No.

In The
Supreme Court of the United States

SARA DEES,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-56621 and 17-56710

SARA DEES; L.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut; G.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut,
Plaintiffs-Appellees / Cross-Appellants

v.

COUNTY OF SAN DIEGO,
Defendant-Appellant / Cross-Appellee

[Argued and Submitted October 23, 2019
Filed May 27, 2020]

Before: Andrew J. Kleinfeld, Consuelo M. Callahan, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson;
Partial Concurrence and Partial Dissent by Judge Callahan

OPINION

R. NELSON, Circuit Judge:

The County of San Diego appeals the district court's post-verdict grant of judgment as a matter of law on Fourth and Fourteenth Amendment claims regarding the alleged seizure of a minor, L, by a social worker. Cross-Appellants L and Sara Dees appeal the district court's grant of summary judgment on their Fourteenth Amendment claims regarding the County's false letter allegedly impairing their right to familial association.

We reverse the district court's grant of judgment as a matter of law on L and Sara's respective Fourth and Fourteenth Amendment claims regarding the seizure. We also reverse the district court's conditional grant of a new trial to Sara on her seizure claim. We affirm the district court's judgment in favor of the County employees on L and Sara's Fourteenth Amendment claims involving the false letter. Finally, we affirm the district court's conditional grant of a new trial on L's Fourth Amendment claim.

I

On February 7, 2013, Ka and Ky's biological mother, Kelly Hunter, reported to San Diego County's Health and Human Services Agency ("Agency") that her ex-husband, Robert Dees, had taken naked photos of their thirteen-year- old daughter, Ka. Hunter's referral was assigned to County social worker Caitlynn McCann.

Pursuant to Agency policy, a companion referral was created for L and G because they primarily resided in the house that Robert shared with his wife, Sara. L and G are Sara's children from her prior marriage to Alfredo Gil. L, a nine-year-old girl at the

time, suffers from several cognitive disabilities. She has been diagnosed with anxiety, ADHD, and is "probably on the autism spectrum." L is also very bright, impulsive, and prone to outbursts.

McCann began her investigation by interviewing Ka and attending a police interview of Robert. Both Robert and Ka acknowledged that Robert had taken naked photos of Ka, ostensibly at Ka's request as part of a project to document her body's changes during puberty. The police, after completing their forensic interview with Robert, inspected the camera that had been used to take the photos. According to Robert, the photos of Ka had been deleted by Sara's sister, who discovered them. Robert would not allow the police to take the camera because he claimed that it also contained naked photos of him and Sara.

After McCann interviewed Robert and Ka, she interviewed L. L told McCann that Hunter was trying to "make Rob[ert] look wrong" and that Robert had not taken any nude photos of her. At the end of the day, Robert agreed, at McCann's request, to move out of the home during the investigation and to produce Ka for a forensic interview.

The next day, McCann informed Gil, L and G's biological father, that he "was going to be given full custody of . . . [his] two daughters . . . [because] their step-father had taken nude photos of" Ka. Gil picked up his daughters that day under the operative custody arrangement. He arranged for L and G to stay at their grandmother's house during the following week, even though L and G were scheduled to stay with Sara.

Sara and Robert subsequently secured legal

counsel and a hearing at which they sought "to change the custodial rights back to the . . . original custodial rights." The family court judge agreed, over Gil's objections, and ordered the children returned to Sara pursuant to the preexisting custody arrangement. Sara took back custody of L and G shortly thereafter.

After learning about the family court's decision, McCann's supervisor ordered McCann to wrap up her investigation. Agency policy required McCann to complete a final welfare check on L and G, and "a lot of loose ends. . . [and] discrepancies" still left McCann suspicious that illegal activities were taking place. McCann's suspicions were not shared by the San Diego Police Department, which closed its investigation and advised McCann that the District Attorney was not seeking a search warrant for Robert's camera. Still, McCann believed the criminal investigation was ongoing.

McCann called the Dees to arrange a final interview of L and G. L and G's grandmother, who was staying at the Dees' home, told McCann that she was not to interview L or G without an attorney present. Despite the grandmother's instruction, McCann went to L and G's school to interview them. McCann believed that school district policy allowed her to interview the kids at school in a case of suspected child abuse. The school district's policy does not require the social worker to notify the parents or to obtain parental consent, but the social worker must:

1. advise the child of the right to have school personnel present during the interview[;]

2. advise the child that (s)he may stop the interview at any time and periodically check with the child during the interview to determine if (s)he is comfortable with continuing the interview. If the child says to stop, then the [social worker] will immediately terminate the interview[;]

3. not include law enforcement in the interview[; and]

4. complete the interview within developmentally-appropriate time limits, which will never exceed 60 minutes.

McCann asked a school assistant to bring L to the administrative office. L was willing to talk with McCann. McCann told L that a school official could remain in the room, L could stop the interview at any time, and if L had any questions, McCann would try to answer them. L did not want a school official in the room during the interview and never indicated that she wanted to stop talking to McCann.

The interview lasted five minutes. McCann asked L whether Robert, despite agreeing to remain out of the house during the pendency of the investigation, was, in fact, back in the house. McCann did not ask L directly if Robert had taken nude photos of her but understood from the conversation that no such photos existed. The interview ended "naturally" when McCann finished her questions and L indicated she did not have any questions for McCann. A school official then escorted L back to her classroom.

L's emotional state during and after the interview is disputed. According to McCann, L was "diplomatic" during the interview and was not upset immediately after the interview. Sara, who happened to be in the school when L was interviewed, disputes McCann's assessment of L's emotional state. According to Sara, L was upset after the interview, screaming "CPS is here, CPS is here."

Two days later, McCann was unambiguously informed by the police that their investigation was closed. A week later, McCann closed her own investigation, finding any allegation that L was being abused "unfounded"—meaning that she concluded, under Agency policy, there had "been no shown abuse, and there [was] no basis for the allegation."

That same day, McCann sent a letter, signed by Gloria Escamilla-Huidor and Alberto Borboa (McCann's supervisors), to the family court overseeing the custody dispute between Sara and Gil. The letter stated that "[a] decision has been made to remove the child(ren) [L and G] from the custodial parent [Sara] and place [them] with the non-custodial parent [Gil] to avoid placing the child(ren) into Polinsky Children's Center, foster home or adjunct." The statement in the letter was false because L and G were never removed from Sara's custody. At trial, the County's own expert testified that the letter was "not correct" and "ma[de] no sense." McCann testified that the quoted language was "standard language . . . [that she] couldn't have edited . . . if . . . [she] wanted to" and that the letter "was sent on behalf of . . . [Gil], who was concerned about his children and was looking for custody." The letter was received by the family court, but the family court never acted on it. L and G have

remained in Sara's primary custody since February 13, 2013.

Sara and L brought multiple claims against the County and various County employees alleging, among other things, violations of their Fourth and Fourteenth Amendment rights. In particular, Sara and L brought claims against the County employees alleging violations of the Fourteenth Amendment right to familial association by sending the false letter to the family court. The County employees moved for summary judgment on those claims. Despite noting that "McCann's conduct in preparing the March 7 letter . . . [was] alarming," the district court concluded "the letter caused no harm to Plaintiffs." Accordingly, the district court granted summary judgment to McCann, Huidor, and Borboa on Sara and L's Fourteenth Amendment claims related to the false letter.

A jury trial was subsequently held on the remaining claims. At the close of the County's case, Sara and L moved, pursuant to Federal Rule of Civil Procedure ("Rule") 50(a), for judgment as a matter of law on their respective Fourteenth and Fourth Amendment claims regarding McCann's alleged seizure of L. The district court took the motion under advisement and submitted the case to the jury.

