APPENDICES

Appendix 1
Decision of the
California Court of Appeal

Filed 3/26/19 Golin v. San Andreas Regional Center CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JEFFREY R. GOLIN et al.,	A145752
Plaintiffs and Appellants,	(San Mateo County
v.	Super. Ct. No. CIV507159)
SAN ANDREAS REGIONAL CENTER, et al.,	
Defendants and Respondents	

In November 2001, Jeffrey and Elsie Golin's developmentally disabled adult daughter, Nancy Golin,[1] wandered off and went missing for over 15 hours before returning home. During the investigation of Nancy's disappearance, the police learned Jeffrey and Elsie had a history of alleged neglect and abuse of their daughter. Believing Nancy to be gravely disabled and a danger to herself, the police placed Nancy on

[1] Because Jeffrey, Elsie, and Nancy share the same last name, we refer to them by their first names. We mean no disrespect in doing so.

a Welfare and Institutions Code section 5150[2] hold at Stanford Hospital and Clinics, Inc. (Stanford) and obtained emergency protective orders (EPO's) giving temporary custody. of Nancy to Stanford, San Andreas Regional Center (SARC), or adult protective services (APS), and barring Jeffrey and Elsie from contacting their daughter. When the EPO's expired, Nancy was transferred to a residential care facility called Embee Manor, but Jeffrey and Elsie were not immediately notified of their daughter's whereabouts. Three days later, Jeffrey and Elsie were arrested for felony dependent adult abuse. In 2003, the California Department of Developmental Services (DDS) was appointed Nancy's permanent limited conservator.

Jeffrey, Elsie, and Nancy, through her guardian ad litem (collectively plaintiffs), filed suit under section 1983 of title 42 of the United States Code (section 1983) against SARC, Stanford, Edna Mantillas, doing business as Embee Manor, and several other governmental and private parties involved in Nancy's placement and conservatorship.

---

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise stated. Under section 5150, which is part of the Lanterman-Petris-Short Act. (Welf. & Inst. Code, § 5000 et seq.; LPS Act), a peace officer may, with probable cause, take into custody any person who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled," and to place such a person in a county-designated facility for an initial 72-hour treatment and detention. (§ 5150, subd. (a).)

They alleged, among other things, defendants violated Nancy's constitutional rights to be free from unreasonable seizure and deprivation of liberty without due process, and unreasonably interfered with plaintiffs' rights of familial association. After a three-week trial, the trial court denied plaintiffs' motion for a directed verdict, and the jury returned general verdicts in favor of defendants. The trial court then denied plaintiffs' motions for judgment notwithstanding the verdict (JNOV). On appeal, plaintiffs contend the trial court committed reversible error in denying their motions because the evidence required a determination of all issues in their favor as a matter of law. Plaintiffs further contend the trial court committed instructional error by directing the jury to determine questions of law as to whether (1) SARC, Stanford, and Mantillas were entitled to the defense of qualified immunity, and (2) defendants' conduct "shocked the conscience" for purposes of substantive due process. For the reasons set forth below, we will affirm the judgment.

I. BACKGROUND

A. Factual Background

The following facts were established at trial.

1. Nancy Is a Developmentally Disabled Adult

Nancy is an autistic adult, developmentally disabled since birth. She suffers from profound mental retardation and epilepsy. She has the mental abilities of a very young child and must be constantly monitored and protected. Although she was able to speak a few simple words when she was a child, her speech deteriorated over time, and by her 30's, Nancy was mute. She has been prescribed phenobarbital for her seizures.

2. Jeffrey and Elsie's History of Suspected Abuse and Neglect

In the mid-1980's, police were called after Jeffrey left Nancy home alone in a locked bedroom on the second floor with a pot for a toilet and a bowl of dried banana slices. On previous occasions when Jeffrey left Nancy in that bedroom, she had used a second-floor ledge to escape. In 1986, Nancy burned herself with a lighter discarded by Elsie and was hospitalized for several weeks. Less than 10 years later, Nancy got too close to a barbeque at Jeffrey's workplace and sustained second and third degree burns over 50 percent of her body. Nancy was hospitalized for several months and received numerous skin grafts.

During her childhood, Nancy became a "consumer" of SARC, a private non-profit corporation that contracts with DDS to coordinate services for individuals with developmental disabilities.[3] SARC prepared an individual program plan (IPP) for

---

[3] Under the LPS Act, "the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, 'has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons' [citation], while 'regional centers,' operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime.' " (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) SARC is one of 21 regional centers in California that coordinates services for individuals with

Nancy—a comprehensive "whole person assessment" that spelled planned course of action for her. However, Jeffrey and Elsie never participated in any of Nancy's IPP's, and they declined services from SARC for many years.

In, stating Nancy was disheveled and in need of a bath, and claiming Jeffrey and Elsie were not monitoring her medications or providing her with a safe home environment.

Between January and June 2001, several incidents were reported to APS of suspected neglect and abuse concerning Nancy. A January 2001 report noted during the preceding six months, Nancy had been hospitalized repeatedly because of Jeffrey and Elsie's failure to comply with doctors' orders regarding Nancy's antiseizure medication. A March 2001 report stated after Jeffrey and Elsie were arrested on felony domestic violence charges, Nancy was placed on a section 5150 hold (5150 hold) because there was no one left to feed and care for her.

In April 2001, APS requested SARC's assistance in investigating a complaint involving possible abuse of Nancy. Two nurses from SARC, along with SARC district manager Tucker Liske, visited the Golins. One of SARC's nurses described arriving at a "storage unit" with no windows and saw Nancy with burn scars and poor overall body hygiene.

---

developmental disabilities. SARC coordinates services for individuals and families in the counties of Monterey, San Benito, Santa Clara, and Santa Cruz.

APS also received several reports about Nancy wandering off. According to an April 2001 report, Nancy wandered away from Jeffrey and Elsie and was found taking donuts away from customers at a donut shop. APS received two reports in June 2001 that Nancy had been placed on a 5150 hold after she was found wandering around a restaurant late at night.

3. Nancy Goes Missing and Returns the Next Morning

On the evening of November 14, 2001, Elsie left Nancy alone in a van to use a bathroom, and when Elsie returned, Nancy was gone. Jeffrey and Elsie called the Palo Alto Police Department (PAPD) and reported Nancy missing. The parents searched all night for their daughter but she could not be found.

The next morning, PAPD officers, including Detective Lori Kratzer, arrived at the scene where Nancy had gone missing. Jeffrey told Kratzer his family had been living out of a van because they were having difficulty finding housing. The van smelled strongly of body odor and urine, and when Kratzer asked about the odor, Jeffrey and Elsie said Nancy spent a lot of time in the van watching videos and sometimes wet herself.

Kratzer contacted SARC to determine if it had any record of Nancy. A SARC case manager told Kratzer both SARC and APS had been attempting to offer Nancy services but her parents were resistant to agency intervention. SARC also reported Nancy and her parents had no stable residence and their last known address was a U-Haul storage space. Kratzer also spoke with Jamie Buckmaster, program manager at APS. Buckmaster informed Kratzer there were numerous reports of suspected

dependent adult abuse regarding Nancy. In a note by Buckmaster introduced into evidence at trial, Buckmaster wrote that after her telephone call with Kratzer, "It was decided that I would speak to SARC about conservatorship of client." While Kratzer was questioning Jeffrey and Elsie, Nancy returned. She had been missing for 15 hours. Her clothes were dirty, her hair was oily, and she had body odor, and according to Kratzer, Nancy's poor hygiene was not simply the result from being gone overnight. Kratzer also noticed a large wound covering the top of Nancy's foot that looked partially infected and scabbed over.

