[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-11073

(Filed Oct. 12, 2021)

ANDREW JOSEPH, JR., as natural father, next friend and personal representative of the Estate of Andrew Joseph, III deceased,

Plaintiff-Appellee,

versus

CHAD CHRONISTER, FLORIDA STATE FAIR AUTHORITY, an instrumentality of the State of Florida, MARK CLARK, in his individual capacity,

Defendants-Appellants,

Appeals from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-00274-MSS-CPT

Before JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges.

PER CURIAM:

Following oral argument and a review of the record, we affirm the district court's order rejecting the

qualified immunity and sovereign immunity claims of the appellants. Because the parties are familiar with the record, we set out only what is necessary to explain our decision, and given the summary judgment posture of the case, we view the facts in the light most favorable to the plaintiff, Andrew Joseph, Jr. ("Mr. Joseph"). *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (qualified immunity under federal law); *Green v. Graham*, 906 F.3d 955, 959 (11th Cir. 2018) (sovereign immunity under state law).

I

The Florida State Fair, organized by the Florida State Fair Authority, takes place every year at fairgrounds located near Tampa. The FSF has a Student Day for which the FSFA issues free admission tickets to students at area schools. Andrew Joseph, III ("Andrew")—who was 14 at the time—attended Student Day at the FSF on February 7, 2014.

After being dropped off with four friends at Gate 3 of the FSF at around 6:30 p.m., Andrew was seized and detained by law enforcement officers employed by the Hillsborough County Sheriff's Office and/or the FSFA. The seizure took place following a disturbance at the FSF's midway. Corporal Mark Clark took Andrew to a processing area in the FSF fairgrounds where all children who had been seized and detained were held.

Corporal Clark then turned Andrew over to Deputy Henry Echenique. At the processing area, Deputy Echenique filled out an ejection form for Andrew based

on information provided to him by Corporal Clark. The form stated that the basis for Andrew's ejection was "running through the mid-way causing disorderly conduct." D.E. 255 at 2, ¶ 5. Corporal Clark did not attempt to call Andrew's parents to let them know their son had been detained and was in custody, as required by Fla. Stat. § 985.101(3). Nor did any of the other HCSO officers at the processing area.

Andrew was in custody at the processing area for about 40 minutes, from 8:00 p.m. to about 8:41 p.m. During that time, officers ran a background check on him to ensure that he was not wanted, missing, or endangered. They also took his photograph.

At 8:41 p.m., Deputy Stephen Jones—who at the time was working for the FSFA—and another officer put Andrew and other minors into an HCSO transport van and drove them to a drop-off point outside Gate 4 of the FSF. The drop-off point was near Orient Road and Interstate 4. The officers did not attempt to release Andrew and the other minors to their parents or other responsible adults, as required by Fla. Stat. § 985.115(2)(a), and told them they would be arrested if they tried to re-enter the FSF fairgrounds.

Andrew did not call his parents while waiting at Gate 4 because he was afraid he would get in trouble. He also declined a ride from a one of his friend's parents. When he and his friend, C.T. (who was 12 years old), asked an officer at Gate 4 if they could reenter the FSF fairgrounds to walk to their pre-arranged pick-up

point, the officer told them they could not and they faced arrest for trespassing.

Andrew and C.T. walked down the sidewalk on Orient Road and under Interstate 4 to the Hard Rock Casino. Andrew and C.T. then ran across Interstate 4 from the Hard Rock Casino towards the FSF. But after Andrew received a phone call, he indicated to C.T. that they needed to turn around. When Andrew and C.T. tried to run back across Interstate 4, Andrew was struck and killed by a car at approximately 10:43 p.m.

Mr. Joseph, Andrew's father, filed a lawsuit against a number of defendants. As relevant here, he asserted a state wrongful death claim against Hillsborough County Sheriff Chad Chronister in his official capacity, a state wrongful death claim against the FSFA on a theory of vicarious liability, a state wrongful death claim against the FSFA on a theory of direct liability, a federal claim under 42 U.S.C. § 1983 against Sheriff Chronister, and federal claims under § 1983 against Corporal Clark and Deputies Echenique and Jones in their individual capacities.

These defendants moved for summary judgment on the claims against them on the basis of sovereign immunity and qualified immunity, but the district court denied their motions. Sheriff Chronister, Corporal Clark, and the FSFA now appeal.

II

Our review of the district court's summary judgment order is de novo. *See*, *e.g.*, *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254 (11th Cir. 2004). With that plenary standard in mind, we turn to the arguments of the appellants.

A

To have Article III standing, a plaintiff must allege and ultimately prove three things: (1) an injury in fact; (2) causation; and (3) redressability. *See Moody v. Holman*, 887 F.3d 1281, 1286 (11th Cir. 2018). In the Article III context, causation means that the plaintiff's injury is "fairly traceable" to the defendant's actions. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Sheriff Chronister and Corporal Clark argue that Mr. Joseph lacks Article III standing because he has not sufficiently proven causation. They assert that the actions of Andrew (and those of other parties) and the time lapse of over two hours (from the seizure to Andrew's death) "create too substantial a break in the 'fairly traceable' chain." Br. for Appellants Chronister and Clark at 55–57.

Our cases hold that, in a qualified immunity appeal under the collateral order doctrine, a defendant cannot raise (and we therefore do not decide) whether the plaintiff has Article III standing. *See Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d

1326, 1334 (11th Cir. 1999); *Scott v. Taylor*, 405 F.3d 1251, 1256 n.8 (11th Cir. 2005). Sheriff Chronister and Corporal Clark do not acknowledge or discuss these cases in their brief, and we see no basis (legal or otherwise) for ignoring them. So, we do not address in this appeal whether Mr. Joseph has Article III standing.

B

We turn to the merits and begin with Corporal Clark. Mr. Joseph sued Corporal Clark under § 1983, alleging that he violated Andrew's Fourth Amendment rights when he seized and detained him. On appeal, Corporal Clark—who cannot remember the events related to Andrew on the night of February 7, 2014—argues that he is entitled to qualified immunity because he had probable cause, or at least arguable probable cause, to seize and detain Andrew for committing a trespass under Fla. Stat. § 616.185(a) or obstruction of justice under Fla. Stat. § 843.02. According to Corporal Clark, Andrew picked up the hat of one of his friends who had been detained by the officers, ran after the officers, and "interjected himself into [their] escort." Br. for Appellants Chronister and Clark at 7–8, 28–29, 46. Corporal Clark also contends that any Fourth Amendment right that he may have violated was not clearly established. *See id.* at 47–54. Given the record before us, and applying the governing qualified immunity standard, *see*, *e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–91 (2018), we disagree with Corporal Clark.

"By now it is well established that '[a] warrantless arrest without probable cause violates the Fourth Amendment and forms a basis for a [§] 1983 claim.'" *Carter v. Butts Cnty.*, 821 F.3d 1310, 1319 (11th Cir. 2016) (quoting *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996)). Probable cause exists if the facts and circumstances within the officer's knowledge would cause a prudent person to believe, under the circumstances, that the suspect has committed, is committing, or is about to commit an offense. *See id.* at 1318. Arguable probable cause, which provides a basis for qualified immunity, exists where reasonable officers in the same circumstances and possessing the same knowledge could have believed that probable cause existed. *See id.* at 1320.

In assessing the questions of probable cause and qualified immunity, we repeat that we must take the evidence in the light most favorable to Mr. Joseph. *See Tolan*, 572 U.S. at 657. Here the evidence, viewed from that perspective, indicates that Andrew ran after his friend's hat, not the officers. Nor did he interfere with the officers' seizure of his friend or obstruct the officers in the performance of their duties. Instead, he merely picked up the hat belonging to his friend, acknowledged his friendship with him, and attempted to give the hat to him. *See* D.E. 283 at 3, 32–33 (testimony of C.T. and R.P.). The act of picking up a friend's hat and trying to return it, without more, did not give Officer Clark probable cause or even arguable probable cause to seize and detain Andrew for trespass on the grounds of the FSF under § 616.185(a) (prohibiting

the commission of "any act that disrupts the orderly conduct of any authorized activity of the fair association in charge") or for obstruction under § 843.02 (prohibiting the "obstruct[ion]" of a law enforcement officer without violence).

Corporal Clark is wrong in asserting that Andrew ran after the officers and interfered with their detention and escort of his friend. That factual assertion does not view the summary judgment record in the light most favorable to Mr. Joseph. As the district court put it, for summary judgment purposes "Andrew was not, in any conceivable way, committing a crime, or even breaking any rule." D.E. 283 at 36. To the extent that Corporal Clark asserts that he was merely giving Andrew a trespass warning, or that the encounter was a consensual one, those assertions are belied by the lengthy in-custody detention by armed officers in the processing area following Andrew's seizure.

Insofar as the clearly established prong of qualified immunity is concerned, Corporal Clark does not explain how or why a reasonable officer could have believed or thought that picking up a friend's hat and attempting to give it to him was behavior that disrupted the orderly conduct of the FSF, or the FSFA and its employees or agents. We understand, of course, that Corporal Clark does not bear the burden on this point, but the question is whether, under the circumstances, he would have had fair warning that his seizure and detention of Andrew violated the Fourth Amendment. *See Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc).

We agree with the district court that the law was clearly established in February of 2014 that mere proximity to one who is suspected of (or has committed) an offense does not provide probable cause or arguable probable cause for a detention. *See*, *e.g.*, *Swint v. City of Wadley*, 51 F.3d 988, 997 (11th Cir. 1995) (denying qualified immunity to officers who searched and seized (but did not arrest) patrons at a nightclub when trying to find a single individual who sold drugs to an undercover agent: "Probable cause to arrest one suspect, and even probable cause to believe that a number of other or unidentified people had sold drugs in the establishment in the past, did not give the officers *carte blanche* to seize everyone who happened to be in the Club when the two raids took place."). And, again, Andrew did nothing (when the evidence is viewed in the light most favorable to Mr. Joseph) that would indicate that he had disrupted or obstructed the activities of the officers or of anyone associated with the HCSO, the FSF, or the FSFA. *See Davis v. Williams*, 451 F.3d 759, 766–67 (11th Cir. 2006) (officers did not have probable cause, or arguable probable cause, to arrest homeowner for obstruction of justice or disorderly conduct under Florida law based on his approaching officers conducting a traffic stop near his home and asking them if he could direct the traffic of his guests onto his own property).

C

Sheriff Chronister and the FSFA contend that they are entitled to sovereign immunity under Florida

law on Mr. Joseph's state-law claims for wrongful death. We disagree.

"[A]n order denying state official or sovereign immunity is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016). Although we had previously read Florida law to mean that sovereign immunity is simply an immunity from liability, *see id.* at 1368–70, the Florida Supreme Court has recently told us that our reading of Florida law has been wrong. Because we now know that "[i]n Florida, sovereign immunity is both an immunity from liability and an immunity from suit," *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020), we have jurisdiction to address the denial of sovereign immunity to Sheriff Chronister and the FSFA.

1

Sheriff Chronister devotes much of his sovereign immunity argument to the contention that he did not owe Andrew any duty under Florida law. *See* Br. for Appellants Chronister and Clark at 21–34. The FSFA also makes the same argument, albeit in a more summary way. *See* Br. for the FSFA at 19–21. The Florida Supreme Court, however, has declared that "duty and sovereign immunity are conceptually distinct," and that the question of sovereign immunity is addressed only after a court determines that a duty is owed. *See Sanchez v. Miami-Dade Cnty.*, 286 So. 3d 191, 193 (Fla.

2019) ("[I]f a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty."). The Florida Supreme Court has also explained that "[u]nder traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in a *lack of liability*, *not* application of immunity from suit." *Id.* at 194 (emphasis in original). *See also Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932 (Fla. 2004) ("If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability, and the question of whether the sovereign should be immune from suit need not be reached.").

Because the question of duty goes to the merits of Mr. Joseph's wrongful death claim, and not to the existence of sovereign immunity under Florida law, Sheriff Chronister and the FSFA cannot raise the duty issue in this sovereign immunity appeal. The only proper question for us in an interlocutory appeal raising a state-law sovereign immunity claim is whether the defendant is immune under the relevant state law, and in addressing that question we assume—as the district court concluded—that Sheriff Chronister and the FSFA owed Andrew a duty of care.

2

The Florida Supreme Court has held that under Fla. Stat. §§ 768.28(1)–(5), which waives sovereign immunity in certain circumstances, some "'discretionary' government[ ] functions remain immune from tort

liability." *Com. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1022 (Fla. 1979). It has distinguished between "planning" decisions (which are immune) and "operational" decisions (which are not). *See id.* Applying this framework, it held in *Commercial Carrier* that, once a decision had been made to install a traffic light and a traffic sign at an intersection, their maintenance was "operational level activity." *Id.*

The district court ruled that sovereign immunity did not apply to the alleged operational negligence of the officers who implemented the security policies adopted by the FSFA and the HCSO—i.e., the decisions to not call Andrew's parents and to drop Andrew off at Gate 4 at night. *See* D.E. 283 at 25–28. It relied on two Florida Supreme Court sovereign immunity cases: *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989), and *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999). As relevant here, *Kaisner* held that sovereign immunity does not apply to how police officers carry out a traffic stop; though the officers' decision "involve[s] a degree of discretion," the decision is "operational, not discretionary." 543 So. 2d at 737–38. *Henderson*, which involved the alleged negligence of officers who after a DUI arrest directed an intoxicated person to drive a car to a nearby location, similarly held that sovereign immunity does not apply to "a situation in which sheriff's deputies are alleged to have acted negligently during a roadside detention." 737 So. 2d at 538.

In his brief, Sheriff Chronister does not address the district court's conclusion that the officers' methods and means of carrying out planning decisions made by

the FSFA and the HCSO are operational in nature. *See* Br. for Appellants Chronister and Clark at 34–40. Without such briefing, we cannot say that the district court erred. First, under Florida law, officers owe a common law duty of care to those they take into custody, and "this duty of exercising reasonable care . . . is an operational level function." *Dep't of Health & Rehab. Servs. v. Whaley*, 574 So. 2d 100, 103 (Fla. 1991). Second, where a district court bases its decision on a given ground, an appellant who fails to address that ground in his brief has effectively abandoned his challenge to the ruling. *See Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680–81 (11th Cir. 2014). So, we affirm the district court's ruling that Sheriff Chronister is not entitled to sovereign immunity at the summary judgment stage of the case.

For its part, the FSFA argues that sovereign immunity applies because its decision to turn over all security issues to the HCSO, and the policies developed by the HCSO for the FSF, were discretionary planning decisions. And it seeks to distinguish *Kaisner* and *Henderson* on that basis. *See* Br. for the FSFA at 13–20. But the FSFA's focus misses the point. Mr. Joseph is not suing the FSFA for hiring the HCSO to provide security at the FSF. Nor is he suing the FSFA for the general policies created by the HCSO. He is instead suing for the operational negligence of officers on the ground in failing to notify Andrew's parents and in choosing to drop Andrew off at Gate 4 at night. The question is whether that alleged negligence is operational in nature.

Given the record before us, and based on *Commercial Carrier*, *Kaisner*, and *Henderson*, we agree with the district court that the actions of the officers who dealt with Andrew after his seizure are operational. Those actions may have involved some discretion, as was the case in *Henderson*, but that does not change their operational character.

