jury was not made by defendants Meade or Opp but by others and, therefore, it cannot be said that Meade or Opp initiated the prosecution against Nieves. Accordingly, Nieves has failed to allege that it was these investigators who initiated the prosecution against him.

The pleading is also deficient in its failure to allege that the prosecution was commenced without probable cause. HN5[ ] Because the absence of probable cause is an essential element of malicious prosecution, the existence of probable cause provides a complete defense to malicious prosecution claims. See Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994). Furthermore, an indictment by a grand jury establishes, as a matter of law, the existence of probable cause for the underlying arrest — except in circumstances involving bad faith, fraud, perjury or [*8] suppression of evidence. See Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003), citing Colon v. City of New York, 60 N.Y.2d 78, 455 N.E.2d 1248, 468 N.Y.S.2d 453 (N.Y. Ct. App. 1983).

HN6[ ] Thus, the presumption of probable cause may only be rebutted by evidence that the indictment was procured by fraud, perjury with suppression of evidence or other police conduct taken in bad faith. Id. Plaintiff does not plead any such conduct on the part of any of the County defendants. Indeed, the Child Protective Services investigators are not alleged to have played any role or performed any function with respect to the procurement of the indictment. Even if their role had been more expansive, it is well-settled that HN7[ ] an arrest is supported by probable cause where, as here, the pertinent officers have acted upon relevant information or supporting statements from an alleged victim or an eyewitness. See Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000); Donovan v. Briggs, 250 F. Supp. 2d 242, 251 (W.D.N.Y. 2003).
I also agree with defendants that plaintiff has failed to plead the HN8[ ] malice that is a cornerstone and requirement of pleading, and proving, a malicious prosecution claim. Conclusory or speculative allegations are insufficient: [*9] plaintiff must specifically allege that the named defendants acted with malice. See generally Grossman v. City of New York, 2008 U.S. Dist. LEXIS 19065 at *8 (S.D.N.Y. 2008) (granting motion for summary judgment and dismissing malicious prosecution claim where plaintiff offers "mere conclusory allegations and speculation [*53] relating to malice") (internal quotations omitted), citing D’Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998).

Plaintiff does not allege that Meade and/or Opp, who took very little action in the case other than to make reports about complaints from the victim, acted with malice. Furthermore, I note that what few actions the investigators did take were authorized, if not compelled, by law. HN9[ ] Prior to and at the time of the indictment, the victim, a minor, had made serious allegations against her father. Under such circumstances, New York State law requires child protective service officials to take prompt action to review and investigate the allegations, and under certain circumstances, to turn the matter over to the District Attorney. See N.Y. Social Services Law §424 (outlining the [*d]uties of [*10] child protective service concerning reports of abuse or maltreatment," including the referral of certain matters to the district attorney).

These pleading deficiencies alone require dismissal of this action, and as such the Court need not reach the issue of qualified immunity. However, I find that even if the complaint were otherwise sufficiently pleaded, Child Protective Services Investigators Meade and Opp are entitled to qualified immunity.

HN10[ ] Qualified immunity shields public officials from an action for civil damages, to the extent that their challenged acts do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Specifically, the doctrine applies where it is "objectively reasonable" for an official to believe that his conduct did not violate a plaintiff’s constitutional rights, in light of clearly established law and in the information possessed by the official. See Simms v. Village of Albion, 115 F.3d 1098, 1106 (2d Cir. 1997); Hill v. City of New York, 45 F.3d 653, 661 (2d Cir. 1995). District and trial courts have been cautioned to carefully consider claims of qualified [*11] immunity, and to decide those questions at the earliest possible stage in the litigation. See Saucier v. Katz, 533 U.S. 194, 200-201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

HN11[ ] Particular care must be taken in assessing claims of qualified immunity by child protective service workers, because of the complex nature of their duties. In recognition of this fact, New York extends immunity to any person participating in good faith in providing child protective services, provided that such person acts in the discharge of their duties and the scope of their employment, and does not engage in willful misconduct or gross negligence. See N.Y. Social Services Law §419. In my view and accepting as true all of the allegations of the Complaint, N.Y. Social Services Law §419 provides the investigators with immunity.
Even in the absence of N.Y. Social Services Law §419, the child protective services officers would be entitled to qualified immunity under the Constitution and applicable federal law. The Second Circuit has recognized that qualified immunity is necessary to provide substantial protection for child protective service case workers, because they must constantly choose between "difficult alternatives" in deciding how to fulfill their duties. See Cornejo v. Bell, 592 F.3d 121, 128 (2d Cir. 2010), quoting Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999). I find that upon the facts alleged, it was objectively reasonable for the investigators to believe that their acts did not violate plaintiff's rights. See Robison v. Via, 821 F.2d 913, 920-21 (2d Cir. 1987). This is especially so, considering the limited activity and involvement of Child Protective Investigators Meade and Opp. All these defendants did was to pass on information to others, in a manner which was wholly within the scope of their duties and consistent with the accompanying legal obligations.

Plaintiff has also failed to adequately allege a Monell claim against the County. Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (in order to state a claim against a municipal defendant, the plaintiff must plead that the defendant acted individually to violate the plaintiff's constitutional rights, either by participating directly in the alleged violation, or by creating a custom or policy under which unconstitutional practices occurred). See also Parker v. DeBuono, 2000 U.S. App. LEXIS 31542 at *2 (2d Cir. 2000) (allegations that municipal defendants acted pursuant to customs or policies that violated Section 1983 are insufficient "without any facts suggesting the existence of [such customs or policies]") See also Bradley v. City of New York, 2009 U.S. Dist. LEXIS 51532 at *8-*9 (E.D.N.Y. 2009) (collecting cases and observing that in terms of what a complaint must allege to survive a Motion to Dismiss, the Second Circuit has held that the mere assertion . . . that a municipality has [an unconstitutional] custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference") (internal quotations omitted). Here, plaintiff has not plausibly alleged that the County engaged in any custom, pattern or policy in violation of his constitutional rights. The only claims pleaded against the County are based on activities of Investigator Opp and Meade, which must, for the reasons discussed, above, be dismissed. To the extent that plaintiff alleges claims against the Monroe County Department of Social Services, defendants contend that the department is not a separate entity from the County or subject to a separate lawsuit. I concur, and note that and even if it were a separate entity, plaintiff's claims against it would be deficient for the reasons already discussed.

I also agree with the defendants that because Nieves' wife, Telana, was not charged or prosecuted, she has no independent cause of action and the malicious prosecution claim alleged by her must also be dismissed.

CONCLUSION
The motion of defendants the County of Monroe, the Monroe County Office of Child Protective Services, Elizabeth Opp and Brice Meade, to dismiss (Dkt. #11) is granted and the complaint is hereby dismissed, in its entirety, as to these defendants, with prejudice.

IT IS SO ORDERED.

/s/ David G. Larimer
DAVID G. LARIMER
United States District Judge Dated: Rochester, New York
January 25, 2011.

Southerland v. City of New York
United States Court of Appeals for the Second Circuit
April 21, 2009, Argued; June 10, 2011, Decided
Docket Nos. 07-4449-cv (L), 07-4450-cv (CON)
Reporter
680 F.3d 127 *; 2011 U.S. App. LEXIS 26291 **; 2012 WL 1662981

SONNY B. SOUTHERLAND, SR., individually and as parent and natural guardian of VENUS SOUTHERLAND, SONNY B. SOUTHERLAND, JR., NATHANIEL SOUTHERLAND, EMMANUEL FELIX, KIAM FELIX, and ELIZABETH FELIX, Plaintiffs-Appellants, - v - CITY OF NEW YORK, TIMOTHY WOO, JOHN DOES 1-9, Defendants-Appellees.

Rehearing denied by, Rehearing, en banc, denied by Southerland v. City of New York, 681 F.3d 122, 2012
U.S. App. LEXIS 10308 (2d Cir., 2012)
US Supreme Court certiorari denied by, Motion granted by City of New York v. Southerland, 133 S. Ct. 980, 184
Injunction denied by Southerland v. Woo, 2013 U.S.
Dist. LEXIS 143595 (E.D.N.Y., Oct. 3, 2013)

Prior History: Consolidated appeals from a summary judgment entered by the United States District Court for the Eastern District of New York (Charles P. Sifton, Judge) in favor of, inter alios, the defendant Timothy Woo. The plaintiffs -- a father and his children -- bring various claims under 42 U.S.C. § 1983 asserting that Woo, a children's services caseworker employed by the defendant City of New York, entered their home unlawfully and effected an unconstitutional removal of the children into state custody. The district court concluded that Woo was entitled to qualified immunity with respect to all of the claims against him. The grant of summary judgment is affirmed with respect to the father's substantive due process claim, but vacated and remanded with respect to the father's and children's Fourth Amendment unlawful-seizure and Fourteenth Amendment procedural due process claims, and the children's Fourth Amendment unlawful-seizure claim.


Disposition: As amended, affirmed in part; vacated and remanded in part.

Case Summary

Procedural Posture

Plaintiffs, a father and his children, brought various 42 U.S.C.S. § 1983 claims asserting that defendant children's services caseworker, employed by defendant city, entered their home unlawfully and effected an unconstitutional removal of the children into state custody. The United States District Court for the Eastern District of New York concluded that the caseworker was entitled to qualified immunity. Plaintiffs appealed.

Overview

The case worker entered the home seeking a 16-year old daughter, based on reports from her school. While there, he took other children in the household into custody, allegedly believing them to be a different group of step-siblings. Plaintiffs claimed Fourth and Fourteenth Amendment violations. Though the Family Court eventually determined the children had been abused and neglected, the subsequently determined facts did not bear upon whether the removal was constitutional. Inter alia, the appellate court held that it could not conclude as a matter of law that the Family Court, in deciding whether there was probable cause to believe that an abused or neglected child may have been found in plaintiffs' home, N.Y. Fam. Ct. Act § 1034(2), would have issued the order had a corrected affidavit been presented to it. Thus,
The grant of summary judgment is affirmed with respect to the father's substantive due process claim, but vacated and remanded with respect to the father's and children's Fourth Amendment unlawful-search and Fourteenth Amendment procedural due process claims, and the children's Fourth Amendment unlawful-seizure claim.

Counsel: MICHAEL G. O'NEILL, New York, N.Y., for Plaintiffs-Appellants Venus S., Sonny B.S. Jr., Nathaniel S., Emmanuel F., Kiam F., and Elizabeth F.

SONNY B. SOUTHERLAND, Brooklyn, N.Y.,

[**2] Plaintiff-Appellant, Pro se.

JULIAN L. KALKSTEIN, City of New York (Michael A. Cardozo, Corporation Counsel; Larry A. Sonnenshein, of counsel), New York, N.Y., for Defendants-Appellees.


Opinion-NOTE- THIS CASE DID NOT TRANSFER WELL FROM PDF FORM TO WORD FORM WHEN I PUT THESE MATERIALS TOGETHER- FOR ONE THING, THE FOOTNOTES DON'T SHOW UP AS FOOTNOTES, THEY ARE JUST MASHED IN WITH THE REST OF THE TEXT- IF YOU NEED TO PRINT THE CASE FOR YOUR OWN USE, YOU WOULD DO BETTER FINDING IT IN YOUR ONLINE RESEARCH PROVIDER AND PRINTING THAT-

MEM

[*131] SACK, Circuit Judge:

This lawsuit involves a man and a woman -- the plaintiff Sonny B. Southerland Sr. ("Southerland") and non-party Diane Manning -- two groups of children, and a caseworker's apparent confusion between the two groups. Plaintiff Ciara Manning is the daughter of Southerland and Diane Manning. Ciara was supposed to be living with Southerland at the time in question, but in fact had left to live with a friend, and had not resided in Southerland's home for at least a year.

In addition to Ciara, plaintiff Southerland fathered, by one or more women other than Diane Manning, six other children: the plaintiffs Venus Southerland, Sonny B. Southerland Jr., Nathaniel Southerland, Emmanuel Felix, Kiam Felix, and Elizabeth Felix (together, the "Southerland Children"). At the time of the principal events in question, the Southerland Children, unlike Ciara, were living with their father.
Diane Manning also allegedly bore, by one or more men other than [**3] Southerland, six children other than Ciara: Eric Anderson, Richy Anderson, Felicia Anderson, Erica Anderson, Michael Manning, and Miracle Manning (together, the “Manning Children”).

They lived with Diane and, like her, are not parties to this lawsuit.

In May 1997, the defendant Timothy Woo, a caseworker in the Brooklyn Field Office of the New York City Administration for Children's Services ("ACS"), was assigned to investigate a report by a school counselor about then-sixteen-year-old Ciara Manning. School staff had thought Ciara to be acting strangely.

After being unable, despite repeated attempts, to gain entry to the Southerland home to investigate the report, Woo sought and obtained from the Kings County Family Court an order authorizing entry into the apartment. Woo's application to obtain that order contained several misstatements of fact, which suggested Woo's possible confusion about which of the children resided with Southerland.

Under the authority of the Family Court's order, Woo then entered the Southerland apartment. Ciara was not there; some of Southerland's other children who lived with him, the Southerland Children, were. Based on what Woo perceived to be the poor condition [**4] of the home and of the Southerland Children, and based upon his other observations from the investigation undertaken to that date, Woo and his supervisor decided to carry out an immediate removal of the children into ACS custody.

Southerland and the Southerland Children brought this action based on Woo's entry into the apartment and removal of the children. They claim that Woo violated [*132] their Fourth Amendment rights to be free from unreasonable searches of their home, and that the manner in which the Southerland Children were removed violated their procedural due process rights under the Fourteenth Amendment. Southerland also claims that the removal of the Southerland Children from his home violated his substantive due process rights under the Fourteenth Amendment. Finally, the Southerland Children claim that their removal violated their Fourth Amendment rights to be free from unreasonable seizure.

The district court (Charles P. Sifton, Judge) concluded, inter alia, that Woo was entitled to qualified immunity with respect to all of the claims against him and granted summary judgment in his favor. We agree with respect to Southerland's substantive due process claim. We disagree, however, as to Southerland's and the Southerland Children's Fourth Amendment unlawful search claims, Southerland's and the Southerland Children's procedural due process claims, and the Southerland Children's Fourth Amendment unlawful seizure claim. To that extent, we vacate the district court's judgment and remand for further proceedings.

BACKGROUND

The relevant facts are rehearsed in detail in the district court's opinion. See Southerland v. City of N.Y., 521 F. Supp. 2d 218 (E.D.N.Y. 2007) ("Southerland II"). They are set forth here only insofar as we think it necessary for the reader to understand our resolution of these appeals.
Where the facts are disputed, we construe the evidence in the light most favorable to the plaintiffs, [**6] who are the nonmoving parties. See, e.g., SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 137 (2d Cir. 2009). We also draw all reasonable factual inferences in the plaintiffs’ favor. See, e.g., id.

The ACS Investigation

On May 29, 1997, a school guidance counselor reported to the New York State Central Registry Child Abuse Hotline that one of the school's students, Ciara Manning, the then-sixteen-year-old daughter of Diane Manning and plaintiff Southerland, was "emotionally unstable." The counselor further reported:

Father fails to follow through with mental health referrals. On 5/12/97 the child swallowed a can of paint. Father failed to take the child for medical attention. Father is unable to control or supervise the child. She may be staying out of the home in an improper environment.


He first examined the files of a case pending in that ACS office regarding Ciara's mother, Diane Manning. Material in those files disclosed that Ciara had several younger half-siblings: the Manning Children. According to Woo, this material also indicated that Ciara was reported to be living with her father, Southerland, at a Brooklyn address, although plaintiffs correctly note the absence of any further evidence as to the source of that information or the time it was received. It is not clear from the record whether Woo was aware that the children referenced in Diane Manning's case file were not related to Southerland and that they did not live with him. See Southerland II, 521 F. Supp. 2d at 222, 224 & n.8.

Woo also contacted the school guidance counselor who had called the child-abuse hotline. According to Woo, the counselor told him that while at school, Ciara had swallowed non-toxic paint, expressed thoughts of suicide, and was generally behaving aggressively and "acting out." Declaration of Timothy Woo [**8] ¶ 6 (Dkt. No. 169) ("Woo Decl."), Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Sept. 18, 2006). Woo’s handwritten notes from the conversation indicate that the counselor told Woo that Ciara was having "problems trying to get [her] father's attention" and that her "father doesn't approve of the place [where she] is staying." Notes of Timothy Woo at 1 ("Counselor Phone Call Notes"), Ex. A to the Declaration of Michael G. O’Neill (Dkt. No. 182) ("O’Neill Decl."), Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Dec. 29, 2006). It is disputed whether the counselor also told Woo that Southerland had been unresponsive to the school’s stated concerns about Ciara’s behavior.
Later the same day, May 29, 1997, Woo attempted to visit Southerland's apartment in Brooklyn. Woo testified that he thought Ciara was residing at that apartment because an open case file on Ciara's mother indicated that Ciara lived with her father. Woo Decl. ¶¶ 5,7. However, as discussed above, Woo's conversation with the counselor earlier in the day suggested that Ciara was not living with her father. When no one answered the door at Southerland's home, Woo left a note containing his contact information.

The following day, May 30, Southerland telephoned Woo. During the course of their conversation, Southerland described Ciara as a runaway who would not obey him. Southerland suggested that he visit the ACS office to discuss the matter with Woo further. The plaintiffs dispute Woo's assertion that during the phone conversation, Southerland indicated that he would not permit Woo to visit Southerland's apartment. Southerland contends that, although he did question why Woo needed to visit the apartment since Ciara did not live there, Southerland nonetheless indicated that he would be willing to make an appointment for Woo to conduct a home visit if Woo insisted.

Southerland visited the ACS office and met with Woo later that day. According to Southerland's deposition testimony, he told Woo that Ciara had run away and that he had obtained several "Persons in Need of Supervision" ("PINS") warrants against her. Woo's case notes indicate that Woo asked Southerland why he had not sought medical attention for Ciara after the paint-swallowing incident. See Progress Notes of T. Woo at 1 ("Progress Notes"), Ex. B to O'Neill Decl.

According to Southerland, he told Woo that Ciara did not need psychiatric help, and that she "was only acting the way she did to get attention." Woo Decl. ¶ 10; see also Declaration of Fritz Balan ¶ 7 (Dkt. No. 170) ("Balan Decl."). Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Sept. 18, 2006).

According to Woo, Woo explained to Southerland that various services were available through ACS to assist him and his children, including counseling and help with obtaining food, furniture, and clothing. Woo said Southerland declined. According to Southerland's deposition testimony, however, no such assistance was ever offered.

When Woo said he would need to make a home visit, Southerland replied that it would be "no problem" as long as he was notified in advance. Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Sept. 18, 2006). According to Woo, Woo explained to Southerland that various services were available through ACS to assist him and his children, including counseling and help with obtaining food, furniture, and clothing. Southerland declined. According to Southerland's deposition testimony, however, no such assistance was ever offered.

On June 2, 1997, Woo made a second attempt to examine the Southerland apartment. A woman whose identity was unknown to Woo answered the door. She said that Southerland was not at home. Woo left.

The following day, June 3, Woo again went to the apartment. He heard noises inside, but no one answered the door. Again, he left.
The next day, June 4, Woo went to the apartment for a fourth time. He waited in the hallway for several minutes. Southerland emerged accompanied by five school-aged children: Sonny Jr., Venus, Emmanuel, Nathaniel, and Kiam. Woo wrote down their names in his case notes. Southerland told Woo that he did not have time to talk because he was taking the children to school. Woo gave Southerland an ACS business card and told him that if he continued to be uncooperative, ACS would seek court action. See Southerland II, 521 F. Supp. 2d at 223-24 & n.6; see [*12] also Progress Notes at 2.

The Removal of the Southerland Children

On June 6, 1997, at the direction of supervisor Balan, Woo applied to the Kings County Family Court for an order to enter the Southerland apartment pursuant to section 1034(2) of the New York Family Court Act. It is ACS policy to investigate not only the status of the child named in a report of suspected abuse or neglect of the type referred to in section 1034(2), but also to ascertain the condition of any other children residing in the same home. Woo listed Ciara on the application. Instead of including the names of the children he had met leaving Southerland's home on June 4, however, he listed the other children of Ciara's mother Diane -- the Manning Children: Eric Anderson, Richy Anderson, Felicia Anderson, Michael Manning, Miracle Manning, and Erica Anderson -- whose names he apparently had obtained from the Diane Manning case files he had reviewed at ACS's Brooklyn Field Office. The Family [*135] Court issued an "Order Authorizing Entry" into the Southerland apartment the same day, June 6. See Southerland II, 521 F. Supp. 2d at 224.

Three days later, on the evening of June 9, 1997, pursuant to the Order Authorizing Entry, Woo and at least one other caseworker entered the Southerland apartment with the assistance of officers from the New York City Police Department. Southerland and the Southerland Children were inside the apartment. Woo Decl. ¶¶ 13-15, 19. The district court described what happened next, from Woo's perspective:

Woo determined that there were six children between the ages of three and nine residing in the apartment. He listed their names [correctly] as Venus, Sonny Jr., Nathaniel, Emmanuel, Kiam, and Elizabeth Felix. Soon after beginning his evaluation of the home, Woo called his supervisor [Balan] on his cell phone, described his observations, and answered his supervisor's questions. Woo reported that the four boys slept on the floor in one bedroom and the two girls slept on a cot in another bedroom. The children appeared as though they had not been bathed in days and their clothing was malodorous. with Southerland's name and the address of the Southerland apartment. The body of the application states in its entirety:

In the refrigerator, Woo found only beer, a fruit drink, and English muffins. Woo did not examine the contents of the kitchen cupboards. The other caseworker observed [**15] that one child, Venus, was limping because of a foot injury. The child stated that she had stepped on a nail. The caseworker concluded that Southerland had not sought medical attention for her. Woo reported that the only light source in the bedroom area was from a blank television screen. Woo observed an electric lamp on the floor, without a shade, connected to an outlet in the living room
by means of several extension cords along the floor. Woo reported that another room contained stacks of electronic equipment. Woo and his supervisor concluded that the children’s safety was threatened, and Balan directed Woo to remove the children from the home.

Southerland II, 521 F. Supp. 2d at 224-25 (footnotes omitted).

[*136] As the district court also observed, the plaintiffs -- relying primarily on later deposition testimony by Southerland -- offer a starkly different description of the conditions in the Southerland home at the time. According to Southerland’s testimony, the apartment did not lack proper bedding; the boys had a bunk bed in their room, although they preferred to sleep on yellow foam sleeping pads on the floor. Id. at 225 n.10. The children were not dirty; Southerland testified that he laundered the children’s clothing about once a week and bathed the children daily. Id. at 225 n.11. There was food in the refrigerator, and it is also a reasonable inference from Southerland’s testimony that there was food in the cupboards (which Woo did not examine), because Southerland testified that groceries for the household were purchased on a regular basis. Id. at 225 n.12. The household did not lack adequate lighting; Southerland testified that he had a lamp plugged into a wall in each room, id. at 225 n.14, [**17] and that there were no extension cords running from room to room. Finally, although Southerland does not dispute that Venus had a foot injury, the plaintiffs stress Woo’s concession that he did not personally observe the injury during his assessment of the home. Id. at 225 n.13.

In the early morning hours of June 10, 1997, at Balan’s direction, Woo removed the Southerland Children from the Southerland home. Woo took them to the ACS preplacement emergency shelter and arranged for emergency foster care. Id. at 226.

At some point -- it is not clear from the record exactly when -- Woo interviewed Ciara Manning, whom he had found living at the home of her friend. Ciara told Woo that her father had sexually abused her and threatened to kill her if she told anyone about the abuse -- allegations she later recanted. The Southerland Children also complained of various kinds of abuse and mistreatment at the hands [**18] of Southerland and his companion, Vendetta Jones. The allegations concerning the sexual abuse of Ciara were included in a verified petition filed by ACS with the Family Court on June 13, 1997, and that petition was amended on June 27, 1997, to add allegations concerning corporal punishment of the Southerland Children. The petitions commenced child-protective proceedings under Article 10 of the New York Family Court Act, §§ 1011 et seq., through which ACS sought to have the Southerland Children adjudicated as abused, neglected, or both.

On July 1, 1998, more than a year after the children were removed from the Southerland home, [**19] the Kings County Family Court concluded following a five-day fact-finding hearing that Southerland had engaged in excessive corporal punishment of the Southerland Children and that he had abused and neglected them. The court also concluded that he had sexually [*137] abused his daughter Ciara. The court ordered that the Southerland Children remain in foster care, where they had resided since the June 1997 removal. The New York Appellate Division, Second Department, affirmed these orders, In re Ciara M., 273 A.D.2d 312, 708 N.Y.S.2d 717
(2d Dep't 2000), and the New York Court of Appeals denied leave to appeal, 95 N.Y.2d 767, 740 N.E.2d 653, 717 N.Y.S.2d 547 (2000).

In March 2004, nearly seven years after their removal from the Southerland home, Sonny Jr. and Venus were permitted to return to live with Southerland. Some seven months thereafter, Nathaniel and Emmanuel were discharged from the juvenile justice system by the Office of Children and Family Services and also returned to the Southerland home. There is nothing in the record to suggest that Kiam or Elizabeth ever returned to live with Southerland.

However strongly the facts of mistreatment found by the Family Court at trial in July 1998 [**20] may support Woo's perceptions about the dangers to the Southerland Children of their remaining with Southerland, virtually none of this information was in Woo's possession when he effected the June 9, 1997, entry and removal, as the district court correctly observed. See Southerland II, 521 F. Supp. 2d at 226 n.19. Although Woo mentions in his briefing that the Family Court eventually determined that Ciara and the Southerland Children had been abused and neglected, he does not dispute the plaintiffs' assertion that these subsequently determined facts should not bear upon our consideration of whether Woo's actions in effecting the removal were constitutional. We therefore need not consider the relevance, if any, of these subsequent events on the plaintiffs' ability to recover on their constitutional claims. Prior Federal Court Proceedings

In June 1999, some two years after the removal and while the Southerland Children remained in foster care, Southerland, on behalf of himself and his children, filed a pro se complaint in the United States District Court for the Eastern District of New York against more than forty defendants for the allegedly wrongful removal of the Southerland Children from his home. On February 1, 2000, the district court (Charles P. Sifton, Judge) granted the defendants' [**22] motion to dismiss on grounds that included failure to state a claim, failure to plead certain matters with particularity, lack of subject matter jurisdiction, and Eleventh Amendment immunity. See Opinion & Order (Dkt. No. 43), Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Feb. 2, 2000), Ex. G to Silverberg Decl.

Southerland appealed. We affirmed in part, reversed in part, and remanded. We [*138] ruled, inter alia, that the district court had erred in dismissing Southerland's claims under 42 U.S.C. § 1983 relating to the seizure and removal of the Southerland Children. See Southerland v. Giuliani, 4 F. App'x 33, 36 (2d Cir. 2001) (summary order) ("Southerland I"). We concluded that the pro se complaint stated valid claims for violations of both the substantive and procedural components of the Fourteenth Amendment's Due Process Clause. See id. at 36-37. We "emphasize[d] that our holding [wa]s limited to the claims made directly by Sonny Southerland," noting that "[a]lthough the children probably have similar claims, we have held that a non22 attorney parent must be represented by counsel in bringing an action on behalf of his or her child." Id. at 37 (citation, footnote, and internal [*23] quotation marks omitted). We therefore "[l]eft it to the district court upon remand to determine whether Southerland should be given a chance to hire a lawyer for his children or to seek to have one appointed for them." Id.
On remand, the district court appointed counsel to represent both Southerland and the Southerland Children.10 Southerland II, 521 F. Supp. 2d at 227. In

U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). However, because Woo has not made this argument in this case, and because we ultimately affirm the dismissal of Southerland's substantive due process claim on other grounds, we need not consider this question at this time. See also note 31, infra.

10 Michael G. O'Neill was appointed as counsel for both Southerland and the Southerland Children. In April 2004, November 2002, through counsel, Southerland and the Southerland Children jointly filed an amended complaint, id. at 221 & n.1, asserting nine claims under 42 U.S.C. § 1983 against Woo and the City of New York, id. at 221 n.2.