4. Nancy Is Taken to Stanford on a 5150 Hold

Believing Nancy to be a risk to herself and gravely disabled, Kratzer and her supervisors decided to place Nancy on a 72-hour hold under section 5150. When Kratzer informed Jeffrey and Elsie of the decision, Jeffrey called Kratzer "the evil one" and Elsie started telling Nancy that Stanford "was going to kill her." Elsie took Nancy inside a commercial space where they appeared to be living. Kratzer went inside and found Nancy lying on a sleeping bag on the floor. Patrol officers transported Nancy to the Stanford emergency department for a welfare check. Dr. Robert Hayward, a member of Stanford's medical staff, accepted Nancy on the 5150 hold. Upon her arrival at Stanford, Nancy had a level of phenobarbital in her system that exceeded therapeutic and even critical dosage levels. Stanford's emergency department social worker supervisor, Scott Skiles, spoke on the phone with Kratzer, who said the police were considering bringing criminal charges against Jeffrey and Elsie. Buckmaster asked Stanford not to let Jeffrey and Elsie visit Nancy. She told Stanford

Social Worker Jeannie Lutticken that until all legal efforts were in place, Nancy was only safe at Stanford. Stanford decided it would not permit Jeffrey and Elsie to see Nancy. Nancy was kept in a locked psychiatric ward at Stanford.

5. Defendants Discuss Residential Placement and Conservatorship for Nancy

According to the testimony of SARC's district manager, Liske, and SARC's director of consumer services, Miriam "Mimi" Kinderlehrer, APS asked SARC to coordinate a residential placement for Nancy, and SARC worked with APS to find her a placement. Kinderlehrer testified APS had strong concerns about the ability of Jeffrey and Elsie to care for their severely disabled adult child, and "APS felt that [Nancy] should be placed in a residential placement because they felt going back with her family was unsafe. And she was a consumer of [SARC's], she had been a consumer of ours many years before. Her case was reopened and we went forward to place her in what we thought was a safe placement." APS and SARC also discussed obtaining a permanent and temporary conservatorship for Nancy. Kinderlehrer told Buckmaster time was of the essence because "if somehow the clients found out where Nancy [was] placed by SARC and showed up, the RCF [(residential care facility)] manager would have a hard time keeping them away and keeping them from taking Nancy if Nancy wanted to go with them. [¶] I told her that was why conservatorship was so important." However, Kinderlehrer and SARC executive director Santi Rogers acknowledged a conservatorship was a lengthy process that "usually takes many months," even for a temporary conservatorship.

When APS called SARC asking for a coordinated placement, SARC treated it as an emergency. Rogers testified Nancy's case was "an exceptional situation" and there was an "urgency at the moment" because Nancy's parents had been previously arrested for dependent adult abuse. When a consumer's parents are in jail, SARC does not usually contact them to involve them in placement.

6. Emergency Protective Orders Are Issued

On November 16, 2001, Kratzer referred Jeffrey and Elsie's case to the district attorney's office for prosecution for dependent adult abuse, and she obtained EPO's granting temporary care and custody over Nancy to Stanford, APS or SARC, and barring Jeffrey and Elsie from contacting Nancy. The EPO's were set to expire at 5:00 p.m. on November 27, 2001.

Buckmaster spoke on the telephone with Kratzer, who informed her the EPO's were issued, and "'The judge, upon hearing the situation, recommends conservatorship.'" Kratzer also told Buckmaster about Jeffrey's and Elsie's criminal history, including their arrests for assaulting a police officer, and Kratzer said she would be seeking felony charges against Jeffrey and Elsie. This news caught Buckmaster's attention because it was the first time she had heard a police officer say "felony" in a physical abuse and neglect case. Buckmaster called Liske of SARC and "'explained to him the critical need for conservatorship [for] Nancy in order to keep her safe.'" She also informed Liske about the EPO's and PAPD's intent to arrest Nancy's parents on felony dependent adult abuse charges. She asked Liske to "'contact the RCF [¶] . . . [¶] . . . which was holding a bed for Nancy and ask them to hold it longer.' " Liske told Buckmaster " 'they had several vacancies and it wouldn't be a problem.' "

7. Stanford Unsuccessfully Attempts to Extend Nancy's Treatment

On November 18, 2001, Stanford applied to extend Nancy's 5150 hold for intensive treatment under section 5250 (5250 hold).[4] At the November 26, 2001 certification hearing, the hearing officer, Judith Ganz, ruled the LPS Act does not apply to those who are developmentally disabled and dismissed the 5250 hold. Ganz noted, however, the EPO's remained in place until November 27, 2001 at 5:00 p.m.

8. A Meeting Is Held at Stanford to Coordinate Placement for Nancy

Following the dismissal of the application for a 5250 hold, a meeting was held on November 26, 2001 at Stanford. Among the meeting participants were Dr. Hayward and Social Worker Lutticken of Stanford, Liske of SARC, and Buckmaster of APS. They discussed Nancy's behavior problems and inability to sleep, the denial of the 5250 hold, the upcoming expiration of the EPO's, and Kratzer's communication to Dr. Hayward about obtaining an extension of the EPO's. They also discussed SARC's effort to obtain a temporary conservatorship.

9. Nancy Is Discharged from Stanford and Transferred to Embee Manor

On November 27, 2001, around 3:00 p.m., Liske contacted Lutticken and informed her he had found board and care for Nancy at Embee Manor, an adult residential facility owned and operated by Edna Mantillas and vendored by SARC. Lutticken said she would tell Stanford staff not to release information as to where Nancy

---

[4] Under section 5250, after a person has been detained for 72 hours on a 5150 hold and has received an evaluation, he or she may be certified for not more than 14 days of involuntary intensive treatment related to the mental health disorder, under certain specified conditions.

was going. At 5:00 p.m., the EPO's expired, and Nancy was discharged from Stanford and transferred to Embee Manor. At trial, Stanford's expert, Dr. Stephen Hall, testified it was within the standard of care for Stanford to transfer Nancy to a facility chosen by SARC.

Elsie testified she was at the door of the Stanford psychiatric ward promptly at 5:00 p.m. when the EPO's expired, and an unnamed man and woman told her Nancy had already left, and they refused to tell her where Nancy had been taken. Mantillas received the discharge summary from Stanford and signed the paperwork for Nancy's admission at Embee Manor. Mantillas knew Nancy had no conservator, but it was her understanding SARC had authority to place clients at vendor facilities like Embee Manor.

APS and SARC were aware there was no court order giving custody or control of Nancy to SARC after November 27, 2001. However, Kinderlehrer testified it was SARC's practice they did not need a judge's signature for someone like Nancy to remain with SARC. If SARC felt the person's parents were not capable of taking care of her and keeping her safe, SARC would take responsibility for not letting the person go back to her parents. Kinderlehrer further testified there is no requirement an adult be conserved before services are provided to him or her, and the vast majority of SARC's customers are unconserved. Kinderlehrer was aware of no statutory provision requiring SARC to obtain a court order before coordinating a residential placement for an unconserved adult like Nancy.