The FSFA alludes generally to the event action plan developed by the HCSO for the FSF but does not quote or summarize any of its provisions. The deposition testimony indicates that the plan is an internal HCSO document, *see* D.E. 243-2 at 185–86, and a copy of the plan can be found at D.E. 236-4. Significantly, the plan does not direct or order officers working at the FSF, as a policy/planning matter, to ignore Fla. Stat. § 985.101(1)(b) and not attempt to call or notify the parents of minors who have been seized and/or detained. Nor does the plan direct or order officers working at the FSF, as a policy/planning matter, to ignore Fla. Stat. § 985.115(2)(a) and not release detained minors into the custody of their parents or other responsible adults. Finally, nor does the plan direct or order officers working at the FSF, as a policy/planning matter, to take detained minors who have been ejected to Gate 4—no matter the time of day—and leave them there to their own devices. Absent such language in the plan devised by the HCSO for the FSF, we cannot say that the alleged negligent acts of the officers are protected by sovereign immunity.

We add one final point. The FSFA contends that the HCSO's actions regarding security were not

imputable to it once it made the decision to delegate responsibility for security to HCSO. As the district court correctly explained, however, the FSFA's argument is short on legal support:

> The FSFA conspicuously cites no authority for the proposition that a state instrumentality can, as a policy decision, delegate to a third party its obligations and absolve itself from all liability for the operational negligence of its appointed agents—the Court can find none and declines to invent any such precedent in this Order.

D.E. 283 at 25. In its brief here, the FSFA again fails to cite any cases holding that a state agency can delegate its public safety duties to a third-party contractor and thereby enjoy the benefits of sovereign immunity. Even the case cited by the FSFA, *McCall v. Alabama Bruno's, Inc.*, 647 So. 2d 175, 176 (Fla. 1st Dist. Ct. App. 1994) (citing Restatement (Second) Torts § 49 (1965) and its comments), says that there are some "non-delegable duties arising out of some relation toward the public or the particular plaintiff" which cannot be avoided through the hiring of a contractor.

III

The district court's summary judgment order is affirmed. **AFFIRMED.**

JORDAN, Circuit Judge, Concurring:

I join the court's opinion in full and write separately to address some of the issues raised by the appellants and not reached by the court.

* * * * * * *

In a qualified immunity appeal under the collateral order doctrine, we do not address claims that the plaintiff lacks Article III standing. *See*, *e.g.*, *Scott v. Taylor*, 405 F.3d 1251, 1256 n.8 (11th Cir. 2005). But even if we could adjudicate the Article III standing of Mr. Joseph in this appeal, I am not persuaded by argument of Sheriff Chronister and Officer Clark.

At the summary judgment stage, the question is not whether Mr. Joseph has conclusively established Article III causation but rather whether he has submitted sufficient evidence—accepted as true—to create an issue of fact and permit the jury to find that there is causation. *See Bishoff v. Osceola Cnty.*, 222 F.3d 874, 878 (11th Cir. 2000). Viewing the record in the light most favorable to Mr. Joseph, a reasonable jury could find that Andrew's death is "fairly traceable" to the decisions/ actions/ omissions of the defendants to (a) not call his parents as required by Florida law; (b) not turn Andrew over to his parents or another adult as required by Florida law; (c) leave Andrew to fend for himself at Gate 4, a drop-off area near Interstate 4, at night; and (d) tell Andrew that he would be arrested if he tried to renter the FSF grounds in order to get back to Gate 3, where he had been dropped off.

To the extent that Sheriff Chronister and Officer Clark are arguing (or suggesting) that proximate cause is missing, any such argument goes not to Article III standing but to the merits of Mr. Joseph's claims for damages. *See Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018). As the Supreme Court has explained, "[p]roximate caus[e] is not a requirement of Article III standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014).

Indeed, the Supreme Court has rejected an Article III standing argument much like the one that Sheriff Chronister and Officer Clark press here. *See Bennett v. Spears*, 520 U.S. 154, 168–69 (1997) (rejecting defendant's Article III argument that any injury would be the result of another agency's actions: "This wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While . . . it does not suffice if the injury complained of is th[e] result [of] the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else.") (citations and internal quotation marks omitted). We have similarly explained that "a plaintiff need not show that the defendant's actions were the very last step in the chain of causation." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126 (11th Cir. 2019). Furthermore, "[t]here is no Article III requirement that Mr. [Joseph] 'demonstrate a connection between the injur[y] [he] claim[s] and the . . . rights being asserted.'" *Moody*, 887 F.3d at 1287 (quoting *Duke Power*

Co. v. Carolina Envt'l Study Grp., Inc., 438 U.S. 59, 78 (1978)).

* * * * * * *

I agree with the court that Sheriff Chronister's appeal of the denial of sovereign immunity does not allow us to address whether a duty was owed to Andrew. But because Sheriff Chronister presses the duty issue so forcefully, I explain why I believe his argument is flawed.

In Florida, the "existence of a duty is a legal question." *Lim-ones v. Sch. District of Lee Cnty.*, 161 So. 3d 384, 389 (Fla. 2015). A duty in Florida can arise from (1) statutes or regulations, (2) judicial interpretations of statutes or regulations, (3) sources in the common law or judicial precedent, or (4) the general facts of a case. *See id.* For a number of reasons, I agree with the district court that the Sheriff, through his employees, agents, and subordinates, had a general duty to ensure the safety of minor children like Andrew who have been seized and detained.

First, several Florida statutes create a duty of care where detained minors are concerned. I describe them in detail.

One Florida statute, Fla. Stat. § 985.101(1)(b), provides that a child (i.e., a minor) like Andrew can be taken into custody for a "delinquent act or violation of law." That same statute also provides in a different subsection that when a child is taken into custody for such an act, "the person taking the child into custody

shall attempt to notify the parent, guardian, or legal custodian of the child," and "shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to the [Department of Juvenile Justice] under [Fla. Stat. §§] 985.14 and 985.145, whichever occurs first." § 985.101(3).

Another Florida statute, Fla. Stat. § 985.115(2), provides that "unless there is a need to hold the child, a person taking a child into custody shall attempt to release the child" to (a) the child's parent, guardian, or legal custodian and if they are unavailable to "any responsible adult;" (b) contingent upon specific appropriation, to an authorized shelter; (c) if the child is suffering from a serious physical condition, to a law enforcement officer who shall take the child to a hospital for evaluation and treatment; (d) if the child is believed to be mentally ill, to a law enforcement officer who shall take the child to a designated facility for evaluation; (e) if the child appears to be intoxicated and has threatened physical harm on himself or others or is incapacitated by substance abuse, to a law enforcement officer who shall take the child to a hospital, addiction facility, or treatment resource; or (f) if available, to a juvenile assessment center equipped and staffed to assume custody of the child for the purpose of assessing his needs. That same statute further provides in a different subsection that upon taking a child into custody, a law enforcement officer may deliver the child "for temporary custody, not to exceed 6 hours, to a secure booking area of a jail or other facility intended or used

for the detention of adults, for the purpose of fingerprinting or photographing the child or awaiting appropriate transport . . . provided no regular sight and sound contact between the child and adult inmates or trustees is permitted and the receiving facility has adequate staff to supervise and monitor the child's activities at all times." § 985.115(3).

Taken together, these Florida statutes, §§ 985.101(1), (3) and 985.115(2), (3), create a general duty on the part of law enforcement officers to notify the parent, guardian, or legal custodian of a child taken into custody, and to safely release a child who is in custody as directed. The statutes set out detailed and mandatory instructions for what officers are to do (in terms of notification and release) when a child is taken into custody in order to make sure that the child is safe and returned to the adults who care for him. They therefore establish a duty of care. *See* Restatement (Second) of Torts § 286 (1965) (explaining when a statute can be adopted by a court as setting out the standard of care). The situation here is similar to that in *Florida Department of Corrections v. Abril*, 969 So. 2d 201, 205–06 (Fla. 2007), where the Florida Supreme Court held that that state statutes created a duty on the part of laboratories to maintain HIV test results confidential. *See also Estate of Logusak ex rel. Logusak v. City of Togiak*, 185 P.3d 103, 108 (Alaska 2008) (pursuant to statute requiring police to release intoxicated minor to the custody of her parents unless there was a lawful reason for further detention, "police officers did

have a duty to act reasonably in releasing [the minor] to her parents").

Sheriff Chronister argues he owed no duty to Andrew because these two statutes only apply to situations where a child is "placed under arrest." But the statutes do not speak of a child who is "placed under arrest"; they speak of a child who is taken "into custody." *See* §§ 985.101(1), 985.115(2), (3). And taking a person (including a child) "into custody" does not require a formal arrest. As the Florida Supreme Court has held, a person is "in custody" when there is a "formal arrest *or* restraint on freedom of movement of the degree associated with a formal arrest." *Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1989) (emphasis added and citation and internal quotation marks omitted).

The "in custody" analysis, moreover, focuses on how a reasonable person would have perceived the situation. *See id.* Viewing the facts in the light most favorable to Mr. Joseph, Andrew was in custody from the time that he was taken to the processing area and was still in custody when he was driven to Gate 4 near Interstate 4 and left there. He had been seized against his will inside the FSF fairgrounds, taken in an HCSO van to a processing area, held there for about 40 minutes—during which time the officers ran a background check on him to ensure that he was not wanted, missing, or endangered, and took his photograph—and then driven by officers to Gate 4, where he was left to fend for himself. If that is not custody, I don't know what is.

There is also a common-law basis for concluding that Sheriff Chronister owed Andrew a duty of reasonable care under the circumstances. Under Florida law a "special tort duty does arise when law enforcement officers become directly involved in circumstances which place people within a 'zone of risk' by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger." *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932 (Fla. 2004). Indeed, the Florida Supreme Court has held that a "person taken into custody . . . 'is owed a common law duty of care.' " *Dep't of Health & Rehab. Servs. v. Whaley*, 574 So. 2d 100, 103 (Fla. 1991) (citation omitted). Given these cases, Sheriff Chronister's argument fails.

The existence of a duty of care under these circumstances makes sense. Generally speaking, a "person who has custody of another owes a duty of reasonable care to protect the other from foreseeable harm." Dan B. Dobbs et al., The Law of Torts § 418 (2d ed. June 2021 update). When the police detain a minor, they "owe a duty of reasonable care to protect the minor's safety while he or she is involuntarily detained," and "the majority of courts have held that there is a greater degree of care owed a juvenile." Catherine Palo, *Wrongful Death of a Minor in Police Custody*, 69 Am. Jur. Trials 1 §§ 1, 4 (1998 & August 2021 update).

Importantly, the Florida Supreme Court has rejected the argument that the question of duty should be characterized as narrowly as possible through the specific circumstances presented. *See Limones*, 161

So. 3d at 391 ("reject[ing] the decision of the Second District to narrowly frame the issue as whether [the school district] had a specified duty to diagnose the need for or use an AED on [the student]" in part because such a "narrow definition of duty, a purely legal question, slides too easily into breach, a factual matter for the jury"). So, whether Sheriff Chronister breached that duty of reasonable care through the operational decisions of his officers (e.g., the decisions to not call Andrew's parents and to drop Andrew off at Gate 4 at night) is a factual issue for the jury to determine, and not a legal one for us to resolve.

* * * * * * *

The district court correctly denied the appellants' motions for summary judgment based on qualified immunity and sovereign immunity. I join the court's opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREW JOSEPH, JR., as natural father, next friend and personal representative of the Estate of Andrew Joseph, III deceased,

Plaintiff,

v.

CHAD CHRONISTER, FLORIDA STATE FAIR AUTHORITY, an instrumentality of the State of Florida, HENRY ECHENIQUE, in his individual capacity, MARK CLARK, in his individual capacity, and STEPHEN JONES, in his individual capacity,

Defendants.

Case No: 8:16-cv-274-T-35CPT

ORDER

(Filed Feb. 21, 2020)

THIS CAUSE comes before the Court for consideration of the Amended Dispositive Motion for Summary Judgment filed by Defendants Chad Chronister, Mark Clark, Henry Echenique, and Stephen Jones,

(Dkt. 226), the response in opposition thereto, (Dkt. 243), and the reply in support (Dkt. 250); Defendant, Florida State Fair Authority's Motion for Summary Judgment, (Dkt. 230), and the response in opposition thereto, (Dkt. 244); and Plaintiff's Motion to Strike Expert Testimony of W. Ken Katsaris, (Dkt. 232), and the response in opposition thereto. (Dkt. 239) Upon consideration of the relevant filings, case law, and being otherwise fully advised, the Court hereby **ORDERS** that the Amended Dispositive Motion for Summary Judgment filed by Defendants Chad Chronister, Mark Clark, Henry Echenique, and Stephen Jones, (Dkt. 226), is **GRANTED IN PART and DENIED IN PART**, Defendant, Florida State Fair Authority's Motion for Summary Judgment, (Dkt. 230), is **DENIED**, and Plaintiff's Motion to Strike Expert Testimony of W. Ken Katsaris, (Dkt. 232), is **GRANTED IN PART and DENIED IN PART**.

I. BACKGROUND

A. Factual History

This action arises from an unspeakable, preventable tragedy—the death of Andrew Joseph III ("Andrew"), a fourteen-year-old child who attended Student Day at the Florida State Fair ("the Fair") on February 7, 2014. Student Day at the Fair was a day in which the Florida State Fair Authority ("FSFA") invited—indeed encouraged—youngsters to attend the Fair in droves, having issued free tickets at area schools and having imposed no requirement that students be

accompanied by a parent or other guardian. (Dkt. 226-36 at 35:6–9; Dkt. 226-19 at 42:9–21) The FSFA was aware of certain challenges this practice posed and prepared, in part, for those challenges by providing security officers; some were employees of the FSFA and others were members of the Hillsborough County Sheriff's Office ("HCSO"). (Dkt. 226-19 at 12:24–25, 13:1–9; Dkt. 226-21 at ¶¶ 23, 29, 30, 31; Dkt. 244-10) The FSFA and the HCSO implemented graduated arrest procedures for persons suspected of committing crimes at the Fair, including ejectment and up to formal arrest. (Dkt. 226-21 at ¶¶ 17–19; Dkt. 226-19 at 33:22–25, 34:1–4)

At around 6:30 pm on February 7, 2014, Andrew was dropped off at the Gate 3 entrance to the Fair by Shawntae Munn ("Ms. Munn"), along with four other children, C.T., C.E., V.M., and T.D. (Dkt. 255 at ¶ 1) The "Midway" was crowded. (Id. at ¶ 2) While not stipulated to by the Parties, the record indicates that at some point, several attendees—not including Andrew—created a disturbance on the Midway. (Dkt. 226-11 at 39:3–22, 40:12–24; Dkt. 226-10 at 54:13–19, 56:10–15, 57:1–10, 61:7–25) This disturbance resulted in a decision to detain several individuals. (Dkt. 226-11 at 41:19–25, 43:15–17) Andrew knew one of the individuals and observed him drop his hat while being forcibly detained. (Dkt. 226-4 at 50:8–18; 226-11 at 43:3–5) Andrew picked up the hat and attempted to hand it to his friend. (Dkt. 226-4 at 54:12–25, 55:1–9; Dkt. 226-11 at 37:2–18) For reasons that have yet to be explained, Andrew was detained on the Midway. (Dkt.