In the amended complaint, Southerland asserts four separate claims against Woo. First, he brings an unlawful-search claim, asserting that Woo's entry into his home "without privilege, cause or justification" violated the Fourth Amendment. Am. Compl. ¶¶ 40-41 (Dkt. No. 75), Southerland v. City of N.Y., No. 99-cv3329 (E.D.N.Y. Nov. 22, 2002). Southerland brings a second Fourth Amendment unlawful-search claim for Woo's remaining in his home even after discovering that the children listed on the Order Authorizing Entry were not there. Third, Southerland [*139] asserts a Fourteenth Amendment procedural due process claim for removal of the Southerland Children from his home

Southerland resumed proceeding pro se before the district court, while Mr. O'Neill continued to represent the Southerland Children (including Venus and Sonny Jr., even after they were no longer minors). In April 2004, the district court also appointed a guardian ad litem to represent the Southerland Children's interests. See Southerland II, 521 F. Supp. 2d at 221 n.1. In the instant appeals, Southerland represents himself pro se, while Mr. O'Neill continues to represent the Southerland [*24] Children.

without a court order and in the absence of an immediate threat of harm to their lives or health. Finally, Southerland asserts a substantive due process claim, also under the Fourteenth Amendment, [*25] for Woo's removal of the Southerland Children absent a reasonable basis for doing so.

The amended complaint also interposes various claims on behalf of the Southerland [*26] Children. First, the Children assert the same procedural due process claim under the Fourteenth Amendment as does Southerland. Second, they bring a substantive due process claim under the Fourteenth Amendment on the theory that they were removed from their home without reasonable basis. The district court recharacterized the latter claim as arising under the Fourth Amendment's guarantee of protection against unlawful seizure. See Southerland II, 521 F. Supp. 2d at 230 n.24. Finally, the district court construed the amended complaint as asserting on behalf of the Children the same two Fourth Amendment unlawful-search claims as were
asserted by Southerland, see id. at 233-34 & n. 28, a decision that Woo has not challenged on appeal.

Southerland and the Southerland Children also bring several claims against the City of New York.

[**27] Southerland asserts that the City is liable under 42 U.S.C. § 1983 for the removal of the Southerland Children insofar as that removal was conducted pursuant to two alleged official City policies: to remove children without a reasonable basis, and to remove children without a court order despite the absence of any immediate threat of harm to their lives or health. Southerland and the Southerland Children also allege that high-ranking policymakers within the City’s police department knew or should have known that the City’s failure to train police officers accompanying ACS employees on home visits and investigations would deprive New York City residents of their constitutional rights.

On the defendants’ motion for summary judgment, the district court concluded that Woo was entitled to qualified immunity as to all of the claims against him. With respect to the Fourth Amendment unlawful-search claims, the court concluded that the false and misleading statements [**28] made by Woo in his application for the Order Authorizing Entry did not strip him of qualified immunity because the plaintiffs could not show that these statements were necessary to the finding of probable cause to enter the home. Southerland II, 521 F. Supp. 2d at 230-31. The court decided that qualified immunity was warranted because "a corrected affidavit specifying all of the information known to Woo establishes an objective basis that would have supported a reasonable caseworker’s belief that probable cause existed." Id. at 231 (brackets, citation, and internal quotation marks omitted).

With respect to the Southerland Children's Fourth Amendment unlawful-seizure claim, and the procedural due process [*140] claims brought by both sets of plaintiffs, the district court decided that qualified immunity shielded Woo from liability because his actions pre-dated the clear establishment of law in this context, which in its view did not occur until this Court's decision in Tenenbaum v. Williams, 193 F.3d 581, 596-97 (2d Cir. 1999), cert. denied, 529 U.S. 1098, 120 S. Ct. 1832, 146 L. Ed. 2d 776 (2000). See Southerland II, 521 F. Supp. 2d at 231-32.

Lastly, with regard to Southerland's substantive due process claim, the district court [**29] concluded that Woo was entitled to qualified immunity because "it was objectively reasonable for [him] to conclude that Southerland's substantive due process rights were not violated" when Woo removed the Southerland Children from the home, because HN3[ ] "[b]rief removals of children from their parents generally do not rise to the level of a substantive due process violation, at least where the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal." Id. at 232 (brackets and internal quotation marks omitted).

Notwithstanding the district court's conclusion that Woo was entitled to qualified immunity as to every claim asserted against him, the court proceeded to consider, in the alternative, the
underlying merits of the plaintiffs' various claims. The court decided that even in the absence of immunity, Woo would be entitled to summary judgment with respect to the plaintiffs' Fourth Amendment unlawful-search claims and Southerland's substantive due process claim. Specifically, with respect to the Fourth Amendment unlawful-search claims, the district court decided that "no reasonable juror could infer that Woo knowingly and intentionally [**30] made false and misleading statements to the family court in order to receive an order authorizing his entry into the Southerland home." Id. at 233. With respect to Southerland's substantive due process claim, the court concluded that "no reasonable juror could find that the removal of the children from their home in order to verify that they had not been neglected or abused was so 'shocking, arbitrary, and egregious' that Southerland's substantive due process rights were violated." Id. at 234-35 (citation omitted).

The district court concluded that the City was also entitled to summary judgment on all of the claims against it. See Southerland II, 521 F. Supp. 2d at 23539. The plaintiffs do not appeal from that portion of the judgment and therefore have abandoned their claims against the City. See LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995).

The district court determined, however, that without qualified immunity protection, summary judgment would not be appropriate on the merits of the procedural due process claims brought by both Southerland and the Southerland Children because, "[a]lthough defendants argue that the 'totality of the circumstances' Woo encountered [**31] in the Southerland home required an ex parte removal, they fail to explain why there was not sufficient time for Woo to seek a court order removing the children." See Southerland II, 521 F. Supp. 2d at 235 n.31. Nor would summary judgment be appropriate on the merits of the Southerland Children's Fourth Amendment unlawful-seizure claim, the district court said, because the defendants could not explain "why the particular circumstances that Woo encountered in the Southerland home established that there was imminent danger to the children's life or limb requiring removal in the absence of a court order." Id. at 234 n.29.

Both Southerland and the Southerland Children now appeal from the dismissal of [*141] each of their claims against Woo, with the exception of one of their Fourth Amendment claims. The plaintiffs have not appealed the district court's adverse ruling as to their claim that Woo violated the Fourth Amendment by remaining in their home even after determining that the children listed on the Order Authorizing Entry were not present.

We affirm with respect to the dismissal of Southerland's substantive due process claim. We vacate and remand with respect to Southerland's and the Southerland [*32] Children's Fourth Amendment unlawful-search claims; Southerland's and the Southerland Children's procedural due process claims; and the Southerland Children's unlawful-seizure claim.

DISCUSSION
I. Standard of Review
HN4[ ] "We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving part[ies] and drawing all reasonable inferences in [their] favor." Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005).

"[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." D'Amico v. City of N.Y., 132 F.3d 145, 149 (2d Cir.), cert. denied, 524 U.S. 911, 118 S. Ct. 2075, 141 L. Ed. 2d 151 (1998); see Fed. R. Civ. P. 56(a).

II. Principles of Qualified Immunity

HN5[ ] Qualified immunity shields public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "In general, public officials are entitled to qualified immunity if (1) their conduct does not violate clearly established

[**33] constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." Holcomb v. Lykens, 337 F.3d 217, 220 (2d Cir. 2003) (internal quotation marks omitted). A right is "'clearly established'" when "'[t]he contours of the right . . . are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Qualified immunity is an "affirmative defense," Gomez v. Toledo, 446 U.S. 635, 636, 639-41, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980), and "it is incumbent upon the defendant to plead[] and adequately develop" that defense, Zellner v. Summerlin, 494 F.3d 344, 368 (2d Cir. 2007) (internal quotation marks omitted).

HN6[ ] In this Circuit, "[e]ven where the law is 'clearly established' and the scope of an official's permissible conduct is 'clearly defined,' the qualified immunity defense also protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful." Taravella v. Town of Wolcott, 599 F.3d 129, 134 (2d Cir. 2010) (some internal quotation marks omitted); accord Walczyk v. Rio, 496 F.3d 139, 154 n.16 (2d Cir. 2007). In [**34] other words, a caseworker is also entitled to qualified immunity "if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." Manganiello v. City of N.Y., 612 F.3d 149, 165 (2d Cir. 2010) (quoting Walczyk, 496 F.3d at 154); see also Tenenbaum, 193 F.3d at 605 (applying same principle to "child welfare workers"). But see Taravella, 599 F.3d at 136-41 (Straub, J., dissenting) (stating that this prong of the qualified immunity analysis "has no basis in Supreme [*142] Court precedent and has served to confuse the case law in this area"); Okin, 577 F.3d at 433 n.11 ("O]nce a court has found that the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred, it is no defense for a police officer who violated this clearly established law to respond that he held an objectively reasonable belief that his conduct was lawful."); Walczyk, 496 F.3d at 165-71 (Sotomayor, J., concurring) ("[W]hether a right is clearly established is the same question as whether a reasonable officer would have known that the conduct in question was unlawful.") (emphasis in original).
III. Overview of Constitutional Principles Relating to the State’s Removal of Children from Their Homes

As we observed in a decision post-dating the events at issue in these appeals, HN7 [**35] “[p]arents . . . have a constitutionally protected liberty interest in the care, custody and management of their children.” Tenenbaum, 193 F.3d at 593; see also Troxel v. Granville, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (collecting cases concerning the "fundamental right of parents to make decisions concerning the care, custody, and control of their children").

"[C]hildren have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association." Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000) (brackets and internal quotation marks omitted), cert. denied, 534 U.S. 820, 122 S. Ct. 51, 151 L. Ed. 2d 21 (2001); see also Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (“Th[e] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.”). HN8[ ]

The state’s removal of a child from his or her parent may therefore give rise to a variety of cognizable constitutional claims.

First, both the parents and the children may [**36] have a cause of action for violation of the Fourteenth Amendment under a theory of denial of procedural due process. The Fourteenth Amendment imposes a requirement that except in emergency circumstances, judicial process must be accorded both parent and child before removal of the child from his or her parent’s custody may be effected. See, e.g., Kia P., 235 F.3d at 759-60; Tenenbaum, 193 F.3d at 593-94; Duchesne, 566 F.2d at 825-26. Both Southerland and the Southerland Children have asserted such a procedural due process claim against Woo in this case.

Second, a parent may also bring suit under a theory of violation of his or her right to substantive due process. Southerland does so here. Parents have a "substantive right under the Due Process Clause to remain together [with their children] without the coercive interference of the awesome power of the state." Tenenbaum, 193 F.3d at 600 (internal quotation marks omitted); see also, e.g., Anthony v. City of N.Y., 339 F.3d 129, 142-43 (2d Cir. 2003); Kia P., 235 F.3d at 757-58. Such a claim can only be sustained if the removal of the child "would have been prohibited by the Constitution even had the [parents] been given all the procedural [**37] protections to which they were entitled." Tenenbaum, 193 F.3d at 600 (emphasis deleted). In other words, while a procedural due process claim challenges the procedure by which a removal is effected, a substantive due process claim challenges the "fact of [the] removal" itself. Bruker v. City of N.Y., 92 F. Supp. 2d 257, 266-67 (S.D.N.Y. 2000).

HN9[ ] "Where another provision of the Constitution provides an explicit textual [*143] source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." Kia P., 235 F.3d at 757-58 (quoting Conn v. Gabbert, 526 U.S. 286, 293, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999)) (brackets and internal quotation marks omitted). HN10[]
For child removal claims brought by the child, we have concluded that the Constitution provides an alternative, more specific source of protection than substantive due process. When a child is taken into state custody, his or her person is "seized" for Fourth Amendment purposes. The child may therefore assert a claim under the Fourth Amendment that the seizure of his or her person was "unreasonable." U.S. Const. amend. IV; see Tenenbaum, 193 F.3d at 602.

**Third** claim belongs only to the child, not to the parent, although a parent has standing to assert it on the child's behalf. Tenenbaum, 193 F.3d at 601 n.13. In accordance with our order in Southerland I, 4 F. App'x at 37 n.2, the district court therefore determined that the Southerland Children's substantive due process claim should be construed instead as a Fourth Amendment unlawful-seizure claim. See Southerland II, 521 F. Supp. 2d at 230 n.24.

Finally, depending on the circumstances in which a removal occurs, other Fourth Amendment claims might also be viable. Here, Southerland and the Southerland Children asserted two Fourth Amendment claims for unlawful search: one claim relating to Woo's entry into the Southerland home, and one (now abandoned) relating to Woo's remaining in the home even after determining that the Manning Children were not present. Both claims were based on an allegation that Woo made false statements to the Family Court in order to obtain the Order Authorizing Entry, and therefore that there was no valid judicial authorization for him to carry out a search of the Southerland apartment. We begin our analysis with the unabandoned search claim based on Woo's allegedly unlawful entry.

**IV. The Fourth Amendment Unlawful-Search Claims**

The district court determined that summary judgment was warranted on the plaintiffs' Fourth Amendment unlawful-search claims on two separate grounds. First, the district court concluded that Woo was entitled to qualified immunity under the "corrected affidavit" doctrine. See Southerland II, 521 F. Supp. 2d at 23031. Second, the district court decided that Woo was entitled to summary judgment on the merits because no reasonable juror could find that Woo had knowingly made false or misleading statements in seeking to obtain the Order Authorizing Entry. Id. at 233. We disagree with both conclusions.

A. The Corrected-Affidavit Doctrine

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The plaintiffs argue that the district court erred in its application of the corrected-affidavit doctrine, HN12[ ] under which a defendant who makes erroneous statements of fact in a search-warrant affidavit is nonetheless entitled to qualified immunity unless the false statements in the affidavit were "necessary to the finding of probable cause." Martinez v. City of Schenectady, 115 F.3d 111, 115 (2d Cir. 1997) (internal quotation marks omitted). In order to determine whether false statements were "necessary" to the finding of probable cause," the court must "put aside allegedly false material, supply any omitted information, and then determine whether the
contents of the 'corrected affidavit' would have supported [the] finding..." [*144] Id. (citation and internal quotation marks omitted). In applying the corrected-affidavit doctrine, qualified immunity is warranted only if, after correcting for the false or misleading statements, the affidavit accompanying the warrant was sufficient "to support a reasonable officer's belief that probable cause existed." Id. (internal quotation marks omitted).

We have observed that HN13[ ] the materiality of a misrepresentation or omission in an application for a search warrant is a mixed question of law and fact.15 Velardi v. Walsh, 40 F.3d 569, 574 (2d Cir. 1994). "The legal component depends on whether the information is relevant to the probable cause determination under controlling substantive law." Id. "[T]he weight that a neutral magistrate would likely have given such information," however, is a question for the factfinder. Id. In such circumstances, a court may grant summary judgment to a defendant based on qualified immunity only if "the evidence, viewed [**41] in the light most favorable to the plaintiffs, discloses no genuine dispute that a magistrate would have issued the warrant on the basis of the corrected affidavits." Walczyk, 496 F.3d at 158 (emphasis and internal quotation marks omitted). Here, we cannot conclude as a matter of law -- although a trier of fact might conclude after an evidentiary hearing or the district court might conclude as a matter of law in light of additional evidence -- that the Family Court, in deciding whether there was "probable cause to believe that an abused or neglected child may [have] be[en] found [in the Southerland home]," N.Y. Fam. Ct. Act § 1034(2), would have issued the order had a corrected affidavit been presented to it.

The district court, which "[a]ssum[ed] for purposes of the qualified immunity defense that Woo made false and misleading statements" in applying for the Order Authorizing Entry, Southerland II, 521 F. Supp. 2d at 230, correctly noted that the plaintiffs "would still have to [**42] demonstrate that those statements were necessary to the finding of probable cause for qualified immunity not to attach to Woo's actions," id. at 230-31 (citation and internal quotation marks omitted). The court determined that Woo was entitled to qualified

] In child-abuse investigations, a Family Court order is equivalent to a search warrant for Fourth Amendment purposes. See Nicholson v. Scoppetta, 344 F.3d 154, 176 (2d Cir. 2003); Tenenbaum, 193 F.3d at 602.

immunity based on its conclusion that a corrected affidavit, containing all of the information available to Woo at the time the affidavit was made, would have supported a finding of probable cause to enter the home under the applicable substantive law. Id. at 231.

We disagree. HN15[ ] Section 1034(2) of the New York State Family Court Act, which provides the evidentiary standard for a showing sufficient for the issuance of an investigative order, governed Woo's application to obtain the Order Authorizing Entry. The district court, in its September 2007 decision, cited the statute as it had been amended in January 2007. See id. at 224 n.7. But under the version of the statute that governed at the time of Woo's application, unlike the version of the statute in effect in 2007, the affiant was required to demonstrate "probable cause to believe that an abused or neglected child may be found on premises," N.Y.
Fam. Ct. Act § 1034(2) (McKinney 1997) [*43] (emphasis added), presumably meaning the "premises" identified in the application submitted to the Family Court.

[*145] The district court should have engaged in its corrected-affidavit analysis with reference to the law applicable at the time of the events in question. The children that Woo listed on his application for the Order Authorizing Entry -- the Manning Children and Ciara -- were children who did not reside "on premises" in the Southerland home.

The district court concluded that "a properly made application would still list Ciara Manning on the application because Southerland is her father and was the parent legally responsible for her care, even if she had run away." Southerland II, 521 F. Supp. 2d at 231. That may be relevant to an inquiry under the statute [*44] as amended in 2007, but it is not relevant to the appropriate question under the applicable version of the law at the time of the entry: whether there existed probable cause for Woo to believe that Ciara Manning could be found "on premises" at the Southerland home. In fact, she, like the Manning Children, was not "on premises." And Woo had reason to know that she was not -- from the information in the initial Intake Report transmitted to Woo; from the guidance counselor's statement to Woo that Southerland did not approve of the place where Ciara was staying; and from Southerland's own statements during his May 30 telephone conversation with Woo that Ciara was a runaway and did not live at his home.

The plaintiff children point out that there were other deficiencies in the district court's corrected-affidavit analysis that undermine the court's conclusion that the information known to Woo at the time he applied for the Order Authorizing Entry would have supported a finding of probable cause. For example, Woo's application stated that Ciara "tried to kill herself by swallowing nontoxic paint," and that Southerland "did not take [Ciara] to a medical doctor and refused to take [**46] [Ciara] for psychiatric evaluation." Application for Authorization to Enter Premises dated June 6, 1997, at 1 ("June 6 Application"), Ex. C to Silverberg Decl. But the plaintiff children argue that the application omitted several relevant facts that, according to Southerland's version of events, were known to Woo at that time: that the paintswallowing incident took place at school, not at home; that Southerland was willing to obtain treatment for his daughter, but had trouble doing so, precisely because she was not living in his home; and that [*146] Southerland had attempted to assert control over his daughter by applying for PINS warrants. Southerland Children's Br. at 30-31; see also id. at 28-36 (disputing additional assertions of fact, such as whether the swallowing of paint indeed was a suicide attempt). As the plaintiff children put it:

Woo's omission of the fact that the incident took place at school allowed the court to assume that this suicide attempt took place in Southerland's residence. The overall picture painted by Woo is that Southerland's daughter attempted to kill herself, that Southerland did nothing about it, and refused to let others do something about it as well. By [*47] omitting the fact that the daughter was not even living at the Southerland apartment, Woo gave the family court the impression that it was necessary to allow Woo to enter the apartment in order to render
assistance to a suicidal teenager in the home of a parent who could not be bothered to help her and who prevented the efforts of ACS to provide help to her.

Id. at 31-32. The district court included much of this information in its recitation of facts, Southerland II, 521 F. Supp. 2d at 222-23 & nn.4 & 5, but it did not factor these considerations into its application of the corrected affidavit doctrine.

For these reasons, application of the corrected-affidavit doctrine does not as a matter of law preclude liability in this case.

B. Knowing or Reckless Misstatements of Fact

The district court also concluded that even if the corrected-affidavit doctrine did not apply, summary judgment was appropriate because, on the merits, "no reasonable juror could infer that Woo knowingly and intentionally made false and misleading statements to the family court in order to receive an order authorizing his entry into the Southerland home." Southerland II, 521 F. Supp. 2d at 233. Based on that premise,

[*48] the district court concluded that "the [O]rder [Authorizing Entry] was issued with probable cause and Woo's entry into and search of Southerland's home did not violate plaintiffs' Fourth Amendment rights." Id.

We disagree. If the district court were correct that Woo did not knowingly make false and misleading statements, that would entitle Woo to qualified immunity, but would not necessarily render his underlying conduct lawful -- the issue the court was addressing. HN17 When a person alleges a Fourth Amendment violation arising from a search executed by a state official, "the issuance of a search warrant . . . creates a presumption that it was objectively reasonable for the [defendant] to believe that the search was supported by probable cause" so as to render the defendant qualifiedly immune from liability. Martinez, 115 F.3d at 115. To defeat the presumption of reasonableness, a plaintiff must make "a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit and that the allegedly false statement was necessary to the finding of probable cause" for which the warrant was issued. Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) [*49] (internal quotation marks omitted), cert. denied, 505 U.S. 1221, 112 S. Ct. 3032, 120 L. Ed. 2d 902 (1992).

We need not consider further whether the district court erred by confusing the qualified immunity and merits analyses, however, because we also do not agree with the district court's conclusion that no reasonable juror could find that Woo did not knowingly or recklessly make false statements -- the immunity inquiry. [*147] We think that several disputed facts, taken together and viewed in the light most favorable to the plaintiffs, would permit a reasonable factfinder to find otherwise.
First, there is substantial evidence, viewed in the light most favorable to the plaintiffs, that Woo knew or had reason to know that Ciara was not residing at the Southerland home when he applied for the Order Authorizing Entry. On appeal, Woo appears to assert that he was justified in searching for Ciara at the Southerland home because, according to ACS’s Diane Manning case files, “Ciara was reported to be living with her father, Sonny B. Southerland, Sr. at his address at 10 Amboy St. Brooklyn.” Woo Decl. ¶ 5. Although the plaintiffs deny that the substance of this report was accurate, they do not effectively dispute that the information was contained in ACS’s records, nor do they dispute that Southerland's home was, in fact, Ciara's legal residence. To the contrary, they affirmatively allege in their complaint that Southerland was the parent with “physical and legal custody” at the relevant time. Am Compl. ¶¶ 9-10.

If Woo had no further knowledge or reliable information about Ciara’s whereabouts, we think -- having regard to the “factual and practical considerations of everyday life,” Gates, 462 U.S. at 231 (internal quotation marks omitted) -- that Woo might well have had probable cause to believe that Ciara was to be found at Southerland’s apartment -- her custodial parent’s home. Cf. Manganiello, 612 F.3d at 161 (probable cause may exist even where an officer "relied on mistaken information, so long as it was reasonable for him to rely on it"). Nor, we think, was the fact that both Southerland and the school counselor informed Woo [*51] that Ciara did not live with Southerland alone sufficient to establish that Woo believed otherwise. Cf. Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987) (“[T]he officials need not defer action [on a child abuse report] merely on account of a parent's protestations of innocence or promises of future protection . . . .”).

But there is more. At his deposition, Woo appeared to concede that he did know with some certainty -- if not by the time of applying for the Order Authorizing Entry on June 6, then by the time of executing that Order on June 9 -- that Ciara did not reside with Southerland and would not be found at his home. When asked by plaintiffs’ counsel why he had persisted in seeking to enter the Southerland apartment once he knew that Ciara Manning was not staying there, Woo plainly accepting the factual premise of the question -- explained that he had sought to enter in order to, among other things, "contact [Southerland] to find out about [Ciara’s] whereabouts," Deposition of Timothy Woo at 17 (“Woo Dep.”), Ex. D to O'Neill Decl.; to "assess the safety of the children's home environment," id.; to look for "the Manning children," id. at 18-19; and to investigate the well-being [*52] of the children who Woo knew were residing with Southerland, id. at 20-22. In his declaration tendered in support of the defendants’ summary judgment motion, moreover, Woo did not identify when it was that he found Ciara living in the home of her friend, but instead stated only that his interview of Ciara occurred "during the course of the investigation" when he went to the home. Woo Decl. ¶ 23. His statements thus strongly [*148] support the notion that Woo was well aware that, wherever Ciara was, it was unlikely to be in the Southerland Apartment.

Second, evidence in the record, again viewed in the light most favorable to the plaintiffs, would permit a reasonable juror to conclude that Woo knowingly or recklessly misrepresented the
nature of the paintswallowing incident in his application. About one week before June 6, Woo learned from a school counselor that Ciara had "swallowed non-toxic paint at school" and had been "acting out and expressing thoughts of suicide." Woo Decl. ¶ 6. Although the counselor informed Woo that Southerland had failed to seek mental health treatment for Ciara, see id., before Woo made his application to Family Court, Southerland had explained to Woo that the reason he had not taken Ciara for treatment was that she did not reside with Southerland and did not listen to him, id. ¶ 8. Yet Woo's application represented to the Family Court that Ciara "tried to kill herself by swallowing non-toxic paint" and that Southerland "did not take [her] to a medical doctor and refused to take [her] for psychiatric evaluation." June 6 Application at 1. A reasonable trier of fact might find those statements to be materially misleading insofar as they characterize Ciara's paint-swallowing as a suicide attempt; fail to note that the incident occurred at school rather than in Southerland's home; and omit the fact that Ciara may have been living outside the home and free from Southerland's control.

Finally, the district court overlooked the parties' dispute concerning Woo's knowledge about which children resided in the Southerland apartment. The district court stated that Woo "had reason to believe that the Manning children would be found in the Southerland apartment because of a separate investigation of the Manning children and his personal observation that there were other children in the Southerland home who had not yet been positively identified." Southerland II, 521 F. Supp. 2d at 233. But, as the district court opinion elsewhere observes, on June 4, 1997 -- two days before he applied for the Order Authorizing Entry -- Woo met the Southerland Children, not the Manning Children, emerging from the Southerland apartment and wrote down their names. See id. at 223-24 & n.6. We think that there is a triable issue of fact as to whether Woo in fact believed, as he wrote in his application to the Family Court, that it was the Manning Children who were in the Southerland home, or whether he recklessly confused or knowingly conflated the two groups of children.

Although these alleged misrepresentations may turn out to be no more than accidental misstatements made in haste, the plaintiffs have nonetheless made a "substantial preliminary showing" that Woo knowingly or recklessly made false statements in his application for the Order Authorizing Entry. Golino, 950 F.2d at 870 (internal quotation marks omitted). This showing rebuts the presumption of reasonableness that would otherwise, at the summary judgment stage, entitle Woo to qualified immunity, a defense on which he has the burden of proof.

In sum, because we conclude that genuine issues of material fact exist, both as to whether Woo knowingly or recklessly made false statements in his affidavit to the Family Court and as to whether such false statements were necessary to the court's finding of probable cause, we vacate the district court's grant of summary judgment on the plaintiffs' Fourth Amendment unlawful-search claims.

Once again, we note that a trier of fact might, after review of the record (whether or not augmented by additional evidence), conclude that the errors in the June 6 Application were
either accidental or immaterial. We vacate the grant of summary judgment because, on the current record, we cannot reach that conclusion ourselves as a matter of law.

V. The Plaintiffs' Procedural Due Process Claims

Southerland and the Southerland Children each assert a procedural due process claim against Woo. The district court held that Woo was entitled to qualified immunity on these claims. We disagree.

A. Procedural Due Process in the Child-Removal Context

HN20[ ] "As a general rule . . . before [*56] parents may be deprived of the care, custody, or management of their children without their consent, due process -- ordinarily a court proceeding resulting in an order permitting removal -- must be accorded to them." Nicholson, 344 F.3d at 171 (quoting Tenenbaum, 193 F.3d at 593). "However, 'in emergency circumstances, a child may be taken into custody by a responsible State official without court authorization or parental consent.'" Id. (quoting Tenenbaum, 193 F.3d at 594). "If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, ex parte or otherwise, for the child's removal, then the circumstances are not emergent." Id. (quoting Tenenbaum, 193 F.3d at 594).