The jury returned a verdict in favor of the County on all counts. The jury answered "No" to the question, "Did Caitlin McCann violate the 4th Amendment Constitutional rights of . . . [L] when she conducted the *school interview[]*?" The jury also answered "No" to the question, "Did Caitlin McCann violate the 14th Amendment Constitutional right of Sara Dees when

she conducted the ?" Because the jury concluded no constitutional violations occurred, it did not reach whether McCann was acting pursuant to an official County policy, whether that policy caused the constitutional violations, or whether L or Sara were damaged by the constitutional violations.

L and Sara subsequently renewed their Rule 50(a) motion under Rule 50(b) and, in the alternative, sought a new trial pursuant to Rule 59. The district court granted L and Sara's renewed Rule 50 motion and conditionally granted a new trial pursuant to Rules 59 and 50(c)(1). It made the following findings:

1. McCann seized L during the school interview;

2. McCann's seizure of L was unreasonable because there was no "warrant, court order, parental consent, exigency, or at the very least, reasonable suspicion to seize and interview L";

3. McCann's unreasonable seizure of L violated Sara's Fourteenth Amendment familial association right;

4. McCann interviewed L pursuant to a County policy; and

5. the County's policy of allowing social workers to interview children caused the constitutional violations.

The County, Sara, and L filed timely notices of appeal. Accordingly, the following claims are now before us:

1. Sara and L's Fourteenth Amendment claim for familial interference regarding the false letter;

2. Sara's Fourteenth Amendment claim against the County regarding McCann's seizure of L; and

3. L's Fourth Amendment claim against the County regarding her seizure by McCann.

II

A district court's grant of summary judgment is reviewed de novo. *O'Rourke v. N. California Elec. Workers Pension Plan*, 934 F.3d 993, 998 (9th Cir. 2019).

A district court's grant of judgment as a matter of law is also reviewed de novo. *Krechman v. County of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013). We "must view the evidence in the light most favorable to the nonmoving party. . . and draw all reasonable inferences in that party's favor." *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (internal quotation marks omitted). The district court may not weigh evidence or make credibility determinations when reviewing a motion for judgment as a matter of law. *Id.* "A jury's verdict must be upheld if it is supported by substantial evidence . . . even if it is also possible to draw a contrary conclusion from the same evidence." *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007) (internal quotation marks and citation omitted).

Finally, the district court's ruling on a motion for new trial is reviewed for abuse of discretion. *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1022 (9th Cir. 2018). Indeed, "[t]he authority to grant a new trial . . . is *confided almost entirely* to the exercise of discretion on the part of the

trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (emphasis added). We may reverse a district court's grant of a new trial only if the jury's verdict is supported by the clear weight of the evidence and "must uphold the district court if any of its grounds for granting a new trial are reasonable." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999).

III

We begin with the Fourteenth Amendment claims, including Sara and L's appeal of the district court's grant of summary judgment on their claims regarding the false letter. We then turn to the district court's grant of judgment as a matter of law and, in the alternative, a new trial to Sara on her claim regarding McCann's seizure of L.

A

After the parties fully briefed their appeals, this Court issued its decision in *Capp v. County of San Diego*, 940 F.3d 1046 (9th Cir. 2019). In *Capp*, a father and his two children sued the County of San Diego and County social workers alleging violations of the First, Fourth, and Fourteenth Amendments. Specifically, the children alleged their Fourth Amendment rights were violated when the social workers seized and interviewed them during a child abuse investigation into their father. *Id.* at 1059–60. The father brought a separate Fourteenth Amendment claim, *id.* at 1060, alleging the County placed him on a child abuse monitoring list and encouraged his ex-wife to withhold the children from him while she sought custody in family court (which was ultimately denied). *Id.* & n.9. This Court affirmed the district court's dismissal of the Fourth and

Fourteenth Amendment claims. *Id.* at 1059–60. With respect to the Fourteenth Amendment claims, we stated:

> Plaintiffs do not allege that Capp *actually lost* custody of his children as a result of Defendants' alleged misconduct. Capp might have been subjected to an investigation by the Agency, but that alone is not cognizable as a violation of the liberty interest in familial relations.

Id. at 1060 (emphasis added) (footnote omitted).

Capp's holding built on *Mann v. County of San Diego*, 907 F.3d 1154 (9th Cir. 2018). In *Mann*, social workers investigating a child abuse allegation omitted exculpatory information from their application to the family court to take custody of the allegedly abused children. *Id.* at 1158. The family court granted the application, and the social workers removed the children from their parents' custody. *Id.* The social workers then took the children to a temporary shelter for children and allowed medical professionals to perform invasive medical examinations on the children, including gynecological and rectal exams. *Id.*

The parents of the children alleged that the County violated their Fourteenth Amendment substantive due process rights "when it perform[ed] the . . . medical examinations without notifying the parents about the examinations and without obtaining either parents' consent or judicial authorization." *Id.* at 1161. We reversed the lower court and agreed with the parents' position, holding "the County's failure to provide parental notice or to

obtain consent violated . . . [the parents'] Fourteenth Amendment rights." *Id.* at 1164.

Reading *Capp* and *Mann* together, our Court requires that, to establish a Fourteenth Amendment claim based on a minor being separated from his or her parents, plaintiffs must establish that an actual loss of custody occurred; the mere threat of separation or being subject to an investigation, without more, is insufficient.

B

Applying our precedent to Sara and L's Fourteenth Amendment claims regarding the false letter, we affirm the district court, but on alternate grounds.[1]

As we have described, the mere threat by a social worker to take away a child is insufficient to support a Fourteenth Amendment claim. Furthermore, the improper conduct in *Capp*, which included falsely informing the father that he had been placed on a sex offender list and actively encouraging the mother to withhold the child and seek sole custody in family court, goes well beyond the conduct at issue here. 940 F.3d at 1060. *Mann* is the same. In that case, the bases of the parents' Fourteenth Amendment claims were the gynecological and rectal exams performed on the

[1] The district court granted summary judgment to the County on Sara and L's Fourteenth Amendment claims regarding the false letter because "the letter caused no harm to Plaintiffs." This holding is difficult to reconcile with our precedent and the Supreme Court's holding that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986) (applying *Carey* to a substantive due process claim).

children without parental notification or consent. 907 F.3d at 1161. The admittedly false letter falls short of the offending conduct in *Capp* and pales in comparison to the conduct in *Mann*.

Sara's argument to the contrary is unpersuasive. She characterizes the false letter as a ticking "time bomb" waiting to go off if the family court ever reopens the case. But that analogy is pure hyperbole, especially since the family court did nothing after receiving the letter. We have no doubt that, if the family court case is ever reopened, ample evidence—and a citation to this opinion—will dissuade the family court from taking any action based on what all acknowledge is a false representation in the letter.

Sara also claims McCann violated her Fourteenth Amendment familial association right when McCann allegedly seized L at school. This presents a closer question. But again, in light of our discussion above, we conclude that *Capp* bars Sara from successfully pursuing this claim. *Capp* plainly holds that a cause of action does not lie where the social worker is accused of seizing a child and the parent has not "actually lost" control over the child. *Id.* at 1060. Here, McCann's interview of L lasted five minutes. No evidence suggests that McCann interviewed L to coerce or otherwise intimidate either Sara or L. Instead, McCann simply intended to "wrap things up." In effect, Sara never actually lost control over L. Moreover, as we hold below, *see infra* § IV.A, the district court erred in granting L judgment as a matter of law on her Fourth Amendment claim, which also precludes Sara's Fourteenth Amendment claim on the seizure. Accordingly, we reverse the district court's grant to Sara of judgment as a matter of law

and, in the alternative, a new trial.