10. Jeffrey and Elsie Are Arrested and Charged with Dependent Adult Abuse

The same day Nancy was discharged from Stanford, the district attorney charged Jeffrey and Elsie with felony dependent adult abuse, and arrest warrants were issued the next day. On November 30, 2001, Jeffrey and Elsie were arrested.

Elsie testified that from November 27, 2001 to January 3, 2002, she was extremely concerned about Nancy and called DDS and the Department of Justice trying to learn of her daughter's whereabouts, but nobody would tell her where her daughter was.

At Jeffrey and Elsie's arraignment hearing on January 3, 2002, the criminal court issued a no-contact order barring Jeffrey and Elsie from any contact with Nancy. Later, in March 2002, the criminal court issued an order permitting Jeffrey and Elsie to have supervised visits with Nancy. APS volunteered to supervise these visits and Buckmaster attended them.

In early 2003, the criminal charges against Elsie were dismissed, and the no-contact order was dissolved. Jeffrey pled no contest to misdemeanor dependent adult abuse, and after completing six months' probation, his conviction was expunged in August 2003.

11. DDS Is Appointed Nancy's Conservator

Beginning in December 2001, SARC attempted to secure a conservatorship for Nancy by inquiring with the Santa Clara Office of the Public Guardian and DDS. At that time, both agencies declined. However, in April 2002, DDS initiated

conservatorship proceedings for Nancy, and in October 2002, the court appointed a temporary private conservator.

After a three-week conservatorship trial, the court issued a statement of decision in October 2003, in which it found, by clear and convincing evidence, Jeffrey and Elsie were unable to provide for the best interests of their daughter. The court concluded Jeffrey's and Elsie's "difficult personalities" and "mistaken overconfidence in their limited medical knowledge" had exposed Nancy to "dangerous non-compliance with physicians' directions as to medication and care for [Nancy's] very serious seizure disorder and other medical problems." The court was also concerned about Jeffrey and Elsie's history of marital strife, as well as their past abuse and neglect of Nancy. Based on these and other numerous findings in support, the court appointed DDS as Nancy's permanent limited conservator. Jeffrey and Elsie were granted reasonable visitation with their daughter.

B. Procedural Background

The long procedural history of this case need not be recounted here in full. In short, the case was initially filed in 2006 in Sacramento County Superior Court but was transferred to Santa Clara County Superior Court. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 626 (*Golin I*).) After Jeffrey and Elsie appealed a ruling finding them to be vexatious litigants, the Sixth District Court of Appeal remanded and transferred the case to San Mateo County Superior Court. (See *Golin v. Allenby* (Sept. 18, 2015, A140652) [nonpub. opn.] (*Golin II*).)

1. The Parties and Claims

Numerous defendants were named in plaintiffs' lawsuit, including SARC and its agents Rogers, Liske, and Kinderlehrer; the City of Palo Alto and Kratzer; Stanford; Buckmaster of APS; Mantillas; former DDS directors Clifford B. Allenby and Therese Delgadillo; and the attorney for DDS in the conservatorship proceedings, H. Dean Stiles. (See *Golin I, supra,* 190 Cal.App.4th at p. 626, fn. 9.)

In the operative fourth amended complaint, the first cause of action under section 1983 alleges defendants, acting under color of law, violated Nancy's Fourth Amendment right to be free from unreasonable seizures, her Fourteenth Amendment right not to be deprived of liberty without due process of law, and her First and Fourteenth Amendment rights to be free from unreasonable interference with parent-child relationships. The second cause of action under section 1983 alleges defendants violated Jeffrey's and Elsie's First and Fourteenth Amendment rights to be free from unreasonable interference with parent-child relationships.

Plaintiffs also asserted causes of action for section 1983—civil conspiracy, intentional infliction of emotional distress, negligence and negligence per se, false imprisonment, chemical battery, and elder abuse.

2. Pretrial Dismissals

Before trial, the claims against Allenby, Delgadillo, and Stiles were dismissed by demurrer, and we affirmed that ruling. (See *Golin II, supra,* A140652.) The City of Palo Alto and Kratzer successfully moved for summary judgment, which we affirmed. (See *Golin v. City of Palo Alto* (Dec. 9, 2016, A144680) [nonpub. opn.].) In so

ruling, we found Kratzer had probable cause to initiate the 5150 hold of Nancy and was entitled to qualified immunity from plaintiffs' section 1983 claim.

Prior to trial, plaintiffs voluntarily dismissed most of their causes of action, except for the first and second causes of action under section 1983, and the false imprisonment claim against Stanford.

3. Trial

Trial commenced in March 2015 and lasted for approximately three weeks. After the close of evidence, the court granted a partial directed verdict in favor of Stanford, holding it was immune from civil liability for its decision to detain Nancy under sections 5150 and 5250 based on the immunity provided by section 5278.[5] The court also [5] held Stanford could not be liable for its compliance with the EPO's, and its conduct did not fall below the standard of care. The only remaining issue was whether Stanford violated Nancy's constitutional rights and/or falsely imprisoned her after the EPO's expired at 5:00 p.m. on November 27, 2001.[6]

---

[5] Under section 5278, "[i]ndividuals authorized under this part to detain a person for 72-hour treatment and evaluation pursuant to Article 1 (commencing with Section 5150) . . . or to certify a person for intensive treatment pursuant to Article 4 (commencing with Section 5250) . . . shall not be held either criminally or civilly liable for exercising this authority in accordance with the law."

[6] Plaintiffs provided no substantive arguments in their briefs challenging the trial court's partial directed verdict for Stanford other than the cursory statement, "Plaintiffs assert this was

Plaintiffs moved for a directed verdict against all defendants on their first and second causes of action under section 1983. The motion was denied.

The case went to the jury on May 8, 2015. As relevant here, the jury was instructed on the responsibilities of a regional center, the circumstances where the director of a regional center or his or her designee may consent to medical treatment of a client, and the absence of a California statute "which specifically and explicitly gives authority for a regional center to require a developmentally disabled adult to take or accept services or the coordination of services by a regional center without the consent of that developmentally disabled adult or the consent of a person appointed by judicial order as his or her conservator." The jury was also instructed on the constitutional right against deprivation of liberty without due process of law; the right to family association and integrity between parent and child, including adult offspring; the state actor requirement and four circumstances where a private person may be a state actor; the defense of qualified immunity; and the "shocks the conscience" standard for constitutional violations of the right to family association and deprivation of liberty without due process of law.

The jury returned a general verdict the same day in favor of all defendants. Following the verdict, plaintiffs filed motions for JNOV, arguing the evidence

---

error." We decline to advance an argument plaintiffs failed to fully make. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

received at trial was insufficient as a matter of law to support the verdict in defendants' favor. The motions were denied.

Plaintiffs appealed.