HN21[ ] To show that emergency circumstances existed, "[t]he government must offer 'objectively reasonable' evidence that harm [was] imminent." Id. Although this Court has not attempted to set forth exhaustively the types of factual circumstances that constitute imminent danger justifying emergency removal as a matter of federal constitutional law, we have concluded that these circumstances include "the peril of sexual abuse," id., the "risk that children will be [*57] 'left bereft of care and supervision,'" id. (quoting Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991)), and "immediate threat[s] to the safety of the child," Hurlman, 927 F.2d at 80 (internal quotation marks omitted); see also N.Y. Fam. Ct. Act § 1024(a) (defining emergency circumstances, for the purposes of state law, as "circumstance[s] wherein a child's remaining in the parent's care and custody "presents an imminent danger to the child's life or health").

B. Analysis

The district court correctly concluded that summary judgment was not appropriate on the underlying merits of the plaintiffs' procedural due process claims because Woo did not demonstrate, as a matter of law, that he did not have time to obtain a court order authorizing the removal of the Southerland Children before taking that act. See Southerland II, 521 F. Supp. 2d at 235 n.31 (citing Nicholson, 344 F.3d at 171). The court nonetheless granted summary judgment on qualified immunity grounds, concluding that "the law concerning procedural due process rights in the context of child removals was not clearly defined at the time of the events in question." Id. at 232.
However, the district court overstated the extent to which [*58] the relevant standards were undeveloped at the time of the removal. In Hurlman, some six years before the events here in issue, we recognized that

[*150] HN22[ ] officials may remove a child from the custody of the parent without consent or a prior court order only in "emergency" circumstances. Emergency circumstances mean circumstances in

which the child is immediately threatened with harm, for example, where there exists an immediate threat to the safety of the child, or where the child is left bereft of care and supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.

Hurlman, 927 F.2d at 80 (citations and internal quotation marks omitted); see also Robison, 821 F.2d at 921-22 (describing the "emergency' circumstances" exception and collecting cases).

HN23[ ] It thus was clearly established at the time of the Southerland Children's removal that state officials could not remove a child from the custody of a parent without either consent or a prior court order unless "emergency' circumstances" existed. Hurlman, 927 F.2d at 80; see also Cecere v. City of N.Y., 967 F.2d 826, 829-30 (2d Cir. 1992) (setting forth the "clearly established" [*59] procedural due process principles that apply in this context); Velez v. Reynolds, 325 F. Supp. 2d 293, 314-15 (S.D.N.Y. 2004) (explaining those principles).

In concluding that the law of procedural due process was not clearly established in the child-removal context by 1997, the district court in this case relied primarily on our decision in Tenenbaum. There, two years after the events here in issue, we held as a matter of first impression that HN24[ ] "where there is reasonable time consistent with the safety of the child to obtain a judicial order, the 'emergency' removal of a child is unwarranted." Tenenbaum, 193 F.3d at 596. Because this principle was not clearly established [*60] in 1990 -- the year the underlying conduct at issue in Tenenbaum took place -- we affirmed the district court's decision in that case that the defendants were entitled to qualified immunity. We also made clear, however, that even in 1990, "it was established as a general matter . . . that 'except where emergency circumstances exist' a parent can 'not be deprived' of the custody of his or her child 'without due process, generally in the form of a predeprivation hearing.'" Id. at 596 (quoting Hurlman, 927 F.2d at 79).

In the present case, however, the plaintiffs assert "not solely that defendants had sufficient time to obtain a court order, but that the circumstances in which Woo found the children did not warrant their removal at all, whether evaluated by pre- or post-Tenenbaum standards." Southerland Children's Br. at 39. We understand the [*151] plaintiffs' contention to be that "emergency circumstances" warranting removal simply did not exist because the conditions in the Southerland home were insufficiently dangerous.

The district court did not decide as a matter of law that emergency circumstances existed in the Southerland home. To the contrary, the district court concluded that ["viewing the facts in the light [*62] most favorable to plaintiffs, a reasonable juror could determine that the
circumstances Woo encountered did not demonstrate an imminent danger to the children's life or limb." Southerland II, 521 F. Supp. 2d at 234 n.29. The court further decided that "a reasonable juror could find that there was sufficient time to acquire a court order prior to the removal." Id. at 235 n.31. In light of those determinations, with which we agree, and our assessment that the relevant law was clearly established by 1997, we cannot conclude as a matter of law that "it was objectively reasonable for [Woo] to believe [that his] acts did not violate those [clearly established] rights." Holcomb, 337 F.3d at 220. Qualified immunity therefore is not available to Woo on the plaintiffs' procedural due process claims at the summary judgment stage. Because summary judgment also cannot be granted to the defendants on the underlying merits of these claims,22 we vacate the grant of summary judgment to Woo as to the procedural due process claims.

F.3d at 590, 594. [**61] There was no doubt at the time that the possibility of sexual abuse was, as it always is, a serious concern. At issue was whether there was nonetheless time under the circumstances to secure a court order prior to effecting the removal without risking imminent danger to the child. See id. at 608 (Jacobs, J., concurring in part and dissenting in part) (describing majority opinion as holding that, while there was "exigency," there was still no "emergency," because there was time to obtain a court order). Tenenbaum represented a novel application of procedural due process law because of the majority's holding that, regardless of the seriousness of the allegations, it was still necessary to obtain a court order if time permitted. Here, by contrast, we understand the plaintiffs to assert that the circumstances presented did not necessitate an inquiry into whether there was time to obtain a court order, because the conditions in the Southerland home were not grave enough to trigger that inquiry.

22 The district court correctly noted that there are material factual disputes concerning whether emergency circumstances existed warranting the immediate removal of the Southerland Children from their home. See Southerland II, 521 F. Supp. 2d at 234 n.29 & 235 n.31. But even where emergency circumstances warranting removal exist, "the constitutional requirements of notice and opportunity to be heard are not eliminated but merely

VI. Southerland's Substantive Due Process Claim

Southerland asserts a substantive due process claim against Woo under the Fourteenth Amendment. The district court held not only that qualified immunity attached to Woo's actions, but also that summary judgment would be warranted on the merits even in the absence of qualified immunity. We agree that Woo is entitled to summary judgment on [**64] the merits, and we therefore affirm this portion of the district court's judgment.

A. Substantive Due Process in the Child-Removal Context

HN26[ ] Substantive due process rights safeguard persons "against the government's 'exercise of power without any reasonable justification in the service of a legitimate governmental objective.'" Tenenbaum, 193 F.3d at 600 (quoting County of Sacramento v. Lewis, 523 U.S. 85
To establish a violation of substantive due process rights, a plaintiff must demonstrate that the state action was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." [*152] Okin, 577 F.3d at 431 (quoting Lewis, 523 U.S. at 847 n.8). The interference with the plaintiff's protected right must be "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." Anthony, 339 F.3d at 143 (quoting Tenenbaum, 193 F.3d at 600); see also Lewis, 523 U.S. at 840 (doctrine of substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them" (internal quotation marks omitted)). Thus, in the childremoval context, we ask whether "the removal . . . would have been prohibited by the Constitution even had the [plaintiffs] been given all the procedural protections to which they were entitled." Tenenbaum, 193 F.3d at 600 (emphasis omitted).

Therefore, a plaintiff may have a viable claim for violation of procedural due process even where emergency circumstances existed at the time of removal, if the plaintiff does not receive a timely and adequate post-deprivation hearing. See id. at 760-61. In this case, as will be explained below, important factual questions remain concerning the post-removal judicial confirmation proceedings, if any, that took place in the days after the Southerland Children's removal from their home.

We have long recognized that parents have a "constitutionally protected liberty interest in the care, custody and management of their children," id. at 593, and that the deprivation of this interest is actionable on a substantive due process theory, see id. at 600 (recognizing a "substantive right under the Due Process Clause 'to remain together without the coercive interference of the awesome power of the state'" (quoting Duchesne, 566 F.2d at 825)). We have also observed, however, that "although parents enjoy a constitutionally protected interest in their family integrity, this interest is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89, 104 (2d Cir. 1999) (internal quotation marks omitted), cert. denied, 528 U.S. 1155, 120 S. Ct. 1160, 145 L. Ed. 2d 1072 (2000).

We have explained [*66] that, HN28[ ] in part because the law contemplates a careful balancing of interests, a parent's substantive constitutional rights are not infringed if a caseworker, in effecting a removal of a child from the parent's home, has a reasonable basis for thinking that a child is abused or neglected. See id.; Gottlieb, 84 F.3d at 518. "This Circuit has adopted a standard governing case workers which reflects the recognized need for unusual deference in the abuse investigation context. An investigation passes constitutional muster provided simply that case workers have a 'reasonable basis' for their findings of abuse." Wilkinson, 182 F.3d at 104; see also id. at 108 (concluding that the "reasonable basis test" requires that caseworkers' decisions to substantiate an allegation of child abuse "be consistent
with some significant portion of the evidence before them"). We have applied this "reasonable basis" standard from time to time in recent years. See, e.g., Nicholson, 344 F.3d at 174; Phifer v. City of N.Y., 289 F.3d 49, 60 (2d Cir. 2002); Kia P., 235 F.3d at 758-59.

HN29[ ] We have also recognized that state interference with a plaintiff's liberty interest must be severe before it rises to the level of [**67] a substantive constitutional violation. See, e.g., Anthony, 339 F.3d at 143. "The temporary separation of [a child] from her parents" does not constitute an "interference [that is] severe enough to constitute a violation of [the parents'] substantive due-process rights," Tenenbaum, 193 F.3d at 601; see also, e.g., Kia P., 235 F.3d at 759; Cecere, 967 F.2d at 830 (ruling that plaintiff's generalized due-process claim failed because a "brief" four-day removal, executed "in the face of a reasonably perceived emergency," did not violate due process); Joyner ex rel. Lowry v. Dumpson, 712 F.2d 770, 779 (2d Cir. 1983) (concluding that there was no substantive due process violation where temporary transfer of custody [*153] to foster-care system did not "result in parents' wholesale relinquishment of their right to rear their children"). In

Tenenbaum, we observed that in other contexts, our court and the Supreme Court had held that even very brief seizures or detentions could violate the Fourth Amendment rights of criminal suspects. See Tenenbaum, 193 F.3d at 601 (citing Davis v.

Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969), which held that police detention, even for a brief period of time, violated the Fourth Amendment [**68] where there was no probable cause to arrest, and United States v. Langer, 958 F.2d 522, 524 (2d Cir. 1992), which held that police detention even for ten to fifteen minutes was "constitutionally significant" for purposes of 18 U.S.C. § 242). We reasoned, however, that "[i]t does not follow from the principle that brief seizures of people may be unreasonable and therefore violate the Fourth Amendment that brief removals of children from their parents to protect them from abuse are without any reasonable justification in the service of a legitimate governmental objective under the Due Process Clause." Tenenbaum, 193 F.3d at 601 (internal quotation marks and citation omitted).

HN31[ ] Thus, "brief removals [of a child from a parent's home] generally do not rise to the level of a substantive due process violation, at least where the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal." Nicholson, 344 F.3d at 172 (citing Tenenbaum, 193 F.3d at 600-01 & n.12). And once such "court confirmation of the basis for removal" is obtained, id., any liability for the continuation of the allegedly wrongful separation of parent and child can [**69] no longer be attributed to the officer who removed the child. Cf., e.g., E.D. ex rel. V.D. v. Tuffarelli, 692 F. Supp. 2d 347, 354, 368 (S.D.N.Y. 2010) (applying brief-removal doctrine, and granting summary judgment in favor of defendants, where family court confirmed the basis for ACS's temporary removal of children three days after removal occurred), aff'd, 408 F. App'x 448 (2d Cir. 2011).

B. Analysis
The district court, in deciding that Woo enjoyed qualified-immunity protection as to these charges, observed that the Southerland Children "were removed in the context of a child protective investigation [in which] removal would be subject to court confirmation," Southerland II, 521 F. Supp. 2d at 232, and that "a timely post-deprivation hearing [was held] where a family court judge confirmed the removal," id. at 234. The court therefore concluded that it was objectively reasonable for Woo to think that Southerland's rights were not being violated because "[b]rief removals of children from their parents generally do not rise to the level of a substantive due process violation." Id. at 232 (brackets and internal quotation marks omitted).

We agree with the district court that the removal of children from their parent for the purpose of keeping the children safe does not violate the parent's substantive due process rights if a postremoval judicial proceeding is promptly held to confirm that there exists a reasonable basis for the removal. The period of time in which the child and parent are separated solely at the instance of the defendant is, in such a case, not sufficient to amount to a substantive due process violation by the defendant caseworker. See Nicholson, 344 F.3d at 172; Kia P., 235 F.3d at 759; Tenenbaum, 193 F.3d at 600-01. This is not a matter of the defendant's qualified immunity: Where the "briefremoval doctrine" applies, a plaintiff does not have a cause of action for a substantive due process violation in the first place. See, e.g., Kia P., 235 F.3d at 759 (applying brief-removal doctrine and concluding that plaintiff's "rights to substantive due process were not abridged").

The viability of such a substantive due process cause of action on the facts of this case is not an easy judgment to make because the record is not entirely clear as to whether such a postremoval judicial proceeding occurred, and if so, the nature of it. In a previous opinion, the district court explained that the Southerland Children "remained in custody without a court order until the morning of June 12, 1997, at which time Woo obtained a court order confirming the removal." Southerland v. City of N.Y., No. 99-cv-3329, 2006 U.S. Dist. LEXIS 53582, at *4, 2006 WL 2224432, at *1 (E.D.N.Y. Aug. 2, 2006) (emphasis added). But Woo declared that "[t]he Family Court affirmed the removal of the Southerland/Felix children . . . on June 13, 1997," Woo Decl. ¶ 24, and Balan stated that "[t]he removal was affirmed by Family Court on June 14, 1997," Balan Decl. ¶ 18. It is also unclear whether

Southerland was present at that hearing, whenever it was, or on what factual basis the Family Court decided that the continued removal of the Southerland Children was warranted.

We nonetheless conclude that summary judgment was warranted. Southerland and the Southerland Children dispute neither that a post-removal judicial confirmation proceeding was held nor that it took place within four days after removal. See Southerland Children's Br. at 23; Pro Se Pl.'s Opp'n to Defs.' Mot. for Summ. J. ¶¶ 36-37, Pro Se Submission of Sonny B. Southerland at 7 (Dkt. No. 192), Southerland v. City of N.Y., No. 99-cv3329 (E.D.N.Y. Mar. 14, 2007). Therefore, based on this concession, only the (at most) four days of removal prior to the court hearing are attributable to Woo. Tuffarelli, 692 F. Supp. 2d at 354, 368. In light of this concession, the
A question becomes: Was the four-day period a "shocking, arbitrary, and egregious" amount of time for Southerland to have been separated from his children at Woo's instruction, i.e., without an intervening judicial confirmation of the basis for removal. Anthony, 339 F.3d at 143 (internal quotation marks omitted).

We conclude, on the basis of previous consideration of similar circumstances by courts in this Circuit and our own judgment, that the four-day separation under these circumstances was not so long as to constitute a denial of substantive due process to Southerland. See Kia P., 235 F.3d at 759 ("day or two" removal to review a child's case did not violate substantive due process); Tuffarelli, 692 F. Supp. 2d at 368 [*73] (no substantive due process violation where children were removed on a Friday evening, and judicial proceedings commenced in a timely manner on the following Monday); Green ex rel. T.C. v. Mattingly, 07-cv-1790(ENV)(CLP), 2010 U.S. Dist. LEXIS 99864, at *34-35, 2010 WL 3824119, at *10 (E.D.N.Y. Sept. 23, 2010) (four-day removal of child during ACS investigation did not violate substantive due process).

Although the Southerland Children continued to be separated from Southerland even after the post-removal confirmation proceeding, in light of the presumption of regularity that we attribute to state judicial proceedings, see, e.g., Honeycutt v. Ward, 612 F.2d 36, 41 (2d Cir. 1979), and in [*155] light of Southerland's failure to proffer any evidence tending to rebut that presumption, we cannot conclude that the continued separation of Southerland from his children following the judicial confirmation proceeding is fairly attributable to Woo. We therefore conclude that Southerland's substantive due process claim fails on its merits. Accordingly, we affirm the grant of summary judgment to Woo on that basis as to this claim.

VII. The Southerland Children's Fourth Amendment Unlawful-Seizure Claim

Finally, the Southerland Children assert a claim for violation of their Fourth Amendment right to be free from unreasonable seizure.

A. Evolution of the Southerland Children's Theory of Liability

The Southerland Children originally characterized this constitutional claim as arising under the Due Process Clause of the Fourteenth Amendment. Specifically, they alleged that "Woo lacked a reasonable basis for removing the [Southerland] Children from plaintiff's home without a court order," and that "[i]n so doing, Woo deprived the [Southerland] Children of their substantive due process liberty interests in being in the care and custody of their father and natural guardian, guaranteed to them by the [F]ourteenth [A]mendment." Am. Compl. ¶ 51. They relied upon the Fourteenth Amendment notwithstanding our observation in Southerland I that "[t]he children's claims for unreasonable seizure would proceed [*75] under the Fourth Amendment [as applied to the states by the Fourteenth] rather than the substantive component of the Due Process Clause." Southerland I, 4 F. App'x at 37 n.2 (citing Kia P., 235 F.3d at 757-58).
By the time of the summary judgment proceedings after remand, the Southerland Children appeared to recognize that their claim did indeed arise under the Fourth Amendment. See Southerland Children's Mem. of Law in Opp'n to Mot. for Summ. J. at 16-20 ("Children's Dist. Ct. Br.") (Dkt. No. 184), Southerland v. City of N.Y., No. 99-cv-3329 (E.D.N.Y. Dec. 29, 2006) (arguing the Southerland Children's substantive due process claim as though it arose under the Fourth Amendment). And in its opinion resolving the summary judgment motion, the district court correctly noted that the Southerland Children's substantive due process constitutional claim was governed by the Fourth Amendment. See Southerland II, 521 F. Supp. 2d at 230 n.24 (citing Southerland I, 4 F. App'x at 37 n.2).

The Southerland Children also narrowed their theory of liability as to the legal substance of that claim. Originally, they pled that the removal was unconstitutional both because it lacked a "reasonable basis," Am. ¶ 51, and because the removal had the effect of separating them from Southerland, thereby depriving them of their "liberty interests in being in the care and custody of their father," id. In effect, the Southerland Children thus pled both that their warrantless seizure was unreasonable because it was not supported by an exception to the Fourth Amendment warrant requirement (no "reasonable basis"), and that the seizure was unreasonable insofar as it burdened the Southerland Children's substantive due process right to "be[] in the care and custody of their father."25

A Fourth Amendment unlawful-seizure claim differs from a Fourth Amendment unlawful-search claim. It is not yet clear from the case law of our Circuit what kinds of Fourth Amendment unlawful-seizure claims might be asserted by a child who is removed from his or her home. From reviewing our past decisions and those of other circuits, however, we can identify at least three possibilities.

First, a child might assert that the act of seizure itself lacked a lawful basis, such as consent, probable cause, or exigent circumstances. See, e.g., Southerland II, 521 F. Supp. 2d at 234 n.29 (evaluating Southerland Children's Fourth Amendment unlawful-seizure claim in those terms).

Second, a child might assert that the seizure was carried out in an unreasonable manner, such as through the use of excessive force or through a sudden, surprise raid. See, e.g., Brokaw v. Mercer County, 235 F.3d 1000, 1011-12 (7th Cir. 2000) (upholding manner-of-seizure claim brought by child removed from his home where officers "acted like kidnappers").

Third, a child might assert that the seizure endured for an unreasonable length, and thereby burdened the child's interest in being in the care and custody of his or her parents. See, e.g., Hernandez ex rel. Hernandez v. Foster, 657 F.3d 463, 474 (7th Cir. 2011) (recognizing and upholding seized child's...
In their submission opposing the defendants’ summary judgment motion, however, the Southerland Children appeared to have abandoned the theory that the seizure unreasonably burdened their due process right to their father’s care and custody. In other words, they no longer challenged the reasonableness of the effect or duration of their removal as a violation of their rights to substantive due process. Instead, they argued only that the removal was unconstitutional as an unlawful seizure because the act of removal itself was unsupported by sufficient legal justification: Woo could not demonstrate the existence of either parental consent or exigent circumstances that would justify the act of removal absent prior judicial authorization. See generally Children’s Dist. Ct. Br. at 16-20.

B. District Court’s Analysis

The district court properly analyzed this claim solely by reference to the theory set forth in the Southerland Children's summary-judgment briefing -- i.e., that their Fourth Amendment rights had been violated because there were no "exigent circumstances" justifying their removal without a court order. See Southerland II, 521 F. Supp. 2d at 234 n.29. In light of the Southerland Children’s abandonment of any of the other alleged theories of liability, especially under principles of substantive due process, the district court correctly framed the claim in this manner.

As with the procedural due process claim, see supra Part V.A., the court concluded that at the time of the alleged seizure, "there was no clear application of Fourth Amendment standards in the child removal context.” Southerland II, 521 F. Supp. 2d at 231. The court pointed, in particular, to Tenenbaum, 193 F.3d at 605, our decision that viewed Fourteenth Amendment due process claims as properly Fourth Amendment unlawful-seizure claims of the sort asserted here, but that had not issued until after the seizure in this case. See Southerland II, 521 F. Supp. 2d at 231. Based on the absence of clear law at the time of the Southerland Children’s removal, the court held, as a matter of law, that Woo was protected from this claim by qualified immunity. Id. at 231.

In addition to the immunity question, and despite finding in Woo's favor on it, the district court nonetheless addressed the merits of the Southerland Children's Fourth Amendment unlawful-seizure claim. It concluded in a footnote that, "[i]n the absence of Woo's qualified immunity defense," summary judgment would not be warranted on this claim on its underlying merits because "a reasonable juror could determine that the circumstances Woo encountered did not demonstrate an imminent danger to the children’s life or limb.” Id. at 234 n.29.

C. Appeal
On appeal, the Southerland Children appear to persist in their view that their Fourth Amendment unlawful seizure claim is addressed solely to the issue of whether there was a legal basis for the act of removal. See Southerland Children's Br. at 24, 36-41;

Woo Br. at 36-37; Southerland Children's Reply Br. at 68. We review the argument in those terms, treating as abandoned any argument the Southerland Children might have made that the removal was unreasonable because it had an unlawful effect or was of unlawful duration, and was therefore a violation of their substantive due process rights. See City of N.Y. v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011).


By way of footnote, the district court decided that Woo was entitled to summary judgment with respect to the claim that the removal was unlawful. In doing so, the court assumed that a seizure of a child without a court order is constitutionally justified under the Fourth Amendment only if there are "exigent circumstances." See Southerland II, 521 F. Supp. 2d at 234 n.29. This Court, however, has yet to articulate definitively the legal standard that applies to a Fourth Amendment unlawful-seizure claim brought by a child alleging that his or her removal without parental consent or prior judicial authorization was not supported by sufficient cause.

In [**82] Tenenbaum, we considered this question, apparently for the first time. See 193 F.3d at 603-05. We described, in dicta, three possible "modes of determining whether a seizure was 'reasonable' under the Fourth Amendment . . . in cases where the state seizes a child in order to prevent abuse or neglect." Kia P., 235 F.3d at 762 (citing and discussing Tenenbaum, 193 F.3d at 603-05).

As one mode, we referred to the "exigent circumstances" exception to the warrant requirement that is well-established in the law-enforcement context. See Tenenbaum, 193 F.3d at 604 (noting that "it is core Fourth Amendment doctrine that a seizure without consent or a warrant is a 'reasonable' seizure if it is justified by 'exigent circumstances'"); see generally United States v. Klump, 536 F.3d 113, 117-19 (2d Cir. 2008) (describing and applying the "exigent circumstances" exception in law-enforcement context), cert. denied, 555 U.S. 1061, 129 S. Ct. 664, 172 L. Ed. 2d 638 (2008); United States v. MacDonald, 916 F.2d 766, 769-70 (2d Cir. 1990) (en banc) (elaborating standards). We concluded that such an exception would be viable in the child-removal context too. Tenenbaum, 193 F.3d at 604-05. We suggested that that exception would apply when "a child is subject to the danger of abuse if not removed . . . before court authorization can reasonably be obtained." Id. at 605.

As another mode, we said that a seizure conducted in accordance with the ordinary probable cause standard -- the standard that applies in the law enforcement context -- might also suffice. Under such a rule, a caseworker could lawfully remove a child from his or her home without parental consent or prior judicial authorization if the caseworker knew "facts and circumstances that were sufficient to warrant a person of reasonable caution in the belief that" a child was abused or neglected. Id. at 602-03 (internal quotation marks omitted).
Alternatively, we noted that under some circumstances an even lesser, "special needs," standard might apply, in which case only "reasonable cause" would be necessary to render lawful a warrantless seizure. See id. at 603-04. That would reflect the principle that "there are some agencies outside the realm of criminal law enforcement where government officials have 'special needs beyond the normal need for law enforcement [that] make the warrant and probable-cause requirement impracticable.'" Id. at 603 (quoting O'Connor v. Ortega, 480 U.S. 709, 720, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) [**84] (plurality opinion)) (alterations in Tenenbaum). We observed, however, that case law in our sister circuits suggested that the "emergency removal of a child by caseworkers is not such a 'special needs' situation." Id. at 603-04 (collecting cases).

We did not decide in Tenenbaum which of those three standards should apply as the constitutional floor in child-removal cases -- i.e., the standard below which an officer could not go without violating the Fourth Amendment. Id. at 605; see also Kia P., 235 F.3d at 762-63 (reserving same question). But we did conclude that, HN37[ ] at least "where information possessed by a state officer would warrant a person of reasonable caution in the belief that a child is subject to the danger of abuse if not removed from school before court authorization can reasonably be obtained, the 'exigent circumstances' doctrine . . . permits removal of the child without a warrant equivalent and without parental consent." Tenenbaum, 193 F.3d at 605 (citing Hurlman, 927 F.2d at 80); see also Phifer, 289 F.3d at 60-61 (recognizing and applying this holding in the context of a Rooker-Feldman analysis). And, subsequent to Tenenbaum, we have assumed that the standard to be [**85] applied to such claims cannot be any less than probable cause. See Nicholson, 344 F.3d at 173 ("We have not addressed . . . the question whether[,] in the context of the seizure of a child by a state protective agency[,] the Fourth Amendment might impose any additional restrictions above and beyond those that apply to ordinary arrests." (emphasis added)).

Again here, we need not adopt a standard. We observe first, as we did in Tenenbaum, that this case does not present circumstances in which the "special needs" test applies, if ever it does in the child-removal context. Tenenbaum, 193 F.3d at [*159] 603. In this case "the requirement of obtaining the equivalent of a warrant where practicable [would not impose] intolerable burdens on the government officer or the courts, [and] would [not] prevent such an officer from taking necessary action, or tend to render such action ineffective," Tenenbaum, 193 F.3d at 604.

The elimination of a possible "special needs" approach leaves either the probable-cause or exigent circumstances standard applicable to the merits of whether Woo's behavior violated the Children's constitutional rights.28 But we need not decide between them -- at least not yet. As explained below, regardless of which standard applies, Woo cannot establish as a matter of law on the current record that he would be entitled to qualified immunity or that no reasonable jury could find in favor of the Children on the merits of their Fourth Amendment seizure claim.

2. Qualified Immunity
The district court decided that Woo was entitled to qualified immunity because "prior to
[**87] the Court of Appeals' decision in Tenenbaum [in 1999], there was no clear application of
Fourth Amendment standards in the child removal context." Southerland II, 521 F. Supp. 2d at 231.
Although we agree with the district court's observation that this Circuit had not yet applied
Fourth Amendment unlawful-seizure principles in the child-removal context by 1997, we think
that the district court erred by conducting its inquiry solely by reference to the label -- "unlawful
seizure" -- attached to the claim at issue.