IV

Finally, we turn to L's Fourth Amendment claim regarding her alleged seizure at school. L's claim went to the jury, which answered "No" to the question of whether "Caitlin McCann violate[ed] the 4th Amendment Constitutional rights of . . . [L] when she conducted the –?" Post-trial, the district court set aside the jury verdict and concluded that, as a matter of law, McCann unreasonably seized L. In the alternative, the district court conditionally granted a new trial to L on this claim. In doing so, the district court made several findings, but on appeal the County challenges only one finding: that the interview was an unreasonable seizure. Because we agree on de novo review with the County that *substantial evidence* supports the jury's verdict regarding the school interview, we reverse the district court's grant of judgment as a matter of law. But because the *clear weight of the evidence* does not support the jury's verdict, in combination with our healthy deference to the trial court, we affirm the grant of a new trial.

A

The Fourth Amendment protects a child's right to be free from unreasonable seizure by a social worker. *See Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 790–91 (9th Cir. 2016) (en banc). "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)). "When the actions of the [official] do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence . . . a seizure occurs if, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Whether a person is seized for purposes of the Fourth Amendment is a mixed question of law and fact. *United States v. Cormier*, 220 F.3d 1103, 1110 (9th Cir. 2000). Whether a person is being compelled to answer an official's questions, rather than freely consenting to answer them, is a question of fact. *United States v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1976).

Turning to this case, the district court inappropriately weighed the facts when it granted judgment as a matter of law. In determining whether L did not consent to the interview, the district court discounted the fact that the interview lasted only five minutes. Additionally, the district court acknowledged McCann's testimony that "L did not seem upset," but then concluded, apparently solely on the basis of Sara's testimony, that "the circumstances show that L was upset by the interview." Finally, the district court did not consider that L failed to end the conversation with McCann despite being explicitly told that she could do so. Broadly, the district court inappropriately weighed the facts before it, despite acknowledging, earlier in the proceedings, that seizure and consent are fact intensive inquires for which the jury is well suited to make the determinations.

Nor do the cases upon which the district court relied in its decision to grant L judgment as a matter of law—*Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009) *vacated in part sub nom. Camreta v. Greene*, 563 U.S. 692 (2011); *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009); *Jones v. Hunt*, 410 F.3d 1221 (10th Cir. 2005); and *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003)—compel the conclusion that L was seized and did not consent to the interview. Each case is factually distinguishable. First, in each case a police officer either conducted the interview or was present during the interview. *Greene*, 588 F.3d at 1017; *Stoot*, 582 F.3d at 913; *Jones*, 410 F.3d at 1226; *Heck*, 327 F.3d at 510. No police officer was present during McCann's interview of L. Furthermore, the interviews in *Greene*, *Stoot*, and *Jones* lasted anywhere from one to two hours. *Greene*, 588 F.3d at 1017; *Stoot*, 582 F.3d at 915; *Jones*, 410 F.3d at 1226. In *Heck*, the interview lasted twenty minutes. 327 F.3d at 510. Here, in contrast, McCann's interview of L was just five minutes. To be sure, the fact that L was nine and suffers from cognitive difficulties creates a higher probability that she did not feel free to leave or may not have consented to the interview. But, at a minimum, the factual differences between *Greene*, *Stoot*, *Jones*, and *Heck* on the one hand and this case on the other, undermines reliance on those cases here. In short, the district court erred in finding that those cases compelled the conclusion that L was seized and did not consent *as a matter of law*.

At bottom, the district court impermissibly weighed the evidence before it and concluded that L was seized and did not (or could not) consent as a matter of law. As the district court, Sara, and L all

acknowledge, the facts both support and undercut the jury's verdict. Viewing the evidence in the light most favorable to the County and granting the County all inferences therefrom, substantial evidence supports the jury's verdict. None of the caselaw cited by the district court, Sara, or L supports the conclusion that, under the facts of this case, L was seized and did not consent as a matter of law. Accordingly, we reverse the district court's grant to L of judgment as a matter of law on her Fourth Amendment claim.

B

Although we reverse the district court's grant of judgment as a matter of law to L on her Fourth Amendment claim, we affirm the district court's grant of a new trial. We acknowledge the tension in this decision. Above, we conclude that the district court erred by granting L judgment as a matter of law. Here, we conclude that the district court properly granted a new trial on the same claim. But such a decision is not unprecedented in this Circuit or our sister circuits. *See Garter-Bare Co. v. Munsingwear Inc.*, 723 F.2d 707, 716–17 (9th Cir. 1984) (reversing grant of judgment as a matter of law to a defendant while simultaneously affirming the grant of a new trial to the same defendant); *Christopher v. Florida*, 449 F.3d 1360, 1362 (11th Cir. 2006) (same).

This result is not inherently contradictory and is driven by the standard of review. The district court's ruling on a motion for new trial is reviewed for abuse of discretion instead of de novo review, which we applied above. *See OTR Wheel Eng'g, Inc.*, 897 F.3d at 1022. Indeed, "[t]he authority to grant a new trial . . . is *confided almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical*, 449

U.S. at 36 (emphasis added). The district court's decision to grant a new trial must stand unless the jury's verdict is supported by the clear weight of the evidence and we "must uphold the district court if any of its grounds for granting a new trial are reasonable." *4.0 Acres of Land*, 175 F.3d at 1139.

With this highly deferential standard of review firmly in mind, we turn to the district court's opinion. The bulk of the opinion analyzes whether Sara and L were entitled to judgment as a matter of law. On the final page of the opinion, the district court acknowledged its obligation to rule on the alternative motion for a new trial and held "the Court conditionally grants the motion for a new trial because the clear weight of the evidence does not support the verdict."

First, we dispose of the sole argument offered by the County regarding the district court's decision to order a new trial: namely, that the district court "failed to identify *how* the verdict was against the clear weight of the evidence, or what evidence it relied on in reaching that conclusion." We disagree. The district court issued a well-reasoned, though ultimately incorrect, opinion granting judgment as a matter of law, which is, of course, a higher standard for plaintiffs to meet than the standard for a new trial. Requiring the district court to copy and paste its judgment as a matter of law analysis under a separate header for a new trial makes little, if any, sense. The district court did not abuse its discretion by failing to do so.

Second, the district court did not abuse its discretion by ordering a new trial. Properly framed,

the question is whether the district court abused its discretion in concluding that the jury's verdict was not supported by the clear weight of the evidence. *4.0 Acres of Land*, 175 F.3d at 1139. The County's burden in persuading us that the district court abused its discretion is an extraordinarily high hurdle, as the Supreme Court has made clear. *Allied Chemical Corp.*, 449 U.S. at 36.

Rightfully so. The district court, having sat through all of the testimony and with the benefit of credibility determinations that cannot readily be made on a cold record, felt so strongly that the jury erred that he ordered a new trial. Moreover, the facts here support the "reasonableness" of the district court's opinion: it is at least arguable whether a nine-year old girl with cognitive disabilities, called into the administrative office of her school by a woman who she knew had the authority to disrupt her family's life, would feel empowered to leave or could have consented to the discussion. *Cf. J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (holding that a thirteen-year-old's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave for purposes of *Miranda*'s custody determination (quotations omitted)). While substantial evidence supports the jury's verdict, the clear weight of the evidence does not compel it. In short, the district court did not abuse its discretion in concluding that the jury's verdict was not supported by the clear weight of the evidence.

V

Sara and L's Fourteenth Amendment claims regarding the false letter are barred by our decisions

in *Capp* and *Mann*, as is Sara's Fourteenth Amendment claim regarding the school seizure. Moreover, substantial evidence supported the jury's verdict in favor of the County on L's Fourth Amendment claim. However, the district court did not abuse its discretion in concluding that the clear weight of the evidence did not support the jury's verdict on L's Fourth Amendment claim.