II. DISCUSSION

Plaintiffs contend the trial court erred in denying their motions for a directed verdict and for JNOV on their section 1983 claims. Plaintiffs argue the private-party defendants (SARC, Stanford, and Mantillas) acted under color of state law for purposes of section 1983 because they willingly participated in joint activity with the state or its agents. Defendants were not entitled to qualified immunity, plaintiffs argue, because the law was clearly established in 2001 that a developmentally disabled person could not be taken from her parents or involuntarily confined without a court order, and defendants were aware Nancy was unconserved and there was no court order giving anyone authority to make decisions on her behalf after the EPO's expired. Plaintiffs further contend the trial court erred by instructing the jury to decide whether defendants were entitled to qualified immunity for their actions, and whether their actions shocked the conscience or offended the community's sense of fair play and decency. Plaintiffs argue these were questions of law for the trial court to decide.[7]

---

[7] Conversely, Buckmaster does not dispute she acted under color of state law as program manager for APS, a county agency providing protective services to elderly and dependent adults

As we shall explain, plaintiffs were not entitled to a directed verdict or JNOV because substantial evidence supported the judgment. On the issue of state action, we conclude Mantillas did not act under color of state law. While SARC acted under color of state law by willfully participating in joint action with an agent of the state (Buckmaster), SARC was entitled to assert the defense of qualified immunity under the multifactor test set forth in *Richardson v. McKnight* (1997) 521 U.S. 399, 403–404, 407–408 (*Richardson*). Furthermore, plaintiffs were not entitled to a directed verdict or JNOV against SARC and Buckmaster on their qualified immunity defenses because their conduct amounted to judgment calls made in a legally uncertain environment. Nor were plaintiffs entitled to a directed verdict or JNOV against Stanford because the challenged conduct did not shock the conscience or offend the community's sense of fair play and decency. Finally, even if the trial court erred in directing the jury to decide questions of law, these were nonconstitutional procedural errors for which prejudice is not presumed, and plaintiffs failed to demonstrate prejudice.

A. Standard of Review

"[A] motion for a directed verdict is in the nature of a demurrer to the evidence. [Citations.] In determining such a motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence. [Citation.] A

---

who may be subject to neglect, abuse, or exploitation, or who are unable to protect their own interest. (§ 15751.)

directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629–630 (*Howard*).) An appeal from the denial of a directed verdict is "functionally equivalent to contending there was insufficient evidence to support the jury verdict," and thus, error will only be shown if there was no substantial evidence in support of the verdict. (*Id.* at p. 630.)

A motion for judgment notwithstanding the verdict is "'absolutely the same'" as the power to direct a verdict. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327.) The motion "may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

B. Section 1983

"A [section] 1983 plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law. [Citation.] While generally not applicable to private parties, a [section] 1983 action can lie against a private party when 'he is a willful participant in joint action with the State or its agents.'" (*Kirtley v. Rainey* (9th Cir. 2003) 326 F.3d 1088, 1092 (*Kirtley*).)

1. "Under Color of State Law"

Federal law governs whether a private party acted under color of state law, and we start with the presumption that conduct by private actors is not state action. (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395–396.) "[Courts] recognize at least four different criteria, or tests, used to identify state action: '(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.' [Citations.] Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." (*Kirtley, supra*, 326 F.3d at p. 1092.) "'While these factors are helpful in determining the significance of state involvement, there is no specific formula for defining state action.' [Citations.] Instead, 'contemporary decisions stress the necessity of a *close nexus* between the state and the challenged conduct rather than application of a mechanistic formula.' [Citations.] 'Under any formula, however, the inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case.' [Citation.] 'Only by sifting facts and weighing circumstances can the

nonobvious involvement of the State in private conduct be attributed its true significance.'" (*Sutton v. Providence St. Joseph* Medical Center (9th Cir. 1999) 192 F.3d 826, 836, italics added by *Sutton*.)

"The extent of state involvement in the action is a question of fact." (*Lopez v. Dept. of Health Services* (9th Cir. 1991) 939 F.2d 881, 883.) However, the ultimate question of whether a private party is a state actor for section 1983 purposes "is a mixed question of fact and law and is thus subject to our *de novo* review." (*Taylor v. Charter Medical Corp.* (5th Cir. 1998) 162 F.3d 827, 830–831; *Duke v. Smith* (11th Cir. 1994) 13 F.3d 388, 392.)

There is no dispute SARC, Stanford, and Mantillas are private parties.[8] Plaintiffs contend these defendants were nevertheless state actors under the joint action and governmental nexus tests because they conspired and acted jointly with APS and PAPD and used court procedures to coordinate Nancy's placement.[9] Plaintiffs also

---

[8] Conversely, Buckmaster does not dispute she acted under color of state law as program manager for APS, a county agency providing protective services to elderly and dependent adults who may be subject to neglect, abuse, or exploitation, or who are unable to protect their own interest. (§ 15751.)

[9] Plaintiffs also contend SARC is a state actor under the public function test because the care and protection of developmentally disabled persons is a state obligation. However, plaintiffs abandoned this theory at trial and cannot revive it on appeal. (Carmichael v. Reitz (1971) 17 Cal.App.3d 958, 969.)

argue APS provided significant encouragement to the other defendants to place Nancy in a residential care facility, and the defendants cooperated with APS to achieve that end.

SARC and Mantillas raise several arguments as to why they did not act under color of state law.[10] SARC argues the public function, government compulsion, and government nexus tests are not met merely because a private business is subject to state regulation. Even where the state directs a regional center like SARC to coordinate services, SARC contends the state does not control how SARC exercises its judgment as to the coordination of those services. SARC further argues the joint activity test was not met because (1) there was no evidence of a conspiracy, as plaintiffs dismissed their conspiracy claim before trial; (2) the evidence showed, at most, mere cooperation among SARC and the public actors, which does not rise to the level of state action as a matter of law; and (3) there was ample evidence for the jury to conclude the public actors did not insinuate themselves into positions of interdependence with SARC in its selection of placement for Nancy, or in SARC's continued monitoring of Nancy at Embee Manor.

Mantillas argues she did not act under color of state law because there was no evidence of a conspiracy involving her, nor any joint action between her and the public actors. Mantillas contends she had no involvement in securing the 5150 hold, the

---

[10] Stanford also argues it was not a state actor and adopts the arguments of SARC and Mantillas.

EPO's, or in making the determination as to whether Nancy should have any contact with her parents or needed to be conserved. Rather, Mantillas claims she merely entered into a contract with SARC, a nonprofit corporation, to provide services to Nancy.

Both SARC and Mantillas rely on the unpublished federal court decision in *McHone v. Far Northern Reg'l Ctr.* (N.D.Cal. Jan. 5, 2015, Case No. 14-cv-03385-EDL) 2015 U.S.Dist. Lexis 1239 (*McHone*), which held a regional center that contracted with DDS to provide services and support to developmentally disabled individuals was not a state actor. *McHone* found the regional center was not engaged in an exclusive government function for purposes of the public function test because there was a division of labor between the state and private entities in the provision of services and care to developmentally disabled individuals. (*Id.* at pp. *14–*25.) The court further held the manner in which the regional center performed its obligations was not compelled by the state for purposes of the government compulsion test, and either the receipt of state funds nor extensive regulation by the state was sufficient to convert the regional center into a state actor. (*Id.* at p. *28.)

Notably, *McHone* did not address the joint activity test, which plaintiffs principally rely upon here. Furthermore, in *McHone*, "there [were] no allegations that the state had any involvement in [the patient's] admission to [the residential care facility] or any other of the alleged acts that occurred there." (*McHone, supra,* 2015 U.S.Dist. Lexis 1239 at p. *28.) By contrast (as we explain more fully below), the undisputed evidence in this case shows the direct involvement of APS, through Buckmaster, in

the efforts to find placement and initiate conservatorship proceedings for Nancy. Thus, *McHone,* even if persuasive in all other respects, does not dispose of all the issues raised by plaintiffs in this case.