Our decision in Tenenbaum did indeed effect a change in the constitutional nomenclature
governing a child’s claim for alleged substantive constitutional violations arising out of his or her
removal from a parental home. There, the plaintiffs contended that "[their daughter's]

Child Servs., 635 F.3d 921, 926-28 (7th Cir. 2011); Riehm v. Engelking, 538 F.3d 952, 965 (8th
Cir. 2008); [**86] Gates v. Texas Dep't of Protective & Regulatory Servs., 537 F.3d 404, 427-29 (5th Cir. 2008).

28 Our sister circuits apply somewhat divergent standards in determining whether a seizure of a
child without judicial authorization or parental consent violates the Fourth Amendment. See,
e.g., See Siliven, 635 F.3d at 926-28

(probable cause or exigent circumstances sufficient); Riehm, 538 F.3d at 965 (same); Gates,
537 F.3d at 427-29 (exigent circumstances required); Wallis v. Spencer, 202 F.3d 1126, 1136
(9th Cir. 2000) (same).

temporary removal [from school] for the purpose of subjecting her to a medical examination
violated their and [their daughter's] substantive due-process rights." Tenenbaum, 193 F.3d at
599. We noted that the Supreme Court observed in Albright v. Oliver, 510 U.S. at 273, that

HN39[ ] where a particular Amendment provides an explicit textual source of constitutional
protection against a particular sort of government [**88] behavior, that Amendment, not the
more generalized notion of substantive due process, must be the guide for analyzing these
claims.

Tenenbaum, 193 F.3d at 599 (brackets and internal quotation marks omitted). We said that
"
HN40[ ]

[s]ubstantive due process analysis is . . . inappropriate . . . if [the] claim is covered by the Fourth
Amendment." Id. at 600 (quoting Lewis, 523 U.S. at 843) (second brackets in original; other
internal quotation marks omitted). We then concluded that the daughter's "removal and her
examination constituted a seizure and search, respectively, under the Fourth Amendment," id.,
and that her claim "therefore [*160] 'must be analyzed under the standard appropriate to [the
Fourth Amendment], not under the rubric of substantive due process." Id. (quoting United States v. Lanier, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)).

The fact that Tenenbaum changed the legal "rubric" applicable to the Southerland Children's constitutional claim -- from substantive due process to illegal seizure - however, is not alone determinative of whether the constitutional rights implicated in the Children's seizure were clearly established prior to the time of the seizure. It would be inappropriate, we think, to afford Woo qualified immunity on the Southerland Children's claim solely because, two years after the events in question, we shifted the constitutional label for evaluating that claim from the Fourteenth to the Fourth Amendment.

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But cf. Tenenbaum, 193 F.3d at 605 (resting grant of qualified immunity on basis that there "was no 'clearly established' law under the Fourth Amendment" in 1990 concerning standards for removing a child from her school). What matters is whether an objectively reasonable caseworker in Woo's position would have known that removing a child from his or her home without parental consent, circumstances warranting the removal, or court order would violate a constitutional right -- not whether the caseworker would have known which constitutional provisions would be violated if the caseworker proceeded to act in a particular way.

We reached a similar conclusion in Russo v. City of Bridgeport, 479 F.3d 196 (2d Cir.), cert. denied, 552 U.S. 818, 128 S. Ct. 109, 169 L. Ed. 2d 24 (2007). There we made clear that the constitutional "right to be free from prolonged detention caused by law enforcement officials' mishandling or suppression of exculpatory evidence," id. at 211, was a species of the right to be free from unlawful seizure under the Fourth Amendment, not a substantive due process right under the Fourteenth Amendment, see id. at 208-09. In then proceeding to undertake a qualified-immunity inquiry, we cautioned that our "clarification [of the law was] of no consequence to the question of whether the right was clearly established [at the time of the relevant events], because the proper inquiry is whether the right itself -- rather than its source -- is clearly established." Id. at 212 (collecting cases; emphases in original).

Here, as in Russo, in inquiring whether there was clearly established law to govern the Southerland Children's claim in 1997, we look not only to authorities interpreting the Fourth Amendment, but to all decisions concerning the same substantive right -- the right of a child not to be seized from his or her home without parental consent, prior judicial authorization, or the existence of special circumstances.

Although the standard for determining whether the circumstances justify seizure of a child without judicial authorization or parental consent under the Fourth Amendment was not established by 1997 and, as we have pointed out, remains unsettled to this day, the Children's right not to be taken from the care of their parent without court order, parental consent, or emergency circumstances was firmly established, albeit under a procedural due process framework. See Hurlman, 927 F.2d at 80. Regardless of whether probable cause or exigent circumstances must be established to justify a warrantless seizure for Fourth
Amendment purposes, the existence of emergency circumstances sufficient to justify removal of the Southerland Children in a manner comporting with their due process rights would also certainly suffice to justify their removal in a manner comporting with their Fourth Amendment rights barring unreasonable seizure. To that extent, at the time of the events in this [**92] case, the Southerland Children's Fourth Amendment rights against unreasonable seizure were clearly established.

In light of this determination, the next question the Court must address is whether "it was objectively reasonable for [Woo] to believe [that his] acts did not violate th[e Childrens' clearly established] right]," Holcomb, 337 F.3d at 220, not to be taken from the care of their parent without court order, parental consent, or emergency circumstances. Once again, for the purposes of the qualified immunity analysis, the legal origin of the right is not determinative. If Woo has established that he was objectively reasonable in believing that he did not violate the Children's right to be free from unwarranted seizure without exigent circumstances, court order, or parental consent, then he is protected against their Fourth Amendment seizure claim, no matter the standard used to determine liability on this claim on the merits. For the same reasons as in our procedural due process analysis -- that we cannot conclude as a matter of law on the current record [**93] that it would have been objectively reasonable for Woo to believe that his actions did not violate the Children's constitutional right not to be removed from their home barring exigent circumstances — we cannot conclude as a matter of law that Woo must prevail on the "objectively reasonable" inquiry as to the violation of the children's Fourth Amendment illegal seizure claims. See supra, Part V. Thus, qualified immunity is unavailable to Woo at this stage on the current record.

3. The Merits of the Fourth Amendment Unlawful Seizure Claim

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Because we conclude here that Woo is not entitled to qualified immunity as a matter of law, at least on this record, the remaining question is whether Woo is entitled to summary judgment on the merits. The district court assumed that a seizure of a child without a court order or parental consent is constitutionally justified under the Fourth Amendment only if there are "exigent circumstances." See Southerland II, 521 F. Supp. 2d at 234 n.29. It concluded that, taking the evidence in the light most favorable to the Southerland Children, "a reasonable juror could determine that the circumstances Woo encountered did not demonstrate an imminent danger to [**94] the children's life or limb." Id.

As our discussion here makes clear, however, this may not be the standard that should apply in deciding the merits of the Children's Fourth Amendment seizure claim. The district court should reconsider the merits question -- on an expanded record if the court deems that appropriate -- cognizant of the uncertainty in the legal landscape. The district court may need to decide, in the first instance, what standard should apply, but it may not. For example, if the court determines that under either standard the Southerland children can establish that the circumstances in the
home did not justify the [*162] seizure as a matter of law, then it need not decide whether the probable cause or exigent circumstances standard is applicable.

VIII. Further Development of the Record

As should be clear by now, nothing in this opinion should be read to foreclose the district court from exercising its sound discretion as to the nature and scope of any further pretrial proceedings on remand. Cf. Huminski v. Corsones, 386 F.3d 116, 152 (2d Cir. 2004) (district court free to consider whether granting additional discovery would be appropriate before deciding a renewed motion for summary judgment). The district court may, although it need not, permit additional discovery, a renewed motion for summary judgment, or both. And it follows that, should this case proceed to trial, nothing in this opinion should be construed as preventing the district court from entertaining a properly supported motion for judgment as a matter of law by the defendants.

CONCLUSION

For [*96] the foregoing reasons, we affirm the grant of summary judgment as to Southerland’s claim for infringement of his substantive due process rights under the Fourteenth Amendment. We vacate the district court’s grant of summary judgment as to Southerland’s and the Southerland Children’s claims for Fourth Amendment violations arising out of the allegedly unlawful search of the Southerland home; as to Southerland’s and the Southerland Children’s claims for violations of procedural due process under the Fourteenth Amendment; and as to the Southerland Children’s claim for unlawful seizure under the Fourth Amendment and remand to the district court for further proceedings.

Each party shall bear his, her or its own costs on appeal.

24 On remand, with respect to both the conduct and determination of any further pretrial proceedings and a subsequent trial, if any, nothing in this opinion is intended to limit the district court’s discretion to consider or admit into evidence (1) the outcome of the Family Court proceedings addressing and disposing of the claims of child abuse involving Southerland, or (2) testimony, documents, or physical evidence from those proceedings to the extent the outcome of those proceedings or other such evidence may bear on, inter alia, background, witness credibility, scope or amount of damages, Woo’s professional judgment, or such other issues, as the district court may determine. We leave to the district court’s determination in the first instance the admissibility of any such evidence for any particular purpose.

Steven J. Phillips and Marie Condoluci, individually and as parents and natural guardians of T.C.P., an infant, Plaintiffs v. County of Orange, Board of Education Goshen Central School District, Village of Goshen, Defendant
THE COURT: Good morning. Please be seated.

I called you here today to read an opinion resolving all of the pending motions for summary judgment. As you see, there is a reporter here, and I am going to read it into the record.

What I would like to do, with the permission of the parties, is, as I read it, not read out the specific record references — they are in my opinion — but, rather than say Defendants’ Joint 56.1 statement, paragraph XB, plaintiffs responding, I won’t read that. I am giving the draft to the reporter and the reporter will fill that in.

Similarly with the case citations. I do intend to say Schneckloth v. Bustamonte, but the reporter will then fill in — I am making this up — 364 U.S. the numbers.

Is that acceptable to everybody? Plaintiff?
R. BERGSTEIN: Yes, your Honor.
THE COURT: Defendants?
COUNSEL: Yes, your Honor.
THE COURT: So we will proceed on that basis. It certainly will let the reading be more fluid.

And just to get to the end first, what I am doing is I am granting summary judgment to the plaintiffs against the county on the seizure, because I think it was an unconstitutional seizure. I am dismissing the village entirely, so I am granting the village’s motion for summary judgment. The village is out. And then I am denying all of the other summary judgment aspects, okay? This will narrow the case and it will either proceed to settlement or trial. We will talk about that at the end as to how you want to proceed.
My decision is as follows:

I. INTRODUCTION

Plaintiffs, Steven Phillips and Marie Condoluci, suing individually and on behalf of their infant daughter, T.C.P., who was five years old at the relevant time, bring this action against the County of Orange (“the County”), the Goshen Central School District Board of Education (“the School District”), and the Village of Goshen (“the Village”) (collectively, “defendants”), alleging that defendants are liable pursuant to 42 U.S.C. 1983 for violations of plaintiffs’ Fourth Amendment rights. Plaintiffs also claim that defendants are liable for conspiring to violate 42 U.S.C. 1983.

Before the Court are the parties’ various cross-motions for summary judgment. For the reasons that I am about to set forth, I grant the Village’s motion for summary judgment, grant partial summary judgment to plaintiffs — as I said, I am granting it on the issue of reasonable seizure as to liability and it will be up to the jury to determine damages, if any — and deny the summary judgment motions of the County and the School District.

II. BACKGROUND

The following facts are undisputed unless otherwise noted.

A. The Report and the Initiation of a Child Abuse Investigation

On November 3, 2009, Robin Hogle called the State Central Registry (“SCR”) to report that a family friend of the plaintiffs, suspected that Mr. Phillips, the father, had sexually abused his five-year-old daughter, T.C.P, and that Condoluci, the child’s mother, was aware of the abuse and failed to intervene. (Joint Defs.’ 56.1 Response 2, 21, 25.) Hogle told SCR personnel that, according to this anonymous family friend, plaintiffs had nude pictures of the child on the refrigerator that they referred to as art, Phillips allegedly said that his child had a “sweet ass,” the child frequently visited the school nurse, and the child and her sister allegedly slept with their parents. (Id. 23-26.) The narrative of the call to SCR states: “It is suspected father is sexually abusing [T.C.P.] and mother is aware and doing nothing. There have been ongoing concerns for about 3 months…close friends of the family have witnessed specifics and confronted the family.” (Id. 27; Ex. 3 to Bergstein Aff. at 4.) You will see, as it turns out, of course, there is nothing to these anonymous allegations, but that’s down the road. Hogle admitted to the SCR that she had no firsthand knowledge whatsoever of these allegations. (Id.) The SCR accepted the anonymous report of Hogle. (Id. 28.) The SCR only accepts a report when a SCR hotline specialist determines that there is “reasonable cause to suspect that a child is an abused or maltreated child.” (Id. 16.) The SCR Manual defines “reasonable cause to suspect” as “what reasonable people, in similar circumstances, would conclude from such things as the nature of the injury(ies) to the child, statement and demeanor of the parents of the child, conditions of the home, etc.” (Id. 17.)
applying the “reasonable cause” standard, the SCR Manual instructs that the specialist “should accept the report regardless of whether the information is firsthand knowledge” and should assume that all callers are acting in good faith. (Id. 18, 19.) Linda Joyce, Director of the SCR, testified that the SCR does not give reduced weight to allegations of child abuse when they are made anonymously. (Deposition of Linda Joyce, 86-87, Ex. L.) After making the determination that Hogle’s report constituted reasonable cause to suspect abuse, the SCR transmitted the report to the Orange County Department of Social Services, Child Protective Services (“CPS”) for investigation. (Id. 15, 29.) I will refer to that as “CPS,” which is part of the county for liability purposes.

Pursuant to New York Social Services Law 423(6), a social services district may establish a multidisciplinary team (“MDT”) to investigate reports of suspected child abuse. Members of an MDT must include representatives from CPS, law enforcement, and the district attorney’s office. (Id.) Orange County established an MDT within its Child Abuse Investigation Unit which only investigates SCR reports involving sexual abuse, fatalities, or serious physical abuse. (Joint Defs.’ 56.1 Response 31.) One of the stated objectives of the MDT is to “increase the number of child sexual abuse cases that are adjudicated in family court and/or result in a conviction in criminal court,” and a New York State Police file is opened on all SCR reports investigated by the MDT. (Id. 35, 91; Exhibit 4 to Bergstein affidavit at 2.) The County contracted with the Village for a Village police officer to serve as one of the law enforcement members of the MDT. (Id. 49.) That Village police officer, Andrew Scolza, was directly supervised by John Richichi, a senior investigator for the New York State Police who served as the MDT’s Law Enforcement Supervisor. (Id. 39, 50.) And we will see that the only involvement of the village is its contract with the county to supply a police officer to be a member of the MDT.

Upon receiving the SCR report, no member of the MDT assessed whether the report met the “reasonable cause to suspect” abuse standard. (Id. 81.) The Village and the School District state that the MDT does not make its own reasonable cause determination because the SCR has already done so and because “the MDT must investigate the report.” (Id.) The parties dispute whether an SCR report can be rejected without an investigation if CPS determines that there is not reasonable cause to suspect abuse. (Id 87.) The Village and the School District argue that all SCR reports must be investigated, while plaintiffs claim that CPS could decide not to investigate a SCR report should CPS find that the report does not meet the reasonable cause standard. (Id.) The County admits that members of the MDT were not trained to reject reports that lacked reasonable cause to believe abuse occurred. (County 56.1 Response, 87.) Upon receipt of the SCR report on November 3, 2009, Susan Hughes, an Orange County CPS caseworker, contacted Hogle. Hogle told her that there “is a strong suspicion that the child is being sexually abused” but stated that “the children are not in imminent danger.” (Joint Defs. 56.1 Response 71, 72.) Karen Smith, the MDT case supervisor, determined that the child was not in imminent danger and the MDT did not need to begin its investigation immediately. (Id. 74) I have no idea where Hogle came up with
the idea that there is a strong suspicion of sexual abuse but, again, that’s for down the road.

The MDT investigation, which began the next day, November 4, 2009, was assigned to Jamie Scali-Decker, a CPS employee, and Officer Scolza, a Village police officer, who had been assigned by contract to this case. (Id. 88, 93.) Pursuant to MDT protocols, Scali-Decker checked CPS records to determine whether the family was the subject of any prior complaints. There was no such history. (Id. 95.) Scali-Decker then contacted Hogle, who told her that while she personally knew the plaintiffs and had contact with the child during a summer bible camp, where Hogle saw her on a daily basis outside plaintiffs’ presence, Hogle observed no signs of child abuse or inappropriate conduct. (Id. 6, 97; Scali-Decker Dep. 75-77.) She also denied ever seeing nude pictures of the child. (Id.) She reiterated that the information she had provided came from a so-called friend of the family who insisted on anonymity and informed Scali-Decker that the child was enrolled in the Goshen Central School District. (Id. 99, 102.) Scali-Decker urged Hogle to have this anonymous source call her directly. (Id. 101.) Hogle’s source, as you all know, turned out to be Theresa Falletta, the former babysitter of the family.

Scali-Decker contacted Scotchtown Avenue Elementary School and confirmed the child’s attendance there. (Id. 109.) Because their investigation had as the target both of the parents, the plaintiffs here, Scali-Decker and the police officer decided to interview the child at her school without parental consent or notice. (Id. 113; Scali-Decker Deposition Ex. H at 79; Scolza Deposition, Ex. F at 91; Smith Deposition, Ex. Q at 78.) Smith, the MDT case supervisor, approved the interview. (Smith Deposition, Ex. Q at 78.)

The MDT protocol emphasizes that “the most ideal and advantageous location…to interview…is at [CPS] offices,” but states that “schools represent a commonly utilized location for child interviews consistent with the pre-established protocol between the school and CPS” because school interviews are “often the only option in cases which require an immediate response and risk assessment to a report of a sexual abuse.” (Joint Defs. 56.1 Response 94.)

Although defendants deny that the MDT protocols require interviewing an alleged child victim at school without parental consent or notice when both parents are subject to a SCR report, see id. 103, Smith, Richichi, Scali-Decker, Scolza, Dudzik-Andrews, LaSusa testified that it was the MDT’s practice to do so. (Dudzik-Andrews Dep. at 49-54; Smith Dep. at 44-46, 48-50, Richichi Dep. at 54-56; Scali-Decker Dep. at 40-42, 47-51, 87-88; LaSusa Dep. at 24-27; Scolza Dep. at 39-40, 97. David Jolly, the Commissioner of the County’s Department of Social Services, also testified that it was the MDT’s standard practice to do so, but it depended on when the report was received. (Jolly Dep. at 38.)

When Scali-Decker contacted the school to confirm the child’s attendance, she did not speak with the school nurse or any teachers regarding the allegations in the report. (Id.
110.) The parties agree that members of the MDT do not normally contact school personnel prior to speaking with a child unless school personnel are the source of the report; however, defendants deny that it was the MDT’s policy not to contact the school nurse or teachers in such instances. (Id. 110-11.)

On November 4, 2009, Scali-Decker and the officer arrived at the child’s school and identified themselves. (Id. 129; Joint Defs.’ 56.1 336.) Daniel Connor, the school’s superintendent, allowed Scali-Decker and Officer Scolza to interview the child without parental notification or consent. (Joint Defs.’ 56.1 Response 133, 138.) The superintendent testified that it was the School District’s practice to permit CPS caseworkers or police officers to interview students without parental consent or notice. (Id. 138.) The School District believed that it was legally obligated to allow CPS to interview children in school without parental consent or notification, but it has not cited in its submission any statute or regulation or other legally enforceable obligation on which this belief was formed. (Joint Defs.’ 56.1 155, 156.)

B. Interview of T.C.P.

After Superintendent Connor authorized the interview, Mary Kay Jankowski, the school social worker, removed the child from her kindergarten class — remember we are dealing with a five-year-old — and took her to the assistant principal’s office to be questioned by Scali-Decker and the police officer. (Joint Defs.’ 56.1 Response 143, 145.) The child had never been in that office prior to the interview, and children at the school knew that they were not allowed to walk alone in the hallways. (Id. 146, 147.) The officer was not in uniform, but he was carrying a gun, which was under his suit jacket, and was carrying his shield, and handcuffs. (Id. 127.) For these purposes, I am prepared to assume they were not visible.

Scali-Decker and Officer Scolza interviewed the child with Jankowski present for approximately 15 to 20 minutes. (Id. 145; Joint Defs.’ 56.1 345.) The child did not know Scali-Decker or Scolza and didn’t, presumably, know the school social worker Jankowski. Jankowski told the child that “it was okay” to answer questions that Scali-Decker and Officer Scolza would ask her. (Joint Defs.’ 56.1 Response 144.) Scali-Decker did not offer the girl an opportunity to call her parents, nor did she tell the girl she was free to leave and not answer the questions. (Id. 149.) The doors to the office she was in were closed. (Id. 145.) She was questioned about various topics, including: (1) whether she bathed alone and how she bathed; (2) whether either of her parents ever touched her inappropriately; (3) whether she had any secrets; (4) whether she could identify her body parts, including the private body parts; (5) whether she had seen anyone else’s private parts or whether she had ever shown her private parts to anyone; (6) whether she had ever been alone; (7) whether she slept with her mother or father; (8) whether her parents argue and, if so, what they argue about; (9) whether anyone was naked at home; (10) whether there were naked pictures of anyone at home; and (11) whether she ever saw magazines, movies, or TV programs with any naked people.
; (Id. 151-52, 155; Ex. 10 to Bergstein Aff. at 10.) She was quiet and compliant throughout the questioning. (Id. 153.) Not a single one of the child’s answers indicated that she had been abused or maltreated or that there was any cause for concern. (Id. 170.)

After the interview, Jankowski told Scali-Decker and Officer Scolza that the school nurse informed Jankowski that the child had not made an unusual number of visits to her. (Id. 167.) You will remember that was another one of the anonymous allegations. The parents did not learn that CPS had interviewed their child until later that afternoon. (Joint Defs. 56.1 389-90.)

C. The Interview of Plaintiffs and the Search of their Home

The day after the school interview, on November 5, 2009, plaintiffs arrived at the Department of Social Services ("DSS") office with their two-year old daughter and they waited for an interview with Scali-Decker and Officer Scolza, that is, the two employees who had interviewed the child. (Joint Defs.’ 56.1 Response 171.) While Plaintiffs waited, Scali-Decker received a phone call from Ms. Falletta, who continued to insist on anonymity. (Id. 176.) She did identify herself as Hogle’s source of information for her report against plaintiffs and described what she viewed as her grounds for concern. She stated that the father occasionally made vulgar or inappropriate comments, that he sometimes slept in the same bed as the child, and that there were pictures of the child in a mermaid costume which she, Falletta, felt were “sexual in nature.” (Jnt. Defs.’ 56.1 404, 406, 407, 408.) Falletta also informed Scali-Decker that another friend had stated that Phillips gave him “a sick feeling.” (Id. 263.) Falletta admitted that she had no knowledge whatsoever of the child acting out sexually, that the child had never told her that her father had acted inappropriately, and she had never seen naked pictures of the child. (Joint Def.’s 56.1 Response 178; Scali-Decker Dep. at 97.)

After receiving this call from Falletta, Scali-Decker and Officer Scolza interviewed the parents. They, of course, vehemently denied the allegations of sexual abuse. (Joint Def.’s 56.1 Response 182.) The father did say he had said his daughters “have cute butts.” (Plaintiffs’ 56.1 Response 270; Phillips Dep., Ex. D at 70.) Plaintiffs showed Scali-Decker the pictures of the child in a mermaid costume — everyone here has seen them; they are part of the record — the pictures Falletta had referenced, and Scali-Decker wrote in her notes that in the pictures, “[a]ll of the child’s private areas were covered and the child appeared happy…it does not appear sexual in nature.” (Joint Def.’s 56.1 Response 183; Ex. 3 to Bergstein Aff. at 32.) Certainly that’s the way the picture of the young child in a mermaid costume appears to me. That’s not for me to determine.

Scali-Decker scheduled a home visit with plaintiffs for the next day, November 6, 2009. (Id. 185.) Condoluci testified that she agreed to the home visit after Scali-Decker told the parents that a home visit was “required.” (Condoluci Dep. Ex. E at 99.) Scali-Decker
averred that she is unsure whether she said that the home visit was “required,” but in fact she said she often tells parents that she is required to do a home visit. (Scali-Decker Decl. 14.) In other words, she did not know what she said on this particular time. Dudzik-Andrews, the MDT’s Senior Case Supervisor, testified at a deposition that caseworkers tell parents that a home visit is required and are not trained to tell parents that they can refuse to consent to the home visit. (Dudzik-Andrews Dep. 59-60.) Smith, a MDT case supervisor, could not recall any parent ever refusing to consent to a home inspection. (Joint Def.’s 56.1 Response 187.)

After interviewing the parents, Scali-Decker and the police officer concluded that “there was not enough for a criminal charge,” therefore, Scolza would close the criminal case and Scali-Decker would conclude the CPS case (Id. 189.) Scali-Decker then met with her supervisor, Smith, and informed Smith that there was no basis to the allegations against plaintiffs, but that she would still complete the home visit “based on [the MDT] protocol.” (Id. 190.) Plaintiffs aver that had they known that they could refuse the home visit and that the allegations against them had been made anonymously and were hearsay and that they had, in part, already been disproven, they would not have consented to the visit. (Id. 188.) Joseph LaSusa, a senior CPS caseworker, conducted an inspection of plaintiffs’ home on November 6, 2009. (Id. 197, 202.) He walked around the kitchen, living room, home office, and all the bedrooms. (Id. 202-03.) Plaintiffs state that LaSusa said, “With allegations like these, I need to see the bedrooms.” (Condoluci Decl. 12; Phillips Decl. 14.) When LaSusa asked why the child and her younger sister sometimes did not sleep in their bedrooms by themselves, the parents responded, not surprisingly, that the children sometimes had trouble sleeping. (Joint Def.’s 56.1 Response 205.) On November 9, 2009, LaSusa told Scali-Decker and Smith that there was nothing unusual with the home and that he had no concerns about the parents. (Joint Def.’s 56.1 Response 206.) On that same day, Scali-Decker and Smith agreed to close the case as unfounded. (Id. 207.) Scolza testified that he then closed the criminal investigation into plaintiffs on November 6, 2009 — the very day of the home visit — and that he wrote that it was closed “by investigation” rather than as unfounded or baseless, because he believed that plaintiffs demonstrated “improper judgment” by displaying the photos of their daughter in her mermaid costume on the refrigerator. (Scolza Dep. at 71-73.)

III. THE LEGAL STANDARD

I am not going to go through the legal standard at length here. Everyone here knows what it is, that is, essentially, summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Caterett, 477 U.S. 317, 322 (1986). In determining whether a genuine dispute of material fact exists, the Court “is to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.” Patterson v. Cnty. of Oneida, 375 F.3d 206, 219 (2d Cir.2004). Nonetheless, the party opposing summary judgment “may not rely on

“When considering cross-motions for summary judgment, a court must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133,142 (2d Cir. 2004) (internal quotation marks omitted).

IV. DISCUSSION

a. The Child Was Seized in Violation of the Fourth Amendment
Plaintiffs claim that the interview of the child at her school violated her Fourth Amendment right to be free from unreasonable searches and seizures. “[T]he Fourth Amendment applies in the context of the seizure of a child by a government agency official during a civil child-abuse or maltreatment investigation.” Kia P. v. McIntyre, 235 F.3d 749, 762 (2d Cir. 2000). The threshold question is whether the in-school interview of the child constituted a “seizure” for Fourth Amendment purposes.

“A ‘seizure,’ triggering the Fourth Amendment’s protections occurs only when government actors have, ‘by means of physical force or show of authority…in some way restrained the liberty of a citizen.’” Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968)). Further, a seizure occurs where, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Kia P., 235 F.3d at 762 (internal quotation marks omitted). When evaluating whether a child was seized, a court should consider the age of the child at issue. See Guan N. v. NYC Dept. of Educ., 11 Civ. 4299, 2014 WL 1275487 at *20 (S.D.N.Y. Mar. 24, 2014) (concluding that “a reasonable [twelve-year-old]…would have felt restrained from leaving”); Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005) (viewing the seizure claim “through the eyes of a reasonable sixteen-year-old”).