Each party shall bear its own costs on appeal.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion affirming the district court's judgment in favor of the County employees on the claims involving the false letter, reversing the district court's grant of judgment as a matter of law on L and Sara's Fourth and Fourteenth Amendment claims regarding seizure, and reversing the conditional grant of a new trial to Sara on her seizure claim. However, I would vacate the district court's conditional grant of a new trial to L. The majority sustains the district court's grant of a new trial holding that the district court did not abuse its discretion in deciding that the jury's verdict was not supported by the clear weight of the evidence. I disagree.

As noted by the majority, in *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999), we held that a "trial court may grant a new trial, even though the verdict is supported by substantial

evidence," and that we should "uphold the district court if any of its grounds for granting a new trial are reasonable." But we also stated that such a grant is proper only "if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Id.* (quoting *Oltz v. St. Peter's Community Hosp.,* 861 F.2d 1440, 1452 (9th Cir.1988)). We noted that "[t]he corollary, of course, is that a district court may not grant or deny a new trial merely because it would have arrived at a different verdict." *Id.* (citing *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981)). We held that "we may find that a district court abused its discretion in ordering a new trial if the jury's verdict is not against the clear weight of the evidence." *Id.* (citing *Roy v. Volkswagen of Am. Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990), *amended*, 920 F.2d 618 (1991)). In *4.0 Acres*, we actually vacated the grant of a new trial, noting that "[w]here the jury's verdict is not against the clear weight of the evidence, a district court abuses its discretion in ordering a new trial." *Id.* at 1143.

This is one of those instances where the district court abused its discretion in granting a new trial contrary to the jury's determination. The question whether "Caitlin McCann violat[ed] the 4th Amendment Constitutional right of . . . [L] when she conducted the school interview" was put to the jury. The jury, which heard all the evidence, answered "No." The brevity of the in-school interview was not contested. Nor was L's agreement to speak with McCann or her behavior during the interview. There was some conflicting evidence as to L's subsequent reaction to the interview, but, again, the jury heard

all that evidence. Even giving all of L's witnesses the benefit of the doubt, a jury would not likely conclude—in light of the uncontested facts surrounding the interview—that the five-minute interview violated L's Fourth Amendment constitutional rights.

As the majority correctly notes in vacating the district court's grant of judgment as a matter of law, our prior decisions cited by L do not require a finding that her interview constituted an unreasonable seizure. Our most recent precedent, *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), concerned a two-hour questioning of an elementary school girl by a social worker and an armed police officer in a private office at the girl's school. *Id.* at 1015. The social worker did not have a warrant, probable cause, or parental consent. *Id.* The defendants did not contest that the two-hour interview constituted a seizure but argued that it was not unreasonable. *Id.* at 1022. We recognized that the defendants' claim of qualified immunity required a delicate balancing of competing interests, and we ultimately held that although the two-hour interview constituted an unreasonable seizure in violation of the young girl's constitutional rights, the defendants were entitled to qualified immunity.[2] *Id.* at 1033.

Recognizing that *Greene* was a close case, what in our case supports the determination that the jury verdict was not supported by the clear weight of the

[2] Similarly in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), where a fourteen-year-old boy was taken out of his school class and interviewed for about two hours, the defendant officer did not contest that the interview constituted a seizure. In *Stoot*, we again affirmed the district court's grant of qualified immunity for the seizure.

evidence? Certainly, as the majority asserts, it "is at least arguable whether a nine- year old girl with cognitive disabilities, called into the administrative office of her school by a woman who she knew had the authority to disrupt her family's life, would feel empowered to leave or could have consented to the discussion." Majority at 21. But, at most, these considerations support a determination that the interview constituted a seizure. They do not require, or inherently support, a determination that the "seizure" was unreasonable.

More importantly, what is "at least arguable" does not address the weight of the evidence. A number of uncontested facts support the jury's verdict. Although L suffers from several cognitive disabilities, she is very bright. She was asked if she wanted a school staff member to be present during the interview and she said no. L was asked if she was willing to talk to McCann, and she agreed to do so. The interview lasted only five minutes, during which L answered McCann's questions and indicated that she did not have any questions for McCann. After the interview L was escorted back to her classroom and, according to school officials, did not seem upset.[3]

My colleagues and I agree that substantial evidence supported the jury's verdict. We not only conclude that the trial court erred in granting judgment as a matter of law by improperly weighing the evidence, but, critically, we also conclude that the evidence was sufficient to support the jury's verdict. Majority at 19 ("None of the caselaw cited. . . supports

[3] Contrary to the situation in *Greene*, there is no indication that McCann was threatening, and she was not accompanied by a police officer (a fact that was stressed in our opinion in *Greene*).

the conclusion that, under the facts of this case, L was seized and did not consent as a matter of law."). In light of this determination, for us to sustain the grant of a new trial, it should be clear what evidence is contrary to the jury's verdict. Here, the only explanation offered by the trial court was its understanding of the applicable law, which we have held was incorrect. Furthermore, this is not a situation where a party could not present all the relevant information to the jury or where the judge was privy to information not shared by the jury.[4]

This appeal presents a relatively unique situation. After an issue had been referred to a jury and the jury returned its decision, the trial court granted judgment as a matter of law and conditionally granted the motion for a new trial, contrary to the jury's determination. Then, on appeal, we hold that district court erred in granting judgment as a matter of law, and (2) the jury's finding is supported by substantial evidence. In such a situation, the grant of a motion for a new trial is an abuse of discretion unless it is clear from the record, or from the trial court's explanation, why the jury's verdict was not supported by the clear weight of the evidence. *See 4.0 Acres*, 175 F.3 at 1143 ("Where the jury's verdict is not against the clear weight of the evidence, a district court abuses its discretion in ordering a new trial."). Because my review of the record reveals substantial evidence that supports the jury's determination, and the trial court has not indicated what evidence might undermine the jury's verdict, I would vacate the grant

[4] There is no suggestion that any of the evidence presented was false and we see no evidence of a "miscarriage of justice." *See 4.0 Acres*, 175 F.3d at 139.

of the motion for new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-56621 and 17-56710

SARA DEES; L.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut; G.G., a minor by and through her Guardian Ad Litem, Robert Schiebelhut,
Plaintiffs-Appellees / Cross-Appellants

v.

COUNTY OF SAN DIEGO,
Defendant-Appellant / Cross-Appellee

[August 19, 2020]

ORDER

Before: KLEINFELD, CALLAHAN, and R. NELSON, Circuit Judges.

Plaintiffs-Appellees filed a petition for rehearing and rehearing en banc on July 27, 2020 (Dkt. No. 82). The panel has voted to deny the petition for rehearing. Judges R. Nelson and Callahan voted to deny the petition for rehearing en banc, and Judge Kleinfeld so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is **DENIED**.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 3:14-cv-0189-BEN-DHB

SARA DEES; L.G., a minor, and G.G., a minor, by and through their Guardian ad Litem, Robert Schiebelhut, Plaintiffs,

v.

COUNTY OF SAN DIEGO; CAITLIN MCCANN; SRISUDA WALSH, and GLORIA ESCAMILLA-HUIDOR, Defendants.

[Filed October 10, 2017]

ORDER GRANTING MOTION FOR JUDGMENT AS A MATTER OF LAW

In February 2013, Defendant Caitlin McCann ("McCann"), a social worker for Defendant County of San Diego, Health and Human Services Agency (the "County"), investigated the Dees family regarding allegations of child sexual abuse. After interviewing the parents and children, the investigation was closed as unfounded. Subsequently, Sara Dees and her two

minor children, L.G. and G.G., sued McCann and the County for violations of their constitutional rights during the investigation. The case was tried before a jury from February 7, 2017 to February 13, 2017. The jury returned a verdict in favor of Defendants on all claims.