226-4 at 54:12–17) C.T., who was with Andrew at the time, was also detained by an HCSO officer. (Id.) The Parties stipulate for purposes of Defendants' Motion that Defendant Corporal Mark Clark subsequently escorted Andrew from the Midway to a "Processing Area" within the confines of the Fair. (Dkt. 255 at ¶ 3) In his deposition, Corporal Clark stated that he has no memory of Andrew, of interacting with Andrew, or of Andrew's actions leading up to his detention. (Dkt. 226-13 at 35:15–23; 37:19–25; 38:1–25) Corporal Clark did not memorialize the basis for his detention of Andrew in a writing that he created himself.

Rather, according to Deputy Henry Echenique, at the Processing Area, Corporal Clark handed Andrew over to him, and the Parties stipulate that Echenique filled out Andrew's ejection form "based on the information provided to him by Corporal Clark." (Dkt. 255 at ¶ 4) The stated basis for Andrew's ejection from the Fair as reflected on the ejection form prepared by Echenique was "Running through the mid-way causing disorderly conduct." (Id. at ¶ 5)

Andrew was in the custody of the HCSO for approximately 44 minutes. Specifically, Andrew was in the Processing Area from approximately 8:00 pm until 8:41 pm. (Id. at ¶ 6) At 8:04 pm, Andrew's background was run on FCIC/NCIC to ensure that he was not wanted, missing, or endangered. (Id. at ¶ 7) At 8:16 pm, Andrew's photograph was taken. (Id. at ¶ 8) Deputy Echenique was with Andrew for about twenty to thirty minutes in total. (Id. at ¶ 9) At 8:41 pm, Andrew was placed on an HCSO transport van, driven by

Defendant Stephen Jones and monitored by an HSCO officer, which transported Andrew away from the Processing Area. (Dkt. 244-1; Dkt. 226-28 at 80:6–9) Andrew was on the transport van from 8:41 pm to 8:44 pm, where he was taken from the Processing Area at coordinates -82.364703 (latitude) 27.992571 (longitude) to a drop off point beyond Gate 4 at coordinates -82.371466 (latitude) 27.98716 (longitude) ("Ejectment Location"). (Dkt. 255 at ¶ 10) Both locations are on the FSFA's property, (id. at ¶ 10), but the latter location is outside the gates of the Fair itself. The Ejectment Location was bordered by Orient Road and Interstate 4 ("I-4"). (Dkt. 226-19 at 50:21–25; Dkt. 243-3)

After exiting the HCSO transport van, Andrew and the other ejected children walked to Gate 4 and stayed there for some time. (Dkt. 255 at ¶ 13) The record reflects that HCSO never contacted Andrew's parents while he was in custody on February 7, 2014. (Dkt. 244-9 at ¶¶ 6–7) Andrew did not call his parents while waiting at Gate 4. (Dkt. 255 at ¶ 14) Andrew's parents did not call his cell phone until after Ms. Munn could not locate him when she arrived at the Fair at Gate 4[1] to pick up Andrew, C.T., C.E., V.M., and T.D. (Id. at ¶ 15)

According to C.T., in attempting to return to the side of the Fair where they were originally to be picked up by Ms. Munn, Andrew and C.T., who had also been ejected, were told by an unspecified HCSO law

[1] Although Ms. Munn dropped the children off at Gate 3, T.D., her son, contacted her and advised that they were waiting at Gate 4. (Dkt. 226-2 at 42:2–18)

enforcement officer at Gate 4, "No, you can't walk through here. I can't take you through here. You guys have been kicked out of the Fair. I can really arrest you guys for trespassing right now. You're not supposed to be here." (Dkt. 226-4 at 74:4–14) The officer also told them, "[T]he only thing separating you guys from the main gate is the interstate." (Id. at 74:14–17) Andrew and C.T. then walked in the direction of I-4, down the Orient Road sidewalk, which led them under I-4 to the Hard Rock Casino, which sits on the opposite side of I-4 almost directly across from the fairgrounds. (Dkt. 255 at ¶ 16; Dkt. 243-3) Upon arriving at the casino and apparently realizing that they were on the wrong side of I-4 from the Fair, Andrew and C.T. ran directly across I-4 from the casino side to the Fair side. (Dkt. 255 at ¶ 17) Andrew then received a phone call from T.D. and said, "Oh, I know what I'm about to do." (Id.) C.T. asked Andrew, "What, we've got to turn around?" and Andrew said, "Yes." (Id.) Andrew and C.T. then ran back across I-4 towards the casino, in an apparent attempt to backtrack to the Orient Road sidewalk and return to Gate 4. (Id. at ¶ 18) Andrew was struck and killed by a vehicle on I-4 at approximately 10:43 pm in the lane that was closest to the casino and furthest from the Florida State Fairgrounds property. (Id.) C.T. made it safely to the casino side and returned to Gate 4 via the Orient Road sidewalk. (Dkt. 226-4 at 83:2–6)

B. Procedural History

On February 3, 2016, Andrew Joseph, Jr. ("Plaintiff") filed this action as the natural father, next friend,

and personal representative of his son Andrew's estate, asserting claims against the FSFA, the Sheriff of Hillsborough County, the Hillsborough County School Board, the Hillsborough County School District, and John Does I-X. (Dkt. 1) On April 22, 2016, Plaintiff amended his complaint as a matter of course, (Dkt. 28), and on January 18, 2017, Plaintiff filed a Second Amended Complaint after obtaining leave of Court, wherein he identified the John Does as HCSO deputies Henry Echenique, Mark Clark, Stephen Jones, and Adrian Chester. (Dkt. 77) Thereafter, Plaintiff voluntarily dismissed the Hillsborough County School Board and the Hillsborough County School District from this action. The remaining Defendants filed motions to dismiss. (Dkts. 82, 83, 84, 85) On April 27, 2017, the Court denied as premature the individual officers' motions to dismiss in which they asserted the defense of qualified immunity. (Dkts. 112, 113) On May 11, 2017, the officers filed a notice of interlocutory appeal, and the Court stayed the case pending resolution of the interlocutory appeal. (Dkts. 116, 121)

The Eleventh Circuit reversed the Orders denying the officers' motions to dismiss and remanded the action for further proceedings. (Dkts. 126, 128) Thus, on February 16, 2018, the Court lifted the stay and reinstated all four motions to dismiss. (Dkt. 129) At the Parties' request, the Court held a hearing, at which the Court granted Plaintiff's oral motion for leave file a third amended complaint. (Dkt. 138) On March 30, 2018, Plaintiff filed a Third Amended Complaint, which is the operative complaint in this case. (Dkt.

143) Plaintiff's Third Amended Complaint alleges a state wrongful death cause of action against HCSO Sheriff Chad Chronister ("Count I"), a state wrongful death cause of action against the FSFA for vicarious liability ("Count II"), a state wrongful death cause of action against the FSFA for direct liability ("Count III"), a deprivation of civil rights cause of action against HCSO Sheriff Chad Chronister in his official capacity under 42 U.S.C. § 1983 ("Count IV"), and claims against Corporal Clark and Deputies Jones and Echenique[2] ("Officer Defendants") in their individual capacities for violation of Andrew's civil rights under 42 U .S .C. § 1983 ("Counts V–VII"). (Dkt. 143)

The Officer Defendants and HCSO Sheriff Chad Chronister opted to answer the allegations in the Third Amended Complaint rather than move to dismiss. (Dkt. 146) The FSFA moved to dismiss, (Dkt. 147), which motion the Court denied. (Dkt. 209) All of the Defendants have now moved for summary judgment. (Dkts. 226, 230) Plaintiff has moved to strike the expert opinions of W. Ken Katsaris, (Dkt. 232), whose expert report is proffered in support of Defendants' Motion for Summary Judgment. (Dkt. 226-39) These motions are ripe for the Court's review.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the movant can show that there is no genuine issue of

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[2] Adrian Chester was not named as a Defendant in the Third Amended Complaint.

material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1320-1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). "If a party fails to properly support an assertion of fact or fails to properly address another

party's assertion of fact . . . the court may grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

III. DISCUSSION

A. Standing

As a threshold matter, Plaintiff has the burden of proving that he has Article III standing. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). To do so, he must allege sufficient facts to establish that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. (citation omitted). As to the first element, the injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992) (citations and quotation marks omitted). "[T]he concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights," and a plaintiff need not assert an actual injury "beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." Spokeo, Inc., 136 S. Ct. at 1552; see also Carey v. Piphus, 435 U.S. 247, 266 (1978) (holding that nominal damages are appropriate when a plaintiff's constitutional rights have been infringed but he cannot show further injury).

As to the second element, "there must be a causal connection between the injury and the conduct

complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41–42 (1976)). To satisfy Article III's causation requirement, the injury alleged must be connected with the conduct of which Plaintiff complains. Wilding v. DNC Servs. Corp., 941 F.3d 1116, 1125 (11th Cir. 2019). "Significantly, '[p]roxim ate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.'" Id. (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014)). "[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." Id. (quoting Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003)). Thus, to satisfy the standing requirement, "a plaintiff need not show that the defendant's actions were the very last step in the chain of causation, and courts must not confuse weakness on the merits with absence of Article III standing." Id. at 1126.

"Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561. In response to a

summary judgment motion, a plaintiff cannot merely rest on the allegations in his complaint, but must set forth by evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. Id.

Defendants contend that Plaintiff has not satisfied the first two elements of Article III standing. (Dkts. 227 at 3; 228 at 3) However, Plaintiff's son Andrew's death is a concrete injury in fact, which Defendants concede in their reply. (Dkt. 250 at 10) Moreover, it is alleged that prior to his death, Andrew's Fourth Amendment rights were violated when he was arrested without probable cause. As to the second element of standing, the Court finds that both Andrew's constitutional and physical injuries, if the facts are proven, are "fairly traceable" to the conduct of Defendants such that they satisfy the requirements of Article III. Therefore, the Court finds that Plaintiff has standing to proceed with this action.

B. Counts I–III: Wrongful Death Against HCSO Sheriff Chad Chronister and the FSFA

Count I of the Third Amended Complaint asserts a Florida wrongful death action against HCSO Sheriff Chronister in his official capacity[3] as the Sheriff of

[3] When the county sheriff is sued in his official capacity, the suit is effectively an action against the governmental entity he represents—in this case, Hillsborough County. McMillian v. Monroe County, 520 U.S. 781, 785 n.2 (1997); see also Kentucky v.

Hillsborough County, Florida ("Chronister"), and Chronister seeks summary judgment against Plaintiff on this Count. (Dkts. 226, 227) Chronister contends that Count I fails because the HCSO did not owe a legal duty to Andrew and, even if a legal duty existed, the HCSO is immune from civil liability pursuant to the doctrine of sovereign immunity. (Dkt. 227) Likewise, the FSFA contends that summary judgment is appropriate on Counts II and III against it because the FSFA did not owe a legal duty to Andrew and the FSFA is immune from liability pursuant to the doctrine of sovereign immunity. (Dkt. 230)

1. Duty of Care

To establish a cause of action for negligence in a wrongful death action, a plaintiff must allege and prove (1) the existence of a legal duty owed to the decedent, (2) a breach of that duty, (3) that the breach was a legal or proximate cause of the decedent's death, and (4) consequential damages as a result of the breach. Jenkins v. W.L. Roberts, Inc., 851 So. 2d 781, 783 (Fla. 1st DCA 2003). "When addressing the issue

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Graham, 473 U.S. 159, 165–66 (1985) ("Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." (citations and internal quotation marks omitted)).

of governmental liability under Florida law, the duty analysis is distinct from the later inquiry regarding whether the governmental entity is sovereignly immune." Francis v. Sch. Bd. of Palm Beach Cty., 29 So. 3d 441, 443 (Fla. 4th DCA 2010) (citing Wallace v. Dean, 3 So. 3d 1035, 1044 (Fla. 2009)). If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability and the court need not reach the question of sovereign immunity. Wallace, 3 So. 3d at 1044. "However, if a duty of care is owed, it must then be determined whether sovereign immunity bars an action for an alleged breach of that duty." Id. (quoting Pollock v. Fla. Dep't of Highway Patrol, 882 So. 2d 928, 932–33 (Fla. 2004)). "Under traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit." Id. (emphasis in original). "[T]he *absence of a duty of care* renders the defendant *nonliable* as a matter of law because his, her, or its actions are therefore nontortious vis-à-vis the plaintiff." Id. at 1045. (emphasis in original). Whether the defendant owed Plaintiff a duty of care "poses a question of law that the court must answer before permitting a negligence claim to proceed before the trier of fact." Id. at 1046. Thus, the Court must first determine whether the HCSO and the FSFA owed Andrew a duty of care.

"There are generally four recognized bases for imposing a duty of care: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial

precedent; and (4) a duty arising from the general facts of the case." Id. at 1047. When a duty of care arises from the facts of a case, the inquiry is whether the defendant's conduct created a foreseeable zone of risk. Chirillo v. Granicz, 199 So. 3d 246, 249 (Fla. 2016). "Although a duty analysis considers some general facts of the case, it does so only to determine whether a general, foreseeable zone of risk was created, without delving into the specific injury that occurred or whether such injury was foreseeable." Id. "[W]hen a 'defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty [to all within the zone] placed upon [the] defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.'" Lewis v. City of St. Petersburg, 260 F.3d 1260, 1263 (11th Cir. 2001) (alterations in original) (quoting Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989)). Thus, "each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result." Henderson v. Bowden, 737 So. 2d 532, 536 (Fla. 1999) (quoting McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992)). "This analysis applies equally to the actions of both public and private defendants." Lewis, 260 F.3d at 1263.

With regard to law enforcement officers specifically, while their general responsibility towards the public does not engender a duty to act with care toward any one individual, "[a] special tort duty does arise when law enforcement officers become directly involved in circumstances which place people within a

'zone of risk' by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger." Pollock, 882 So. 2d at 935. "The premise underlying this theory is that a police officer's decision to assume control over a particular situation or individual or group of individuals is accompanied by a corresponding duty to exercise reasonable care." Id.

Here, the HCSO contends that the public duty doctrine prevents Plaintiff from establishing that the deputies owed Andrew any duty of care outside the duty of care generally owed to members of the public. (Dkt. 227 at 3–10) However, the Court finds that a special relationship was created between Andrew and the deputies that operated to defeat the public duty doctrine when the deputies placed Andrew in a foreseeable zone of risk, subjecting him to danger. Specifically, the deputies unlawfully detained and *de facto* arrested Andrew, removed him from the Midway of the Fair, and took him into their custody at the Processing Area. Deputy Jones, an off-duty deputy and employee of the FSFA, then transported Andrew from the Processing Area, within the confines of the Fair, to an Ejectment Location on the fairgrounds but outside of the confines of the Fair and released Andrew, a child, from custody without notifying his parents or a responsible adult, contrary to the requirements of Florida law. See Fla. Stat. §§ 985.101(3); 985.115(2). Further, the FSFA, the HCSO, and the involved deputies failed to provide supervision or oversight of the children or any useful direction in regard to the ejectment. The transporting

officers simply left the children to their own devices and drove away.