This Court is unaware of any precedent within the Second Circuit that directly addresses whether an in-school interview of a child by CPS caseworkers can constitute a seizure. However, in Doe v. Heck, 327 F.3d 492 (7th Cir. 2003), the Seventh Circuit answered this question in the affirmative. Lower courts within the Second Circuit have held that the removal of a child, even temporarily, constitutes a seizure and also that an in-school interview of a child by a school district representative regarding the student’s conduct constituted a seizure. See e.g., Mislin v. City of Tonawanda Sch. Dist., No. 02-CV-273 S, 2007 WL 952048, at *8-9 (W.D.N.Y. Mar. 29, 2007) (holding that a student “was seized for purposes of the Fourth Amendment when…he was removed from his class during the school day and required to sit for a 20-minute, closed-door, recorded

The parties agree that the following factual statements are true:

The school social worker removed the child from her kindergarten class and brought her to the assistant principal's office. She had never been to the assistant principal’s office before.

The social worker told the child that it “was ok” to answer the questions of the two adults strangers.

Behind closed doors and in front of three adults, she was subjected to 15 to 20 minutes of intimate questioning.

She was not given the opportunity to call her parents, she was not told that she could leave, she was not told she could decline to answer questions and, as I stated, the parties agreed the school rules prohibited children from walking in the hallways by themselves.

In those circumstances, this court concludes that a reasonable five-year-old child would not have thought she was free to leave or that she was free decline to answer the questions posed by the adults.

I therefore find that T.C.P. was seized within the meaning of the Fourth Amendment. See e.g., Mislin, 2007 WL 952048; Jones, 410 F.3d at 1227 (noting that “[a] reasonable high school student would not have felt free to flaunt a school official's command, leave an office to which she had been sent, and wander the halls of her high school without permission”); Heck, 327 F.3d at 510 (finding that where eleven-year-old boy was removed from his class and questioned by a police officer and two caseworkers “for twenty minutes about intimate details of his family life,” he was “‘seized’ within the meaning of the Fourth Amendment because no reasonable child would have believed that he was free to leave”).

The Court must now examine whether T.C.P’s seizure was unreasonable, so I have concluded there was a seizure. The next determination is was it an unreasonable seizure and therefore violative of the Fourth Amendment of the Constitution. Probable cause is generally descriptive of what seizures are reasonable where, as here, no warrant or court order has been obtained. See Tenenbaum v. Williams, 193 F.3d 581, 602-03 (2d Cir. 1999). The Second Circuit, though, has not yet definitively stated whether the probable cause standard or a lower “special needs” based standard applies
in the context of a child abuse investigation to determine the reasonableness of a
Some government officials outside the realm of criminal law enforcement “have ‘special
needs beyond the normal need for law enforcement [that] make the warrant and
probable-cause requirement impracticable.’” Tenenbaum v. Williams, 193 F.3d 581, 603
(2d Cir. 1999) (quoting O’Connor v. Ortega, 480 U.S. 709, 720 (1987). “If forcing a non-
law enforcement government officer to follow ordinary law enforcement requirements
under the Fourth Amendment would impose intolerable burdens on the officer or the
courts, would prevent the officer from taking necessary action, or tend to render such
action ineffective, the government officer may be relieved of those requirements and
subjected to less stringent reasonableness requirements instead.” Tenenbaum, 193
F.3d at 603; see also, e.g., T.L.O., 469 U.S. at 340-43 (school administrator’s search of
a student’s purse was not subject to the warrant and probable-cause requirements).
In Tenenbaum, where CPS caseworkers took a child from her school to a hospital for a
medical examination without a warrant or consent of the parents, the Court rejected a
categorical exemption from probable cause requirements for caseworkers in the context
of child abuse and evaluated the seizure using the probable cause standard. Id. at 604
(“If [CPS] caseworkers have ‘special needs,’ we do not think that freedom from ever
having to obtain a pre deprivation court order is among them.”) Other circuits have also
indicated that the seizure of a child by caseworkers is not such a “special needs”
situation. See, e.g., Good v. Dauphin County Soc. Servs. for Children and Youth, 891
F.2d 1087, 1092-94 (3d Cir.1989) (applying ordinary probable-cause standard to
inspection of child’s nude body by caseworker and police officer); Donald v. Polk
County, 836 F.2d 376, 384 (7th Cir.1988) (applying probable-cause standard to
caseworkers’ removal of child from parents’ custody). See Darryl H. v. Coler, 801 F.2d
893, 901-02 (7th Cir.1986). Tenenbaum did leave open the possibility, though, that in
other circumstances CPS caseworkers could demonstrate “special needs” such that
their actions should be subject to the less stringent reasonableness requirement.
Here the defendants argue that the “special needs” of the MDT justify the application of
the less stringent reasonableness requirement. To support that, they cite T.L.O. and its
progeny. But those cases are minimally relevant here, because while they also examine
in-school searches and seizures, the searches and seizures in those cases were
conducted by school officials seeking to utilize the school’s “swift and informal
disciplinary procedures” necessary to “maintain order in the school,” rather than being
conducted by a CPS caseworker and a police officer who were pursuing parallel child
abuse and criminal investigations. See T.L.O., 469 U.S. at 340-41.
A case involves “special needs" where the government has identified some need,
“beyond the normal need for law enforcement,” to justify a departure from traditional
Fourth Amendment probable cause standards. See Ferguson v. City of Charleston, 532
U.S. 67, 76 n.7 (2001). Fourth Amendment protections are relaxed only where there is
no law enforcement purpose behind the searches or seizures and “little, if any,
entanglement with law enforcement.” Id. at 81 n. 15. Here, law enforcement objectives
and law enforcement entanglement are decidedly present. The MDT’s own written
objectives include “increas[ing] the number of child sexual abuse cases that are adjudicated in family court and/or result in a conviction in criminal court.” (Exhibit 4 to Bergstein affidavit at 2.) Although Police Officer Scolza testified that when he was investigating a case, he was “not necessarily” conducting a criminal investigation and that it was, rather, his job “to see if there is a criminal component.” In this case, Scolza participated in interviews as a law enforcement officer to determine whether Phillips had sexually abused his daughter; that is, clearly he was doing criminal investigation, at least in part. Had Scolza determined it was appropriate, he would have effected an arrest and coordinated with the District Attorney’s office to “swear out” a charging document, without a referral to local law enforcement. (Richichi Dep at 32; Joint Defs.’ Response 89.) And indeed, a New York State Police file is opened on all SCR reports investigated by the MDT. (Joint. Defs.’ Response 35, 91; Exhibit 4 to Bergstein affidavit at 2.) So here there is direct involvement of law enforcement in an in-school seizure and interrogation of a suspected victim of child abuse, though, in light of that, I cannot find that the child was seized for some “special need[, beyond the normal need for law enforcement.” Ferguson, 532 U.S. at 74 n. 7; see also Roe v. Texas Dep’t of Protective & Regulatory Servs., 299 F.3d 395, 407 (5th Cir. 2002) (where investigations into allegations of physical or sexual abuse are performed jointly with law enforcement agencies, “we must apply the traditional Fourth Amendment analysis” because “a child protective services search is so intimately intertwined with law enforcement.”)

Thus, I evaluate the child’s seizure using the probable cause standard. I must determine whether Officer Scolza and Scali-Decker knew “facts and circumstances that were sufficient to warn a person of reasonable caution in the belief that a child was abused or neglected.” Southerland v. City of New York, 680 F.3d 127, 158 (2d Cir. 2012). The parties here agree on the basic contents of Hogle’s calls. That’s not really at issue. It is not at issue. Although Hogle identified herself, she was reporting the concerns of an anonymous source who she did not identify then and she refused to identify the source on other occasions as well. “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” Florida v. J.L., 529 U.S. 266, 270 (2000) (internal citations and quotations omitted).

Although Hogle reported the basis for her anonymous source’s knowledge — that is, that the unnamed source was allegedly a family friend of plaintiffs — Hogle’s statements did not bolster the veracity of her anonymous source. The source’s allegations concerning the parents displaying allegedly nude pictures of their five-year-old, their sleeping arrangements, and the alleged frequent visits to the school nurse by the child were not, without more, indications that sexual abuse was occurring. Linda Joyce, the director of the SCR, testified that the allegations of a parent sleeping with a child or that a child frequently visited the school nurse would not in and of itself meet the SCR’s “reasonable cause to suspect abuse standard.” She also testified that nude pictures of the child in the home would not automatically meet that reasonable cause standard. In fact, Hogle testified that the SCR specialist she spoke to initially told
her “she did not think there was enough information to take a report,” indicating that
even the SCR believed that these allegations might not have provided a sufficient basis
on which to initiate an investigation.

Going back to what Hogle was saying, she stated, “it is suspected” that there is sexual
abuse and her anonymous source claimed to have “witnessed specifics,” although she
provided absolutely no specifics. Hogle herself undermined her source’s report and
credibility when she admitted that Hogle knew the family, Hogle had had daily personal
contact with T.C.P. when they both attended a summer bible camp at Hogle’s church,
and that Hogle had observed no indications of abuse or inappropriate conduct. The risk
of distortion of the report as it was transmitted from party to party was illustrated here
where Scali-Decker spoke directly to the anonymous source herself and learned that
the source had not in fact seen nude pictures and the source’s concern stemmed
largely from the little girl’s mermaid costume and several allegedly vulgar comments she
claimed the father had made.

I hereby make the finding that Hogle’s report did not provide probable cause to seize
the child and that this interview was conducted in violation of the Fourth Amendment.
Defendants argue that members of the MDT were entitled to rely on the SCR’s
determination of reasonable cause to suspect abuse. As the SCR manual makes clear,
SCR specialists do not make a determination of probable cause. They assume the good
faith of anonymous callers and the accuracy of their reports as a matter of policy. The
MDT, therefore, was not entitled to rely on any SCR determination of reasonable cause.

b. Liability Pursuant to Monell

Plaintiffs bring claims against each defendant for the alleged violation of their Fourth
Amendment rights. “Congress did not intend municipalities to be held liable [under 42
U.S.C. 1983] unless action pursuant to official municipal policy of some nature caused a
Thus, “to prevail on a claim against a municipality under section 1983 based on acts of
a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2)
deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that
an official policy of the municipality caused the constitutional injury.” Roe v. City of
Waterbury, 542 F.3d 31, 36 (2d Cir. 2008). The fifth element reflects the notion that “a
municipality may not be held liable under 1983 solely because it employs a tortfeasor.”
Bd. of Cnty. Comm’rs v. Brown, 520 U.S. 397, 403, (1997). In other words, a
municipality may not be liable under section 1983 “by application of the doctrine of
respondeat superior.” Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986). Instead,
there must be a “direct causal link between a municipal policy or custom and the alleged
Moreover, “a custom or policy cannot be shown by pointing to a single instance of
unconstitutional conduct by a mere employee of the [government].” Newton v. City of
New York, 566 F.Supp.2d 256, 271 (S.D.N.Y.2008); see also Oklahoma City v. Tuttle,
471 U.S. 808, 823-24 (1985) (“Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.”) In the end, therefore, “a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the ‘moving force’ behind the alleged injury.” Roe, 542 F.3d at 37 (internal quotations omitted). “That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” Bd. of Cnty. Comm’rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 404 (1997).

i. The County Is Liable Pursuant to Monell for the Child’s Unconstitutional Seizure

The MDT is a unit within the Orange County CPS, and therefore its seizure of the child constitutes an action of the County taken under the color of law. As set forth above, the child’s seizure was unconstitutional in the view of this court. The question of damages is a factual matter for a jury to decide. As you know, upon finding of a constitutional violation under 1983, I instruct the jury that it must find $1 nominal damages if it doesn’t find any other damages, so there is a dollar here in damages, and it will be up to the jury to decide whether there are additional damages, if it gets to a jury, that is, if this comes to trial.

Plaintiffs claim that there are no genuine disputes of material fact as to the final elements of the Monell test: that is, “an official policy of the municipality caused the constitutional injury” such that the municipality was the “moving force” behind the deprivation of federal rights.

Plaintiffs allege that the County had a policy of interviewing children regarding allegations of parental abuse at school without parental consent or notification and without probable cause. The County contends that it did not have such a policy and investigatory decisions were instead made on a case-by-case basis. Despite the County’s position, the testimony of all relevant witnesses confirms that there was such a policy. There is no disputed material fact in that regard.

A municipality’s informal practice may be sufficient to establish Monell liability. See Jeffes v. Barnes, 208 F.3d 49, 57 (2d Cir. 2000). Numerous caseworkers and supervisors attested that the MDT had a practice of interviewing children at school without parental notification or consent. David Jolly, Commissioner of Social Services for the County averred that “[i]n this case, the decision to interview the child at the child’s school was reached by the MDT in accordance with our local protocols.” (Jolly Decl. 12.) He acknowledged that the County’s MDT protocol could be read to direct that children be interviewed at DSS offices, but “it makes more sense to interview the child in the community” and that concerns of alleged perpetrator access to children “leads to interviews being conducted at school or in other spaces where the subject child feels safe.” (Id. 30, 31.) He further testified that if the report of abuse is received during
school hours, the MDT’s practice would be to interview the child at school without notice to the parents. (Jolly Dep. at 38.) The MDT protocols themselves state that “[s]chools represent a commonly utilized location for child interviews consistent with a pre-established protocol between the school and C.P.S. This location is not always the most favorable location for such an interview, but is often the only option in cases which require an immediate response and risk assessment to a report of sexual abuse.” (Ex. 4 to Bergstein Aff. at 110 2.)

Richichi, the MDT’s Law Enforcement Supervisor, testified at his deposition that where a parent is the target of the allegation, “we’ll try to talk to the children first,” and “[d]epending on the age of the child...if we can, we’ll interview them at school,” in part because “[i]t would be counterproductive to notify a parent that they’re the target of an investigation or somebody in the household is a target of the investigation prior to talking to the alleged victim.” (Richichi Dep. at 55-56.)

Dudzik-Andrews, the MDT’s Senior Case Supervisor, testified similarly that in cases of suspected sexual abuse, the MDT would interview the child before anyone else is interviewed unless they did not have access to the child. (Dudzik-Andrews Dep. at 32-33.)

Smith, the MDT case supervisor, as well as the police officer and Scali-Decker, also testified that it was the MDT’s practice where both parents are accused of abuse to interview the child at school without parental notification or consent and without speaking to school personnel first, unless school personnel are the source of the report. (See Smith Dep. at 46, 48, 50; Scolza Dep. at 39; Scali-Decker Dep. at 40-41, 47.) LaSusa, a senior CPS caseworker who had worked on the MDT for seven years, similarly testified that the standard practice was to interview the child at school, generally without notifying the child’s parents, and that an interview with the child is the first investigative step taken after speaking to the source of the report. (LaSusa Dep. at 25-27.)

County witnesses testified unequivocally that the MDT does not assess whether reports it receives from the SCR constitute “reasonable cause to suspect abuse” or probable cause. (See Dudzik-Andrews Dep. 45-46; Richichi Dep. 34-35.) The County’s practices, which were to interview children without notification or authorization of the parents and to interview them at school whenever possible and without making a determination of probable cause were unquestionably the moving force behind the unconstitutional seizure for purposes of Monell liability.

The County protests that once the MDT receives a report from the SCR, the MDT is required to investigate it. The County argues that the County’s actions therefore do not constitute the deliberate conduct that Monell requires. Regardless of whether or not the MDT had any choice in whether it had to investigate the report from the SCR, the MDT certainly had discretion over how to investigate the report. In this case, for example, the
MDT could have sought to corroborate the anonymous report with other adults who would have had direct knowledge of the veracity of those allegations, such as the school nurse. Additional investigation could have either established probable cause or cast further doubt upon the report. The MDT could also have sought parental permission for an interview and, if it was refused, presumably they could have sought a court order. And if there is any evidence of imminent danger to T.C.P. — and there doesn’t seem to have been any in this record — arguably the MDT could have used the exigent circumstances exception to probable cause and invoked that. See Tenenbaum, 193 F.3d at 605. It was the county’s — that is, MDT’s — discretionary investigatory protocols which caused the child’s unconstitutional seizure and results in the County being liable pursuant to Monell, and that’s why I am granting summary judgment in favor of the parents, but only against the county on liability.

ii. The Village is Not Liable Pursuant to Monell

Plaintiffs allege that the Village is liable pursuant to Monell for the child’s unconstitutional seizure. However, the defendant in discovery has not adduced any evidence whatsoever that the Village had any role whatsoever in creating the policies of the MDT or guiding its investigations. Instead, discovery showed that the Village’s involvement with the MDT consisted exclusively of a contract with the County to assign a single police officer, Officer Scolza, to the MDT. (Jnt. Defs. 56.1 78.) Officer Scolza was then supervised on a day-to-day basis by supervisors from the County, and the State and the Village had no oversight or supervision over the daily operations of officers assigned to the MDT. (Jnt. Defs. 56.1 81, 82.) The parties agree that the MDT Protocol was in effect prior to the Village’s contract with the County and that “the way in which investigations are conducted by the MDT has not changed since the Village became involved with the MDT.” (Jnt. Defs. 56.1 54, 55.)

Plaintiffs say that when the Mayor of the Village signed the Vendor Services Contract with the County, that is the contractor I am talking about that ended up in Scolza being assigned to this investigation, in which the village agreed to assign a police officer to the MDT and that the officer would agree to follow mutually agreed protocols, that according to the plaintiffs, the Village was delegating the authority to create municipal policy to an entity that directed unlawful action, thereby incurring liability. The Village did not have the authority to create CPS investigative policy for the County, therefore it could not delegate such authority.

Additionally, Pembaur v. City of Cincinnati, 475 U.S. 469, 471 (1986), which plaintiffs cite to support this proposition, applies only to situations where a municipality delegates policymaking authority to an official within that same municipality, rather than delegating policymaking authority to another municipality altogether, which is what plaintiffs allege the Village did here.
So I conclude that no reasonable jury could find that the Village’s policy of assigning one law enforcement officer to the MDT was the “moving force” behind the child’s unconstitutional seizure.

I therefore grant the Village’s motion for summary judgment in its favor and deny plaintiffs’ motion for summary judgment as to the Village’s Monell liability. Therefore the Village no longer has any claims against it.

iii. Material Questions of Fact Exist Regarding Plaintiffs’ Claim that the School District is Subject to Monell Liability

Plaintiffs allege that the School District’s policy of permitting CPS caseworkers and police officers to interview students without parental consent or notice was a “moving force” behind the child’s constitutional injury. “[T]he word ‘policy’ generally implies a course of action consciously chosen from among various alternatives.” Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Where a municipality acts merely to comply with state law, rather than in accordance with its own discretionary policy, it cannot be held liable pursuant to Monell. See Vives v. City of New York, 524 F.3d 346, 356 (2d Cir. 2008) (“[A] municipality cannot be held liable simply for choosing to enforce [the law].”)

It is undisputed that the school district believed that it was obligated by law to allow CPS to interview children in school without parental consent or notification. But the school district has not cited to this court any statute or regulation on which this belief was formed and, thus, I cannot preclude Monell liability at this time on the part of the school district. They have just given me nothing to back up their statement that they were legally obligated to allow CPS to interview the children without parental consent or notification.

I therefore find that there is a material question of fact as to whether the school district was required to permit CPS to interview children without parental consent or notification and, as I say, I am denying the plaintiffs’ and the school district’s summary judgment on this issue.

c. Material Question of Fact Exist Regarding Plaintiffs’ Conspiracy to Violate 42 U.S.C. 1983 Claim except as to the Village

The parties also move for summary judgment on plaintiffs’ claim that a conspiracy to violate 42 U.S.C. 1983 existed among the County, the Village, and the School District in connection with the interview of the child. To prove a Section 1983 conspiracy, plaintiffs must show: “(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). “[A] plaintiff must show that defendants acted in a willful manner, culminating in an agreement, understanding, or meeting of the minds, that violated [his or her] rights, privileges or immunities secured by the Constitution or federal courts.” Bussev v. Phillips, 419 F.Supp.2d 569, 586-87 (S.D.N.Y. 2006).
Material questions of fact as to whether or not an agreement existed between at least two state actors precludes summary judgment for any party. As set forth above, the Village merely assigned an officer to the MDT. The Village itself had no role whatsoever in creating or enacting the County’s MDT practices. A reasonable jury therefore could not find that the Village acted in concert with the County to inflict an unconstitutional injury, and I am granting summary judgment to the Village on plaintiffs’ conspiracy claim.

As is also set forth above, there is a material question of fact as to whether or not the School District acted willfully when it agreed to allow the County’s MDT to interview the child without parental consent or notification. In sum, plaintiffs have not proven a conspiracy because the Village did not “act in concert” with the County “to inflict an unconstitutional injury,” and there is a material question of fact as to whether the School District acted in “a willful matter.” Summary judgment for the County and the School District is therefore precluded because a reasonable jury could find that the County and the School District conspired to violate the child’s constitutional rights. I therefore deny summary judgment on this claim to the plaintiffs, the County, and the School District, but I am granting summary judgment on the conspiracy count to the Village.

d. Material Questions of Fact Exist Regarding Plaintiffs’ Claim that Their Home Was Searched in Violation of the Fourth Amendment

Plaintiffs argue that the home visit constituted an unlawful search in violation of the Fourth Amendment for which the County is liable pursuant to Monell on the grounds that their admitted consent to the search was not voluntarily given. It is well settled that “one of the specifically established exceptions to the requirement of both a warrant and probable cause is a search that is conducted pursuant to consent.” Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Such consent must be voluntary. Id. at 227.

“[T]he question whether a consent to a search was voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all circumstances.” Schneckloth, 412 U.S. at 227 (internal quotations omitted). In reviewing the totality of the circumstances, courts consider: the youth of the accused,…his lack of education,…or his low intelligence,…the lack of any advice to the accused of his constitutional rights,…the length of detention…the repeated and prolonged nature of the questioning,…and the use of physical punishment such as the deprivation of food or sleep.

Of course this is from Schneckloth as well, 412 U.S. at 226. Courts also consider whether the subject knew of the right to refuse at time he or she consented; however, such knowledge is not dispositive of the question of voluntariness.
See id. at 231-33. Further, “[t]he standard for measuring the scope of a [subject's] consent under the Fourth Amendment is that of objective reasonableness,” Florida v. Jimeno, 500 U.S. 248, 251 (1991), and thus, the claimant’s subjective fears do not vitiate consent where government actors did not otherwise engage in coercive conduct. Winfield v. Trottier, 710 F.3d 49, 53 (2d Cir. 2013) (citing Jimeno, 500 U.S. at 251). Plaintiffs claim that the consent that they gave, they admitted they gave consent, but they claim it was not voluntary because Scali-Decker told them that a home visit “was required.” Scali-Decker said that while she does not remember the exact words she used when setting up the home visit, she often tells parents that she is “required” to do a home visit. (Scali-Decker Decl. 14.)

The MDT’s Senior Case Supervisor, Dudzik-Andrews, testified in his deposition that caseworkers tell parents that a home visit is required and are not trained to tell parents that they can refuse to consent to the home visit. (Dudzik-Andrews Dep. 59-60.) Smith, an MDT case supervisor, was not able to recall any parent ever refusing to consent to a home inspection. (Joint Def.’s 56.1 Response 187.)

Regardless of whether Scali-Decker told plaintiffs that a home visit was required, the County contends that the mother, who happens to be an experienced attorney — the plaintiff Condoluci is an attorney — must have known that she could refuse to allow a warrantless search of her home.

In that regard, the County also urges upon the court that there has been spoliation of evidence here because the mother admits that she conducted Westlaw research for two hours after she learned that her child had been interviewed without a consent but before the interview of the mother at the Department of Social Services. The alleged spoliation arises out of the fact that when the County sought copies of that research four years later, the mother, certainly understandably, no longer had the cases, but she did provide the county with the statute and case that she had read in advance of her interview at the Department of Social Services. That’s adequate. I find there is no spoliation of evidence here.

A reasonable jury could conclude either that the parents’ consent was voluntary or that the parents’ consent was only granted “in submission to a claim of lawful authority,” under Schneckloth, 412 U.S. at 233, and therefore involuntary. The County also argues that regardless of whether a constitutional violation occurred, it cannot be held liable pursuant to Section 1983 because 18 NYCRR 432.2 requires caseworkers to conduct a home visit prior to closing a case as unfounded. However, while the County may not have discretion over whether caseworkers attempt to conduct a home visit, it does have discretion over how such attempts are made. It has discretion, for example, over whether the subjects of the investigation are told that such a visit is required and whether they are told that they have the right to refuse to consent to the searches.
If a jury found that plaintiffs’ consent was not voluntarily given, it is certainly possible for a reasonable jury to find that the County’s policy of telling parents that a home visit was required and not informing them of the right to refuse to consent was the “moving force” behind the constitutional violation. Therefore, the voluntariness of plaintiffs’ consent to the search of the home is a disputed issue of material fact and, accordingly, the Court denies summary judgment to both plaintiffs and the County here.

V. CONCLUSION

Okay. I think I have made it clear what I am doing. I will enter a minute order saying that for the reasons set forth on the record today:

I am granting summary judgment to plaintiffs on the Monell claim against the County for the seizure, which I find to be unreasonable;

I am denying summary judgment to the plaintiffs on their Monell claims against the School District and the Village for the unreasonable seizure, as well as on their Monell claim against the County for the search of the home;

I am granting the Village’s motion for summary judgment in its favor, and I am dismissing the Village as a defendant;

I am denying the school district’s motion for summary judgment in all respects; and

I am denying the county’s motion for summary judgment in all respects.

All right. Thank you.
SERVICES, et al., Defendants.


For Megan Golden, in her individual and official capacity as caseworker at RCDSS, Defendant: Gregg T. Johnson, LEAD ATTORNEY, April J. Laws, Corey A Ruggiero, Loraine Clare Jelinek, Johnson & Laws, LLC, Clifton Park, NY.

For Megan Golden, in her individual and official capacity as caseworker at RCDSS, Defendant: Gregg T. Johnson, LEAD ATTORNEY, Loraine Clare Jelinek, Johnson & Laws, LLC, Clifton Park, NY.

Judges: Lawrence E. Kahn, United States District Judge.

Opinion by: Lawrence E. Kahn

Opinion

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

The present action was brought by Plaintiffs William McLoughlin and Sovaira Mall on behalf of themselves and their infant son, DM, against the Rensselaer County Department of Social Services (RCDSS); two of its employees, Megan Golden and Jennifer Rosengart (the "Individual Defendants"); and an unidentified "John Doe" defendant, who allegedly removed DM from his parents' custody for three days, ordered a CT scan of DM against his [*2] parents' wishes, and filed an "indicated report" of child abuse against McLoughlin and Mall with the New York State Child Abuse Registry.

Plaintiffs filed suit pursuant to 42 U.S.C. § 1983. Against each Defendant, they allege: (1) violation of Plaintiffs' due-process rights and DM's Fourth Amendment rights for performing the CT scan, (2) false imprisonment, (3) violation of the Plaintiffs' due-process rights and DM's Fourth Amendment rights for removing DM from his parents' custody, (4) violation of the Eighth Amendment, (5) abuse of process, (6) malicious prosecution, (7) violation of Plaintiffs' right to equal protection, and (8) violation of Plaintiffs' substantive due-process rights. Dkt. No. 1 ("Complaint") ¶¶ 58-90.

Defendants filed an answer and later moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that the Complaint failed to state a Monell claim against RCDSS, that the individual Defendants had qualified immunity against all eight claims, and that all of the claims except the third and fifth failed to state a claim for relief. Dkt. Nos. 9 ("Answer"), 17-1 ("Defendants' Memorandum") at 8. For the following reasons, Plaintiffs' claims against RCDSS are dismissed. For the remaining Defendants, Plaintiffs' Eighth Amendment, malicious
prosecution, [*3] equal protection, and substantive due process claims are dismissed. For all other claims, the Defendants' motion is denied.