Plaintiffs now move for judgment as a matter of law on their *Monell* claim against the County. They contend that McCann conducted an unconstitutional interview of L at her school pursuant to the County's policy and practice that permits children to be interviewed at school at any time without parental consent, exigency, or court order, as long as a child abuse investigation is open. Plaintiffs ask the Court to overturn the jury's verdict and order a new trial on the question of damages. Alternatively, they request the Court order a new trial as to liability. (Mot., ECF No. 151). The County opposes the motion. (Opp'n, ECF No. 158).

This case requires the Court to carefully consider competing interests in two extremely sensitive subjects. On the one hand, the crime of child sexual abuse is heinous and "society has a compelling interest in protecting its most vulnerable members from abuse within their home." *Greene v. Camreta*, 588 F.3d 1011, 1015 (9th Cir. 2009), *vacated in part as moot* by 563 U.S. 692 (2011). On the other hand, the mere accusation of an alleged crime "does not provide cause for the state to ignore the rights of the accused or any other parties." *Wallis v. Spencer*, 202 F.3d 1126, 1130 (9th Cir. 2000). Parents have an "exceedingly strong interest" in raising their children as they see fit and protecting both themselves and their children from intrusive, embarrassing

government investigations. *Greene*, 588 F.3d at 1016. Here, the Court's task is delicate because not only must it resolve this conflict, it also must decide whether to disturb the collective judgment of the jury. With these considerations in mind, the Court has reviewed the record and the law. The Court concludes that the jury's verdict on the *Monell* claim was in error and grants Plaintiffs judgment as a matter of law.

BACKGROUND[1]

Plaintiff Sara Dees is married to Robert Dees. Sara has two children from a prior marriage to Mr. Alfredo Gil, Plaintiffs L.G. and G.G. At the time of the events that are the subject of this action, L was nine years old and suffered from anxiety and ADHD. Because of these disorders, changes to L's routine could "set her off" and cause her to "melt down." Subsequent to the events at issue, L's psychiatrist has suggested that L may have autism spectrum disorder. G was five years old at the time. Robert also has two children from a prior marriage to Ms. Kelly Hunter, Ka. and Ky. Sara, Robert, and the four children all resided together.

On Thursday, February 7, 2013, Ms. Hunter called the hotline for Child Welfare Services, a division of the County's Health and Human Services Agency, to report that Robert had taken naked photos of their daughter, Ka. Ms. Hunter explained that the

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[1] Both parties move to seal trial transcripts and trial exhibits. (ECF Nos. 150, 159). The parties do not contend that they sought to seal these materials during trial. Rather, the information in the documents became part of the public record during trial. As such, the parties have waived the issue. The motions to seal are **DENIED.**

photographs were taken at Ka.'s request because she wanted to document her body as it changed during puberty. Ms. Hunter informed the hotline representative that Ka. lived with her father in a blended household with Sara and her biological children. Child Welfare Services generated two referrals: one for Ka. and Ky. and a companion referral for L and G.

McCann was assigned to investigate the referrals. That day, McCann interviewed the four children living in the Dees home. Ka. explained that she asked her dad to photographically document her changing body. She did not feel uncomfortable in any way, and she thought she and her father had a healthy relationship. The three other children all said that they had never been inappropriately photographed and did not know of any inappropriate photographs of anyone else. The interviews of L and G occurred at home in their bedrooms with the door open. Sara had consented to the interviews but was not present during them.

McCann continued the investigation for the next few weeks, but she did not learn anything indicating that the children were being abused or neglected. McCann interviewed other family members and family members' therapists. Ka. also submitted herself for a forensic interview.

On or about February 11, 2013, the Family Court ordered Robert Dees to live outside of the home during the investigation. However, on or about February 13, 2013, the Family Court decided against making changes to the custody of the Gil children, leaving primary physical custody of L and G with

Sara. McCann's supervisor, Srisuda Walsh, learned about the Family Court's custody order sometime around February 13. She subsequently instructed McCann to close her investigation.

At some point, the San Diego Police Department ("SDPD") opened a companion investigation. But on February 21, 2013, McCann spoke with the investigating SDPD detective, who informed McCann that the SDPD and District Attorney would not be pursuing a case.

That should have been the end. It was not.

On February 25, 2013, McCann interviewed L's teacher. According to McCann, nothing in the interview raised any concerns. The teacher explained that L has behavioral problems and appears very needy, but is smart and quick with her work. McCann testified that at the end of the day on February 25, 2013, she had no information to lead her to believe that the children were in any danger.

Yet, on February 26, 2013, McCann went to L and G's school to interview them. Ostensibly, McCann decided to interview L and G because she wanted to "wrap up [her] investigation . . . , make sure that [the children] were okay, and . . . get out of their lives." (2/9/17 Trial Tr. at 230:6-10). She also said she wanted to ensure that Robert Dees was not living in the home.

This time, McCann neither asked, nor received, Sara's or Mr. Gil's consent to talk to the children. She admitted that four days earlier, on February 22, 2013, she had spoken to the children's grandmother to ask whether she could interview them. The grandmother

said that McCann could only speak with the children in the presence of an attorney. She informed McCann that she intended to tell Sara about the conversation. Despite this notice from the grandmother, McCann conducted the unconsented interview because "per [the County's] policy, [she] can interview kids at school." (2/9/17 Trial Tr. at 230:17-18, 232:7-11; *see also* 2/8/17 Trial Tr. at 144:4-5).

The County's written policy provides that "[Child Welfare Services social workers ("SWs")] are authorized to interview a suspected victim of child abuse during school hours and to conduct the interview on school grounds." (Pls.' Ex. 3, County's Policy). The policy states:

> A SW may interview a child who may be a victim of abuse or neglect without a parent's consent. (This may include other children in the referred family since they may be potential victims.) However, a child who is **not** an alleged victim or member of the referred family **cannot** be interviewed without a parent's consent.

(*Id*. (emphasis in original)).

The policy requires the social worker to comply with certain procedures during the interview:

> The SW will:
> - Advise the child of the right to have school personnel present during the interview
> - Advise the child that (s)he may stop the interview at any time and periodically check

with the child during the interview to determine if (s)he is comfortable with continuing the interview. If the child says stop, then the SW will immediately terminate the interview

- Not include law enforcement in the interview
- Complete the interview within developmentally-appropriate time limits, which will never exceed 60 minutes.

(*Id.*) Leesa Rosenberg, who testified as the person most knowledgeable about the County's policies regarding interviews of children during child abuse investigations, characterized these procedures as safeguards to protect the child's rights. The policy does not advise the child that he or she may decline to be interviewed. Nor does the policy include any guidance about when to inform a parent about the interview. Rosenberg stated that, at the time of the events at issue, the County's policies allowed a social worker to interview a child at school without the knowledge and consent of a parent and without a court order.

Similarly, Walsh testified that it was the practice of the County's social workers to interview children at school even if the children were not in imminent danger and without parental consent, as long as the social worker had an open investigation. McCann confirmed this practice.

When McCann arrived at the school, L was called out of class and brought to the school's administrative office to speak with McCann. McCann testified that when she introduces herself to children, she tries to be "friendly and nice." McCann asked L if

she was willing to speak with McCann, and L replied affirmatively. McCann also asked L if she wanted anyone present, and L said no. McCann informed L that she could end the interview at any time and that she could ask any questions. McCann interviewed L in an unoccupied office in the school's front office area. McCann described L as appearing "fine" and "not . . . upset at all." (2/8/17 Trial Tr. at 147:7-8; 2/9/17 Trial Tr. at 232:14-15).