The HCSO seeks to avoid liability by citing Milanese v. City of Boca Raton, 84 So. 3d 339 (Fla. 4th DCA 2012) There, the Florida Fourth District Court of Appeal held that the police owed no duty of care to an intoxicated adult who was released from police custody and was subsequently struck and killed by a train near the police station. Id. at 340. In Milanese, the individual was taken into custody for driving erratically and transported to the police station. Id. After issuing several traffic citations, none of which were for driving under the influence, the officer called a cab and, once the cab arrived, escorted the individual to the front door of the station and released him while he was still impaired. Id. However, the cab driver did not see the individual and left minutes after the individual was released. Id. The individual was subsequently struck and killed by a train on nearby railroad tracks, and his estate sued the city for negligence. Id. In affirming the lower court's dismissal of the complaint, the Fourth District Court of Appeal concluded that no duty of care existed upon the individual's release from custody because the police played no part in creating the dangers that the individual faced upon release nor did they do anything to render him more vulnerable to those dangers. Id.

In contrast to the facts of Milanese, Andrew was a 14-year-old child who was separated from most of his companions, taken from the relative safety of the confines of the Fair, and forcibly removed to a location

outside of the Fair, where he was inherently subject to any number of foreseeable dangers. He could have been accosted by a stranger, robbed, or assaulted. Or, he could have attempted to find his way back to his drop off location and become confused and injured—or, as happened here, killed.

Unlike Milanese, in which the individual was released in no worse position than the officer found him intoxicated, with access to a vehicle—Andrew was released in a far worse position than where he was found, such that he was more vulnerable to danger—outside of the Fair fencing, in the dark of night, away from most of his companions, on a side of the Fair distant from, and with no reasonable way to get back to, his designated pickup location. Any correct direction he could have taken to return to Gate 3 would have involved traversing roughly one to two miles through the major thoroughfares of Orient Road and Dr. Martin Luther King Jr. Boulevard. (Dkt. 224-8 at ¶ 13) What is more, upon release, Andrew specifically asked to be allowed to walk back through to the other side of the Fair with a police escort to meet his ride home and was told by an HCSO law enforcement officer at Gate 4, "No, you can't walk through here. I can't take you through here. You guys have been kicked out of the Fair. I can really arrest you guys for trespassing right now . You're not supposed to be here." (Dkt. 226-4 at 74:4–14) He was also erroneously instructed that the only thing separating him from his desired location was I-4. (Id. at 74:14–18)

Whether the specific cause of injury to Andrew on I-4 was a foreseeable event that was proximately caused by the actions of the Defendants is a question of fact for the jury and is irrelevant for purposes of determining the issue of duty. As the Florida courts have explained: "Duty is determined as a matter of law and is the tool used by the jury to assess the defendant's behavior, whereas proximate cause is a fact-specific assessment by the jury to determine whether the exact injury is likely to recur if the defendant's same conduct is repeated in a similar context." Chirillo, 199 So. 3d at 249. The pertinent inquiry at this stage in the proceedings is whether the on-duty HCSO deputies and off-duty FSFA employees created a foreseeable zone of risk when they placed Andrew in a worse situation than he would have been in if he had not been taken into police custody and driven to a place of ejectment outside of the confines of the Fair.

Plaintiff argues further that Chapter 985 of the Florida Statutes concerning juvenile justice is also implicated in this analysis, imposing a duty of care on Defendants. (Dkt. 243 at 28 n.20; Dkt. 244 at 4, 8) Specifically, Section 985.101, Florida Statutes lists the circumstances under which a child may be taken into custody, including "[f]or a delinquent act or violation of law, pursuant to Florida law pertaining to a lawful arrest," and further provides that "[w]hen a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue

such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to the department under ss. 985.14 and 985.145, whichever occurs first." Fla. Stat. § 985.101(1)(b), (3). Section 985.115(2), Florida Statutes provides that when a child is taken into custody, the person taking the child into custody shall attempt to release the child as follows:

> **(a) To the child's parent, guardian, or legal custodian or, if the child's parent, guardian, or legal custodian is unavailable, unwilling, or unable to provide supervision for the child, to any responsible adult.** Prior to releasing the child to a responsible adult, other than the parent, guardian, or legal custodian, the person taking the child into custody may conduct a criminal history background check of the person to whom the child is to be released. If the person has a prior felony conviction, or a conviction for child abuse, drug trafficking, or prostitution, that person is not a responsible adult for the purposes of this section. The person to whom the child is released shall agree to inform the department or the person releasing the child of the child's subsequent change of address and to produce the child in court at such time as the court may direct, and the child shall join in the agreement.
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> (b) Contingent upon specific appropriation, to a shelter approved by the department or to an authorized agent.

> (c) If the child is believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt treatment, to a law enforcement officer who shall deliver the child to a hospital for necessary evaluation and treatment.
>
> (d) If the child is believed to be mentally ill as defined in s. 394.463(1), to a law enforcement officer who shall take the child to a designated public receiving facility as defined in s. 394.455 for examination under s. 394.463.
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> (e) If the child appears to be intoxicated and has threatened, attempted, or inflicted physical harm on himself or herself or another, or is incapacitated by substance abuse, to a law enforcement officer who shall deliver the child to a hospital, addictions receiving facility, or treatment resource.
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> (f) If available, to a juvenile assessment center equipped and staffed to assume custody of the child for the purpose of assessing the needs of the child in custody. The center may then release or deliver the child under this section with a copy of the assessment.

Fla. Stat. § 985.115(2) (emphasis added).

It is undisputed that, after he was held in custody, processed, and ejected, Andrew was not released in accordance with Section 985.115(2), and none of the Officer Defendants attempted to contact Andrew's parent, guardian, or legal custodian at any point prior to his release in accordance with Section 985.101(3).

(Dkt. 244-9 at ¶¶ 6–7; Dkt. 226-15 at 23:6–11; Dkt. 226-28 at 80:24–25, 81:1–3) The HCSO contends that Chapter 985 does not apply to this case because Andrew was not "taken into custody" for purposes of that statute, arguing that "[s]ubsection (1) [of Section 985.101] sets forth the four circumstances under which a child is taken into custody. None of those four circumstances are a trespass and ejection." (Dkt. 250 at 13–14) Defendant's reading of the statute is incorrect. Subsection (1) of Section 985.101, Florida Statutes, sets forth the circumstances under which a child may lawfully be taken into custody, but it does not define the only circumstances in which law enforcement's encounter with a child can be considered taking the child into custody pursuant to Chapter 985. Rather, Section 985.03 defines the term "taken into custody," for purposes of its use in the Chapter, as "the status of a child immediately when *temporary* physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law." Fla. Stat. § 985.03(48) (emphasis added). While not every encounter between law enforcement and a juvenile will result in a child being "taken into custody" under this definition, and will not trigger the statutory notification and release requirements, the facts of the instant case support a finding that law enforcement took at least temporary physical control over Andrew when they removed him from the Midway, held him in the Processing Area where he was not free to leave for approximately 40 minutes while they ran a warrant search, questioned him, and photographed him, and

then transported him involuntarily on an HCSO transport van under the authority of two sheriff's officers (one on duty and one off-duty) from the Processing Area to the Ejectment Location outside of the Fair.

The Court notes that Florida cases have reasoned that certain encounters between law enforcement and children do not constitute being "taken into custody" for purposes of triggering the speedy trial requirement. See M.H. v. State, 637 So. 2d 25, 25 (Fla. 4th DCA 1994) (finding that a juvenile who was taken to police station and held for his own safety *without* being fingerprinted, photographed, interrogated, or placed in a holding cell while an officer attempted to get in touch with the child's parents or a responsible adult was not "taken into custody" for purposes of triggering the 45-day time limit for filing a delinquency petition); State v. F.T.H., 579 So. 2d 911, 912 (Fla. 5th DCA 1991) (holding that a juvenile who was approached on the street, told that he matched the description of a robbery suspect, asked for his name, address, and phone number, and photographed was not "taken into custody" for purposes of triggering the 45-day speedy trial provision); R.C. v. State, 461 So. 2d 215, 216 (Fla. 1st DCA 1984) (juvenile had not been "taken into custody" for purposes of triggering the speedy trial provision when he was at all times in the custody of his mother, voluntarily met with an officer, and there was no indication that he could not have voluntarily left); State v. M.S.S., 436 So. 2d 1067, 1069 (Fla. 2d DCA 1983) (holding that a juvenile who was taken to the police station but "not

charged, fingerprinted, or otherwise processed by the police" was not "taken into custody" for purpose of triggering the juvenile speedy trial rule until the date of his arrest months later). The factual differences between these cases and the instant cases are facially apparent. In contrast to the facts in these cases, Andrew was held and fully processed to be ejected for a criminal trespass, and he was not free to leave once he was seized by law enforcement officers. He was then transported and ejected from the Fair, as if formally trespassed, and no attempt was made to notify or release him to a parent or guardian.

The Court finds that these cases are also legally inapposite. They resolve the timing of the speedy trial doctrine under Florida law, Chapter 985 and are not instructive outside that context. See M.S.S., 436 So. 2d at 1069 (noting that the meaning of "in custody" is different for different purposes); State ex rel. Dean v. Booth, 349 So. 2d 806, 807 (Fla. 2d DCA 1977) (finding that an individual was "in custody" for purposes of being entitled to Miranda warnings while simultaneously not being "in custody" for purposes of triggering the speedy trial rule); Snead v. State, 346 So. 2d 546, 547 (Fla. 1st DCA 1976) (holding that an arrest in which no charge is made does not commence the period in which a speedy trial is required). These additional statutory duties were triggered in this instance.

Whether or not the additional duties to contact his parents or release him in accordance with Chapter 985 are considered, the Court additionally finds that the affirmative actions and omissions by the on-duty

HCSO deputies and the off-duty deputies who were acting as FSFA employees created a foreseeable zone of risk to Andrew such that these employees owed Andrew a duty to either to lessen the risk or see that sufficient precautions were taken to protect him from the harm that the risk they created posed. See Lewis, 260 F.3d at 1263; Kaisner, 543 So. 2d at 734.

The FSFA additionally argues that no duty was owed to Andrew because the accident resulting in his death occurred off FSFA property and therefore outside of any foreseeable zone of risk. (Dkt. 230 at 7–12) "Although a landowner is most commonly liable for injuries that occur on the property, there are occasions when a landowner may be liable for a dangerous condition that results in injury off the premises." Johnson v. Howard Mark Prods., Inc., 608 So. 2d 937, 938 (Fla. 2d DCA 1992). "[T]he general standard of care which the common law places on all landowners to protect invitees under a wide spectrum of circumstances can authorize a case-specific standard of care requiring protection of invitees on nearby property if the landowner's foreseeable zone of risk extends beyond the boundaries of its property." Id. As explained previously in this Court's Order denying the FSFA's Motion to Dismiss, (Dkt. 209), the instant case is more factually similar on the issue of duty to Bardy v. Walt Disney World Co., 643 So. 2d 46, 47–48 (Fla. 5th DCA 1994), than Aguila v. Hilton, Inc., 878 So. 2d 392, 394 (Fla. 1st DCA 2004).

> In Aguila v. Hilton, Inc., 878 So. 2d 392, 394 (Fla. 1st DCA 2004), the First District Court

of Appeal found no duty of care was owed by the defendant motel owners when their employee security guard instructed several intoxicated college students to leave their motel room, after which one of the students left the motel premises, drove under the influence, and killed the plaintiff's daughter in a car wreck. Id. at 394–95. The court noted that the main difference between Aguila and cases finding a duty of care was that there was no relationship between the motel and the plaintiff, a member of the general public. Id. at 397–98. Further, the court recognized that Florida law does not impose a general duty on the owner of a business to ensure the safety of an intoxicated person who is about to leave the premises of the business. Id. at 398. However, the court stated that it was "significant that the security guard did not eject the students from the motel grounds" under the facts of that case. Id. Thus, the security guard could not be said to have created the risk. The court distinguished the facts of Aguila from another case, Bardy v. Walt Disney World Co., in which the Fifth District Court of Appeal found a duty of care when a Disney security guard ejected a drunken Disney employee from the premises and ordered him to remove his car, despite his protestations that he was too intoxicated to drive. 643 So. 2d 46, 47 (Fla. 5th DCA 1994). In Bardy, the court found that the defendant's conduct, through its employee, had created a foreseeable risk of harm to the driver who was an invitee of the premises prior to his ejection. Id. at 48. In the instant

> case, there was a relationship between the FSFA and Andrew, who had, prior to his ejection, been a patron and invitee of the Fair, and the FSFA can be said to have created the risk of harm to Andrew when its agent employees forcibly ejected him from the fairgrounds into an area adjacent to a busy interstate. Thus, this case is factually more like Bardy than Aguila on the issue of duty.

(Dkt. 209 at 10–11)

This analysis finds further support in the record facts that an unknown HCSO official told Andrew and C.T. to leave even the premises at the gate nearest to the Ejection Location, refused their reasonable request to be escorted to the proper location to meet the person who was supposed to pick them up, advised them that the only thing separating them from their intended location was the interstate, and further threatened them with a formal arrest if they remained near the place of ejectment. (Dkt. 226-4 at 74:4–18) In short, these facts support the conclusion that Andrew was directed to leave FSFA property, and any suggestion that his responding to the threat of arrest and moving beyond the property as directed should not be chargeable to the Sheriff's office or the Fair is unpersuasive. Based on these facts, the zone of risk was initially created and subsequently expanded by the Defendants. Because the Court finds that the Defendants owed Andrew a legal duty of care, the next inquiry is whether sovereign immunity shields the FSFA and the HCSO from liability for their conduct.

2. Sovereign Immunity

Florida's legislature has explicitly waived sovereign immunity for liability in torts involving personal injury, wrongful death, and loss or injury of property. Fla. Stat. § 768.28. Further, sovereign immunity under Florida law is "only a defense to liability, rather than immunity from suit." Parker v. Am. Traffic Sols., Inc., 835 F.3d 1363, 1368 (11th Cir. 2016).

> [S]overeign immunity under Florida law is no[t] immunity from suit, but only immunity from liability: "although the state will have to bear the expense of continuing the litigation, the benefit of the *immunity from liability*, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment.

CSX Transp., Inc. v. Kissimmee Util. Auth., 153 F.3d 1283, 1286 (11th Cir. 1998) (emphasis in original) (quoting Dep't of Educ. v. Roe, 679 So. 2d 756, 759 (Fla. 1996)). The statutory waiver of sovereign immunity from liability in tort actions is limited to "any act for which a private person under similar circumstances would be held liable." Pollock, 882 So. 2d at 932. Thus, "[t]here can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances." Id. (quoting Henderson, 737 So. 2d at 535).