II. BACKGROUND

Defendants contest many of Plaintiffs' allegations in the Answer, but for the purposes of the present motion the Court will only consider the facts as alleged in the Complaint. Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010). Plaintiffs have also expressly incorporated a May 23, 2016 Decision After Hearing by the Bureau of Special Hearings of the State of New York Office of Children and Family Services (the "Hearing Bureau") into the Complaint. Dkt. Nos. 20 ("Plaintiffs' Opposition") at 7; 20-1 ("Hearing Bureau Decision"). Defendants agree that the Hearing Bureau Decision is incorporated into the Complaint and can be considered on their Rule 12(c) motion. Dkt. No. 21 ("Defendants' Reply") at 5.

McLoughlin and Mall are DM's parents. Compl. ¶ 1-2. McLoughlin is "White Caucasian" and Mall is Pakistani, meaning DM is a "mixed-race child." Id. ¶ 3. At around 10:30 PM on April 21, 2015, McLoughlin was doing laundry and placed DM (then three months old) on a clothes dryer. Id. ¶ 8. DM "kicked and slid off the dryer" about six inches onto a nearby table, and then another two or two-and-a-half feet onto the floor. [*4] Id. ¶ 9. He suffered a bump on his head and scrapes on his nose, knuckles, and knees. Id. ¶ 10. McLoughlin brought DM into the shower, which usually soothed DM when he was upset. Id. Eventually the infant "calmed down and was not exhibiting any signs of stress." Id. ¶ 11. McLoughlin left DM with his father so he could pick up Mall from work. Id. According to McLoughlin's father, DM was "smiling and happy" and did not show "any signs of distress" during this time. Id. At 11:15 PM, Mall returned with McLoughlin and decided to call DM's pediatrician. Id. ¶ 12. The on-call service advised McLoughlin and Mall to take DM to the emergency room. Id. ¶ 13.

The Plaintiffs arrived at the hospital around 12:10 AM and had DM examined by Dr. Jason Adam Jacque. Id. ¶ 14. Because DM only had a small bump on his head and was not exhibiting any disconcerting symptoms, Dr. Jacque did not think it was worth administering a CT scan and instead recommended that DM be kept for observation. Id. ¶ 14-15. Dr. Jacque explained that the "exposure to the high levels of radiation associated with the CT scan could be harmful to plaintiff DM and could cause cancer." Id. ¶ 15. The on-call physician from DM's pediatrician's [*5] office, Dr. Kroopnick, conferred with Dr. Jacque and agreed that DM was "clinically well" and only had to be kept for observation. Id. ¶ 16. Initially, Dr. Kathryn A. Hogan, another attending physician at the hospital, recommended giving DM a CT scan to check for internal injuries, but she later agreed that DM should only be kept for observation unless his condition deteriorated. Id. ¶ 17. Dr. Hogan later testified that the decision to observe DM rather than give him a CT scan did not place DM in "an imminent risk of harm." Hr'g Bureau Decision at 12.

Defendant Golden is a child protective services caseworker employed by RCDSS, and is "White Caucasian." Id. ¶¶ 5, 19. Defendant Rosengart is Golden's supervisor and is also an employee of RCDSS. Id. ¶ 6. While Plaintiffs were at the hospital, a call was placed to the New York State Central Abuse Register, and Golden was assigned to investigate the report. Id. ¶ 19. Golden
insisted that DM receive a CT scan, but, based on Dr. Jacque's advice, McLoughlin and Mall refused unless DM's condition deteriorated. Id. ¶ 20. Golden later testified that she was not aware of the fact that DM's doctors had chosen to keep DM for observation rather than administer a CT scan. Hr'g Bureau Decision ¶ 24. Golden informed McLoughlin and Mall that if they did not consent to a CT scan, she would remove DM from their custody. Compl. ¶ 22. Eventually Mall agreed to give her consent. Id. Nonetheless, Golden, with Rosengart's approval, removed DM from his parents' custody because McLoughlin and Mall purportedly "refused to consent to a CT scan of [P]laintiff DM." Id. ¶¶ 23-25 (internal quotation marks omitted). The CT scan did not reveal any internal injuries. Id. ¶ 26.

Golden then placed DM in a foster home from April 21, 2015 until April 24, 2015, after which he was returned to his parents. Id. ¶¶ 29, 33. During the three days DM was separated from McLoughlin and Mall he was "wailing, crying and reaching out for his parents." Id. ¶ 49. Golden also filed an "indicated report" of child abuse against McLoughlin and Mall. Id. ¶ 34. An indicated report is a report with "some credible evidence of alleged abuse or maltreatment." Hr'g Bureau Decision at 8. The report was at least in part "based on [McLoughlin and Mall's] alleged failure to follow through with the medical recommendation that [DM] receive a CT scan." Id. at 11. Plaintiffs allege that during the [*7] investigation Golden "exhibited certain negative behavioral gestures that were condescending towards plaintiff Mall," and that "Golden's unfavorable treatment of all of the plaintiffs was motivated by defendant Golden's racial animus and bias against Plaintiffs Mall and DM as Pakistani and Bi-racial respectively." Compl. ¶¶ 30-31.

At the time, McLoughlin was employed by the New York State Department of Victim Services, which had informed him that he could be terminated if they received an indicated report of child abuse. Compl. ¶¶ 35-36. The administrators of the little league baseball and basketball teams that he coached also informed McLoughlin that he would lose his coaching position if they received an indicated report. Id. McLoughlin and Mall requested a hearing challenging the indicated report. Id. ¶ 37. The Hearing Bureau found that the allegations of maltreatment were not supported by a fair preponderance of the evidence and amended the report from "indicated" to "unfounded." Hr'g Bureau Decision at 8, 13.

Plaintiffs filed the Complaint on April 19, 2018. Defendants answered on June 29, 2018, asserting eight defenses, three of which form the basis of their Rule 12(c) motion. Answer ¶¶ [*8] 98-105. Defendants filed the present motion on September 14, 2018, asserting that (1) all claims against RCDSS should be dismissed because the Complaint does not sufficiently allege a Monell claim; (2) all claims against the individual Defendants are barred by the doctrine of qualified immunity; and (3) six of the eight counts in the Complaint fail to state a valid constitutional claim. Defs.' Mem. at 8.

III. LEGAL STANDARD

The standard for a motion for judgment on the pleadings pursuant to Rule 12(c) is the same as the standard applied under Federal Rule of Civil Procedure 12(b)(6). Bank of N.Y. v. First
Millennium, Inc., 607 F.3d 905, 922 (2d Cir. 2010). Therefore the Court will take all factual allegations in the Complaint as true and draw all reasonable inferences in the non-movant's favor. Jaffer v. Hirji, 887 F.3d 111, 114 (2d Cir. 2018).

Plaintiffs cite Conley v. Gibson for the famously overturned proposition that a motion to dismiss must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Pls.' Opp'n at 14 (quoting 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

Several of the claims in the Complaint as well as the arguments in Plaintiffs' Opposition seem to have been drafted with this standard in mind. In Bell Atl. Corp. v. Twombly, the Supreme Court "retire[d]" the Conley standard and replaced [*9] it with a requirement that the complaint meet the "plausibility standard." 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Now, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While the Court must accept all factual allegations in the complaint as true, this does not extend to bare legal conclusions. Id.; see also Twombly, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal quotation marks and alterations omitted)).

IV. DISCUSSION

A. Monell Claims Against RCDSS

When a plaintiff brings a § 1983 claim against a municipality they must not only show that their constitutional rights were violated, but also that the injury stemmed from the "execution of [the municipality's] policy or custom." Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A municipality cannot be held liable under § 1983 "solely on the basis of respondeat superior," so "a single incident alleged in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy." Hillary v. St. Lawrence County., No. 17-CV-659, 2019 U.S. Dist. LEXIS 31720, 2019 WL 977876, at *7 (N.D.N.Y. Feb. 28, 2019) (quoting Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 122-23 (2d Cir. 1991)). Plaintiffs make three separate attempts [*10] to establish Monell liability: (1) a formal municipal policy; (2) approval and ratification of illegal activity; and (3) failure to train or supervise, all of which fail. Compl. ¶¶ 43-46.

Plaintiffs asserts that "RCDSS has a policy and practice of wrongfully using legitimate legal processes to achieve illegitimate collateral objectives," and that Golden was acting "in accordance with the policies, practices, customs and usages established by defendants Rosengart and RCDSS." Id. ¶¶ 44-45. However they do not support these conclusory allegations with any facts, such as other instances in which RCDSS employees abused legal processes.
Plaintiffs also assert that RCDSS "approved and ratified each and every unlawful act of defendant Golden" because it later denied a request to amend the indicated report and defended itself and Golden on appeal before the Bureau of Special Hearings. Id. ¶ 43, Hr'g Bureau Decision ¶ 3, Pls.' Opp'n at 20. However, merely approving of a single unlawful act after the fact does not establish that the municipality "ratified" the behavior in the meaning of Monell. Waller v. City of Middletown, 89 F. Supp. 3d 279, 287 n. 3 (D. Conn. 2015); cf. Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) ("[O]nly] persistent failure to discipline subordinates who violate civil rights could give rise to an [*11] inference of an unlawful municipal policy of ratification of unconstitutional conduct within the meaning of Monell.") (emphasis added).

The Complaint states "[u]pon information and belief, defendant RCDSS failed to property train and/or supervise defendant Golden." Compl. ¶ 46. Plaintiffs can also establish Monell liability by showing a failure to train or supervise subordinates that demonstrates "deliberate indifference to constitutional deprivations caused by subordinates, such that the official's inaction constitutes a 'deliberate choice.'" Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 126 (2d Cir. 2004) (quoting City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). "Mere negligence" is insufficient. Cash v. County of Erie, 654 F.3d 324, 334 (2d Cir. 2011). However, the Complaint lacks any factual allegations that establish that RCDSS was conscious of but indifferent to the risk of a constitutional violation, or how any alleged insufficiency in Golden's training or supervision led to the claimed violations. Therefore the claims against RCDSS must be dismissed.

B. Qualified Immunity

The Individual Defendants assert they "are entitled to qualified immunity as a matter of law since they did not violate any of the Plaintiffs' constitutional rights, and

moreover, none of their alleged actions violated clearly established law as of April 21, 2015." Defs.' [*12] Mem. at 11. Qualified immunity shields government employees from liability under § 1983 in two circumstances: 

"(1) their conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that their acts did not violate these clearly established rights." Cornejo v. Bell, 592 F.3d 121, 128 (2d Cir. 2010) (alterations and internal quotation marks omitted). This "second . . . prong provides substantial protection for [child services] caseworkers, which is necessary because protective services caseworkers must choose between difficult alternatives." Id. (citations, alterations, and internal quotation marks omitted). However, qualified immunity is an affirmative defense and the burden is on Defendants to demonstrate that they are entitled to it for each claim. See Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980) ("[A] plaintiff [need not] allege bad faith in order to state a claim for relief . . . . It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful."). Therefore, the Court will consider qualified immunity along with the merits of each claim.

C. Violation of the Fourth Amendment and Procedural Due Process by Removing DM from his Parents' Custody
Plaintiffs claim Defendants' decision to remove DM from his parents' custody violated Plaintiffs' right to due process and DM's Fourth Amendment rights. Compl. ¶¶ 66-71. Defendants do not contest that the Complaint states a constitutional claim, but maintain that they are entitled to qualified immunity. Defs.' Mem. at 8 n.1, 11-14.

1. Procedural Due Process in the Child Services Removal Context

Parents have "a constitutionally protected liberty interest in the care, custody and management of their children," Southerland v. City of N.Y., 680 F.3d 127, 142 (2d Cir. 2012) (quoting Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999)), and children have "a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association," id. (quoting Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000)). Therefore, ordinarily it violates both the parents' and child's procedural due-process rights to remove a child without judicial process. Southerland, 680 F.3d at 142. However, as the state also has a "compelling interest in protecting children from abuse and neglect," Kia P., 235 F.3d at 759, it may act without a court order in "emergency circumstances," but only when "danger to the child is . . . so imminent that there is [not] reasonably sufficient time to seek prior judicial authorization, ex parte or otherwise." Tenenbaum, 193 F.3d at 594. This requires more than "the mere [*14] possibility of danger" or a "suspicion that the child might have been abused." Id. (citations and internal quotation marks omitted).

2. The Fourth Amendment in the Child Services Removal Context

A child is "seized" in the meaning of the Fourth Amendment when they are removed from their parent's custody by a child services caseworker. Tenenbaum, 193 F.3d at 602. The Second Circuit has not articulated a single standard for whether removal of a child without a warrant violates the Fourth Amendment, but has held that two potential "modes" of analysis are "exigent circumstances" and "probable cause." Southerland, 680 F.3d at 157-58. Both exceptions to the warrant requirement require that "information possessed by a state officer would warrant a person of reasonable caution in the belief that a child is subject to the danger of abuse if not removed . . . before court authorization can reasonably be obtained." Tenenbaum, 193 F.3d at 604-05. Therefore the standard for whether the removal violates the child's Fourth Amendment rights is "similar to the procedural due-process standard," namely that the child be in "imminent danger." Id. In both cases the danger to the child must be sufficiently serious, such as "the peril of sexual abuse, the risk that children will be left bereft of care and supervision, and immediate threats to the safety [*15] of the child." Southerland, 680 F.3d at 149-50 (citations omitted). A removal will not violate constitutional rights "where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence." Id. (citations omitted).

3. Qualified Immunity Analysis

Defendants claim "none of their alleged actions violated clearly established law as of April 21, 2015." Defs.'s Mem. at 11. However, Defendants have failed to demonstrate that the rights they allegedly infringed were not clearly established, and therefore they are not entitled to qualified immunity.
immunity under the "first prong." In Southerland, which concerned a child-services removal in 1997, the Second Circuit vacated a ruling granting summary judgment to defendant caseworkers because (1) it was already "clearly established" law that due process required a court order or the presence of emergency circumstances for a child to be removed and (2) the "relevant standards" on what constituted an emergency had been sufficiently developed. 680 F.3d at 149-50 (citing Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991)) ("Emergency circumstances mean circumstances in which the child is immediately threatened with harm, for example, where there exists an immediate threat to the safety of the child, [*16] or where the child is left bereft of care and supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence."). In the Fourth Amendment context, it noted that although the issue of "whether probable cause or exigent circumstances must be established to justify a warrantless seizure" had not been settled, a child's "Fourth Amendment rights against unreasonable seizure were clearly established." Id. at 160-61. If the relevant law in this area was clearly established by 1997, or at least by 2012 when Southerland was decided, then it was clearly established when DM was removed in April 2015.

Defendants would still be entitled to qualified immunity under the "second prong" if they could demonstrate that it was objectively reasonable for them to believe they were not violating these clearly established rights. However, the Court cannot conclude, based on the allegations in the Complaint, that Defendants were objectively reasonable in believing that emergency circumstances, probable cause, or exigent circumstances existed, and therefore Defendants are not entitled to have this claim dismissed at this stage.

Defendants were concerned that DM was placed on the dryer "without any [*17] seat/baby carrier," Defs.' Reply at 6, and that McLoughlin and Mall waited two hours before bringing DM to the hospital, Defs.' Mem. at 13. While this might certainly cause a caseworker some concern, Defendants must establish that a reasonable caseworker would believe that, if DM were not immediately removed, he would be in imminent danger of harm before a court order could be obtained. It is unclear exactly what Golden knew when she made the decision to remove DM, but, drawing all inferences in favor of Plaintiffs, the Court can infer she knew that Mall called her pediatrician's office forty-five minutes after the fall and took DM to the emergency room as soon as the on-call service told her to do so. See Compl. ¶¶ 12, 13. The Court can also infer that she knew that for most of the two hours, DM was not exhibiting "signs of distress" and was presenting as "clinically well." Compl. ¶¶ 11, 16. According to the Complaint, DM only had a "small bump" and "scrapes," meaning there was no reasonable basis to conclude there was any urgency to getting DM treatment, or that the delay posed a serious risk of harm. Id. ¶¶ 10, 14. Nothing in the record indicates that there were previous injuries [*18] indicating "serious ongoing abuse" or that DM was so "bereft of care or supervision" that he would be in danger if he was allowed to return home with his parents.

Generally, courts have only held that it was objectively reasonable to believe negligence warranted removal when there was not just a momentary lapse in supervision, but when there was no guardian present or such an unfit guardian that the child was essentially without any
supervision at all. See, e.g., Duchesne v. Sugarman, 566 F.2d 817, 825-26 (2d Cir. 1977) (holding an emergency situation warranting removal existed where a mother was committed to a mental hospital and no one else could care for her children); Cecere v. City of N.Y., 967 F.2d 826, 827-29 (2d Cir. 1992) (holding that a child services officer temporarily transferring custody of an infant from her mother to her grandmother was objectively reasonable because the mother was addicted to drugs and alcohol and frequently left the child with relatives when she was unable to care for her); Porter v. City of N.Y., No. 03-CV-6463, 2007 U.S. Dist. LEXIS 44362, 2007 WL 1791149 at *4 (E.D.N.Y. June 19, 2007) (holding a removal was objectively reasonable where caseworkers found a child in the care of his grandmother, who was drunk to the point of incapacitation). A delay—or even a failure—to provide medical care will not necessarily establish "an imminent danger to the children's life or limb." Southerland, 680 F.3d at 135-36, 151 [*19] (declining to conclude that a social worker reasonably believed that emergency circumstances were established by, among other things, a father's failure to take his daughter to a doctor to treat a foot injury).

Defendants also argue that McLoughlin and Mall's refusal to consent to the CT scan warranted removal. Defs.' Mem. at 13. Plaintiffs contend they "explained to defendant Golden that the doctors had already determined that a CT scan was not necessary unless plaintiff DM's condition deteriorated." Compl. ¶ 20. Golden later testified that she was "not aware that the medical treatment plan had been determined to be observation." Hr'g Bureau Decision at 8. The Court must credit Plaintiffs' story at this stage. But in either case, it was not objectively reasonable to believe McLoughlin and Mall "adamantly refusing to consent to the child receiving a CT scan" placed DM at risk of imminent harm without learning whether DM's doctors thought the scan was necessary. Defs.' Mem. at 13.

Defendants argue that Plaintiffs' explanation for DM's injuries is an "interesting story" which "initially presents as unbelievable."Defs.' Reply at 5. Defendants also contend that they "were only contacted [*20] because AMC hospital personnel suspected child abuse/neglect had occurred." Id. at 6. Golden's reasons, if any, to doubt McLoughlin and Mall's explanation at the time she made the decision to remove DM, or any information which the hospital staff passed on to RCDSS and Golden before she arrived will be relevant at summary judgment or trial. But beyond the fact that "a suspected child abuse report was made," none of this material appears in the Complaint, and nothing more can be inferred. Compl. ¶ 19. Moreover, even if a hospital employee reasonably suspected some abuse or neglect, this does not lend credence to the belief that DM was at risk of imminent harm warranting emergency removal. To conclude that objectively reasonable grounds for an emergency removal exist because a report was filed would effectively nullify the family's liberty interest in not being forcibly separated without due process. See Tenenbaum, 193 F.3d at 594-595 (holding that reports of sexual abuse against a father did not necessarily establish emergency conditions existed and noting that "[i]f, irrespective of whether there is time to obtain a court order, all interventions are effected on an 'emergency' basis without judicial process, pre seizure [*21] procedural due process for the parents and their child evaporates.").
Defendants reliance on Cornejo v. Bell is misplaced. In that case the injuries to the child were much more serious than those DM sustained, doctors explicitly informed the social workers that they suspected abuse, and the parents had no explanation for the injuries. 592 F.3d at 125, 128-29. The defendant caseworkers were granted qualified immunity for removing an eighteen month old from his mother’s care after his infant brother suffered a heart attack, brain injuries, and a broken rib, which doctors informed them were consistent with violent shaking (and which caused the infant to die a week later). Id. Furthermore, the broken rib appeared to be several weeks old at the time the son was brought to the hospital. Id. Similarly, in Van Emrik v. Chemung Cty. Dep't of Soc. Servs., an infant suffered a spiral fracture in her leg, which doctors described as a "very suspicious" indication of child abuse, and which the child's caretakers could not explain. 911 F.2d 863, 86465 (2d Cir. 1990). In addition, both of these cases were motions for summary judgment, where the court considered testimony from the defendant caseworkers—not motions for judgement on the pleadings. Cornejo, 592 F.3d at 127; Van Emrik, 911 F.2d at 864. Therefore [*22] neither case is on point and warrants dismissal at the pleading stage.

D. Violation of the Fourth Amendment and Due Process by Administering a CT Scan on DM

1. Construing the Claim

Plaintiffs' first claim is entitled "Fourth Amendment Seizure Medical Examination (CT Scan) of Plaintiff DM at the Hospital." Compl. at 11. In the body of the claim, Plaintiffs allege that, "McLoughlin and Mall have a protected liberty interest in directing the medical care of their child," and "[t]he CT Scan ordered by the defendants was a direct violation of plaintiffs' Due Process Rights" without making further mention of the Fourth Amendment. Id. ¶¶ 59-60. Defendants argue that this claim is defective on two grounds: it fails to state a claim because there is no right to due process under the Fourth Amendment, and it is duplicative of Plaintiffs' false imprisonment claim. Defs.' Mem. at 27-28. Admittedly, the claim is confusing as written. However the Complaint provides adequate notice to Defendants that Plaintiffs mean to assert two related claims. First, as Plaintiffs elaborated in their Opposition, the reference to the Fourth Amendment should be read to allege that the CT scan "violated [DM]'s right to be secure in his person" and that it was a "forceful removal and unreasonable [*23] search and intrusion into [his] person." Pls.' Opp'n at 28-29. See, e.g., Tenenbaum, 193 F.3d at 605-06. Second, Plaintiffs claim that the CT scan violated Plaintiffs' due-process rights. See, e.g., Tenenbaum, 193 F.3d at 597-98.

Defendants also provide no explanation as to why the claim is duplicative of the false imprisonment claim, which concerns DM's confinement "in the hospital room and other hospital facilities and the foster home of a third party," Compl. ¶ 63, or why, even if duplicative, "it must be dismissed as a matter of law." Defs.' Reply at 12. Therefore, the Court construes the "first cause of action" to assert a procedural due-process claim and a Fourth Amendment claim on behalf of DM. Compl. ¶¶ 58-61. Because Defendants have moved to dismiss the entire Complaint based on qualified immunity, the Court will next analyze whether Golden and Rosengart are entitled to a defense to these two claims.
2. Qualified Immunity

a. Procedural Due Process in the Medical Examination Context

The Individual Defendants assert "none of their alleged actions violated clearly established law as of April 21, 2015." Defs.' Mem. at 11. However, it was already clearly established in this circuit that "the constitutional liberty interest of parents in the 'care, custody, [*24] and management of their child,' . . . includes a significant decision-making role concerning medical procedures sought to be undertaken by state authority upon their children." Van Emrik, 911 F.2d at 867 (quoting Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). Therefore, a medical procedure cannot be undertaken without parental consent "for investigative purposes at the behest of state officials" without due process. Id.; Tenenbaum, 193 F.3d at 598-99 (finding that a gynecological examination of a child at a social workers' behest and without a court order or parental consent violated her and her parents' procedural due-process rights). As with removals, emergency examinations do not require a court order if the child is in "imminent danger." Id. at 599.

b. The Fourth Amendment in the Medical Examination Context

The Second Circuit has also found that when "procedures undertaken at the initiative of a state official serve primarily an investigative function" the "Fourth Amendment and bodily integrity interests of the child are implicated." Van Emrik, 911 F.2d at 867. Again, the standard is the same as the one for emergency removals, i.e. a caseworker does not violate the Fourth Amendment if "reasonable or probable cause or exigent circumstances justifying an emergency examination . . . exist[ed] at the time the examination was performed." Tenenbaum, 193 F.3d at 606.

If a procedure is "medically [*25] indicated," that is, ordered by a medical professional and "designed for treatment" then the caseworker will not be held liable. Id. at 599; see also Chayo v. Kaladjian, 844 F. Supp. 163, 169 (S.D.N.Y. 1994) ("[M]edically necessary x-rays may be taken without judicial approval or parental consent.") (emphasis added). It is unclear if the unwarranted medical examination needs to be both medically unnecessary and investigatory to violate due process rights or the Fourth Amendment, but when an examination is brought at the request of an investigating social worker rather than a doctor, it is at least plausible that the motive was to investigate child abuse. See Van Emrik, 911 F.2d at 867 (finding an x-ray was not medically indicated where a social worker requested them although the physician "initially opposed them because of concern about radiation"); Tenenbaum, 193 F.3d at 599 (holding that an examination was not medically indicated where it was ordered by a social worker investigating sexual abuse even though it was also meant to uncover possible injuries). Cf. Chayo, 844 F. Supp. at 170 (granting summary judgment for defendant caseworkers on qualified immunity grounds where a "non-party physician [took] full responsibility for the decision to order x-rays" and "there [was] no evidence that the caseworkers even mentioned x-rays, much less [*26] requested they be taken").
c. Analysis

It is unclear from the face of the Complaint whether the CT scan was taken for investigative purposes. Defendants claim that the CT scan was necessary to determine that DM "did not sustain any internal injuries or fractures." Defs.' Mem. at 14. However, Defendant was present at the hospital to investigate a report of suspected child abuse, which ultimately resulted in a report being filed against McLoughlin and Mall, Compl. ¶¶ 19, 34, and DM's doctors had already determined the CT scan was unnecessary, Compl. ¶¶ 15-17. Defendants admit that "Golden advocated for DM to receive a CT scan." Defs.' Mem. at 14. Therefore, the Complaint plausibly states a claim that DM's CT scan "serve[d] primarily an investigative function," and therefore violated Plaintiffs' due-process rights and DM's Fourth Amendment rights according to clearly established law. Van Emrik, 911 F.2d at 867.

Defendants also claim they are entitled to qualified immunity because it was objectively reasonable to believe that DM needed a CT scan and that there was no time to obtain a court order. Defs.' Mem. at 13-14. However, as with the claims regarding their decision to remove DM, the Court cannot agree that it was objectively [*27] reasonable to believe DM was in "imminent danger," or that "probable cause" or "exigent circumstances" warranting an emergency examination existed at the time. Defendants claim that they believed DM had "serious or fatal injuries," and "injuries which they knew could prove fatal." Id.; Defs.' Reply at 7. However these assertions contradict the allegations in the Complaint that DM had a "small bump" on his head and was "clinically well" when Golden arrived. Compl. ¶¶ 14, 16. Two of DM's doctors did not recommend administering a CT scan, and another agreed to observation and later testified that DM was not "placed at imminent risk of harm by the decision to observe him." Compl. ¶¶ 15-17, 39.

Defendants also point out that the "scan was nevertheless authorized and administered by the medical doctors who were treating DM—evidencing the fact that the scan was, at the very least, objectively reasonable under the circumstances." Defs.' Mem. at 14. The question is not whether administering the CT scan was reasonable. It is whether it was objectively reasonable to believe that DM was in immediate danger and therefore that administering the CT scan without parental consent would not violate the [*28] Plaintiffs' constitutional rights. Defendants' contention that "[s]imply because the Plaintiffs are not happy with the Defendants' judgment does not demonstrate that such actions violated clearly established law," reflects the exact indifference to parents' preferences for their children's medical care that the Constitution prohibits. Id.; see Parham v. J.R., 442 U.S. 584, 602-03, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State . . . . Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.") (internal quotation marks omitted). Thus, Defendants are not entitled to have the claim dismissed on qualified immunity grounds.

E. Substantive Due Process
Families have "a substantive right under the Due Process Clause 'to remain together without the coercive interference of the awesome power of the state.'" Tenenbaum, 193 F.3d at 600 (quoting Duchesne, 566 F.2d at 825). Plaintiffs claim Defendants violated their substantive due-process rights to familial association. Compl. ¶¶ 86-90. Where the Constitution "provides an explicit textual source of constitutional protection . . . the more generalized notion of substantive [*29] due process" is an inappropriate basis for the claim. Tenenbaum, 193 F.3d at 599-600 (internal quotation marks omitted). As discussed above in Section C, children are seized within the meaning of the Fourth Amendment when they are removed from their parents' care by the government. Id. As a result, such claims on behalf of the child are construed as being brought under the Fourth Amendment rather than substantive due process. Id. Therefore, DM's substantive due-process claim is dismissed.