"Under the joint action test, 'courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights.' [Citation.] The test focuses on whether the state has '"so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity."' [Citation.] A plaintiff may demonstrate joint action by proving the existence of a conspiracy or by showing that the private party was 'a willful participant in joint action with the State or its agents.'" (*Franklin v. Fox* (2002) 312 F.3d 423, 445 (*Franklin*).)[11]

"Mere cooperation" between private and public actors will not support a finding of state action. (See *Lansing v. City of Memphis* (6th Cir. 2000) 202 F.3d 821, 831 (*Lansing*).) The law requires, "at a minimum, some overt and significant state participation in the challenged action" (*Hoai v. Vo* (D.C. Cir. 1991) 935 F.2d 308, 313) or "a substantial degree of cooperation before imposing civil liability for actions by private individuals that impinge on civil rights" (*Franklin, supra,* 312 F.3d at p. 445). In *Franklin,* a defendant who was convicted of murder alleged his daughter conspired with the district attorney to violate his constitutional rights. (*Id.* at p. 428.) In

[11] Plaintiffs' dismissal of their conspiracy cause of action did not foreclose their ability to prove state action, as the joint action test can be satisfied by proving conspiracy or willful participation in joint action with the state. (*Franklin,* supra, 312 F.3d at p. 445.)

concluding the daughter was not a state actor under the joint action test, the court found no evidence of any conspiracy or joint action between the daughter and the district attorney. "Franklin offers no evidence that [his daughter] made repeated requests or solicited [the district attorney's] input on the types of questions she should ask her father. It is also undisputed that the jailhouse visit was [his daughter's] idea, and not a state-initiated effort to use her to extract her father's confession. . . . [T]he government did not sufficiently insinuate itself into [the daughter's] jailhouse visit to transform her private actions into ones fairly attributable to the state." (*Id.* at p. 445.) The *Franklin* court distinguished the case of *Howerton v. Gabica* (9th Cir. 1983) 708 F.2d 380, where a landlord was engaged in joint action with police officers to evict a tenant. The court in *Howerton* found there was "more than a single incident of police consent to 'stand by' in case of trouble" and the 11 Plaintiffs' dismissal of their conspiracy cause of action did not foreclose their ability to prove state action, as the joint action test can be satisfied by proving conspiracy *or* willful participation in joint action with the state. (*Franklin, supra,* 312 F.3d at p. 445.) defendants "repeatedly requested aid by the police to effect the eviction, and the police intervened at every step." (*Id.* at pp. 384, 385.)

In light of these legal authorities, we have no trouble concluding Mantillas was not a state actor. The evidence at trial established Mantillas was contacted by SARC, a nonprofit corporation, to provide residential placement for Nancy, and plaintiffs cite no evidence of cooperation or coordination between Mantillas and any state agent in making these arrangements. Nor do plaintiffs cite any evidence of Mantilla's

involvement in the discussions and meetings between SARC, Stanford, Kratzer, and Buckmaster prior to Nancy's transfer to Embee Manor. That Mantillas permitted visits (supervised by Buckmaster) between Nancy and her parents merely demonstrates cooperation by Mantillas with a court order, which does not satisfy the joint action test. (*Lansing, supra,* 202 F.3d at p. 831.) We conclude, as a matter of law, Mantillas did not act under color of state law.

We reach a different conclusion for SARC because, on the record before us, we think its private conduct is fairly attributable to the state. It was undisputed APS initially asked SARC to coordinate residential placement for Nancy. Thereafter, APS, PAPD, and SARC worked together to coordinate a plan for Nancy, and Buckmaster was in frequent contact with representatives from SARC, informing the regional center of the EPO's, the trial court's recommendation of a conservatorship for Nancy, and the police's intent to charge and arrest Jeffrey and Elsie for felony dependent adult abuse. During their deliberations, Buckmaster emphasized to Kinderlehrer and Liske the importance of obtaining a conservatorship for Nancy, and Kinderlehrer agreed to request that DDS initiate conservatorship proceedings. Finally, Buckmaster participated in the November 26, 2001 meeting at Stanford, at which Liske of SARC was present, and supervised the visits between Nancy and her parents at Embee Manor after the arrests.

Even under the deferential standard of review applicable here, there is simply no denying the overt and continuing involvement of Buckmaster in the efforts to obtain placement and a conservatorship for Nancy. Nor is there any dispute SARC

willfully participated in deliberations and planning with Buckmaster. Therefore, Buckmaster must be recognized as a joint participant in the challenged activity. (See *Jensen v. Lane County* (9th Cir. 2000) 222 F.3d 570, 575 (*Jensen*) [finding state action where doctor and county were involved in significant consultation regarding "complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others"].)

SARC argues no state actors were involved in its selection of Embee Manor as Nancy's placement facility or in its periodic monitoring of Nancy after her placement. But this argument conspicuously ignores Buckmaster's significant prior involvement, which we have outlined above. And furthermore, it cannot be said Buckmaster was no longer involved after Nancy's placement, since she supervised the visits between Nancy and her parents at Embee Manor.

Stanford argues it was not involved in any state action after 5:00 p.m. on November 27, 2001. We need not decide whether Stanford acted under color of state law, nor assuming it was a state actor whether it was entitled to qualified immunity, because the conduct of Stanford's personnel was not a constitutional violation as it did not "shock the conscience."

The challenged conduct, as limited by the partial directed verdict in Stanford's favor, was the refusal of two unnamed Stanford employees to disclose Nancy's whereabouts to Elsie on November 27, 2001.

"To establish a substantive due process violation, [plaintiffs] must demonstrate that a fundamental right was violated and that the conduct shocks the conscience."

(*Akins v. Epperly* (8th Cir. 2009) 588 F.3d 1178, 1183.) "'Conduct intended to injure will generally rise to the conscience-shocking level, but negligent conduct falls 'beneath the threshold of constitutional due process.' [Citation.] Deliberate indifference or recklessness falls somewhere between negligent and intentional actions. [Citation.] This middle ground is 'a matter for closer calls.' [Citation.] [¶] The Supreme Court has adopted a context-specific approach in determining whether deliberately indifferent or reckless conduct is egregious enough to state a substantive due process claim." (*Ibid.*)

In fast-paced circumstances, such as a police officer's response to an urgent threat to public safety, the purpose-to-harm standard applies. (*Porter v. Osborn* (9th Cir. 2008) 546 F.3d 1131, 1139.) "At the other end of the spectrum are situations . . . where 'extended opportunities to do better are teamed with protracted failure even to care.' [Citation.] Then, 'indifference is truly shocking.' [Citation.] Similarly, we have held that where officers have ample time to correct their obviously mistaken detention of the wrong individual, but nonetheless fail to do so, the suspect's family members need only plead deliberate indifference to state a claim under the due process right to familial association." (*Ibid.*)

Substantial evidence supported the conclusion Nancy's case was an emergency situation subject to the purpose-to-harm standard, as opposed to circumstances in which Stanford had ample time to take less drastic measures but acted with protracted and deliberate indifference. As the testimony established at trial, there was a sense of "urgency" due to Jeffrey's and Elsie's prior run-ins with the law and their

impending arrest, and there was insufficient time to obtain even a temporary conservatorship for Nancy. There was no evidence suggesting the two unnamed Stanford employees intended to harm Nancy and her parents, or were even aware, in the moment, that refusing to disclose Nancy's whereabouts to Elsie would result in an extended separation between Nancy and her parents. Even if the unnamed employees knew they were furthering Nancy's placement at Embee Manor by refusing to disclose her whereabouts to Elsie, Dr. Hall's testimony that it was within the standard of care for Stanford to transfer Nancy to a facility chosen by SARC was substantial evidence supporting the nonconscience-shocking nature of their actions. Thus, under the appropriate context-specific approach, we conclude plaintiffs were not entitled to a directed verdict or JNOV because it did not shock the conscience for Stanford Hospital personnel to refuse, in the urgency of the moment, to divulge to Elise Nancy's whereabouts.