To answer the question of whether sovereign immunity bars a negligence action, it is necessary to

determine whether the negligence alleged by the plaintiff relates to a discretionary or operational function of government. Beach Cmty. Bank v. City of Freeport, Fla., 150 So. 3d 1111, 1113–14 (Fla. 2014). Under Florida law, the former is protected conduct, while the latter is not. Id. at 1114. Because every human endeavor involves some level of discretion, Florida courts have rejected a dictionary approach to defining "discretion." Wallace, 3 So. 3d at 1053. Rather, discretion for purposes of sovereign immunity refers to discretion at the policy making or planning level. Id.

> In this context, a "discretionary," planning-level function involves "an exercise of executive or legislative power such that a court's intervention by way of tort law would inappropriately entangle the court in fundamental questions of policy and planning." *Mosby v. Harrell*, 909 So.2d 323, 328 (Fla. 1st DCA 2005). An "operational" function, on the other hand, "is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Dep't of Health & Rehabilitative Servs. v. B.J.M.*, 656 So.2d 906, 911 n. 4 (Fla. 1995); *Mosby*, 909 So.2d at 328. Operational decisions are not immune. *Trianon Park Condo. Ass'n v. City of Hialeah*, [468 So.2d 912, 924 (Fla. 1985)]. "Functionally, the discretionary-versus-operational test is intended to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins."

> *Wallace [v. Dean*, 3 So.3d 1035, 1044 (Fla. 2009)] (internal quotations omitted).

Beach Cmty. Bank, 150 So. 3d at 1114 (alterations in original).

To aid in this analysis, the Florida Supreme Court instructs courts to consider the following four questions: (1) does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective; (2) is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective, as opposed to one that would not change the course or direction of the policy, program, or objective; (3) does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved; and (4) does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority to do or make the challenged act, omission, or decision. Wallace, 3 So.3d at 1053–54 (citing Commercial Carrier Corp. v. Indian River Cty., 371 So. 2d 1010, 1019 (Fla. 1979)). If all of these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision is discretionary in nature and thus immune from tort action. Id. at 1054.

Both the FSFA and the HCSO contend that Plaintiff's allegations concern purely discretionary policy making or planning decisions. (Dkts. 227 at 13–14; 230 at 14–15) They correctly point out that "[t]he manner in which a city, through its police officers, exercises

discretionary authority to enforce compliance with the laws and protect the public safety, falls squarely within the city's power to govern." Sanchez v. Miami-Dade Cty., 245 So. 3d 933, 938 (Fla. 3d DCA 2018), review granted, No. SC18-793, 2018 WL 4819338 (Fla. Oct. 4, 2018), and review dismissed, No. SC18-793, 2019 WL 6906482 (Fla. Dec. 19, 2019). Florida courts "have long held that a municipality's decision on where to allocate its police resources is a planning level decision that is not subject to civil liability." Id. at 940 (collecting cases). Accordingly, the HCSO and FSFA correctly argue that they are protected under the doctrine of sovereign immunity for their discretionary decisions regarding security and planning for the Fair, including how certain resources should be allocated and how criminal behavior would be handled. (See Dkt. 226-21 (explaining HCSO's decision-making process in selecting the location of the Processing Area and Ejection Location and policy of favoring criminal trespass and ejection over formal arrest for criminal violations)) Further, the deputies' decision to eject Andrew from the Fair is also a discretionary decision, for which sovereign immunity applies. See Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985) ("[T]here is no distinction between the immunity afforded the police officer in making a determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. All of these decisions are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state.").

However, "[w]hen the challenged action involves not 'the policies themselves,' but 'the way [they] were implemented,' the action is operational rather than discretionary." Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla., 402 F.3d 1092, 1119 (11th Cir. 2005) (quoting Kaisner, 543 So.2d at 738). In response to this authority, the FSFA makes the "Pontius Pilate" argument, contending that it broadly made a planning level decision to "turn over all security and implementation of security for the [Fair] event to the [HCSO]" and thus is somehow absolved from all liability thereafter. (Dkt. 230 at 14) The FSFA conspicuously cites no authority for the proposition that a state instrumentality can, as a policy decision, delegate to a third party its obligations and absolve itself from all liability for the operational negligence of its appointed agents—the Court can find none and declines to invent any such precedent in this Order.

In any event, the FSFA is not being sued for its policy decision of delegating security matters to the sheriff—and it can hardly be argued that its decision to do so was not sound. It is being sued for the operational negligence of its employees and agents who participated in the implementation of the security policy. That is to say, the FSFA and the HCSO are immune for their decisions to police the Fair, to arrest those whom the officers have reason to believe are trespassing by acting out, and to eject, rather than formally charge, trespassers, as these are all discretionary, policy-based decisions. However, if the alleged facts are proven in this case, the manner of executing that ejectment and

the failure to provide security or safety in that ejectment, especially in dealing with children, is operational.

Instructive of the distinction are the cases of Henderson v. Bowman and Kaisner v. Kolb from the Florida Supreme Court. In Kaisner, a motorist sued the sheriff's department and two deputies for injuries he received during a roadside detention. 543 So. 2d at 733. The motorist exited his pickup truck and moved to the area between his truck and the police cruiser, which was parked about one vehicle length behind his truck. Id. He was directed by one of the officers not to come any closer, so he remained in the area between the two vehicles. Id. The police cruiser was unexpectedly hit from behind by another vehicle and propelled forward into the pickup truck. Id. Both the officer and the motorist were struck and injured. Id. After concluding that the officers owed the motorist a duty of care, the Florida Supreme Court determined that the sheriff's office was not entitled to sovereign immunity for the alleged negligence of the officers, finding that their actions were operational, not discretionary. Id. at 736–38. In doing so, the court stated:

> The question thus is whether the act of the officers in this case involved 'quasi-legislative policy-making . . . sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.' 73 Cal.Rptr. at 248–49, 447 P.2d at 360–61. We find that it does not. The precise

> manner in which a motorist is ordered to the side of the road is neither quasi-legislative nor sensitive.

Id. at 737. Further, after looking at the Commercial Carrier factors, the court determined that the actions at issue were operational. Id. at 737–38. It reasoned, "[o]bviously, there may be many ways of ordering motorists to the roadside, some safer than others, most requiring neither greater cost nor a change in fundamental governmental policies. The issue here involved neither the policies themselves nor the decision to order petitioners to the roadside, which we would be powerless to alter by way of tort law. Instead, the problem was the way these decisions were implemented, which our courts indeed may review in an action for negligence." Id. at 738.

Likewise, in Henderson, the Florida Supreme Court found that the HCSO was not entitled to sovereign immunity for the allegedly negligent conduct of its deputies initiated by a roadside detention. 737 So. 2d at 539. Specifically, several HCSO deputies detained the driver and three passengers of a Honda that was speeding. Id. at 534. The deputies arrested the driver of the vehicle and charged him with DUI. Id. Although evidence suggested that the front-seat passenger had admitted to being intoxicated, the deputies directed him to drive to a nearby convenience store, advising that they would follow. Id. The deputies denied knowing that the passenger was intoxicated and stated that they told him he could either drive to the convenience store and call his parents for a ride home

or have the car impounded and be picked up at the police station. Id. The individual drove to the nearby convenience store parking lot, and after a couple of minutes, decided to drive away. Id. A chase ensued, during which the individual driving lost control of the vehicle and collided with a cluster of trees. Id. The remaining two passengers were killed. Id. After determining that the deputies' conduct in directing an intoxicated individual to drive the vehicle created a foreseeable zone of risk such that the deputies owed the decedents a duty of care, the Florida Supreme Court further found that this conduct was not protected by sovereign immunity. Id. at 537. The court determined that this was not a case concerning an officer's discretionary decision to arrest or detain a potential subject. Id. at 538. Rather, as in Kaisner, the case concerned a situation that dealt with the officers' alleged negligent conduct in connection with that detention, which was operational and not insulated by the doctrine of sovereign immunity. Id.

Once the HCSO and the FSFA undertook to implement their security policies by arresting and ejecting children from the Fair, they had an operational duty not to do so negligently. Here, as alleged, both HCSO and FSFA employees played a part in Andrew's allegedly negligent ejection from the Fair. Specifically, after taking custody of Andrew, Clark, Echenique, and Jones failed to follow the directives of Section 985.101(3), Florida Statutes by attempting to contact Andrew's parent or guardian. Further, Deputy Jones, who was

an off-duty FSFA employee[4], drove Andrew to a location outside of the Fair gates and released him from police custody without following the directives of Section 985.115(2), Florida Statutes. Even setting aside the directives to notify and release to a parent or guardian, the Defendants released the children at a point distant from their pickup location, outside the confines of the Fair, with no direction, supervision, or oversight. To make matters worse, an unknown HCSO employee then denied Andrew's request to reenter the Fair to reach his intended pick-up point at Gate 3, instructed Andrew and C.T. that they were trespassing by remaining in the location they were placed in by the officers, and threatened them with arrest. Consistent with the reasoning of the Florida Supreme Court in Kaisner and Henderson, the Court finds that Plaintiff's challenges to the HCSO and FSFA employees' conduct in implementing the security policies by arresting and ejecting Andrew from the Fair in an allegedly negligent manner are operational and not subject to sovereign immunity. As such, neither the HCSO nor the FSFA is immune from being vicariously liable for the negligence of their employees. Thus, the FSFA's Motion for Summary Judgment is due to be **DENIED**, and Chronister's Motion for Summary Judgment is due to be **DENIED** as to Count I.

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[4] An employment and indemnification agreement between the Fair and HCSO provided that off-duty deputies were to be considered employees of the Fair while working in an off-duty capacity and were compensated by the Fair. (Dkt. 230 at 2; Dkt. 244-10)

C. Count V–VII: Deprivation of Civil Rights Against Clark, Echenique, and Jones in their Individual Capacities under 42 U.S.C. § 1983

Counts V, VI, and VII of the Third Amended Complaint assert § 1983 causes of action against Deputy Echenique, Corporal Clark, and Deputy Jones in their individual capacities. All three Counts are subject to the Officer Defendants' Motion for Summary Judgment. (Dkt. 228) All of the Officer Defendants have raised the defense of qualified immunity. (Id.)

1. Qualified Immunity

Under the Fourth Amendment, an individual has a right to be free from "unreasonable searches and seizures." U.S. Const. Amend. IV. "[A]n arrest is a seizure of the person and the reasonableness of an arrest is, in turn, determined by the presence or absence of probable cause for the arrest." Skop v. City of Atlanta, GA, 485 F.3d 1130, 1137–38 (11th Cir. 2007) (citation and quotation marks omitted). "Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." Id. (quoting United States v. Floyd, 281 F.3d 1346, 1348 (11th Cir.2002) (per curiam)). "This probable cause standard is practical and non-technical, applied in a specific factual context and evaluated using the totality of the circumstances." Id. (citing Maryland v. Pringle, 540 U.S. 366, 370 (2003)).

While an officer who arrests an individual without probable cause has violated that individual's Fourth Amendment right, this does not inevitably remove the shield of qualified immunity. Id. The defense of qualified immunity provides that it is inevitable that law enforcement officials will, in some cases, reasonably but mistakenly conclude that probable cause is present, and in such cases those officials should not be held personally liable. Id. "Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Gates v. Khokhar, 884 F.3d 1290, 1298 (11th Cir. 2018), cert. denied, 139 S. Ct. 807 (2019) (quoting Dalrymple v. Reno, 334 F.3d 991, 994 (11th Cir. 2003)). Proper application of the defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Id. (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

A defendant who asserts the defense of qualified immunity has the initial burden of showing he was acting within the scope of his discretionary authority when he took the allegedly unconstitutional action. Id. at 1297. "Assuming the defendant makes the required showing, the burden shifts to the plaintiff to establish that qualified immunity is not appropriate by showing that (1) the facts alleged make out a violation of a constitutional right and (2) the constitutional right at issue was clearly established at the time of the alleged misconduct." Id.

Here, the Parties do not dispute that the Officer Defendants were all acting within the scope of their discretionary authority when they detained and ejected Andrew from the Fair on February 7, 2014. As such, it is Plaintiff's burden to show that the facts constitute a violation of a clearly established constitutional right. In this analysis, the court resolves all issues of material fact in favor of the plaintiff. Lee v. Ferraro, 284 F.3d 1188, 1190 (11th Cir. 2002). The court then answers the legal question of whether the defendant is entitled to qualified immunity under that version of the facts. Id. The Eleventh Circuit has made clear that the "facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case." Id. (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 925 n.3 (11th Cir.2000)).

The relevant "facts" of the case for purposes of deciding the issue of qualified immunity are as follows. The Fair's Midway was crowded. (Dkt. 255 at ¶ 2) Several people were detained on the basis of their running and allegedly causing a disturbance on the Midway. Andrew was detained by an unspecified officer on the Midway at around 8:00 pm on February 7, 2014. While it is unclear who initially detained Andrew, the Parties stipulate for purposes of Defendants' Motion for Summary Judgment that Corporal Clark escorted Andrew from the Midway to the Processing Area. (Id. at ¶ 3) In his deposition, Corporal Clark stated that he has no recollection of Andrew from that night. (Dkt. 226-13 at 35:21–23) Clark does not remember any conduct leading up to Andrew's detention, escorting Andrew to the

Processing Area, or handing him to Echenique. (Id. at 35:15–23, 36:20–25, 37:1) Thus, he does not recall seeing Andrew engage in any conduct that could support a trespass violation. While no law enforcement officer, including Clark, has any personal recollection of the initial encounter with Andrew that led to his detention, several eyewitnesses testified to what they witnessed leading up to and after the encounter.[5]

J.P testified that she was with Andrew for about thirty minutes leading up to the incident.

> We were talking. Then [two juveniles] [J.] and [H.] were getting taken away by the deputies. They were all like handcuffed and stuff. And he was like, what's going on; what's going on. And then we started following them. But then, like, I don't know, they were going too fast. And then Andrew started running after them

[5] While providing context, the testimony of these witnesses, whether favorable or unfavorable to the officers, is not pertinent to the Court's arguable probable cause analysis because no Officer, including Clark, claims to have seen what these witnesses claim they saw. The relevant inquiry for the Court in assessing the presence or absence of arguable probable cause is what was known by the officers at the time of the actions that Plaintiff claims vitiate their qualified immunity. Further, to the extent that the Officers intend to rely on the statement of Echenique in Andrew's Ejection Form as to Andrew's conduct leading up to his being taken into custody, the Court would note that the testimony of these witnesses would seem contradictory and, construed in the light most favorable to the Plaintiff, would refute any suggestion that Andrew was "running on the Midway causing disorderly conduct." Notably, Echenique and Clark both concede that running alone would not be sufficient to support a claim of disorderly conduct. (Dkt. 226-15 at 115:12–13; Dkt. 226-13 at 44:6–7, 45:3–18)

> with his friends, and I was like, well, I'm not going to do that, so I turned around.

(Dkt. 226-9 at 47:10–17) It does not appear that J.P. actually witnessed the interaction between Andrew and law enforcement. However, Andrew's other companion, C.T., testified as follows:

> We was talking to a girl and we seen [J.] and there was somebody else that walked past and they were being held by the officers and they were walking. And I believe it was [J.]'s hat that fell. And then Andrew was like, "oh" – like we picked up that hat and we were like, "oh, [J .] what's up?" And he was asking what happened and I was like right there with him. And then all of a sudden two officers just come up behind us and grabbed us. And then like I was trying to get out and then Andrew had told him not to resist, just to go, so we just walked with them.