The Complaint also fails to state a claim for violation of McLoughlin and Mall's substantive due-process rights. As with procedural due-process claims, the parents' interest must be balanced against the "compelling governmental interest in the protection of minor children." Southerland, 680 F.3d at 152. However, unlike a procedural due-process claim, the removal must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. at 151. In other words, the removal must be so shocking that "the Due Process Clause would not countenance it even were it accompanied by full procedural protection." Tenenbaum, 193 F.3d at 600. A temporary removal, even if done in a manner that violates procedural due process, will generally not rise to this level because it "does not result in parents' wholesale relinquishment [*30] of their right to rear their children." Id. at 600 (quoting Joyner v. Dumpson, 712 F.2d 770, 778 (2d Cir. 1983)); Southerland, 680 F.3d at 152-153. Courts have found that removals to investigate reports of child abuse do not violate substantive due-process rights when the child is returned or the removal is confirmed by court order in less than four days. Id. at 153-54 (collecting cases).

Although the Complaint states a claim for violation of procedural due process, the three-day separation at issue here does not rise to the level of a wholesale relinquishment of McLoughlin and Mall's right to raise DM. Therefore, Plaintiffs' substantive due-process claim is dismissed.

F. Section 1983 False Imprisonment

1. Merits

In their false imprisonment claim, Plaintiffs allege that Defendants "confine[d] plaintiff DM in the hospital room and other hospital facilities and the foster home of a third party." Compl. ¶ 63. False imprisonment requires four elements: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. Willey v. Kirkpatrick, 801 F.3d 51, 70-71 (2d Cir. 2015). Defendants contend that the Complaint does not sufficiently plead the last three elements. Defs.' [*31] Mem. at 24-26.
With reference to the second and third element Defendants claim that Plaintiffs cannot demonstrate that three-month-old DM could not be conscious of, or did not consent to, his confinement. Id. at 24-25. In their opposition, Plaintiffs note that according to some older New York State authorities, when the plaintiff is an infant or incompetent "the action may be predicated upon his restraint or removal against the will of the party having his legal custody." Kajtazi v. Kajtazi, 488 F. Supp. 15, 18 (E.D.N.Y. 1978) (citing Barker v. Washburn, 200 N.Y. 280, 93 N.E. 958, 959-60 (N.Y. 1911)); see Pls.' Opp'n at 26. However, this "proposition no longer represents New York law." Estiverne v. Esernio-Jenssen, 833 F. Supp. 2d 356, 381 n.19 (E.D.N.Y. 2011) (citing Sager v. Rochester Gen. Hosp., 169 Misc. 2d 643, 647 N.Y.S.2d 408, 410 (Sup. Ct. 1996) (granting summary judgment to defendants where there was no evidence that a five month old was conscious of her confinement at a hospital)); see also Parvi v. City of Kingston, 41 N.Y.2d 553, 362 N.E.2d 960, 963, 394 N.Y.S.2d 161 (N.Y. 1977) (noting that questions over whether "awareness of confinement by one who has been falsely imprisoned should be a sine qua non for making out a case" have been "laid . . . to rest in this State"). False imprisonment is a "dignitary tort" and therefore there is no injury unless "the victim knows of the dignitary invasion." Parvi, 362 N.E.2d at 963 (emphasis added). Therefore, DM must have been conscious of his confinement to have a claim for false imprisonment.

However, courts have declined to find that [*32] it is per se implausible for an infant to be conscious of their confinement. See V.S. ex rel. T.S. v. Muhammad, 581 F. Supp. 2d 365, 384 (E.D.N.Y. 2008) (rev'd on other grounds V.S. v. Muhammad, 595 F.3d 426 (2d Cir. 2010) (holding that it was plausible that a 22 month old was "conscious of her prolonged separation from her parents" and her confinement where the complaint alleged she "suffered extreme humiliation, pain and suffering, terror, mental anguish and depression"); Estiverne v. Esernio-Jenssen, 581 F. Supp. 2d 335, 349 (E.D.N.Y. 2008) (declining to dismiss unlawful imprisonment claim on the theory that "a nine-month-old infant cannot, as a matter of law, be conscious of confinement"). Moreover, a plaintiff is not required to remember their confinement later, if there is evidence they were conscious of it at the time. Parvi, 362 N.E.2d at 963.

Here, Plaintiffs allege that DM was "conscious of his seizure during the approximately 3 days and 3 nights that he was placed in the custody of total strangers, as shown by his wailing, crying, and reaching out for his parents." Compl. ¶ 49. This description of DM's behavior plausibly states a claim that he was aware of his confinement and did not consent to it.

Defendants also contend that the confinement was privileged because there was an "emergency situation concerning the life or health of the child." Defs.' Mem. at 25. The standard to determine [*33] whether an emergency is serious enough to privilege a child's confinement is the same as the standard to determine whether a child can be removed from their parents' custody without a court order. See Trombley v. O'Neill, 929 F. Supp. 2d 81, 102 (N.D.N.Y. 2013) (citing Southerland, 680 F.3d at 149).

As discussed in Section C above, there were no reasonable grounds to remove DM based on the information available to Golden at the hospital. In any event, there was certainly no reason to believe DM was in imminent danger when he was placed in foster care after the CT scan
showed he had no serious injuries. Compl. ¶ 29. Therefore the Complaint plausibly states that the confinement was not privileged.

2. Qualified Immunity

For the same reasons that the Complaint plausibly states that DM's confinement was not privileged because no emergency existed, as well as the reasons Defendants are not entitled to qualified immunity outlined in Sections C and D above, it was not objectively reasonable for Defendants to believe that confining DM did not violate his constitutional rights. Therefore Defendants are not entitled to have this claim dismissed on qualified immunity grounds.

G. Violation of the Eighth Amendment by administering the CT Scan on DM

Plaintiffs claim Defendants violated DM's Eighth Amendment rights when they forced him [*34] "to undergo a potentially cancer-causing medical procedure." Compl. ¶ 73. Defendants correctly point out that the Eighth Amendment only applies to convicts. See Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996). Plaintiffs counter that pre-trial detainees are entitled to similar rights under the due-process clause of the Fourteenth Amendment, and that "a detainees rights are 'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" Pls.' Opp'n at 21-22; see also Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017) (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983)). They ask that the claim "be analyzed under the Fourteenth Amendment Due Process provision, as set forth by the Second Circuit in Darnell." Pls.' Opp'n at 22.

Defendants respond that DM was never arrested and was not a pre-trial detainee. Defs.' Reply at 8. However, even assuming children in protective custody have the same substantive due-process rights as pre-trial detainees, the CT scan did not violate these rights. In this context, the test for a § 1983 claim for violation of the Eighth Amendment or substantive due process under the Fourteenth Amendment includes "an 'objective prong' showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a 'subjective prong' . . . showing that the officer acted with at least deliberate indifference to the challenged conditions." [*35] Darnell, 849 F.3d at 29. The objective prong requires "conditions, either alone or in combination [which] pose an unreasonable risk of serious damage to [plaintiff's] health, which includes the risk of serious damage to physical and mental soundness." Id. at 30 (citation and internal quotation marks omitted). An "objective deprivation" occurs where the confined individual is "exposed to conditions that pose an unreasonable risk of serious damage to their future health." Id. (quoting Jabbar v. Fischer, 683 F.3d 54, 57 (2d Cir. 2012)) (alterations omitted). To violate the Constitution, an environmental hazard must be "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk," and it must be "not one that today's society chooses to tolerate." Helling v. McKinney, 509 U.S. 25, 36, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).

Although ordering the scan against McLoughlin and Mall's wishes and in the absence of an emergency arguably violated the Fourth Amendment and procedural due process, it did not "pose an unreasonable risk of serious damage" to DM's health. Darnell, 849 F.3d at 30. CT
scans are a commonplace medical procedure, indicating "society chooses to tolerate" the low risk of cancer. See In re RadPro SecurPass Scanner Cases, No. 13-CV-6095, 2014 U.S. Dist. LEXIS 113616, 2014 WL 4054310, at *7 (S.D.N.Y. Aug. 13, 2014) (rejecting an Eighth Amendment claim for exposure to x-ray machines in prison). The fact that one of DM's pediatricians initially recommended a CT scan indicates [*36] that the scan did not pose an "unreasonable risk of serious harm." Compl. ¶ 17. Therefore the Complaint does not state a claim for violation of the Eighth Amendment or DM's Fourteenth Amendment rights under Darnell.

H. Section 1983 Malicious Prosecution

Plaintiffs also assert a § 1983 malicious prosecution claim against defendants for filing the indicated reports against McLoughlin and Mall. Compl. ¶¶ 78-82. A state law malicious prosecution claim requires, "(1) the commencement or continuation of a criminal proceeding by the defendant(s) against the plaintiff; (2) the termination of the proceedings in plaintiff's favor; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice." Nieves v. County of Monroe, 761 F. Supp. 2d 48, 51 (W.D.N.Y. 2011). "In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment, and establish the elements of a malicious prosecution claim under state law." Fulton v. Robinson, 289 F.3d 188, 195 (2d Cir. 2002). Defendants raise a multitude of deficiencies in Plaintiffs' malicious prosecution claim but the Court need only address one: the failure to plead a violation of their Fourth Amendment rights.

To establish a violation of the Fourth Amendment there must be "some deprivation of liberty consistent with the concept of 'seizure.'" Washington v. Cty. of Rockland, 373 F.3d 310, 316 (2d Cir. 2004) (quoting Singer v. Fulton Cty. Sheriff, 63 F.3d 110, 116 (2d Cir. 1995)). While [*37] "liberty deprivations regulated by the Fourth Amendment are not limited to physical detention," Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997), courts have required the plaintiff be subject to something akin to a restraint on physical freedom. See id. (holding restriction of constitutional right to travel out of the state and requirement to appear for trial and other hearings on demand amounted to seizure); Rohman v. N.Y.C. Transit Auth., 215 F.3d 208, 216, (2d Cir. 2000) (same);

Noga v. Schenectady Police Officers, 169 F. Supp. 2d 83, 91 (N.D.N.Y. 2001) (same). Cf. Burg v. Gosselin, 591 F.3d 95, 101 (2d Cir. 2010) ("A pre-arraignment, non-felony summons requiring no more than a later court appearance does not constitute a Fourth Amendment seizure."). Impositions resulting from civil or administrative proceedings rarely rise to the level of a Fourth Amendment violation. See Washington, 373 F.3d at 316. Although, as discussed above in Section C, removing a child can constitute a "seizure" in violation of the child's Fourth Amendment rights, the commencement of abuse investigations do not implicate Fourth Amendment rights. Estiverne, 833 F. Supp. 2d at 380 (finding parents were not seized or restrained by an abuse investigation); Emerson v. City of N.Y., 740 F. Supp. 2d 385, 392 (S.D.N.Y. 2010) (same).
Plaintiffs rely on Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994), for the proposition that indicated reports of child abuse can implicate a liberty interest when they result in "stigma plus" other deleterious consequences such as a "tangible burden on . . . employment prospects." Pls.' Opp'n at 30. However, that case only concerned procedural due-process rights [*38] under the Fourteenth Amendment, and does not mention the Fourth Amendment. Id. at 1004-05. There is no precedential support for Plaintiffs' view that violation of this liberty interest could form the basis of a malicious prosecution claim. Plaintiffs also claim that because New York State recognizes the tort of civil malicious prosecution, the Court should recognize § 1983 liability in similar circumstances because "the analysis of the state and the federal claims is identical." Pls.' Opp'n at 30 (quoting Boyd v. City of N.Y., 336 F.3d 72, 75 (2d Cir. 2003)). However, Boyd concerned the "elements" of malicious prosecution, not the additional requirement that a constitutional right be violated to bring a § 1983 claim. Id. In Washington v. County of Rockland, the Second Circuit explicitly rejected a similar argument, noting that while Supreme Court and Second Circuit precedent do not foreclose the possibility that a civil proceeding could give rise to a malicious prosecution claim, they still require a violation of the Fourth Amendment. 373 F.3d at 315-17 (citing Albright v. Oliver, 510 U.S. 266, 273-74, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); Singer, 63 F.3d at 116-17).

Although the Complaint mentions that the indicated reports put McLoughlin's job and ability to volunteer coach in jeopardy, it does not show he was subject to any restraints that would amount to a "seizure." Compl. ¶¶ 35-36. Therefore, the Complaint fails to state [*39] a § 1983 claim for malicious prosecution.

I. Section 1983 Abuse of Process

Plaintiffs claim that Defendants committed abuse of process by filing the indicated reports against McLoughlin and Mall. Compl. ¶¶ 74-77. Under New York State law, the elements of abuse of process are that the defendant "(1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." Cook v. Sheldon, 41 F.3d 73, 78 (2d Cir. 1994) (citing Curiano v. Suozzi, 63 N.Y.2d 113, 469 N.E.2d 1324, 1326, 480 N.Y.S.2d 466 (N.Y. 1984)). A § 1983 abuse of process claim also requires the plaintiff to allege the violation of a constitutional right. Id. Defendants do not contest that the Complaint states a claim for abuse of process. Defs.' Mem. at 8 n. 1. However, Defendants have moved to dismiss the entire Complaint "since the individual County Defendants are entitled to qualified immunity." Id. at 8. Defendants provide no reason that the law on abuse of process was not clearly defined, or why any actions they took which did amount to abuse of process were objectively reasonable. This Court "need not entertain an argument that was not briefed." Johannes Baumgartner Wirtschafts-und Vermögensberatung GMBH v. Salzman, 969 F. Supp. 2d 278, 290 (E.D.N.Y. 2013).
Defendants do argue in the context of the malicious prosecution [*40] claim that they should be entitled to qualified immunity because it was "objectively reasonable" to believe there was some credible evidence of abuse, which is the standard for filing an indicated report. Defs.’ Mem. at 30-31. However, while "malicious prosecution and abuse of process are closely allied," only malicious prosecution "concerns the improper issuance of process." Cook, 41 F.3d at 80. In contrast, the "gist" of abuse of process is "improper use of process after it is regularly issued." Id. Even if Defendants had probable cause to file the indicated report, it would not have been objectively reasonable to believe their actions were lawful if they did so "to obtain a collateral objective that is outside the legitimate ends of the process." Id. Because Defendants did not address this claim, they are not entitled to have it dismissed.

J. Equal Protection

Plaintiffs originally claimed that Defendants "discriminated against plaintiffs Mall and DM on the basis of their race, color, and/or religion." Compl. ¶ 84. In the Plaintiffs’ Opposition however, they seem to advance a claim under a "class of one" theory. Pls.’ Opp’n at 22-23 (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)). In either case, the Complaint fails to state a claim.

To state [*41] a claim for selective enforcement of the law based on racial or religious identity, a plaintiff must allege "(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion." Hu v. City of N.Y., 927 F.3d 81, 91 (2d Cir. 2019) (quoting Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995)). To succeed under a "class of one" theory, the plaintiff must demonstrate "(1) that [they have] been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment." Id. (citing Village of Willowbrook, 528 U.S. at 564). For either claim, "it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently." Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994).

Plaintiffs allege "[u]pon information and belief, defendants do not treat similarly situated White/Caucasian members of the community as unfairly as they treated plaintiffs in this case." Compl. ¶ 32. Plaintiffs also claim that "Golden exhibited certain negative behavioral gestures that were condescending towards plaintiff Mall" and that "Golden's unfavorable treatment of all of the plaintiffs was motivated by defendant Golden's racial animus and bias against [*42] plaintiffs Mall and DM as Pakistani and Biracial respectively." Id. ¶¶ 30, 31. However, such conclusory statements are insufficient to make out a claim for discrimination. Thomas v. Pingotti, No. 17-CV300, 2017 U.S. Dist. LEXIS 144173, 2017 WL 3913018 at *7 (N.D.N.Y. Sept. 6, 2017) (dismissing an inmate’s equal-protection claim, which was only supported by a "conclusory assertion that inmates of other races, religions, and gender were treated differently by defendants"). The Complaint contains no specific allegations at all about Defendants’ treatment of similarly situated families that would suggest that Defendants discriminated against Plaintiffs. Therefore, Plaintiffs’ § 1983 equal-protection claim is dismissed.
V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion for Judgment on the Pleadings (Dkt. No. 17) is GRANTED as to all claims against Defendant Rensselaer County Department of Social Service; and it is further

ORDERED, that Defendants' motion is GRANTED as to Plaintiffs' Eighth Amendment, malicious prosecution, equal protection and substantive due-process claims against Defendants Megan Golden, Jennifer Rosengart, and John Doe; and it is further

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Angela N. v Suhr

Supreme Court, Appellate Division, Fourth Department, New York

71 A.D.3d 1489,

*1 Angela N., as Parent and Natural Guardian of Emmanuel N. and Another, Infants, Respondent

v

Sonja Suhr, Defendant, and Thomas Gervasi et al., Appellants.

Supreme Court, Appellate Division, Fourth Department, New York

March 19, 2010

CITE TITLE AS: Angela N. v Suhr

Bouvier Partnership, LLP, Buffalo (Norman E.S. Greene of counsel), for defendants-appellants.

Lipsitz & Ponterio, LLC, Buffalo (John Ned Lipsitz of counsel), for plaintiff-respondent.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 16, 2009. The order, insofar as appealed from, denied that part of the motion of defendants Thomas Gervasi and Elaine Gervasi seeking to compel plaintiff to provide authorizations for disclosure of certain records of Child Protective Services.
It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages resulting from, inter alia, lead poisoning sustained by two of her children while residing at an apartment owned by Thomas Gervasi and Elaine Gervasi (defendants). Defendants appeal from that part of an order denying that part of their motion seeking to compel plaintiff to provide authorizations for certain records of Child Protective Services. Those records concerned an alleged incident of sexual abuse involving one of the children who allegedly sustained neurological and psycho *1490logical injuries as a result of the lead poisoning. Contrary to the respective contentions of plaintiff and defendants, Social Services Law § 372 is inapplicable in this case inasmuch as the child in question was not subject to foster care during the relevant time period (see § 372; Lamot v City of New York, 297 AD2d 527 [2002]). Rather, disclosure of reports of child abuse and maltreatment and the resulting investigation of such abuse is governed by Social Services Law § 422 (see § 422 [4] [A]; see also Catherine C. v Albany County Dept. of Social Servs., 38 AD3d 959, 960 [2007]). Here, Supreme Court properly refused to compel plaintiff to provide the authorizations permitting disclosure of the requested records to defendants because defendants are not individuals to whom disclosure is permitted pursuant to section 422 (4) (A) (see Catherine C., 38 AD3d at 960; Matter of Sarah FF., 18 AD3d 1072, 1074 [2005]). Present—Scudder, P.J., Peradotto, Lindley and Gorski, JJ.
MEMORANDUM

TO: LDSS Commissioners, Executive Directors, State Agencies Using OCFS Databases

FROM: Sheila Poole
Acting Executive Deputy Commissioner

SUBJECT: Confidentiality and Access to and/or Release of Information from Confidential Databases

Date: May 30, 2012

Every day, the children and families we serve trust us with their personal and highly confidential information. Safeguarding that information is an integral component of our service delivery, and a reflection of our professionalism. Whether the information is obtained through a face-to-face contact, telephone call, letter, or by accessing a computer database, strict confidentiality rules apply. Confidential information, including that contained in State and local government databases is protected by numerous federal and State statutes, regulations and policies. OCFS has made safeguarding confidential, personal, private and sensitive information a priority; to both reduce the risk of information security incidents and breaches, and to facilitate ongoing compliance.

Please remember that access to data maintained in confidential databases including but not limited to CONNECTIONS, LTS, WMS, CCRS, ASAP, APS-Net, CBVH CMS, Register of the Blind, JJIS, ICPC, OCS, SSA, any and all NYSAS databases, and the Putative Father Registry is strictly limited to authorized employees and legally designated agents for authorized purposes only. This means that if you access such a case or other personally identifiable data without having an official OCFS purpose, you may be subject to civil liability and/or criminal prosecution, or disciplinary action including termination.

All OCFS, district and Voluntary Agency staff must respect and safeguard confidential information concerning clients, participants and employees, and their respective property and affairs.

The federal and state law and regulations, and OCFS policies that protect confidentiality not only prohibit re-disclosure of confidential information; they also prohibit accessing confidential information regarding a case, client or employee by an individual who has not been assigned to that case or client, or has no duly authorized business reason to access the information. For example:
1. It is prohibited to access your case records, or those of a family member, neighbor, friend, partner, co-worker, or anyone else to whom you have been given no official assignment. If you are assigned to a case in which you have personal involvement with the participants, you should immediately inform your supervisor so that you can be taken off of that case or matter.

2. It is forbidden to access old or closed records involving yourself, a family member, neighbor, friend, partner, co-worker or anyone else for which you have been given no official assignment.

3. You may not re-disclose any information that you have received in your official capacity except if your official duties require you to do so, and you are duly authorized to do so.

4. No one may waive the confidentiality of federal, State or local government records. That means that even if someone has told you that you may access or disclose their record, you may not do so unless in furtherance of your official OCFS duties.

In addition to the above, special rules apply to access to and disclosure of identifiable information regarding youth in the care and custody of OCFS or the LDSS.

- Information about individual youth in OCFS’ custody cannot be disclosed, including information as to whether a particular youth is or has been in OCFS’ custody. Therefore, you may not disclose information identifying an OCFS youth to the media, a member of the state or a local legislature, or the general public. If you are asked, you must state, “We are not authorized by law to disclose whether or not any individual was ever under our jurisdiction.”
- Information about individual youth in foster-care cannot be disclosed. Therefore, you may not disclose information identifying a foster youth to the media, a member of the state or a local legislature, or the general public.

Any exception to the above must be approved by the OCFS Legal Division prior to disclosing any information.

Incidents involving the unauthorized access or disclosure of the confidential information in OCFS-maintained systems/databases must be reported to the OCFS Information Security Officer (ISO) at the acceptable use mailbox at acceptable.use@ocfs.state.ny.us. When reporting, please provide a central point of contact, telephone number, and details as to the nature, location, date, time and individuals involved in the confidentiality or security incident, or breach. Additional information may be requested to determine appropriate response, reporting and corrective actions.

Please note that the confidential information from OCFS files and/or databases is protected by numerous Federal and State statutes and regulations, including but not limited to Social Security Act, Title IV, S 1902(a)(7), [42 USC S 1398a(a)(7)]. Staff also should refer to the New York State Office of Children and Family Services' Administrative Directives, 07-OCFS-ADM-12 and 05-OCFS-ADM-02.

Thank you for your continued attention to this critical matter.

cc: William E. Travis, Jr., CIO/Deputy Commissioner of IT
Peoplev O'Grady
Supreme Court, Appellate Division, Third Department, New York
July 08, 1999
The People of the State of New York, Respondent,
v.
Anne-Marie O'Grady, Appellant.
Supreme Court, Appellate Division, Third Department, New York
11157
(July 8, 1999)
CITE TITLE AS: People v O'Grady

Crew III, J.

Appeal from a judgment of the Supreme Court (Lamont, J.), rendered July 31, 1998 in Albany County, upon a verdict convicting defendant of four counts of the crime of computer trespass.

Defendant was indicted and charged with four counts of the crime of computer trespass in violation of Penal Law § 156.10 (1). Following a jury trial, defendant was convicted as charged and sentenced to a three-year conditional discharge and ordered to pay a $1,000 fine on each of the four counts. Defendant now appeals.

Contrary to defendant's contention, the evidence adduced at trial was legally sufficient inasmuch as, when viewed in a light most favorable to the People, there clearly was a valid line of reasoning and permissible inferences leading to the conclusion reached by the jury. Likewise, the verdict was not against the weight of the evidence inasmuch as, when viewed in a neutral light, there again was a valid line of reasoning and permissible inferences leading to the conclusion reached by the jury. The evidence reflects that on August 26, 1996, Kathleen Olsen entered the Upstate Federal Credit Union in the Village of Liverpool, Onondaga County, and accosted Dineen Gosselin, an employee of the credit union stating, "Stay away from my husband you f______________________ bitch." Gosselin did not know Olsen but recognized her from photographs--Olsen was Gosselin's boyfriend's separated spouse. When Gosselin learned that Olsen did not have an account at the credit union, she contacted her boyfriend and learned that Olsen's maiden name was O'Grady and that her sister, defendant Anne-Marie O'Grady, was employed by the State Department of Taxation and Finance (hereinafter the
For reasons not entirely clear from the record, Gosselin then reported the incident to the Department. *617

The Office of the Inspector General of the Department thereafter conducted an investigation, which revealed that on August 26, 1996 various Department computer records relating to Gosselin's father, mother and brother, as well as other individuals with the same last name, were accessed without authorization despite the fact that said family members had no outstanding tax issues at the time. The investigation further revealed that it was defendant's login and employee identification that were used to access said records. Finally, the Department's records revealed that defendant was working on the day in question.

In our view, the foregoing proof not only amply justifies the jury's inference that defendant was the individual who had unlawfully accessed the Department's computer records but, further, excludes to a moral certainty any possible hypothesis of innocence (see, People v White, 173 AD2d 897, 898, lv denied 78 NY2d 976; People v Leger, 157 AD2d 926, 927, lv denied 75 NY2d 921; People v Saplin, 122 AD2d 498, lv denied 68 NY2d 817). Accordingly, we see no basis for setting aside the jury's verdict.

We also reject defendant's contentions that Supreme Court improperly admitted Gosselin's testimony into evidence and improperly limited defendant's cross-examination of Victor Vasta, the individual who conducted the investigation on behalf of the Department. It is axiomatic that evidence of events that occurred independent of the crimes charged may be admissible as background to explain a material fact or to provide a complete picture of the events (see, People v Hernandez, 139 AD2d 472, 477, lv denied 72 NY2d 957), as well as to establish motive (see, People v Molineux, 168 NY 264). It would appear self-evident that Gosselin's testimony as to the incident with defendant's sister on August 26, 1996 would explain defendant's interest in accessing information concerning Gosselin and her family on the very day of said incident.

During the cross-examination of Vasta, counsel sought to prove that Gosselin had made prior statements to him that were inconsistent with her trial testimony. Supreme Court properly sustained the objection to such testimony on the ground that counsel had not questioned Gosselin concerning such alleged statements and had, therefore, failed to lay a proper foundation for such cross-examination (see, People v Carter, 227 AD2d 661, 662, lv denied 88 NY2d 1067). We have reviewed defendant's remaining contentions and find them equally unpersuasive.

Cardona, P. J., Yesawich Jr., Peters and Graffeo, JJ., concur.

Ordered that the judgment is affirmed. *618
The United States Court of Appeals for the Second Circuit has certified the following question for our consideration: “Whether, under New York law, the common law right of action for breach of the fiduciary duty of confidentiality for the unauthorized disclosure of medical information may run directly against medical corporations, even when the employee responsible for the breach is not a physician and acts outside the scope of her employment?” We answer the question in the negative.

On July 1, 2010, “John Doe” was being treated for a sexually transmitted disease (STD) at the Guthrie Clinic Steuben, a private medical facility. A nurse employed by the Clinic recognized Doe as the boyfriend of her sister-in-law. The nurse accessed Doe's medical records and learned that he was being treated for the STD. While Doe was still awaiting treatment, she sent text messages to her sister-in-law informing her of Doe's condition. The sister-in-law immediately forwarded the messages to Doe; according to Doe, the messages suggested that staff members were making fun of his medical condition.