McCann asked L how she was doing. L "was brief when speaking to" McCann. (Pls.' Ex. 2, McCann's Delivered Service Log). L said that since the last time she saw McCann, "things have gotten worse" because "[redacted] can't stay home unless their grandmother is home, and they have to go everywhere with her." (*Id.*) When asked if she likes her grandmother, L responded that "she's ok." (*Id.*) McCann also asked about Robert Dees and the photographs. L told McCann that Robert was not living in the home. L thought it was "stupid that [Robert] can't live in his own house" and reported that Sara "doesn't like" it. (*Id.*) L "denied [that] any pictures have been taken of her or knowing about any pictures taken of anyone else in her home." (*Id.*)

The interview lasted approximately five minutes. L did not "get up and walk away from [McCann] in the middle of a[ny] question[s]." (2/9/17 Trial Tr. at 236:19-21). McCann testified that the interview ended "naturally" as "there were no other questions [she] had," and she told L that L could return to class. (2/9/17 Trial Tr. at 236:13-15). She admitted, "I guess [it] would be that I ended the interview." (2/9/17 Trial Tr. at 236-15-16). McCann testified that L did not seem upset.

Ironically, Sara testified that she was volunteering in G's classroom that day. She saw L come "screaming down the hallway," yelling "CPS is here, CPS is here." L told Sara that "CPS wants to talk to [G] right now. Hurry, hurry." (2/8/17 Trial Tr. at 222:23-223:1-5). L asked her mother if McCann was there "to take" her. (2/8/17 Trial Tr. at 237:19-20). Sara walked with L and G to the school's front office. She testified that L appeared upset, was hyperventilating, and was running around the front office.

McCann eventually closed her investigation on March 7, 2013, approximately three weeks after Walsh had told her to close it. All the allegations were determined to be unfounded.

At trial, Plaintiffs moved for judgment as a matter of law at the close of evidence, which the Court took under submission. On February 13, 2017, the jury found in Defendants' favor on all claims. Specifically, the jury concluded that McCann did not violate the Fourth Amendment rights of L or the Fourteenth Amendment rights of Sara when she conducted the school interview. (Verdict Form 2, ECF No. 144). Because the jury did not find a constitutional violation, it did not consider whether McCann acted pursuant to an official County policy or practice and whether that policy or practice was the cause of the violation. (*Id.*)

LEGAL STANDARDS

I. Legal Standard for Judgment as a Matter of Law

Under Federal Rule of Civil Procedure Rule 50, a court may enter judgment as a matter of law once "a party has been fully heard on an issue" and "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). In other words, the jury verdict should be overturned and judgment as a matter of law entered "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). The "jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id*.

In evaluating a motion for judgment as a matter of law, a court does not make credibility determinations or weigh the evidence. *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 150 (2000). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. Instead, the court "must draw all reasonable inferences in favor of the nonmoving party." *Id*. "That is, the court should give credence to the evidence favoring the nonmovant as well as 'that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that

evidence comes from disinterested witnesses.'" *Id.* at 151 (internal citation omitted).

II. Legal Standard for a New Trial

Under Federal Rule of Civil Procedure 59(a), a new trial may be granted on all or some of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Because "Rule 59 does not specify the grounds on which a motion for a new trial may be granted," the court is bound by historically recognized grounds. *Zhang v. Am. Gem Seafoods, Inc.,* 339 F.3d 1020, 1035 (9th Cir. 2003). These include verdicts against the weight of the evidence, damages that are excessive, and trials that were not fair to the moving party. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007); *see also Passantino v. Johnson & Johnson Consumer Prods.,* 212 F.3d 493, 510 n.15 (9th Cir. 2000) ("The trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.").

Although the Court may weigh the evidence and assess the credibility of witnesses when ruling on a Rule 59(a) motion, it may not grant a new trial "merely because it might have come to a different result from that reached by the jury." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990) (quotation marks and citation omitted); see also *Union Oil Co. of Cal. v. Terrible Herbst, Inc.,* 331 F.3d 735, 743 (9th Cir. 2003) ("It is not the courts' place to substitute our evaluations for those of the jurors."). A court will not approve a miscarriage of justice, but "a

decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter." *Landes Constr. Co., Inc. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987) (citations omitted).

DISCUSSION

Local government entities, like the County, can be held directly liable for constitutional violations under 42 U.S.C. § 1983 if a policy, custom, or practice of the entity is shown to be the moving force behind the constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978). Plaintiffs brought such a claim based on the County's school interview policy, but the jury did not find in their favor. In the instant motion, Plaintiffs argue there was no legally sufficient evidentiary basis for the jury to find for the County on the *Monell* claim. They ask the Court to enter judgment as a matter of law on the *Monell* claim and to order a new trial on the question of damages. In the alternative, they argue that the verdict is against the clear weight of evidence and request a new trial as to liability.

Plaintiffs' *Monell* claim requires proof that: (1) McCann acted under color of state law; (2) McCann's acts deprived L of her Fourth Amendment rights and Sara of her Fourteenth Amendment rights; (3) McCann acted pursuant to an expressly adopted official policy or longstanding practice of the County; and (4) the County's official policy or longstanding practice caused the deprivation of L's and Sara's rights. *See Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.

1996). The parties agree that McCann acted under color of state law. (Joint Jury Instructions, ECF No. 127; Jury Instruction No. 13, ECF No. 147). Thus, to prevail on their motion, Plaintiffs must show that the evidence, construed in the light most favorable to the County, satisfies the remaining elements and warrants only one conclusion: that McCann violated L's Fourth Amendment rights and Sara's Fourteenth Amendment rights by conducting the school interview and the County's policy or practice caused that violation. The Court considers each element in turn.

A. Deprivation of Constitutional Rights

"Two provisions of the Constitution protect the parent-child relationship from unwanted interference by the state: the Fourth and Fourteenth Amendments." *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 788 (9th Cir. 2016). For a child, the Fourth Amendment protects the child's right to be free from an unreasonable seizure of his or her person. U.S. Const. amend. IV. For a parent, the Fourteenth Amendment safeguards a parent's right to make decisions about the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). In this case, substantial evidence does not support the jury's verdict that no constitutional violation occurred. Instead, the evidence supports only one conclusion: that McCann violated L's Fourth Amendment rights and Sara's Fourteenth Amendment rights.

1. Violation of L's Fourth Amendment Rights

To succeed on L's Fourth Amendment claim, Plaintiffs must show that a seizure occurred and that the seizure was unreasonable. A seizure occurs when, in light of all the circumstances, a reasonable person would have believed that he or she was not free to leave. *Jones v. Cnty. of Los Angeles*, 802 F.3d 990, 1000-01 (9th Cir. 2015) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "The Ninth Circuit has identified five [nonexclusive] factors that aid in determining whether a person's liberty has been so restrained." *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009). Those factors are (1) the number of officers present, (2) whether weapons were displayed, (3) whether the encounter occurred in a public or non-public setting, (4) whether the officer's authoritative manner would imply that compliance would be compelled, and (4) whether the officers advised the detainee of his right to terminate the encounter. Id. These factors do not fit neatly into the context of a child interviewed by a social worker during a child abuse investigation. Because whether a seizure occurs depends on the totality of circumstances, the Court also considers L's age, education, mental development, and familiarity with the interview process. *Cf. Aguilera v. Baca*, 510 F.3d 1161, 1169-70 (9th Cir. 2007) (considering factors tailored to the context of the alleged seizure).

L is a young child with known behavioral disorders. She was taken out of class by school officials. She was not taken to the playground or the cafeteria to talk. She was not sent to a comfortable or familiar place. Instead, L was brought to an

unoccupied office in her school's administrative office area to speak alone with McCann. Police officers were not present. McCann advised L that she could stop the interview at any time, but she did not inform L that she could decline to be interviewed.