To summarize, we conclude, as a matter of law, SARC acted under color of law because it was a willful participant in joint action with the state or its agents. Mantillas, however, did not act under color of law and was therefore not liable under section 1983. And Stanford's conduct did not "shock the conscience." Next, we discuss whether SARC, as a private party, was entitled to qualified immunity.[12]

---

[12] There is no dispute Buckmaster, as program manager for APS, is entitled to assert qualified immunity in this case.

2. Qualified Immunity

Qualified immunity shields government 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* (1982) 457 U.S. 800, 818.) It "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. [Citations.] Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." (*Wyatt v. Cole,* 504 U.S. 158, 167 (1992) (*Wyatt*).)

a. Qualified immunity for private parties

In denying plaintiffs' motions for directed verdict and JNOV, the trial court implicitly found SARC to be entitled to the defense of qualified immunity. In determining whether qualified immunity should be extended to private parties performing public or quasi-public functions, two factors are considered: (1) whether there is a "'firmly rooted'" tradition of applicable immunity, and (2) whether the purposes underlying government employee immunity (e.g., protecting the public from unwarranted timidity on the part of public officials, and ensuring talented candidates were not deterred by the threat of damage suits from entering public service) warrant extension of immunity. (*Richardson, supra,* 521 U.S. at pp. 404–405, 407–408.)

In *Wyatt*, the Supreme Court held individuals who used a state replevin law to compel the local sheriff to seize disputed property from a former business partner were not entitled to seek qualified immunity. The court held the reasons for extending qualified immunity were not furthered in that case because the private parties "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." (*Wyatt, supra*, 504 U.S. at p. 168.) The court concluded extending immunity to them would "have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service." (*Ibid.*)

Wyatt was followed in *Richardson*, supra, 521 U.S. 399, where the Supreme Court held private prison guards employed by a private prison management firm were not entitled to qualified immunity. The court concluded there was no firmly rooted tradition of immunity for a private prison guard (id. at p. 407), and the special policy considerations justifying government employee immunity were not present because (1) the threat of competition from other private corrections firms would prevent unwarranted timidity by the guards, (2) insurance coverage requirements (which increase the likelihood of employee indemnification) reduces the employment-discouraging fear of unwarranted liability, (3) private firms can offset any increased employee liability risk with higher pay or extra benefits, and (4) the distraction of litigation alone was insufficient to justify immunity (*id.* at pp. 409–412). *Richardson* expressly limited its holding to the factual context in which it was brought, e.g., "a private firm, systematically organized to assume a major lengthy administrative task

(managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms." (*Id.* at p. 413.)

In *Filarsky v. Delta,* 566 U.S. 377 (2012) (*Filarsky*), the Supreme Court held a private attorney hired part-time by the city to conduct an internal investigation was entitled to qualified immunity. As to the firmly rooted tradition factor, the court observed that at the time section 1983 was enacted, "private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State," and because the court found many examples of individuals receiving immunity while engaged in public service even on a temporary or occasional basis, "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." (*Filarsky*, at pp. 385, 389.) The court also found the purposes of governmental immunity would be furthered by extending immunity to the private attorney in that case because it would protect the government's ability to perform its traditional functions by avoiding unwarranted timidity in the performance of public duties and not deterring talented candidates from public service. (*Id.* at pp. 388–391.) *Filarsky* distinguished *Wyatt* as a case involving defendants "who were using the mechanisms of government to achieve their own ends," as opposed to "individuals working for the government in pursuit of government objectives [who] are 'principally concerned with enhancing the public good.'" (*Filarsky*, at p. 392.) The court also distinguished *Richardson* as "a self-consciously 'narrow[ ]'

decision" that "was not meant to foreclose all claims of immunity by private individuals." (*Filarsky*, at p. 393.)

With these cases in mind, we turn to the parties' arguments regarding qualified immunity for SARC. Plaintiffs mainly rely on *Wyatt* to contend private persons who conspire with state officials to violate civil rights are not entitled to qualified immunity. However, *Wyatt* involved the "very narrow" question of whether qualified immunity "is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." (*Wyatt, supra*, 504 U.S. at pp. 168–169.) As made clear in *Filarsky*, *Wyatt*'s limited holding does not prevent the extension of qualified immunity to private individuals working for the government. (*Filarsky, supra*, 566 U.S. at p. 392.)

Still, confining *Wyatt* to its facts does not necessarily resolve the question of whether SARC is entitled to qualified immunity. We must also consider the relevant factors identified in *Richardson*. The parties' briefing in this regard is woefully inadequate because they fail to address the firmly rooted tradition factor. The history of service providers for the developmentally disabled in California and the robustness of market competition in SARC's field are not readily ascertainable from the record or briefing on appeal. Because it is plaintiffs' burden to provide an adequate record on appeal showing error, the consequence for these inadequacies falls squarely upon them. (See *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187; see also *Sain v. Wood* (7th Cir. 2008) 512 F.3d 886, 893 [no plain error in district

court's implied finding physician was entitled to qualified immunity given absence of record addressing *Richardson* factors].)

The record otherwise discloses SARC is a nonprofit corporation under contract with DDS to provide services and support to the developmentally disabled. This is substantial evidence supporting the inference SARC works in pursuit of state government objectives and is principally concerned with enhancing the public good. (See § 4501[declaring California's responsibility and obligation to provide services and supports to persons with developmental disabilities].) There was no contrary evidence suggesting SARC acted to achieve its own ends in placing Nancy at Embee Manor.

On this record, we believe the purposes of governmental immunity would be furthered by extension of qualified immunity to SARC because it would allow SARC employees to serve the state with the decisiveness and judgment required by the public good, which is especially important when the care of severely developmentally disabled persons calls for difficult decisions to be made. Extension of qualified immunity would also ensure talented candidates are not deterred from working for SARC by the threat of damage suits. And because SARC is a nonprofit corporation and there is no evidence in the record regarding market competition among regional centers in California, we cannot assume there are private market incentives that would moderate the policy concerns regarding employee timidity or the employment-discouraging

fear of unwarranted liability.[13] Accordingly, on this record, we find SARC is entitled to qualified immunity.

b. Plaintiffs were not entitled to a directed verdict or JNOV on SARC and Buckmaster's defense of qualified immunity

The qualified immunity inquiry turns on the "'objective legal reasonableness'" of the acts "assessed in the light of the legal rules that were 'clearly established' at the time [the action] was taken." (*Anderson v. Creighton* (1987) 483 U.S. 635, 639.) The court must determine whether there has been a violation of a constitutional right and whether the right was clearly established in the factual context of the case. (*Saucier v. Katz* (2001) 533 U.S. 194, 200–201, reversed on other grounds in *Pearson v. Callahan* (2009) 555 U.S. 223, 227.)