Five days after his visit to the Clinic, Doe called to complain of the nurse's behavior. He met with an administrator of the Clinic, and the nurse was fired. Thereafter, the President and CEO of Guthrie Clinic, Ltd. sent a letter to Doe confirming that there had been an unauthorized disclosure of Doe's confidential health information, that appropriate disciplinary actions had been carried out, and that steps had been taken to prevent such a breach from occurring in the future.
Doe subsequently filed this action in federal court against defendants, various affiliated entities that allegedly “owned, possessed, operated, staffed and/or otherwise controlled” the clinic. In his complaint, Doe asserted eight causes of action: (1) common-law breach of fiduciary duty to maintain the confidentiality of personal health information, (2) breach of contract, (3) negligent hiring, training, retention and/or supervision of employees, (4) negligent infliction of emotional distress, (5) intentional infliction of emotional distress, (6) breach of duty to maintain the confidentiality of personal health information under CPLR 4504, (7) breach of duty to maintain the confidentiality of personal health information under Public Health Law § 4410, and (8) breach of duty to maintain the confidentiality of personal health information under Public Health Law § 2803-c.


Doe appealed the dismissal of the first five of the eight causes of action. The United States Court of Appeals for the Second Circuit affirmed the dismissal of four of the remaining five causes of action, reserving decision on his claim of breach of fiduciary duty, which is the only subject of this certified question (519 Fed Appx 719 [2d Cir 2013]).

In a separate opinion (710 F3d 492 [2d Cir 2013]), the Second Circuit found that the nurse’s actions were not foreseeable to defendants, nor were her actions taken within the scope of her employment (id. at 495). The court explained that in his complaint Doe himself alleged that the nurse was motivated by purely personal reasons and “[t]hose reasons had ‘nothing *4 to do with [Doe’s] treatment and care’ ” (id. at 495-496, citing Doe *484 complaint at ¶ 25). “As such,” the court held, the nurse’s “actions cannot be imputed to the defendants on the basis of respondeat superior” (id. at 496). The court certified the question to this Court, however, whether Doe may assert a specific and legally distinct cause of action against defendant for breach of the fiduciary duty of confidentiality, even when respondeat superior liability is absent (id. at 498).

Generally, a hospital or medical corporation may be held vicariously liable for the wrongful acts of its employees (see e.g. Hill v St. Clare’s Hosp., 67 NY2d 72, 79 [1986]). However, “[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer’s business and within the scope of employment” (N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251 [2002]). Thus, a medical corporation is generally not liable for a tort of an employee when such an action is not within the scope of employment.

We have, in other circumstances, declined to hold a medical corporation to a “heightened duty” for an employee’s misconduct. For instance, in N.X. v Cabrini Med. Ctr., where a physician employed by the defendant hospital committed a sexual assault
on a sedated patient, this Court rejected the attempt to hold the hospital strictly liable. We declined to recognize a heightened duty on the part of the hospital, explaining: “A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety . . . . This sliding scale of duty is limited, however; it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance . . . . As with any liability in tort, the scope of a hospital's duty is circumscribed by those risks which are reasonably foreseeable” (id. at 252-253).

Since the sexual assault committed by the hospital employee was “not in furtherance of hospital business” and was “a clear departure from the scope of employment, having been committed for wholly personal motives” (id. at 251), we concluded that the hospital could not be held vicariously liable.

(1), (2) Here, Doe urges us to impose absolute liability on the medical corporation for an employee's dissemination of a patient's confidential medical information. We decline to do so, *485 and, to the extent that this rationale may have been employed in Doe v Community Health Plan—Kaiser Corp. (268 AD2d 183 [3d Dept 2000]), we reject that decision. For the same reasons stated in Cabrini, a medical corporation's duty of safekeeping a patient's confidential medical information is limited to those risks that are reasonably foreseeable and to actions within the scope of employment. *5

The dissent, in accepting Doe's argument would impose strict liability on medical corporations for any disclosure by an employee, an approach that is unnecessary and against precedent. In cases where an injured plaintiff's cause of action fails because the employee is acting outside the scope of employment, a direct cause of action against the medical corporation for its own conduct, be it negligent hiring, supervision or other negligence, may still be maintained (see Judith M. v Sisters of Charity Hosp., 93 NY2d 932, 934 [1999]). A medical corporation may also be liable in tort for failing to establish adequate policies and procedures to safeguard the confidentiality of patient information or to train their employees to properly discharge their duties under those policies and procedures. These potential claims provide the requisite incentive for medical providers to put in place appropriate safeguards to ensure protection of a patient's confidential information. Those causes of action in the present case have already been resolved by the federal courts and we therefore do not address them.

Accordingly, the certified question should be answered in the negative.

Rivera, J. (dissenting). Patients, who have little say in the matter, disclose their personal information to medical corporations trusting that it will be kept private. In answering the certified question in the negative, the majority limits a patient's *486 remedy even in cases where a corporation has failed in its duty to protect confidential information. I
believe that a medical corporation's duty extends beyond an employee's conduct within the scope of employment, and I would answer the certified question in the affirmative. The majority's narrow conception of a medical corporation's duty undermines New York's public policy to protect the confidentiality of patients' medical records (see Public Health Law § 2803-c [1], [3] [f]). The ease with which confidential patient information can now spread through personal digital devices and across social networks demands a strong legal regime to protect a patient's confidentiality. A cause of action directly against a medical corporation, unhampered by questions as to whether an employee's conduct occurred within the scope of employment, ensures the fullest protections for patients and best addresses the current realities of medical service delivery.

Comprehensive medical records are crucial to ensuring proper medical care. Medical providers, including corporate medical providers, require private medical data from patients to ensure proper treatment. A patient reveals personal data for purposes of receiving medical services, with the understanding that the patient retains a right to confidentiality in such information. Technological advances have made it possible to collect and house patient data in ways easily accessible to a patient's doctor and other health care provider staff. Computers and cellular devices have transformed medical record keeping and health care service provision, making access to such data fast and easy. While such access surely benefits both the patient and the provider, it also increases the potential for instantaneous and extensive unauthorized disclosure of confidential patient information by a range of staff personnel. Societal interest in maintaining patient privacy in medical records is served through a robust tort system, responsive to the realities of the ease of disclosure.

In some circumstances, we have limited a medical corporation's liability for the negligence of its employees under a theory of respondeat superior (see e.g. N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251-252 [2002]; Judith M. v Sisters of Charity Hosp., 93 NY2d 932, 933-934 [1999]; Hill v St. Clare's Hosp., 67 NY2d 72, 79 [1986]; Suarez v Bakachuk, 66 AD3d 419, 419 [1st Dept 2009]; Doe v Westfall Health Care Ctr., 303 AD2d 102, 110 [4th Dept 2002]; see also majority op at 484). Respondeat superior is a theory of vicarious liability that originally developed under the assumption that a master could control the conduct of an agent (see Mott v Consumers' Ice Co., 73 NY 543, 546-547 [1878]; Restatement [Second] of Agency § 219, Comment a). The modern theory of respondeat superior gives the injured plaintiff a means to recover a remedy from well-insured employers and provides incentives for employers to hire careful employees (see Riviello v Waldron, 47 NY2d 297, 302 [1979]; Restatement [Third] of Agency § 2.04, Comment a). Nonetheless, the law limits the employer's liability to acts "done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions": acts done within the scope of employment (Riviello, 47 NY2d at 302 [citations omitted]). This limitation relieves an employer from liability for an employee's torts when the employer neither benefits from the tortious conduct nor has the means to control the employee's behavior.
Such limitations have no place in a negligence action against a medical corporation for disclosure of confidential medical records. As the majority notes, it is the medical corporation itself, not merely its employees, which owes the duty of confidentiality to the patient (see majority op at 485). New York's public policy would be furthered by permitting a cause of action for breach of medical confidentiality, even in cases where an employee has acted outside the scope of employment, because patients must reveal medical data in order to obtain care from the medical corporation and the patient has no way of protecting against its unauthorized disclosure or means of controlling who has access to it.

Our decision in *N.X. v Cabrini Med. Ctr.* (97 NY2d 247 [2002]) recognized that a hospital owes a duty to keep patients safe, even from third parties and employees acting outside the scope of employment. In that case, a surgical resident sexually assaulted the plaintiff (id. at 249). We held that the hospital could not be held vicariously liable for the resident's wrongdoing because he was acting outside the scope of his employment (id. at 251-252). However, that did not end the inquiry. We also held that “[a] hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety” (id. at 252) and limited “by those risks which are reasonably foreseeable” (id. at 253). In *Cabrini*, the hospital had an independent duty to prevent the employee who acted outside the scope of his employment from harming the plaintiff. Thus, the hospital could be liable for the breach of its duty through the inaction of its nursing staff in the face of obvious risks (see id. at 253-254). When a patient lays helpless in a hospital bed, entrusting his or her care to the hospital, the hospital has an independent duty to ensure his or her safety.

Similarly, a patient entrusts private medical information to the care of the medical corporation and its employees, over whom the patient has no control. The patient's only surefire means to prevent accidental disclosure would be to forgo turning over the confidential information in the first place. This is not a realistic option because a patient cannot expect delivery of medical services without disclosing such data. Indeed, the medical profession encourages full disclosure by the patient of a comprehensive medical history (see AMA Code of Med Ethics Op 10.02 [2]). In order to receive treatment, a patient must reveal personal information; a patient withholds such data at his or her peril. Having turned over private information to ensure proper and adequate treatment, the patient is at the mercy of the medical corporation’s ability to protect its confidentiality. A hospital should owe a duty to keep a patient's health information confidential, and a hospital should be directly liable for its own failure to prevent breaches of confidentiality by employees who act outside the scope of their employment.
In order to protect the patient's privacy interests given the competing need to disclose, such a cause of action would provide a powerful incentive to medical corporations to implement protections against disclosures. Given the highly personal nature of medical data at risk of disclosure, the harm associated with dissemination of such sensitive private information, the ease with which employees of a medical corporation may access confidential data and disseminate it through the use of a commonly held and inexpensive device, a cellular telephone, and the inability of patients to protect themselves from employee misconduct, such an incentive furthers the State's public policy in protecting the confidentiality of medical records.

The certified question should be answered in the affirmative.

Chief Judge Lippman and Judges Graffeo, Read, Smith and Abdus-Salaam concur with Judge Pigott; Judge Rivera dissents and votes to answer the certified question in the affirmative in an opinion.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and record submitted, certified question answered in the negative.

Footnotes

Subjecting hospitals and other health care entities to strict liability for the acts of an employee that were not only unauthorized, but motivated entirely by personal reasons is contrary to well-established precedent (see N.X. v Cabrini Med. Ctr., 97 NY2d 247, 252-253 [2002]; Cornell v State of New York, 46 NY2d 1032 [1979]). While the dissent finds our holding too “narrow” (see dissenting op at 486), the dissent’s reasoning is flawed for the opposite reason; it is too broad. If the dissent’s view is taken to its logical conclusion, a medical provider may be held liable in negligence for any inadvertent disclosure by an employee. As an example, if a receptionist of a private physician discloses at a cocktail party that a patient was in to see the doctor for a particular ailment, perhaps unbeknownst to the patient’s family because he did not want to worry them, under the dissent’s rule, the medical corporation would be required to respond in damages for that disclosure.

The majority believes that claims based on vicarious liability and sounding in negligence limited to conduct within the scope of employment provide sufficient relief for a patient whose private information is wrongfully disclosed (majority op at 485). As the instant case well illustrates, those causes of action alone are inadequate to remedy a breach of the duty to maintain the confidentiality of personal data, and they provide cold comfort to a patient whose personal data is disclosed due to the status of the employee and regardless of the actions of the employer that facilitated disclosure. Our legal system
must be responsive to a health care service system with its attendant comprehensive data collection, supported by technological advances that are vulnerable to access.

Ellish v Airport Parking Co. of Am.
Supreme Court, Appellate Division, Second Department, New York
July 09, 1973
42 A.D.2d 174, 345 N.Y.S.2d 650

Lenore Ellish, Appellant,

v.

Airport Parking Company of America, Inc., Respondent

CITE TITLE AS: Ellish v Airport Parking Co. of Am.

Ellish v. Airport Parking Co. of Amer., 69 Misc 2d 837, affirmed.

William S. Infeld (Leonard N. Shapiro of counsel), for appellant.

Robert Swaybill for respondent.

OPINION OF THE COURT

Hopkins, Acting P. J.

About to leave on a flight from John F. Kennedy International Airport on September 1, 1966, the plaintiff parked her automobile in a lot operated by the defendant under an agreement with the Port of New York Authority. When she returned on September 5, 1966, her automobile had disappeared. Claiming that the defendant was responsible for the loss, she brought this suit. The Civil Court granted judgment in her favor, finding that the transaction was a bailment (Ellish v. Airport Parking Co. of Amer., 66 Misc 2d 470). The Appellate Term reversed and dismissed the complaint, finding that no bailment had been created (Ellish v. Airport Parking Co. of Amer., 69 Misc 2d 837). By permission of the Appellate Term the plaintiff appeals.

We affirm the order of Appellate Term. Under the circumstances of this case we do not find the defendant liable for the plaintiff's loss.
The case was submitted to the Civil Court under an agreed statement of facts (CPLR 3222). Briefly stated, the parties stipulated that the plaintiff drove into the parking lot at the airport, receiving from an automatic vending machine a ticket stamped with the date and time of entry. On one side the ticket was labeled “License to Park” and stated that the lot provided self-service parking; it warned the holder that the lot was not attended and that the car should be locked. On the other side the ticket contained the words in smaller print: “This contract licenses the holder to park one automobile in this area at holder’s risk.” Further, it provided that the defendant was not responsible for the theft of the automobile.

Upon the plaintiff’s receipt of the ticket, a gate opened, permitting the entry of the automobile into the lot. The plaintiff drove the automobile into a parking space, locked it and took the keys with her. Under the practice of the defendant, on leaving the lot, the holder of the ticket would drive to the point of exit, present the ticket to a cashier and pay the amount due based on the time elapsed. If the driver did not have a ticket, the cashier would demand proof of ownership of the automobile. The defendant employed personnel to maintain the lot and to check automobiles left overnight in order to make certain that the cashiers collected proper fees. The lot was patrolled by Port of New York Authority police, in the same manner as the airport.

Since the parties stipulated that neither had any knowledge concerning the disappearance of the automobile from the parking lot, the plaintiff could succeed in the action only by the existence of a duty on the part of the defendant to account for the loss of the automobile while standing in the lot. At common law when a chattel was placed by the owner in the possession of another under an agreement by the latter to deliver it on demand, a convenient short hand expression of a duty cast on the bailee was found by establishing a presumption of negligence if the bailee did not come forward with a satisfactory explanation to rebut the presumption (Fidelity & Guar. Ins. Corp. v. Ballon, 280 App. Div. 373; Potomac Ins. Co. v. Donovan, 274 App. Div. 666), though the burden of proof on the whole case remained on the owner (Richardson, Evidence [8th ed.], § 109). The rule thus reflected the judgment that the party last in possession of the chattel was better able to account for its loss. ¹

A bailment is, of course, merely a special kind of contract; it describes a result which in many instances does not flow from the conscious promises of the parties made in a bargaining process but from what the law regards as a fair approximation of their expectations (see 9 Williston, Contracts [3d ed.], § 1030, n. 7, p. 879; § 1033, pp. 884-885; § 1065, pp. 1011-1023). Hence, in formulating a rule to determine the extent of the liability of the defendant, we must concern ourselves with the realities of the transaction in which the parties engaged. The nature of the circumstances themselves leads to the determination whether the transaction should be considered a bailment, in which event the defendant is liable to the plaintiff, ² or whether the transaction should be considered a license to occupy space, in which event the defendant is not liable to the plaintiff.

Parking lots generally accommodate the free use of automobiles in urban areas. Automobiles are so much a part of urban life that it is necessary for both municipalities and private operators to make space available for parking. The parking lots scarcely resemble the traditional
warehouses of the professional bailee with their stress on security and safekeeping. Rather, they are designed to meet the need of providing temporary space in crowded urban centers for a highly mobile means of transportation. In the case before us, the parking lot at the airport was designed to facilitate the passage of patrons of airlines by private automobiles to the point of their departure and arrival. As the use of air transportation is a major interest in our social and economic life, it is important that a fair rule, easy to apply, should govern the relationship of the parties to the transaction.

Against this general background we think these considerations are paramount:

1. The service provided by the defendant to the plaintiff was clearly a space for her automobile to stand while she was away on her trip. That space was located in a lot where many other automobiles were similarly standing and to which the operators of the automobiles and others were given access. The plaintiff was not treated differently from the other automobile operators; nor was she led to believe that the lot would not be open to others.

2. The service provided by the defendant was impersonal. The plaintiff was aware that the defendant had no employees either to deliver the ticket for the automobile or to park the automobile. She accepted the ticket from an automatic dispensing device and she parked the car herself, choosing her own space, not at the direction of the defendant.

3. The plaintiff retained as much control as possible over the automobile. She locked the car and kept the keys. She did not expect or desire the defendant to move the automobile in her absence.

4. The plaintiff followed the directions contained in the ticket she received. In her favor, we think that the plaintiff should not be closely bound by the terms of the ticket, for plainly it was a contract of adhesion. The plaintiff was hardly in a position to bargain over the conditions of the ticket and, indeed, the condition of nonliability for theft sought to be *imposed by the defendant is unenforceable under the public policy of our statute (General Obligations Law, § 5-325). Nevertheless, it is still the fact that the plaintiff heeded the warning of the ticket to lock her automobile.

5. We can draw the reasonable inference from the agreed statement of facts (CPLR 3222, subd. [b], par. 4) that, since the plaintiff followed the directions in the ticket, she read the other warnings which it contained to the effect that the lot was not attended and that the parking of her car was at her own risk. Thus, any expectation that the defendant would take special precautions to protect her car while she was away could not reasonably have been in her mind.

6. The actual operation of an airport parking lot must have been apparent to her. Thousands of automobiles were constantly entering and leaving the airport, many of which were using the parking lot that her car occupied. The plaintiff, seeing the confusion and bustle, should have realized the gigantic task which an individual check-out of each automobile would require -- a task which she was aware the defendant did not undertake, since the ticket which she received did not identify her automobile.
In the absence of any proof of neglect by the defendant, then, we do not think that the
defendant should be held responsible for the loss of the automobile. Other courts considering
parking lots at airports have concluded as we do (Wall v. Airport Parking Co. of Chicago, 41 Ill.
Ins. Co. v. Affiliated Parking, 448 S. W. 2d 909 [Mo. App.]).

We do not find Dunham v. City of New York (264 App. Div. 732), in which we allowed recovery
for the loss of an automobile parked in a lot at the World's Fair held in 1939, a precedent
requiring us to hold for the plaintiff here. In Dunham, though the motorist locked his car after
parking it and retained the keys, an attendant gave a ticket to the motorist before parking and
directed him to the space to be occupied, thereby giving the appearance of the acceptance of
custody for the car. Here, instead, the defendant by its procedures of impersonal parking
disclaimed any appearance of custody. *179

We are of the opinion that liability should not be determined by ancient labels and
characteristics not connected with present-day practices. It is one thing for the owner of a livery
stable to have to explain the disappearance of a horse from its stall to the owner, but it is not at
all the same for the operator of a parking lot at a busy airport to have to explain the
disappearance from the lot of one of the thousands of cars parked there daily. Unless proof of
negligence is present on the part of the operator of the lot, the risk of loss must be assumed by
the owner of the automobile.

We therefore should affirm the order of the Appellate Term, without costs.

Shapiro, J.

(Dissenting).

My learned brother, Mr. Justice Hopkins, has aptly stated the question here to be determined
when he says: “The nature of the circumstances themselves leads to the determination whether
the transaction should be considered a bailment, in which event the defendant is liable to the
plaintiff, or whether the transaction should be considered a license to occupy space, in which
event the defendant is not liable to the plaintiff.” He concludes that “the realities of the
transaction in which the parties engaged” establish that when the plaintiff placed her automobile
in the defendant's enclosed parking lot (from which she was not free to remove it without paying
the accrued parking charges) she merely obtained “a license to occupy space”. I cannot
subscribe to that view.

We start with the undisputed fact that the plaintiff was a captive-customer of the defendant.
There was no public street on which she could park her car; nor did she have a choice
of parking facilities. If she was to come to the airport by automobile -- which she had a right to do
and the doing of which was encouraged by the defendant's operation of a commercial parking
lot there -- she had no choice of accommodations. She could not pick out a parking lot in which
the operator would take her keys and park her car. It was the defendant's lot or none at all.
Under such circumstances and considering the fact that the plaintiff was not free to leave with
her automobile until she had first paid the charges due thereon, it seems to me that "the realities of the transaction in which the parties engaged" clearly show a sufficient retention of control by the defendant over the plaintiff's car to make the defendant liable for the loss in the absence of the defendant's giving any explanation for the loss. *180

Although the majority recognizes that "the condition of nonliability for theft sought to be imposed by the defendant [by virtue of the terms of the ticket-receipt which the plaintiff received from the automatic machine] is unenforceable under the public policy of our statute (General Obligations Law, § 5-325)," it nevertheless draws the inferences, improperly I believe, "that the plaintiff heeded the warning of the ticket to lock her automobile" and that, since the plaintiff followed that direction on the ticket, she must have "read the other warnings which it contained to the effect that the lot was not attended and that the parking of her car was at her own risk" and that therefore" any expectation that the defendant would take special precautions to protect her car while she was away could not reasonably have been in her mind." But those successive assumptions, heaped upon one another, proceed on the theory that the plaintiff, and others like her, approached this parking lot with *tabula rasa* -- that she knew what to do only from reading the instructions on the ticket. That assumption, in my opinion, lacks validity. Every driver these days is familiar with parking lot procedures and does not have to examine a ticket (with printing usually too small to be readily readable) to know what to do when he enters a self-service parking lot. Every driver knows that airport parking lots are fenced in and attended at all times because he knows that he must pay the full parking fee due when he comes to retrieve his car. The lot operator's retention of the right to payment when the car owner comes for his car, it seems to me, carries with it a concomitant representation that the car will be there at that time, since, at least to that extent, the parking lot operator has retained control over the car. Such awareness by a patron of his obligation to pay when he returns for his car is inconsistent with any implication of acceptance by him of the risk of an unexplained disappearance of the car from the lot.

Neither do we believe that the plaintiff's observations of the confusion and bustle which unfortunately characterize the operations of our huge airports at heavy-use periods should have led her to realize that the parking lot operator owed her no duty of seeking to ascertain that the check she had received when entering the parking lot with her car was the same check presented by the person leaving the lot with her car. Would not the patron have reason to believe, from the fact that the lot was fenced in and its exit gate manned throughout the day and night, that his car was safer there than on the streets or in an unmanned, unpatrolled and unfenced lot and that the lot operator *181 was accepting supervision and control, though limited in degree, of his car?

To buttress its conclusion that the defendant should not "be held responsible for the loss of the automobile", the majority says that other courts considering parking lots at airports have concluded as the majority does (Wall v. Airport Parking Co. of Chicago, 41 Ill. 2d 506; St. Paul Fire & Mar. Ins. Co. v. Zurich Ins. Co., 250 So. 2d 451 [La. App.]; Equity Mut. Ins. Co. v. Affiliated Parking, 448 S. W. 2d 909 [Mo. App.]). However, these three cases are not at all
persuasive. All three use as their keystone the outworn limitation of the law of bailment. *Wall v. Airport Parking Co. of Chicago* (supra) follows the reasoning of *Greene Steel & Wire Co. v. Meyers Bros. Operations* (44 Misc 2d 646 [App. Term, 1st Dept.]) although the *Greene* case did not deal with the loss of an automobile, but with damage to it. In the *St. Paul* case the court based its decision on the ground that in Louisiana the self-service long-term airport parking lot from which the car was stolen was an exception to the general rule that parking lots are treated as compensated depositories against which negligence need not be proved in cases of vehicle loss or theft, because its operation was so “restricted and structured so as to make it clear that the patron-motorist merely leases parking space rather than making a deposit of his car” (p. 453). In the *Equity Mutual* case the rejection of the plaintiff's claim was based on the erroneous premise that it could recover only if there was “such delivery to the bailee as would entitle him to exclude the possession of anyone else, even the owner, for the period of the bailment” (p. 914).

Parking lots where the operators retained dominion over any cars parked in the lots until the cars were returned to their owners have traditionally been held to be liable for loss or damage unless the owners rebutted the presumption of negligence by showing reasonable care. Modern technology has allowed parking lot operators at airports to dispense with attendants at the entrances of the lots who insured that the license numbers and makes of the cars were recorded on the receipts so as to help insure that the holders of the receipts were in fact the owners of the cars when they were taken out of the lots. This cutting of costs of operation, while retaining sufficient dominion of the cars parked in their lots by means of fencing and manned exit gates to insure payment of the fees due as a condition of releasing parked cars to their owners, has caused the operators to seek to avoid liability for loss or damage by claiming that their more automatic method of operation eliminates the presumption of negligence in case of loss they formerly had to rebut. In our view, the shift to lessened personal contact between the lot operator's employees and his patrons in no way changes the basic nature of the relationship between the lot operator and his patrons so long as he retains dominion over the cars parked in his lot and can withhold their return until he is paid the full fee due for the parking. It would be ironic if the operator's use of additional cost-saving devices were read as lessening his responsibility to use due care in protecting cars parked with him from damage or theft. If he fences in the lot, mans its exits at all hours so that his employees control every removal of cars from the lot, and patrols the lot nightly to record all cars left overnight, he is clearly responsible to exercise a reasonable effort to use his facilities to prevent or at least minimize theft of cars from the lot. And if a theft does occur he must rebut the presumption of negligence that arises therefrom by showing that he used reasonable care to avoid thefts.

Airport long-term parking lots are not public streets or open parking areas. Patrons who must use such lots are made aware of this by the fact that the lots are fenced in and their exits are guarded at all times. Such patrons expect the use of due care by the operator to prevent removal of their cars without the receipts given them by the lot operator (by a machine), the
more so because they have no choice but to use the lot and pay the fee imposed. If they find their cars gone when they return, they should be able to recover for the loss unless the operator can show that the loss occurred despite his exercise of due care. Such a result is in accord with both public policy and with the public interest in facilitating air travel.

For the foregoing reasons the order of the Appellate Term should be reversed and the judgment of the Civil Court in favor of the plaintiff should be reinstated.

Christ and Benjamin, JJ., concur with Hopkins, Acting P. J.; Shapiro, J., dissents and votes to reverse and to reinstate the judgment of the Civil Court of the City of New York, Queens County, with an opinion, in which Latham, J., concurs.

Order of the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts, entered May 11, 1972, affirmed, without costs.

Footnotes

1 The presumption of negligence is similar to the doctrine of res ipsa loquitur, which an authority has said has been a strong factor in achieving verdicts in favor of plaintiffs (2 Harper & James, Law of Torts, § 19.11, p. 1099).

2 “Self-park” lots and garages have been said not to create a bailorbailee relation (see Weinberg v. Wayco Petroleum Co., 402 S. W. 2d 597 [Mo. App.]). In many cases the retention of the keys by the motorist is considered a decisive factor preventing liability for loss (see 9 Williston, Contracts [3d ed.], § 1065, pp. 1011-1023; 8 C. J. S., Bailments, § 1, subd. b, par. [2]; Ann. 7 ALR 3d 927).

3 There are a number of appellate decisions dealing with the problem of the liability of parking lot operators for loss of cars with them (Galowitz v. Magner, 208 App. Div. 6; Chamberlain v. Station Parking Serv., 251 App. Div. 825; Dunham v. City of New York, 264 App. Div. 732; Greene Steel & Wire Co. v. Meyers Bros. Operations, 44 Misc 2d 646 [App. Term, 1st Dept.]). The only one which is directly in point is our decision in Dunham, which the majority attempts to distinguish on the factual ground that in Dunham, though the motorist locked his car after parking it and retained the keys, his ticket-receipt was given to him on entrance by an attendant instead of by a machine and the attendant directed the motorist to the space to be occupied. But this difference in no way lessens the essential impersonal nature of the procedure used by the parking lot operator in allocating space for the car; nor does it do away with the fact that the motorist, by locking the car and keeping the keys, retains exactly the same form of partial control of his car as if he himself chose the vacant spot in which to leave his car and received
his ticket-receipt from a ticket-dispensing machine. Thus, if anything, *Dunham*, which is the only appellate case dealing with the theft of an automobile from an airport parking lot, squarely supports the appellant's position.