L was wary of McCann after her first interview. L knew that McCann had the power to disrupt her life. L understood that McCann had caused her step-father to move out of the house. Indeed, L told McCann that "things have gotten worse" since the last time she spoke to McCann. While the interview may have lasted only five minutes, McCann asked L about intimate details of her family life. The two discussed where Robert Dees was living, what her mother thought about Robert being out of the home, and whether inappropriate photographs had been taken. L "was brief" in answering McCann.

L did not end the interview on her own. Instead, the interview ended "naturally," according to McCann, when she finished asking questions. McCann testified that L did not seem upset, but the circumstances show that L was upset by the interview. After the interview, L ran down the school hallway to find her mother and asked her mother whether McCann was there to "take" her.

Under these circumstances, the Court finds that the only reasonable conclusion is that McCann seized L. A reasonable nine-year-old child who is called out of class by school officials for the purpose of meeting with a social worker who has already disturbed the child's family life, and who is not advised that she may refuse to speak with the social worker, will feel compelled to talk to the social worker

and remain there until dismissed. Other courts have found that similar circumstances constitute a seizure. *See Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (holding that 20-minute interview of eleven-year-old boy was a seizure where the child was escorted from class by the principal, caseworkers, and a uniformed police officer into church's empty nursery and questioned by the caseworkers, with the police officer present, about whether the principal or his parents had spanked him); *Greene*, 588 F.3d at 1022 (concluding that nine-year-old girl was seized where taken out of class and interviewed in a private office for two hours by a social worker in the presence of a uniformed police officer, even though the child "did not ask to call home, did not ask to have a [school counselor] or her parents with her, and did not cry"); *cf. Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009) (holding that two-hour school interview of 14-year-old boy during which police detective threatened punishment if the child denied guilt and promised leniency if he admitted guilt constituted a seizure); *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005) (holding that an "emotionally vulnerable" 16-year-old female was seized where a social worker and uniformed police officer, both of whom the teenager knew "had the authority to determine her custodial care," confined her for an "hour or two" in a small office at her school and repeatedly threatened that they would arrest her if she did not agree to live with her father).

The next question is whether the seizure was reasonable. Neither the Supreme Court nor the Ninth Circuit has decided what reasonableness standard applies to seizures of children at school during child abuse investigations. Both parties recognize that the

standard is neither settled nor decided. Plaintiffs argue that McCann needed a warrant, court order, or one of the traditional exceptions to the warrant requirement to justify the seizure. They further contend that the seizure was not reasonable even under the lesser standard of reasonableness applicable to cases concerning searches and seizures on school grounds by school officials for the purposes of maintaining discipline. That standard, outlined in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), requires only that the search or seizure be reasonable under all the circumstances. The County, while arguing that *T.L.O.* is not applicable, simultaneously advocates for a general reasonableness standard.

In *Greene v. Camreta*, the Ninth Circuit applied the traditional Fourth Amendment protections to a social worker's in-school interview of a suspected child abuse victim during a child abuse investigation. The court reasoned that "law enforcement personnel and purposes were too deeply involved in the seizure . . . to justify applying the" *T.L.O.* standard. *Greene*, 588 F.3d at 1027. The interview at issue was motivated by law enforcement purposes, not by the need for school-related discipline. Against this backdrop, the Ninth Circuit held that the seizure of a nine-year-old child "in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." *Id.* at 1030. The Supreme Court eventually vacated this portion of the Ninth Circuit's opinion as moot because the suspected victim had reached the age of majority and moved out of the state, meaning that "she [was] no longer in need of any protection from the challenged practice." *Camreta v. Greene,* 563 U.S. 692, 711 (2011). The Supreme

Court did not disapprove of the Ninth Circuit's reasoning.

This Court finds that *Greene* remains persuasive. Like the social worker in *Greene*, McCann was acting as a law enforcement officer when she arrived at the school to interview L. She pursued the interview to ensure Robert Dees was out of the home and to check, once again, on the children before she closed her investigation. Had she learned about any abuse, she would have been required to report that abuse and notify the police, and she could have removed L from her parents' custody. See Cal. Penal Code § 11165.7 (defining a "mandated reporter" to include a social workers), § 11166 (explaining obligations of a mandated reporter and police notification requirement); Cal. Welf. & Inst. Code § 306 (describing powers of social worker). The interview was not undertaken by school officials for the purposes of maintaining order in the school. As the Ninth Circuit explained in *Greene*, under such circumstances, the traditional procedural protections of the Fourth Amendments are required. See *Greene*, 588 F.3d at 1024-30.

Thus, McCann needed a warrant, court order, parental consent, exigency, or at the very least, reasonable suspicion to seize and interview L. She had none of these. The County admits that McCann did not have a warrant, court order, consent, or exigent circumstances. (Opp'n at 11-12). Nor did she have reasonable suspicion that L was the subject of child abuse and neglect. See *Terry v. Ohio*, 392 U.S. 1, 19-27 (1968) (holding that an officer's reasonable suspicion of criminal activity may justify a brief

investigatory detention).[2] McCann testified that on the day of the interview, she had no information to lead her to believe that the children were in any danger. (2/8/17 Trial Tr. at 143:7-13). The police had ended their investigation, and McCann's supervisor had told her to "wrap . . . up and close" her investigation two weeks earlier. (2/8/17 Trial Tr. at 54:5-7; Pls.' Ex. 2). Drawing all inferences in the County's favor, the only reasonable conclusion from this evidence is that there were no exigencies and McCann had neither reasonable suspicion nor parental consent at the time of the interview. Therefore, because McCann lacked a warrant, court order, parental consent, exigency, or reasonable suspicion, she conducted the school interview in violation of L's Fourth Amendment rights.

2. Violation of Sara's Fourteenth Amendment Rights

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. XIV, § 1. Parents have a well-established liberty interest in the "companionship, care, custody and management of [their] children." *Lassiter v. Dep't of Soc. Servs.,* 452 U.S. 18, 27 (1981); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (explaining that the constitutionally protected liberty interest includes the right to "establish a home and bring up children" and "to control the education of their own"). The right to

[2] *Greene* did not consider whether reasonable suspicion could justify a seizure of a suspected child abuse victim in a child abuse investigation. The Court assumes, without deciding, that a seizure could be reasonable if the social worker had reasonable suspicion that the child was the victim of child abuse and neglect.

familial relations is not, however, absolute. A parent's rights are limited by the government's compelling interest in protecting a minor child. *See Wallis*, 202 F.3d at 1138. For instance, the "right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) (citing *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)). Official conduct must "shock the conscience" to be a Fourteenth Amendment violation. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). A social worker's conduct shocks the conscience when he or she acts with "deliberate indifference," which means "conscious or reckless disregard of the consequences of one's acts or omissions." *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013).

Here, the only reasonable conclusion from the evidence is that McCann unconstitutionally interfered with Sara's familial rights. Sara had a right to raise her child as she saw fit, which included a right to protect her child from being seized without the procedural protections of the Fourth Amendment. *See Doe*, 327 F.3d at 524 (holding that "because the defendants had no evidence giving rise to a reasonable suspicion that the plaintiff parents were abusing their children, or that they were complicit in any such abuse, the defendants violated the plaintiffs' right to familial relations by conducting a custodial interview of John Doe Jr. without notifying or obtaining the consent of his parents"). McCann interfered with Sara's rights by conducting the interview in the absence of a warrant, court order, parental consent, exigency, or reasonable suspicion.