(Dkt. 226-4 at 50:8–18)

> And we walked because Andrew saw one of his friends, which I knew him through football, and we saw him. And his hat fell and we picked up his hat. He was like – or we was like, "What's going on? Why are you" – and then once he said that, like the two officers came up behind us and grabbed us.
>
> **Q. Did you all run over to the area –**
>
> A. No. It was kind of like –
>
> **Q. – where the boys were?**

A It was kind of like – I mean, it was kind of like a—yeah, we went in like a – it wasn't like – I don't know how to describe it, but it was like we wasn't running, but we went over there.

Q. Okay. Did you walk over there?

A. I walked over there.

Q. Did Andrew walk over there?

A. I believe he ran to pick up the hat.

Q. He ran to pick up the hat?

A. Yeah. It was like --- I don't know how close we was, but it was like they walked past us. And when they walked past us, his hat dropped. And Andrew picked it up and like, basically like, in like a hurry, to be like, oh, what's going on.

(Dkt. 226-4 at 54:12–25, 55:1–9) R.P. also witnessed the encounter that led to Andrew's detention.

A. They were taking me and [H.] and [A.] and [J.] to the back to the holding, and that's when Andrew got involved because I made eye contact with him.

And I was like – they were taking me back there. I had two cops on me. They slammed me. I had a bruised hip, light concussion. I went to the hospital with that.

And my hat actually fell off, because I was wearing that FSU hat. And that's when Andrew got involved because he saw me. He

> picked up my hat for me. And that's when they were like, "You know him ?"
>
> I, was like, "Yeah. That's my cousin. That's my friend." We say "cousin." He was my friend.
>
> **Q. All right.**
>
> A. And they were like, You come with us also," and they took him And that's how he got involved like that.

(Dkt. 226-11 at 37:2–18) J.H. did not witness the encounter, but first saw Andrew in the Processing Area roughly five minutes after J.H. arrived there himself. He stated that Andrew told him what happened while they were in the Processing Area:

> He said he was going to get [R.]'s hat, because he saw [R.]'s hat drop and he went to go pick it up and to go give it to him. And one of the deputies came up to him, asked him if he was with us.
>
> And he said, "No. But those are my friends."
>
> And from there he just got grabbed. "Come on. You're coming with them two," and that's when he ended up out there.

(Dkt. 226-8 at 37:17–24)

Ultimately, Clark escorted Andrew to the Processing Area, which was a fenced enclosure. Andrew and the other detainees were surrounded by HCSO deputies in uniform with badges, side arms and tasers, and Andrew and the other detainees were not

permitted to leave.[6] (Dkt. 243-2 at 68:19–25; 69:1–10, 24:23–24, 30:7–23; Dkt. 226-16 at 31:16–20, 31:21–25; 32:1–2, 59:19–23; Dkt. 226-13 at 14:23–25, 15:1–10, 16:3–11; 112:19–21; Dkt. 226-37 at 36:7–10; Dkt. 226-15 at 39:10–13, 111:10–23; Dkt. 226-28 at 35:13–16) The Parties further stipulate for purposes of Defendants' Motion that at the Processing Area, Deputy Echenique filled out Andrew's ejection form "based on the information provided to him by Corporal Clark." (Dkt. 255 at ¶ 4) The basis for Andrew's ejection from the Fair as stated by Deputy Echenique on Andrew's ejection form was: "Running through the midway causing disorderly conduct." (Id. at ¶ 5; Dkt. 226-5)

Andrew was held involuntarily within the Processing Area from approximately 8:00 pm until 8:41 pm, during which time his background was run on FCIC/NCIC to ensure that he was not wanted, missing, or endangered, and his photograph was taken. (Dkt. 255 at ¶¶ 6–8) Deputy Echenique was with Andrew for about twenty to thirty minutes in total. (Dkt. 255 at ¶ 9) The record does not support that there was any investigation into Andrew's alleged disorderly conduct while he was detained and in the custody of HCSO.

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[6] The testimony of other detained juveniles also varies as to the conditions of the Processing Area and how the detainees were treated while they were there. Some said that they were handcuffed with their belongings removed, while others stated that they were not handcuffed and they kept their belongings. (See e.g., Dkt. 226-8 at 39:1–10, 43:17–20; Dkt. 226-11 at 47:7–14, 52:5–9) However, the Court finds that these factual differences are immaterial to resolution of the instant motions. Either way, they were not free to leave.

(Dkt. 226-15 at 24:19–25, 25:1–8, 27:14–17) From 8:41 pm to 8:44 pm, Andrew was on an HCSO transport van, driven by Deputy Jones from the Processing Area to the Ejection Location, outside of the Fair but still on FSFA property. (Dkt. 255 at ¶ 10) Both Deputy Jones and the law enforcement deputy riding along with him in the transport van were armed and in uniform. (Dkt. 226-28 at 80:8–9, 42:12–22, 101:2–6) Andrew was not free to refuse to be transported and he was not free to exit the van. (Id. at 44:6–25; 48:19–23) In total, Andrew was detained and in the custody of the HCSO for approximately 44 minutes.

a. Terry Stop or *De Facto* Arrest?

Defendants contend that Andrew was subjected to a Terry stop rather than a *de facto* arrest. (Dkt. 228 at 3–21) "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. Terry v. Ohio, 392 U.S. 1, 30 (1968). Therefore, it is well-established under the Fourth Amendment that an officer may briefly detain and conduct a limited search of a person if the officer has, based on the totality of the circumstances, a "reasonable suspicion" that the person has engaged in, is engaged in or is about to engage in a crime. United States v. Acosta, 363 F.3d 1141, 1145–46 (11th Cir. 2004). This temporary detention is deemed to be a less intrusive invasion of privacy than a formal arrest and, therefore,

may be constitutionally accomplished merely on articulable or founded suspicion of criminal activity. Terry, 392 U.S. at 21.

To distinguish between a Terry stop and an arrest, the court examines four nonexclusive factors: (1) the purpose of the stop; (2) the diligence with which the agents pursued their investigation; (3) the scope and intrusiveness of the stop; and (4) the duration of the stop. United States v. Mendoza, 658 F. App'x 479, 482 (11th Cir. 2016)[7] (citing Acosta, 363 F.3d at 1146). "The first factor turns on whether the agents 'pursue[d] a method of investigation that was likely to confirm or dispel their suspicions quickly, and with a minimum of interference.'" Id. (quoting Acosta, 363 F.3d at 1146). "The second factor looks at whether the agents carried out their investigation 'without unnecessary delay.'" Id. (quoting Acosta, 363 F.3d at 1146). "The third factor asks whether the stop was more intrusive than necessary to ensure the agents' safety." Id. (citing Acosta, 363 F.3d at 1146). The final factor asks whether the stop took too long. Id. (citing Acosta, 363 F.3d at 1147).

The facts, taken in the light most favorable to Plaintiff, do not support Defendants' contention that Andrew was merely subjected to an investigative Terry stop. The undisputed facts indicate that Andrew was stopped on the Midway by law enforcement personnel

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[7] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

and removed from the scene by Clark to the Processing Area to be processed for ejection. Plaintiff concedes that an officer would have had the right to question Andrew as he was handing a baseball cap to another boy to resolve any ambiguity that criminal activity may be occurring. (Dkt. 243 at 37 (citing United States v. Lewis, 674 F.3d 1298 (11th Cir. 2012)). However, Plaintiff contends that "[t]he constitutional violations against Andrew begin with the actions of these Defendants, following Andrew's cooperation and honest responses to their question. The facts in evidence proclaim Andrew was not, in any conceivable way, committing a crime, or even breaking any rule. Andrew answered their question and resolved all reasonable suspicion and ambiguity, yet the Defendants took Andrew into custody, where they did nothing to dispel their fears of a crime taking place or otherwise satisfy a *Terry* investigation." (Id. at 37–38)

During the 44 minutes of Andrew's detention in the fenced-in Processing Area and subsequent transport to the Ejection Location, Andrew was not free to leave. He was surrounded by HCSO deputies in uniform with badges, side arms and tasers. There is no evidence that Clark, Echenique or any other officer pursued any investigation that was likely to confirm or dispel Clark's—or any other officer's—suspicion that Andrew had committed a crime, let alone that any such investigation was done quickly and in the least intrusive manner necessary. Instead, during the 40 minutes Andrew was being held in the Processing Area, he was already assumed to have committed the crime for

which he was being processed. This is so even though no one, not even the officers involved in his custodial posture, can articulate a first-hand account of the conduct for which he was allegedly being detained, trespassed, processed, and ejected. And, of course, Andrew was ultimately ejected, not released and allowed to proceed on his way and enjoy his time at the Fair or return to his pick-up point and meet his ride. That the deputies elected not to formally charge him with a crime is immaterial to the nature of their seizure and detention. Moreover, Andrew was involuntarily placed on a transport van driven by Jones and staffed by a law enforcement deputy, by the admission of HCSO Master Sergeant Todd Anthony, "to ensure that there was a continuous law enforcement presence" until the conclusion of his custodial detention upon Andrew's release outside the Fair. (Dkt. 226-21 at ¶ 21) Under these facts, the Court finds that Andrew was subjected to an arrest.

b. Arguable Probable Cause and Clearly Established Law

Having determined that Andrew was arrested, the Court must determine whether the arrest was supported by arguable probable cause and whether the law protecting him from a constitutional violation was clearly established at the time of the incident for purposes of qualified immunity.

As stated above, "[p]robable cause exists where the facts within the collective knowledge of law

enforcement officials, derived from reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that a criminal offense has been or is being committed." Gates, 884 F.3d at 1298 (quoting Brown v. City of Huntsville, Ala., 608 F.3d 724, 734 (11th Cir. 2010)). "It requires only 'a probability or substantial chance of criminal activity, not an actual showing of such activity.' " Id. (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)). Thus, innocent behavior frequently will provide the basis for a showing of probable cause. Id.

However, even without probable cause to arrest, an officer will be entitled to qualified immunity if the officer had "arguable probable cause" to arrest. Id. Arguable probable cause exists where "reasonable officers in the same circumstances and possessing the same knowledge as the Defendant *could have believed* that probable cause existed to arrest." Skop, 485 F.3d at 1137 (emphasis in original) (quoting Lee, 284 F.3d at 1195). "This standard recognizes that law enforcement officers may make reasonable but mistaken judgments regarding probable cause but does not shield officers who *unreasonably* conclude that probable cause exists." Id. (emphasis in original) Whether an arresting officer possesses probable cause or arguable probable cause depends on the elements of the alleged crime and the facts of the case. Id. at 1137–38.

Here, the Officer Defendants contend that even though no formal arrest of Andrew occurred, probable cause or at least arguable probable cause existed to arrest Andrew for committing the crime of trespass

pursuant to Fla. Stat. § 616.185, which reads, in pertinent part, as follows:

> (1) For the purposes of this chapter, trespass upon the grounds of the Florida State Fair Authority or any other fair association permitted under s. 616.15 means:
>
> (a) Entering and remaining upon any grounds or facilities owned, operated, or controlled by the Florida State Fair Authority or any other association permitted under s. 616.15 and committing any act that disrupts the orderly conduct of any authorized activity of the fair association in charge, or its lessees, licensees, or the general public on those grounds or facilities;
>
> . . .
>
> (2) Any person committing the offense of trespass upon the grounds of the Florida State Fair Authority or any other fair association permitted under s. 616.15 commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (3) A law enforcement officer may arrest any person on or off the premises, without a warrant, if the officer has probable cause for believing such person has committed the offense of trespass upon the grounds of the Florida State Fair Authority or any fair association permitted under s. 616.15. Such an arrest does not render the law enforcement officer criminally or civilly liable for false

> arrest, false imprisonment, or unlawful detention.

Fla. Stat. § 616.185.

Taking the facts in the light most favorable to the Plaintiff, the evidence does not support a finding that Clark had probable cause to believe Andrew committed or was committing any act that disrupted the orderly conduct of any authorized activity of the FSFA, its lessees, licensees, or the general public. Additionally, in light of Corporal Clark's complete lack of recollection of the events leading up to Andrew's detention, the Court cannot find that reasonable officers in the same circumstances and ***with the same knowledge as Clark*** could have believed that probable cause existed to arrest Andrew. If the witnesses are to be believed, handing a baseball cap to an individual who is being detained is not disorderly, nor is mere proximity or association with that individual a basis to bootstrap a probable cause finding. Ultimately, no law enforcement officer can testify to witnessing Andrew doing anything that would give rise to arguable probable cause to arrest him or even reasonable suspicion to detain.

Moreover, the Court finds that the law protecting Andrew from this arrest was clearly established at the time, vitiating any claim by Clark to qualified immunity on the basis of ignorance. "To be clearly established, a right must be well-established enough 'that every reasonable official would have understood that what he is doing violates that right.'" Gates, 884 F.3d at 1296–97 (internal quotation marks omitted and

alteration adopted) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)). In other words, existing precedent must have placed the statutory or constitutional question beyond debate and thus given the official fair warning that his conduct violated the law. Id. (emphasis in original, quotation marks and citation omitted); Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc) ("The critical inquiry is whether the law provided [Defendant officers] with 'fair warning' that their conduct violated the Fourth Amendment.").

Fair warning is most commonly provided by materially similar precedent from the Supreme Court, the Eleventh Circuit, or the highest state court in which the case arose. Gates, 884 F.3d at 1296. However, a judicial precedent with identical facts is not essential, and "[a]uthoritative judicial decisions may 'establish broad principles of law' that are clearly applicable to the conduct at issue." Id. (quoting Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1209 (11th Cir. 2007)). Occasionally, "it may be obvious from explicit statutory or constitutional statements that conduct is unconstitutional." Id. at 1296–97 (citations and quotation marks omitted). In all of these circumstances, however, "qualified immunity will be denied only if the preexisting law by case law or otherwise makes it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue." Id. (citation, alteration, and quotation marks omitted). In the context of a Fourth Amendment violation, "the dispositive question is whether it was already clearly established, as a matter of law, that at the time of Plaintiff's arrest,

an objective officer could not have concluded reasonably that probable cause existed to arrest Plaintiff under the particular circumstances Defendants confronted." Id. at 1303.

The Court finds that under the particular circumstances confronted by Clark with regard to Andrew's arrest, the law was clearly established such that no officer could have reasonably concluded that probable cause to arrest Andrew existed. The factual circumstances of this case, taken in the light most favorable to Plaintiff, are that Andrew merely approached another juvenile who was being detained, handed the juvenile's hat back to him, and acknowledged that he was friends with that person. Notably, Corporal Clark does not even recall witnessing this limited encounter, so he cannot claim that any part of it informed his basis for finding arguable probable cause to arrest Andrew. Moreover, the law was clearly established at the time of the incident that propinquity will not suffice for probable cause: a person's "mere presence at the scene of a crime, without more, does not support a finding of probable cause to arrest." Holmes v. Kucynda, 321 F.3d 1069, 1081 (11th Cir. 2003) (quotation and citation marks omitted). See also Sibron v. New York, 392 U.S. 40, 62 (1968) ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.")