"'[C]learly established law' should not be defined 'at a high level of generality.'" (*White v. Pauly* (2017) ___ U.S. ___ [137 S.Ct. 548, 552] (*White*).) Rather, "the clearly

---

[13] Notably, in *Halvorsen v. Baird* (9th Cir. 1998) 146 F.3d 680, the Ninth Circuit held a private, nonprofit detoxification firm under contract to the state to provide involuntary detoxification services was not entitled to qualified immunity. Despite the firm's nonprofit status, the court held concerns about employee timidity were moderated by market factors because "if a detox center does a bad job, more effective competitors can bid on the municipal contracts." (Id. at p. 686.) Given the record before us, we do not think Halvorsen is controlling because plaintiffs failed to provide a record showing the degree of market competition in SARC's field.

established law must be 'particularized' to the facts of the case. [Citation.] Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.' " (*Ibid.*) " ' "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." ' " (*Id.* at p. 551.) This standard gives officials " 'breathing room to make reasonable but mistaken judgments about open legal questions.' " (*Ziglar v. Abbasi* (2017) ___ U.S. ___ [137 S.Ct.1843, 1866].) Put simply, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " (*Sloman v. Tadlock* (9th Cir. 1994) 21 F.3d 1462, 1466.)

There is no doubt the law in 2001 clearly established that a civil commitment in the mental health context constituted a significant deprivation of liberty requiring due process (*Addington v. Texas* (1979) 441 U.S. 418, 426), and that the seizure of a mentally disturbed person must be supported by probable cause (*Maag v. Wessler* (9th Cir. 1992) 960 F.2d 773, 775). Also clearly established was the constitutional right of parents and children to family association without unreasonable governmental interference (*Wallis v. Spencer* (9th Cir. 1999) 202 F.3d 1126, 1136), and this right applied to parents and their disabled adult offspring (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 685–686 (*Lee*)).

This high level of generality, however, is insufficient for assessing the objective legal reasonableness of SARC and Buckmaster's conduct in the particular factual context of this case. Plaintiffs have not cited any case holding or suggesting reasonable officials in the positions of SARC and Buckmaster would have understood their

efforts to protect an unconserved, developmentally disabled adult from further parental abuse and neglect would constitute a violation of clearly established law. Nor have we found a case with similar facts which places the statutory or constitutional questions raised in this case"'"beyond debate." ' " (*White, supra,* 137 S.Ct. at p. 551.)

Lee, cited by plaintiffs, is distinguishable. In that case, the Ninth Circuit held it was error to dismiss a complaint by the mother of a developmentally disabled man (Sanders) who was told by the police that her son's whereabouts were unknown, even though the police knew or should have known Sanders had been falsely arrested and extradited to another state. (*Lee, supra,* 250 F.3d at pp. 685–686.) Notably, the mother in *Lee* brought suit individually and as Sanders's conservator (*id.* at p. 677), whereas here, Jeffrey and Elsie were not Nancy's conservators. More importantly, *Lee* did not involve a situation where the police knew the parent of the developmentally disabled individual was accused of and about to be arrested for dependent adult abuse. Thus, *Lee* hardly provides clearly established law for the unique situation encountered by SARC and Buckmaster.

SARC's belief in its authority to unilaterally place Nancy at Embee Manor was not completely unmoored from supporting legal authority. SARC had a "continuing responsibility" to Nancy, "both in choice of placement and in initial decision of referral." (*In re Borgogna* (1981) 121 Cal.App.3d 937, 946.) Rogers confirmed in his testimony, "Once a consumer of services, always a consumer of services," even if the individual is not currently receiving services. Additionally, the LPS Act provides: "An individual who is determined by any regional center to have a developmental

disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous." (§ 4643.5, subd. (b).) Nancy was a SARC consumer since childhood, and the original determination of her developmental disability has not been reversed. It was reasonable for SARC to conclude Nancy required residential care services in light of her then-current living conditions and her parents' impending arrest.

While a consumer's eligibility to continue receiving services from SARC is not the same thing as SARC's unilateral authority to decide on placement, in this case, the decision to place Nancy while temporarily withholding her whereabouts from her parents did not violate clearly established law. The LPS Act calls for participation from parents and families in the provision of services only where "appropriate" and "feasible" (§ 4501), and here, SARC reasonably concluded it was not appropriate or feasible to give Jeffrey and Elsie a decisionmaking role in Nancy's placement given their history of abuse and neglect and impending arrest. The constitutional right to familial association is not absolute and must yield to the state's interests in protecting a child from abusive parents. (*Caldwell v. LeFaver* (9th Cir. 1991) 928 F.2d 331, 333.) Even if SARC misjudged the balance of these competing interests, the evidence did not show plain incompetence or a knowing violation of the law.

Plaintiffs cite no evidence or authority rebutting the testimony of SARC's witnesses that they were aware of no statutory provision requiring SARC to obtain a court order before coordinating residential placement for an unconserved adult.

Plaintiffs construe various portions of the testimony of Kinderlehrer, Buckmaster, Liske, and Dr. Hayward as demonstrating their awareness a court order was required. However, we must view this testimony, and all reasonable inferences drawn from it, in favor of SARC and Buckmaster. (*Howard, supra,* 72 Cal.App.4th at pp. 629–630.) Accordingly, the discussions about conservatorship could have been attempts to find a long-term solution for Nancy, not admissions that her placement at Embee Manor without a conservatorship was unlawful. The discussions about extending the EPO's could have been efforts to formulate a contingency plan in case SARC could not obtain placement before the EPO's expired. When SARC found placement for Nancy at Embee Manor before the EPO's expired, this dispensed with the need for an extension.[14] Finally, Dr. Hayward's testimony that it was "impossible" to have Nancy placed without a temporary conservatorship must be viewed in context. His full testimony was placement "might" be impossible because "some facilities that [Nancy] might have been eligible for might have required a temporary conservatorship for her to go there." He went on to say it "could have been necessary; doesn't mean that it was absolutely necessary." As it turned out, Embee Manor did not require a temporary conservatorship to accept placement for Nancy.

As for Buckmaster, the statutory purpose of APS is to protect elder or dependent adults who cannot care for and protect themselves, and APS agencies are

---

[14] Lutticken testified as much, stating because Nancy "was placed before 5:00 p.m., . . . it wasn' t necessary to extend the emergency protective restraining order."

statutorily required to "take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety." (§ 15600, subd. (i).) Buckmaster testified when APS social workers investigate whether elder or dependent adults need protective services, they identify and coordinate appropriate services. Given Buckmaster's knowledge of Jeffery's and Elsie's past runins with the law, their alleged history of abuse and neglect of Nancy, and their impending arrest for felony dependent adult abuse, it was not unreasonable for Buckmaster to ask SARC to find placement for Nancy and to ask Stanford to temporarily prohibit contact between Jeffrey and Elsie and their daughter. Buckmaster's judgment, even if mistaken, did not amount to plain incompetence or a knowing violation of the law.