Sara's rights were not limited by the government's interest in protecting L. In fact, the County lacked a compelling interest at the time of L's school interview. A government "has no interest whatever in protecting children from parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger." *Wallis*, 202 F.3d at 1141 n.14. At the time of the interview, there was no reasonable evidence that Sara was unfit and that L was in any danger, much less imminent danger. Indeed, McCann admitted as such at trial. (2/8/17 Trial Tr. at 143:7-16).

McCann's actions were deliberately indifferent to Sara's rights. Prior to going to the children's school, McCann had no evidence of L or G having been abused. Her supervisor had instructed her to close the investigation. She had no evidence that either child was in imminent danger. (2/8/17 Trial Tr. at 143:7-16).

What McCann did know is that Sara would not grant consent for any further private interviews with the children. In fact, the grandmother had told her that Sara would insist on an attorney being present. (2/9/17 Trial Tr. at 230:11-16). She also knew that L was a young child with special needs and could be upset easily. (2/8/17 Trial Tr. at 200:11-20). Yet, without Sara's or Mr. Gil's consent, McCann pursued the interview because her policy allowed her to do so. (2/8/17 Trial Tr. at 143:21-144:5).

The evidence is clear that McCann purposely went to the one place she knew she could find L or G and question L or G without Sara knowing. Because of the County's policy, that place was the children's

school. Ironically, had McCann not been indifferent to Sara's rights, she could have asked for consent from Sara right there at the school. McCann was deliberately indifferent and that shocks the conscience. Her conduct need not be "for the very purpose of causing harm" to be shocking. *Gantt*, 717 F.3d at 708.

It is clear that "[t]he government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct—real or imagined—of the other parent." See *Wallis*, 202 F.3d at 1142 n.14. Rather, government social workers must comply with the procedural protections of the Fourth Amendment. That did not happen here. The record demonstrates that the only reasonable conclusion is that McCann violated L's Fourth Amendment rights and Sara's Fourteenth Amendment rights during the school interview.

B. Action Pursuant to the County's Policy or Practice

The jury did not decide whether McCann acted pursuant to an official policy or longstanding practice of the County of San Diego. In this case, the evidence is such that, without weighing the credibility of witnesses or otherwise considering the weight of the evidence, the only conclusion that reasonable jurors could have reached is that this element is satisfied. Indeed, it does not appear that the County contests this element.

The evidence demonstrates that the County had an official policy and longstanding practice of

permitting social workers to interview suspected victims of child abuse, including children in the referred family, at school without parental consent or notification, exigency, reasonable suspicion, court order, or warrant, as long as the social worker had an open investigation. The County's official policy expressly permitted social workers to interview children in the referred family at school without any limitations. (Pls.' Ex. 3). According to the County policy, an interview may proceed even without the consent of the parent who is not suspected of abuse or does not live with one suspected of abuse. An interview may occur even when the abuse allegations have not been substantiated, there are no new allegations, and the interview is intended to provide only "closure" to the children. The County's person most knowledgeable confirmed this policy. (2/8/17 Trial Tr. at 159:18-25). Walsh and McCann further explained that it is County social workers' practice to conduct such interviews so long as an investigation is open. (2/8/17 Trial Tr. at 56:18-57:1, 78:13-79:10, 148:25-149:6).

As for whether McCann acted pursuant to official policy and practice, there is no doubt that she did. She testified numerous times that she went to the school to conduct the interviews because the County's policy permitted her to do so. (2/8/17 Trial Tr. At 144:3-5; 2/9/17 Trial Tr. at 230:17-18, 232:9-11). Therefore, the only remaining question is one of causation, which the Court addresses next.

C. The County's Policy and Practice Caused the Violation

Because the jury did not find a constitutional violation, it did not consider whether the County's policy or practice was the "moving force" behind the constitutional violation. *Monell*, 436 U.S. at 694. To meet the causation requirement, a plaintiff must show both causation-in-fact and proximate causation. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013). Plaintiffs argue that "[i]t was because of the County's policy that McCann believed she was authorized to conduct non-consensual interviews with the children at their school." (Mot. at 23). The County responds that its policy or practice did not cause the constitutional violations because the policy contains safeguards to protect people's rights, such as advising the child that he or she may have school personnel present and periodically assessing how the child is doing during the interview. (Opp'n at 17). The County argues that the policy's procedural safeguards did not and cannot cause a reasonable child to feel like they were not free to leave. (*Id*. at 18).

Construing the evidence in the County's favor, and neither weighing the evidence nor witnesses' credibility, the Court finds that the County's policy and the particular injuries are cause and effect. McCann conducted the school interview despite lacking a court order, warrant, parental consent, exigency, or reasonable suspicion *because her policy allowed her to do so*. She admitted this multiple times at trial. For instance:

> Q: So why didn't you ask Mrs. Dees for her permission to interview the kids at school?

> A: At that point, I have an open investigation. I'm just trying to get out of the case. And I – per policy, I can – I can see kids and wrap it up at school.

(2/9/17 Trial Tr. at 232:9-11; *see also* 2/8/17 Trial Tr. at 144:3-5; 2/9/17 Trial Tr. at 230:17-18). She pursued the school interviews even though she knew that the children were not allowed to be interviewed again without an attorney present. (2/9/17 Trial Tr. at 230:11-22). But for the policy, McCann would not have interviewed L at school and Plaintiffs' injuries would have been avoided.

The procedural safeguards in the policy do not save it. As an initial matter, the County's person most knowledgeable acknowledged that the policy does not protect a parent's rights to custody, care, and companionship of his or her children. Rather, she explained that the procedures are designed to protect the child's rights. But the safeguards do not guarantee that a child interviewee feels free to leave. The pre-interview admonishments fail to tell the interviewee that he or she may refuse the interview. Instead, the procedures assume that the interview will occur. (See Pls.' Ex. 3 (the safeguards provide that the social worker must (1) advise the child of the right to have school personnel present *during the interview*; (2) advise the child that she *may stop the interview* at any time; (3) periodically check with the child *during the interview* to determine if the child is comfortable with *continuing the interview*; (4) not include law enforcement *in the interview*; and (5) *complete the interview* within appropriate time limits (emphasis added)). While a reasonable inference from these procedures is that they may help a child feel more

comfortable during an interview, they do not preclude a finding that the child does not feel free to leave. If anything, these procedures induce compliance with the social worker. The safeguards do not prevent a reasonable child from feeling seized.

The County's policy and longstanding practice of permitting social workers to interview children at school in the absence of a court order, warrant, parental consent, exigency, or reasonable suspicion was the factual and proximate cause of Plaintiffs' injuries. If the policy had required any of the Fourth Amendment procedural protections, the interview would not have occurred and Plaintiffs would not be injured. But none of these conditions were present and McCann acted deliberately because the policy provides social workers with carte blanche to interview children at school during "open" investigations.

D. The Only Reasonable Conclusion Is Contrary to the Jury's Verdict

The parties have been fully heard. The Court now finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for" the County on Plaintiffs' *Monell* claim. Fed. R. Civ. P. 50(a)(1). Without considering the credibility of witnesses or otherwise weighing the evidence, and drawing all reasonable inferences in the County's favor, the only conclusion that reasonable jurors could have reached is that the County's policy and practice caused the violation of L's and Sara's constitutional rights.

CONCLUSION

The Court **GRANTS** Plaintiffs' motion for judgment as a matter of law and sets a status hearing for October 19, 2017 at 1:00 pm.

Rule 50 requires that if "the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed." Fed. R. Civ. P. 50(c)(1). Accordingly, the Court conditionally grants the motion for a new trial because the clear weight of evidence does not support the verdict.

IT IS SO ORDERED.

Dated: October 10, 2017

/s/ Roger T. Benitez
Hon. Roger T. Benitez
United States District Judge