Both binding Eleventh Circuit and United States Supreme Court precedent made clear at the time of

Andrew's arrest that the Fourth Amendment affords "individualized protection":

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause **particularized with respect to that person**. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

Swint v. City of Wadley, Ala., 51 F.3d 988, 997 (11th Cir. 1995) (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)). In Swint, patrons of a nightclub brought a civil rights action against the sheriff, police chief, police officer, city, and county commission for constitutional violations which allegedly occurred during raids on a nightclub in which patrons were searched and seized (but not formally arrested) after officers attempted to identify and find a single individual who sold drugs to an undercover agent. 51 F.3d 988, 997 (11th Cir. 1995). In denying the law enforcement officers' qualified immunity defense, the Eleventh Circuit, quoting the Supreme Court, stated that "[a] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Id. (quoting Ybarra, 444 U.S. at 91). The court explained that each citizen is clothed with constitutional protection against an

unreasonable search or seizure, and such protections were not shed at the door of the nightclub. Id. "Probable cause to arrest one suspect, and even probable cause to believe that a number of other or unidentified people had sold drugs in the establishment in the past, did not give the officers *carte blanche* to seize everyone who happened to be in the Club when the two raids took place." Id.

In this case, the law was clearly established that Andrew was entitled to individualized Fourth Amendment protections and he could not be seized by virtue of his proximity, association, or innocent interaction with another individual whom law enforcement independently may have had probable cause to detain. Thus, if the facts proffered by Plaintiff are true, they show an encounter between Corporal Clark and Andrew, initiated by Clark under the color of law, during which Andrew was seized by Clark without arguable probable cause in violation of clearly established law. As such, Clark is not entitled to qualified immunity.

Deputies Echenique and Jones contend that they are entitled to qualified immunity pursuant to the "fellow officer rule," which generally "allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers." Montes-Valeton v. State, 216 So. 3d 475, 479 (Fla. 2017) (quoting Voorhees v. State, 699 So. 2d 602, 609 (Fla. 1997)). However, the officer conducting the search or arrest must be acting based upon information provided by a fellow officer, and without the communication to the arresting officer of some information that initiates the

arrest, the predicate for application of the fellow officer rule is lacking. Id. Thus, Deputy Echenique, is entitled to rely on the information provided to him by Clark in making a decision to maintain the detention of Andrew.[8] Echenique testified that he only had contact with Andrew in the Processing Area, when he received Andrew from Corporal Clark. (Dkt. 226-15 at 9:12–16)

> **Q. So when you say Clark "handed him to you," what does that mean?**
>
> A. He said, "Deputy Echenique, fill out the ejection form," he said, "for this subject," which was [Andrew Joseph]. I said, "Yes, for what," and he told me, "For running on the midway, disorderly conduct."

(Id. at 9:21–25, 10:1)

> **Q. What did [Clark] say, as exactly as you remember, not from the form, but from your memory?**
>
> A. Again, this form, as you said, I cannot just write "running." I just can't do it. I didn't know

[8] Echenique's testimony also establishes that he did not make the decision to eject Andrew and that he understood this decision was made by Clark, who told him to "fill out the ejection form." (Dkt. 226-15 at 21:19–22, 22:1–2) It ultimately does not matter whether Echenique was the arresting officer or was merely following orders from a superior in maintaining Andrew's detention and processing his ejection, because under either scenario, there are no facts in evidence to support that he had any reason to question Clark's articulated basis for detention and ejection, i.e. "running on the midway, causing disorderly conduct," which Plaintiff stipulates was conveyed by Clark to Echenique. (Dkt. 255 at ¶ 4)

> [Andrew]. I didn't pick him up at the midway. I didn't know nothing. If you look at all my other forms, I wrote exactly what they did on that midway. I'm not just going to write, "running," and not ask Corporal Clark any other questions besides that. What I wrote on that form is, "Running through the midway, causing disorderly conduct," is what he told me. If he told me, "Running," I'd probably ask him, "Doing what?" But that was the conversation.

(Id. at 117:9–21) Further, despite Clark's lack of recollection of the events on the Midway or in the Processing Area as they pertain to Andrew, Plaintiff stipulates, for purposes of resolving Defendants' Motion for Summary Judgment, that Echenique filled out Andrew's ejection form "based on the information provided to him by Clark." (Dkt. 255 at ¶ 4) Nothing in the record suggests that Andrew's ejection was Echenique's idea or that he was present during the initial interaction between Andrew and Clark such that he would have any reason to question the assertion by Clark as to the basis for Andrew's arrest.[9] While, as previously discussed, there is no basis in the record to support Clark's conveyed belief that Andrew was running on the Midway, causing disorderly conduct, there is likewise no basis in this record for Echenique to have

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[9] Echenique testified that Andrew asked if he could speak to Corporal Clark, and that Clark denied the request because he was too busy; but Echenique claims he had no idea what Andrew wanted to speak with Clark about, and he testified that Andrew never claimed he was wrongfully being detained and trespassed. (Id. at 25:1–16, 26:20–23, 25, 27:1–3)

questioned this assertion by Clark. And if Andrew was, in fact, running on the Midway, causing disorderly conduct, as Echenique appeared to believe, such conduct would provide arguable probable cause to arrest Andrew for a violation of Section 616.185, Florida Statutes. As such, Echenique is entitled to qualified immunity for his conduct.

Unlike Echenique, Deputy Jones was not explicitly advised by anyone as to the reason for Andrew's trespass and ejection; rather, he attests that he was merely instructed by the deputies in the Processing Area as to which detainees had been processed and were ready to be transported to either the JAC if they were formally arrested or the Ejection Location if they were being trespassed. (Dkt. 226-28 at 35:22–25; 42:3–4) Deputy Jones was a detention deputy and testified that, as such, he could not give lawful orders. (Id. at 45:15–16) Thus, Jones testified that he always had a law enforcement deputy ride with him, (id. at 80:8–9), because he could not legally trespass citizens. (Id. at 100:22–23) Jones also testified that "[o]nce we arrived to the [Ejection] location, and everybody, all the people were in the van to exit, the law enforcement deputy would then notify them that they were being trespassed from the property. That's what they tell them." (Id. at 80:24–25, 81:1–3)

Though no facts supporting probable cause to arrest Andrew were expressly articulated to Jones, Jones is entitled to the benefit of the fellow officer rule due to his implicit understanding that those who were being ejected had been criminally trespassed from the Fair.

Like Echenique, there is nothing in the record that would provide Jones with any reason to question the validity of Andrew's trespass and the instructions Jones testified he was given to transport Andrew to the Ejection Location. Qualified immunity has been found in similar cases, where the record reflects no reason an officer should question the validity of an order or arrest made by another officer. See Wilkerson v. Seymour, 736 F.3d 974, 980 (11th Cir. 2013) (declining to find liability as to non-arresting officer who arrived at the scene after plaintiff was already under arrest and placed in a transport car when plaintiff did not claim that she told the non-arresting officer her account of the arrest or that she challenged the basis of her false arrest or otherwise put him on notice that her arrest was unconstitutional); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001) (granting qualified immunity to all agents involved in an unconstitutional search except for supervising agents when there was no evidence that the subordinate agents had reason to believe the search was unconstitutional); Hartsfield v. Lemacks, 50 F.3d 950, 956 (11th Cir. 1995) (holding that subordinate officers may be liable under § 1983 only if "they knew or should have known that their conduct might result in a [constitutional] violation"); McDaniel v. Smith, No. CV 507-079, 2009 WL 10690706, at *5 (S.D. Ga. Oct. 29, 2009) (finding that an officer was entitled to qualified immunity when he merely transported an individual who he did not know was being unlawfully detained under orders from his supervisor; "Plaintiff has . . . failed to point to a relevant decision holding that a subordinate officer must independently assess

the legitimacy of a supervisor's orders if the subordinate has no reason to believe the orders were unlawful."). Thus, Jones is also entitled to qualified immunity for his conduct.

D. Count IV: Deprivation of Civil Rights Against Sheriff Chronister in his Official Capacity Under § 1983

Count IV of the Third Amended Complaint asserts a § 1983 violation against Sheriff Chronister in his official capacity and is the subject of Chronister's Motion for Summary Judgment. (Dkts. 226, 227) Specifically, in Count IV of the Third Amended Complaint, Plaintiff contends that Chronister was deliberately indifferent to Andrew's rights when he failed to adequately train or otherwise supervise and direct the HCSO and its deputy sheriffs concerning the rights of the citizens they encounter in their duties, specifically minors, such that it was a policy, practice, and custom for deputy sheriffs to take extreme and reckless actions against the juveniles they encountered. (Dkt. 143 at ¶ 86) Chronister contends that summary judgment should be granted in his favor because Plaintiff has established no legally cognizable deprivation of rights under the United States Constitution or federal law, nor has he shown that a policy or custom was the moving force behind the alleged constitutional deprivations. (Dkt. 227)

The Supreme Court has placed strict limitations on municipal liability under § 1983. A county's liability

under § 1983 may not be based on vicarious liability or the doctrine of *respondeat superior*. City of Canton v. Harris, 489 U.S. 378, 385 (1989); Monell v. Dep't of Soc. Servs., 436 U .S . 658, 694 (1978). A county is "liable under section 1983 only for acts for which [the county] is actually responsible." Marsh v. Butler County, 268 F.3d 1014, 1027 (11th Cir. 2001) (en banc). Indeed, a county is liable only when the county's "official policy" causes a constitutional violation. Monell, 436 U.S. at 694. Mere negligence and gross negligence are not actionable under 42 U.S.C. § 1983. See Farmer v. Brennan, 511 U.S. 825, 835-36 & n.4 (1994); Rooney v. Watson, 101 F.3d 1378, 1381 (11th Cir. 1996). Thus, to succeed in his §1983 claim against HCSO, Plaintiff must identify a municipal "policy" or "custom" that caused his *constitutional* injury.

A plaintiff has two methods by which to establish a county's policy: "identify either (1) an officially promulgated county policy or (2) an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county." Grech v. Clayton Cty., Ga., 335 F.3d 1326, 1329 (11th Cir. 2003) (citing Monell, 436 U.S. at 690–91, 694; Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999)). Because it is rare that a county will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs "must show that the county has a custom or practice of permitting it and that the county's custom or practice is 'the moving force behind the constitutional violation.'" Id. at 1330 (internal quotation marks and alteration omitted) (quoting City of Canton,

489 U.S. at 389). "[M]unicipal liability under § 1983 attaches where and only where a deliberate choice to follow a course of action is made from among various alternatives" by policymakers. Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998) (quoting City of Canton, 489 U.S. at 389).

Where the alleged policy at issue concerns a county's failure to train or supervise, it can only yield liability against a municipality where the county's failure to act reflects deliberate indifference to the constitutional rights of its inhabitants. City of Canton, 489 U.S. at 392. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown, 520 U.S. 397, 410 (1997). "To establish a 'deliberate or conscious choice' or such 'deliberate indifference,' a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." Gold, 151 F.3d at 1350. The Eleventh Circuit repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise. Id. at 1351 (collecting cases). Thus, for Plaintiff to succeed on his § 1983 claim against the HCSO, Plaintiff must point to some evidence exhibiting notice to the Defendant that there was a history of "widespread prior abuse" and that Defendant deliberately chose to ignore those warnings. Id. Even prior complaints are not enough to

put a municipality on notice, absent a showing that the past complaints had any merit. Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987).

Here, the record contains no evidence to support that Chronister was on notice that his training and supervision of the deputy sheriffs concerning the rights of citizens, specifically minors, was inadequate, such that his failure to implement better training or different security measures at the Fair can be said to constitute deliberate indifference. Assuming that a jury could properly find in this case that Andrew experienced a constitutional violation because there was no probable cause or arguable probable cause to justify his arrest, there is nothing in the record to support that this was a widespread practice of the HCSO or that Chronister was aware of such a practice. Though Plaintiff states that HCSO had "knowledge of constitutional violations of juveniles from past years' Student Day events," (Dkt. 243 at 35), Plaintiff does not point to any prior instances of children who experienced constitutional violations at the Fair during past Student Day events such that Chronister can be said to have been on notice of the inadequacy of his training and supervision of the sheriff deputies in respect to their interactions with minors at the Fair. Therefore, Plaintiff has failed to present actual past similar constitutional violations that would put the HCSO on notice that its facially constitutional policy of trespassing juveniles was unconstitutional.

Plaintiff further asserts that there exists an "obvious need for training." (Id.) The United States

Supreme Court has left open the possibility that a need to train could be "so obvious," that it allows for liability without a pattern of actual, prior constitutional violations. City of Canton v. Harris, 489 U.S. 378, 390 (1989). The hypothetical provided for this narrow exception states when a city knows that police officers will be required to arrest fleeing felons and arms officers with firearms to accomplish this task, the need to train officers in the constitutional limitations on the use of deadly force can be said to be so obvious that failure to do so can be characterized as deliberate indifference to constitutional rights. Id. at 390 n.10. This case does not fit into the narrow hypothetical exception suggested in City of Canton. Plaintiff has proffered a single incident in which an individual's constitutional rights appear to have been violated because he was ejected without probable cause, and Plaintiff points to no other incidents of similar constitutional violations that would put Defendants on notice of the unconstitutionality of their policies or the need to train so as to avoid this unconstitutional practice.[10]

For the first time in his response to Defendant Chronister's Motion for Summary Judgment, Plaintiff also contends that the arrest/ejection forms utilized by HCSO which do not require an affiant to attest to the observations justifying a detention and ejection create

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[10] To the extent that any of the other ejections that occurred that night were unconstitutional, this would still be insufficient to put Chronister on prior notice of a practice sufficiently in advance of Andrew's alleged deprivation such that Chronister's conduct could be said to amount to deliberate indifference.

a "high likelihood of violations of ***procedural due process***, as evidenced by the facts of Andrew's case, where he requested to speak with [Corporal Clark], following his escort to the processing area and was denied from doing so." (Dkt. 243 at 34) (emphasis added) Plaintiff also contends that "[t]he inclusion of multiple deputies to process juveniles, while requiring no single deputy be the affiant as to the basis for taking the juvenile into custody, is a recipe for due process violations." (Id.) Again, even assuming without deciding that Andrew's procedural due process rights were violated when his request to speak to Corporal Clark was denied, there is nothing to indicate that this was done pursuant to a policy promulgated by Chronister. The same is true for the inclusion of multiple deputies to process juveniles. Moreover, even if these actions *were* undertaken pursuant to a policy or practice, there is no evidence of prior similar violations that would put Chronister on notice that these practices were, in fact, "a recipe for due process violations" such that a reasonable jury could find deliberate indifference. Finally, this specific allegation was not raised in the Complaint, such that the Sheriff would have been on notice that it was a feature of this suit. Therefore, Defendant Chronister's Motion for Summary Judgment is due to be **GRANTED** with respect to Count IV.