Given the standard of review necessitated by the posture in which the issue of qualified immunity comes before us, we cannot conclude the evidence and reasonable inferences from the evidence, viewed in the light most favorable to SARC and Buckmaster, permit only a single conclusion that a reasonable official in their positions would have believed the challenged conduct to violate clearly established law. Rather, substantial evidence supports the conclusion that the legal contours of plaintiffs' 14 Lutticken testified as much, stating because Nancy "was placed before 5:00 p.m., . . . it wasn't necessary to extend the emergency protective restraining order." constitutional rights in the particular context of this case were uncertain, and SARC and Buckmaster made judgment calls to keep Nancy safe. Qualified immunity protects such "judgment calls made in a legally uncertain environment." (*Ryder v. United*

States (1995) 515 U.S. 177, 185.) Thus, plaintiffs were not entitled to a directed verdict or JNOV on SARC and Buckmaster's defense of qualified immunity.

C. Plaintiffs Fail to Demonstrate Prejudice from the Claimed Instructional Errors

Plaintiffs contend the trial court committed reversible error in instructing the jury to decide whether defendants' conduct (1) was protected by qualified immunity, and (2) met the conscience-shocking standard for substantive due process.[15] Plaintiffs argue these are matters of law for the court, not the jury, and under *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 (*Sandquist*), a determination by the wrong

---

[15] The jury instructions were phrased to direct the jury to make these determinations. The "Shock the Conscience Standard" instruction provided, in relevant part: "In order to be a constitutional violation of the right of family association or deprivation of liberty without due process of law, the state actor's harmful conduct must shock the conscience or offend the community's sense of fair play and decency. . . . [¶] In making this determination, you should consider whether the circumstances allowed the state actor time to fully consider the potential consequences of his, her or its conduct." (Italics added.) The "Qualified Immunity" instruction stated: "If you find that a Defendant is a state actor and that the Defendant acted in violation of 42 U.S.C. Section 1983 as to a particular Plaintiff, then you must decide whether that Defendant is excused from liability to that Plaintiff because of the affirmative defense of qualified immunity." (Italics added.)

decision maker results in a miscarriage of justice requiring reversal without further harmless error analysis.

We agree these matters were ultimately for the trial court's determination. "[Q]ualified immunity is a question of law, not a question of fact" (*King v. State of California* (2015) 242 Cal.App.4th 265, 289), and "[t]he threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court" (*Act Up!/Portland v. Bagley* (9th Cir. 1993) 988 F.2d 868, 873). " 'The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.' " (*King*, at p. 289) Likewise, "[w]hether the alleged conduct shocks the conscience is a question of law." (*Akins v. Epperly, supra*, 588 F.3d at p. 1183.)

Reversal, however, is not automatic. Unlike the erroneous *denial* of a jury trial, which is reversible per se, "the improper *submission* of an issue to the jury is nothing more than a nonconstitutional procedural error," which requires a showing of actual prejudice under the traditional harmless error analysis. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1396, italics added.) Under the "traditional harmless error analysis for nonconstitutional error, . . . prejudice is not presumed. [Citations.] Rather, the presumption is indulged that [plaintiffs] had a fair trial, and [plaintiffs have] the burden of showing otherwise." (*Id.* at p. 1397.) To show prejudice, plaintiffs must show a miscarriage of justice, which should be declared only when the court, after examining the entire cause, including the evidence, is of the opinion it is reasonably probable a result more favorable to the appealing party would have been

reached absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Plaintiffs provide little substantive argument as to how they were prejudiced by the erroneous submission of these issues to the jury. They suggest the jury was not capable of determining these matters, were not instructed how to assess whether a reasonable official in defendants' position could think the challenged conduct was lawful, and may have decided the case on prejudice, passion, and gut feeling. This speculation, however, falls short of demonstrating a reasonable probability of a more favorable result absent the error. As we have discussed, the objective legal reasonableness of SARC and Buckmaster's conduct hinged largely on factual circumstances the jury was capable of understanding and taking into consideration, such as their awareness of Jeffrey's and Elsie's history of run-ins with the law and neglect of their daughter, and their impending arrest. The same goes for the conscience-shocking analysis, which was based on evidence the jury was capable of appreciating regarding the emergency nature of the situation and the lack of evidence of intentional harm by Stanford personnel.

Plaintiffs cite several cases holding there is prejudice when an erroneous jury instruction may have been the basis for the verdict, and in those situations, the court should not speculate upon the basis of the verdict. (See *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 774, overruled in part on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102–103.) But these authorities do not assist plaintiffs because the instant case does not involve a legally

erroneous instruction. Rather, at issue here is the procedural error in having the jury, rather than the court, make the legal determinations set forth in the instructions, an error which requires a showing of actual prejudice. (*Beasley v. Wells Fargo Bank*, *supra*, 235 Cal.App.3d at p. 1396.)

Plaintiffs' reliance on *Sandquist* is also misplaced, as that case involved the factually and procedurally distinct context of a court denying the parties' right to have their contractually agreed-upon decision maker (the arbitrator) decide whether an arbitration agreement permitted classwide arbitration. Of note, all the cases cited by *Sandquist* as requiring automatic reversal involved the *denial* of the right to a jury trial. (See *Sandquist*, *supra*, 1 Cal.5th at p. 261, citing *People v. Blackburn* (2015) 61 Cal.4th 1113, 1135 [total deprivation of jury trial in mentally disordered offender commitment proceeding without valid waiver requires automatic reversal]; *People v. Collins* (2001) 26 Cal.4th 297, 311 [waiver of jury trial obtained by trial court's assurance of unspecified benefit was not valid and error amounted to structural defect requiring reversal without determination of prejudice]; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [denial of right to jury trial on equitable indemnity cause of action was reversible per se].) As we have stated, the improper submission of an issue to the jury is not reversible per se in the same way as the denial of the right to a jury determination. (See *Beasley v. Wells Fargo Bank*, *supra*, 235 Cal.App.3d at p. 1396.)

Finally, in our view, any error in having the jury make these determinations was remedied by plaintiffs' postverdict JNOV motions. The same issues regarding qualified immunity and the "shock the conscience" standard came before the trial

court in the parties' briefing on the JNOV motions. Thus, the correct decision maker did have the opportunity to make the final determination on these questions of law, rendering the earlier instructional error harmless.

III. DISPOSITION

For the foregoing reasons, we conclude the trial court correctly denied plaintiffs' motions for a directed verdict and JNOV, and the claimed instructional errors were harmless. Accordingly, the judgment is affirmed. Each party shall bear their own costs on appeal.

_____

Margulies, Acting P. J.

We concur:

_____

Banke, J.

_____

Kelly, J.*

A145752

Golin v. San Andreas Regional Center

* Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appendix 2
Order of the
California Court of Appeal
Denying Petition for Rehearing

COURT OF APPEAL,
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

JEFFREY GOLIN et al.,

Plaintiffs and Appellants,

v.

SAN ANDREAS REGIONAL CENTER et al.,

Defendants and Respondents.

A145752

San Mateo County Super. Ct. No. CIV507159

BY THE COURT:

The petition for rehearing is denied.

Date: 4/22/2019, Margulies, J., Acting P.J.

Appendix 3
Order of the
California Supreme Court
Denying Review

SUPREME COURT
FILED
July 17 2019
Jorge Navarrete clerk

Deputy

Court of Appeal, First Appellate District, Division One
No. A145752

S8255631

IN THE SUPREME COURT OF CALIFORNIA
En Banc

JEFFREY R. GOLIN et al.,
Plaintiffs and Appellants,
v.
SAN ANDREAS REGIONAL CENTER et al.,
Defendants and Respondents.

The petition for review is denied.

Liu and Cuellar, JJ., were recused and did not participate.

CANTIL-SAKAUYE
Chief Justice