E. Expert Opinions of W. Ken Katsaris

Defendants attach to their Motion for Summary Judgment the expert report of Retired Sheriff W. Ken Katsaris, (Dkt. 226-39), whom Plaintiff has moved to

strike as an expert witness and seeks to preclude from testifying at trial. (Dkt. 232) Plaintiff's Motion is **GRANTED IN PART** for purposes of the Court's ruling on summary judgment. Mr. Katsaris offers numerous legal opinions, many of which have already been resolved as a matter of law by the Court in this Order, such as whether the ejection process at the Fair which Andrew was subjected to constituted "custody" or "arrest", whether Andrew violated Section 616.185, Florida Statutes, whether the Officer Defendants followed proper procedures in ejecting Andrew from the Fair, and whether the Officer Defendants placed Andrew in a more dangerous position than he was previously in by way of their intervention. (Dkt. 226-39) The Court resolved these issues without consideration of the legal opinions of Mr. Katsaris. While Federal Rule of Evidence 704 abolishes the per se rule against expert testimony regarding ultimate issues of fact, "courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law." Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla., 402 F.3d 1092, 1112 n.8 (11th Cir. 2005) (quoting United States v. Milton, 555 F.2d 1198, 1203 (5th Cir.1977)). Thus, to the extent that Mr. Katsaris opined on issues of law that the Court has already resolved for purposes of this Motion for Summary Judgment, his report is **STRICKEN**. To the extent that Defendants still intend to proffer Mr. Katsaris as an expert witness at trial, Plaintiff's Motion is **DENIED WITHOUT PREJUDICE**. The Court will take up any objections to his proffered testimony at that time.

F. Defendants' Embedded Request to Strike Plaintiff's Evidence

Embedded in their Reply brief, the Sheriff and Officer Defendants move to strike, pursuant to Federal Rule of Civil Procedure 56(c)(2), Plaintiff's numerous screenshots from Google Maps and the HCSO's crime search website, and the vehicle crash reports obtained via Public Records Request to the HCSO. (Dkt 250 at 8–10) Federal Rule of Civil Procedure 56 provides that "[a] party may object that the material cited to support or dispute a fact ***cannot be presented*** in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2) (emphasis added).

As to Defendants' objection to the screenshots from Google Maps, the Court **SUSTAINS IN PART AND OVERRULES IN PART** Defendants' request to strike. Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Of note, "[t]he court may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d). The Eleventh Circuit has noted that "the kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958." Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997). This

process is highly limited because "taking judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Id.

Nonetheless, Courts may take judicial notice of maps. United States v. Proch, 637 F.3d 1262, 1266 n.1 (11th Cir. 2011) (citing Government of the Canal Zone v. Burjan, 596 F.2d 690, 693–94 (5th Cir. 1979)). In fact, courts in other circuits have taken judicial notice of information obtained from Google Maps. E.g., Feminist Majority Found. v. Hurley, 911 F.3d 674, 711 (4th Cir. 2018) (taking judicial notice of a Google map and the website's "Distance Measurement Tool" to determine the general location of a relevant location); United States v. Vega-Rivera, 866 F.3d 14, 20 n.3 (1st Cir. 2017) (taking judicial notice of a Google map identifying an area relevant to the litigation); Pahls v. Thomas, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of a Google map to show the general location of events relevant to the litigation); United States v. Perea-Rey, 680 F.3d 1179, 1182 (9th Cir. 2012) (taking judicial notice of a Google map satellite image as a source whose accuracy cannot reasonably be questioned for the purpose of determining the general location of a home). As such, the Court **OVERRULES** Defendants' objection to the Court's consideration of these maps for purposes of summary judgment and takes judicial notice of the Google map screenshots attached to Plaintiff's Response for purposes of establishing the general locations of Gate Four, the Ejection Location, Orient Road, I-4, and the area surrounding

the FSFA property. (Dkts. 243-3, 243-6, 243-7, 243-8, 243-9, 243-10, 243-11, 243-12, 243-14, 243-17)

The Court, however, **SUSTAINS** Defendants' objection to the extent Defendants seek to strike the "Street View" screenshots taken by Plaintiff that purport to depict the relevant areas in question and provide a temporal visual of the proposed routes suggested by the Sheriff in his Answers to Plaintiff's Interrogatories. (Dkts. 243-4, 243-5, 243-16) These images are **STRICKEN** for purposes of summary judgment, as the Court cannot discern if they are accurate depictions of what the locations looked like at the time of the events relevant to this litigation.

Plaintiff also provides screenshots from HCSO's crime search website, (Dkt. 243-18), which Plaintiff contends show that from February 1, 2013 through February 28, 2014 at least 45 criminal incidents were reported in the area surrounding the Fairgrounds, including burglaries (with and without force), DUIs, drug-related incidents, a home invasion, and multiple instances of criminal mischief. (Dkt. 243 at 20) Plaintiff also provides vehicle crash reports that were obtained via Public Records Request to HCSO, (Dkt. 243-19), which show 16 traffic accidents in the area (including on the Fairgrounds) in the same time period, including 2 in which a pedestrian was hit by a vehicle. (Dkt. 243 at 20)

Defendants object to the Court's consideration of the criminal incident reports and vehicle crash reports for purposes of summary judgment because they argue

that this evidence is not relevant to resolution of the motions and because they are "littered with hearsay" and "not authenticated." (Dkt. 250 at 8) However, the Court finds that both of these exhibits are capable of being authenticated at trial as business records under the business records hearsay exception set forth in Rule 803(6) of the Federal Rules of Evidence as "contemporaneous records or reports of events and conditions made in the regular course of business activity." This rule allows business records to be introduced through a custodian or qualified witness. See Fed. R. Evid. 803(6)(D). "Under the 2010 amendment [to Federal Rule of Civil Procedure 56], which became effective on December 1, 2010, authentication of documents no longer is required at the summary judgment stage." Agee v. Chugach World Services Inc., 2014 WL 5795555 at *5 (N.D. Ala. 2014). See also United States ex rel. Powell v. American Intercontinental, 2016 WL 5420639 (N.D. Ga. 2016) (noting that courts "may consider unauthenticated documents on a motion for summary judgment if it is apparent that they will be admissible at trial"). Thus, Defendants' hearsay and authentication objections are **OVERRULED**. Defendants' remaining relevancy objection is likewise **OVERRULED**. The Court finds that this evidence is probative, though not dispositive, of the issue of whether Defendants' conduct created a foreseeable zone of risk, and Defendants' relevance objection goes to the weight rather than admissibility of this

evidence.[11] The Court does not determine whether the vehicle crash reports would be admissible to show the foreseeability of the type of injury that occurred in Andrew's case, i.e. whether they are probative as to the issue of proximate causation, as this issue is not relevant for purposes of resolving the Motions for Summary Judgment. Thus, Defendants' relevance objection to the reports being used to bolster proximate causation is preserved for trial.

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. The Amended Dispositive Motion for Summary Judgment filed by Defendants Chad Chronister, Mark Clark, Henry Echenique, and Stephen Jones, (Dkt. 226), is **GRANTED IN PART** and **DENIED IN PART**.

    a. Summary Judgment is **GRANTED** as to Counts IV, V, and VII of the Third Amended Complaint, asserting 41 U.S.C. § 1983 claims against Chronister, in his official capacity, Echenique and Jones in their

[11] Defendants' assertion that there were more dangerous places Andrew could have been in the community than the point of ejection is a diversion and is dismissed as such. This evidence is relevant to indicate that conditions immediately outside the Fair were more risk prone than the environment within the Fair.

individual capacities. Otherwise, the Motion is **DENIED**.

2. Defendant, Florida State Fair Authority's Motion for Summary Judgment, (Dkt. 230), is **DENIED**.

3. Plaintiff's Motion to Strike Expert Testimony of W. Ken Katsaris, (Dkt. 232), is **GRANTED IN PART and DENIED IN PART**.

   a. The Motion is **GRANTED** for purposes of the Court's ruling on summary judgment. Otherwise, the Motion is **DENIED WITHOUT PREJUDICE**.

DONE and **ORDERED** in Tampa, Florida, this 21st day of February, 2020.

/s/ Mary S. Scriven
MARY S. SCRIVEN
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any pro se party

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11073-BB

ANDREW JOSEPH, JR.,
as natural father, next friend and
personal representative of the
Estate of Andrew Joseph, III deceased,

Plaintiff - Appellee,

versus

CHAD CHRONISTER,
FLORIDA STATE FAIR AUTHORITY,
an instrumentality of the State of Florida,
MARK CLARK, in his individual capacity,

Defendants - Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Dec. 14, 2021)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPEAL NO.: 20-11073

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREW JOSEPH, JR.,
Plaintiff/Appellee,

v.

CHAD CHRONISTER, in his Official Capacity as Sheriff of Hillsborough County and DEPUTY SHERIFF MARK CLARK, in his individual capacity, Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION
DISTRICT COURT NO. 8:16-cv-00274-MSS-TBM

PETITION FOR REHEARING EN BANC BY DEFENDANTS CHAD CHRONISTER, IN HIS OFFICIAL CAPACITY AS SHERIFF OF HILLSBOROUGH COUNTY AND DEPUTY SHERIFF MARK CLARK, IN HIS INDIVIDUAL CAPACITY

(Filed Nov. 8, 2021)

APRIL S. KIRSHEMAN, ESQUIRE
Florida Bar No.: 66291
Email: akirsheman@teamHCSO.com
CHRISTOPHER E. BROWN, ESQUIRE
Florida Bar No.: 0986010

Email: chrisbro@teamHCSO.com
Hillsborough County Sheriff's Office
2008 East 8th Avenue; Post Office Box 3371
Tampa, Florida 33601
Tel: (813) 247-8185; Fax: (813) 242-1817
Attorneys for Defendants/Appellants

DATE: November 2, 2021

[ii] **CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

1. Anulewicz, Christopher – Attorney for Plaintiff/Appellee
2. Brown, Christopher – Attorney for Defendants/Appellants
3. Chronister, Chad (Official Capacity) – Defendant/Appellant
4. lark, Mark – (Individual Capacity) – Defendant/Appellant
5. Conahan, Sean – Attorney for Defendant/Appellant FSFA
6. Doneff, Andrea – Mediator
7. Florida State Fair Authority – Defendant/Appellant
8. Joseph, Jr., Andrew – Plaintiff/Appellee
8. Joseph (Hardy), Deanna – Plaintiff/Appellee
9. Kirsheman, April – Attorney for Defendants/Appellants
10. Norbraten, Todd – Attorney for Plaintiff/Appellee

11. Porcelli, Anthony – District Court Magistrate/ Mediator
12. Rubin, Guy – Attorney for Plaintiff/Appellee
13. Scriven, Mary – District Court Judge
14. Tuite, Christopher – District Court Magistrate

[iii] **11th Cir. R. 35-5(c) Certification**

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Steel v. Citizens*, 523 U.S. 83, 94-95 (1998) (Rejecting the doctrine of "hypothetical jurisdiction," under which a federal court assumes it has subject-matter jurisdiction for the purposes of deciding the merits of a case, including issues of sovereign and/or qualified immunity).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

(1) Should the Eleventh Circuit require a finding of Article III standing before resolving issues of sovereign immunity and/or qualified immunity?

(2) Under Florida law, is a duty of care or "zone of risk" created where Sheriff's personnel: (a) did not

create or permit the danger; (b) did not have custody of the decedent at the time of his death; (c) had released the decedent from any detention; and (d) did not otherwise subject the decedent to danger and where [iv] telephone conversation with a friend immediately prior to his death?

(3) Does viewing the evidence in the light most favorable to a non-moving party for summary judgment require ignoring undisputed and/or stipulated facts that establish arguable probable cause that a violation of Florida Statute §616.185 occurred?

(4) Is it clearly established Florida law that a parent, guardian, or legal custodian of a child must be contacted when a child is taken into custody, not for the purposes of charging the child with a delinquent act, but solely to eject and trespass the child?

/s/ April S. Kirsheman
APRIL S. KIRSHEMAN, ESQUIRE
Florida Bar No.: 66291
Email: akirsheman@teamHCSO.com
CHRISTOPHER E. BROWN, ESQUIRE
Florida Bar No.: 0986010
Email: chrisbro@teamHCSO.com
Attorney of Record for Chad Chronister
in his Official Capacity as Sheriff of
Hillsborough County and Deputy Sheriff
Mark Clark
2008 East 8th Avenue; Post Office Box 3371
Tampa, Florida 33601
Tel: (813) 247-8185; Fax: (813) 242-1817
Attorneys for Defendants/Appellants

[v] **TABLE OF CONTENTS**

[vi] **TABLE OF CITATIONS**

[1] STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

(1) Should the Eleventh Circuit join the Supreme Court and other Circuits and require a finding of Article III standing before resolving issues of immunity, including Sovereign Immunity and Qualified Immunity?

(2) Under Florida law, is a duty of care or zone of risk created where Sheriff's personnel: (a) did not create or permit the danger to AJIII (of crossing Interstate 4 twice, two hours and one mile away from the drop-off point); (b) did not have custody of AJIII (for the two hours before he crossed Interstate 4 twice); (c) had released AJIII from any detention (two hours before AJIII crossed Interstate 4 twice); and (d) did not

otherwise subject AJIII to the danger of crossing Interstate 4 twice and AJIII only crossed Interstate for the second time as a result of a telephone conversation he had with a friend?

(3) Does viewing the evidence in the light most favorable to a non-moving party for summary judgment require ignoring certain facts when those facts establish an objective belief by a reasonable officer that, at least, arguable probable cause existed that an individual violated Florida Statute §616.185?

(4) Is Florida law clear that the notification requirements of Florida [2] Statutes, Chapter §985, apply when a child is temporarily detained, not for the purpose of charging the child with a delinquent act, but solely to eject and trespass the child?

[3] **STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION**

On March 30, 2018, Joseph filed his *Third Amended Complaint* [Dkt. 143] alleging the following claims pertinent to this appeal: Count I: State wrongful death against the Sheriff ("Chronister")[1] and Count VI: 42 U.S.C. §l983 civil rights violation against Deputy Sheriff Mark Clark ("Clark"), collectively "Appellants."

On March 16, 2019, Appellants filed a *Motion for Summary Judgment* [Dkt. 226] arguing *inter alia* that Joseph failed to establish Article III standing,

[1] Chronister was substituted in place of the former Sheriff. [Dkt. 134].

Chronister was entitled to sovereign immunity, and Clark was entitled to qualified immunity.

On February 21, 2020, the District Court entered an Order [Dkt. 283] granting certain portions of the *Motion for Summary Judgment* but denying summary judgment for Appellants. In addition, the District Court found that Joseph established standing under Article III.

On March 17 2020, Appellants filed a *Notice of Interlocutory Appeal*.

On October 12, 2021, the panel in this appeal affirmed the District Court's denial of summary judgment for Clironister and Clark. [Dkt. 294].

This *Petition for Hearing En Banc* follows.

[4] **STATEMENT OF THE FACTS**

On February 7, 2014, around 6:30 p.m., fourteen year old AJIII was dropped off at the Florida State Fair ("FSF") for Student Day[2] with four friends. They were dropped off at Gate 3, without adult supervision.

AJIII, and some of his friends, had working cell phones and they were to call when ready to be picked up. Otherwise, their ride would return to pick them up at Gate 3 around 10:30 p.m.

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[2] "Student Day" is a day designated by the FSF for schools to allow their students free admission to attend the Fair.

By 7:45 p.m., the FSF midway was "very crowded" and large groups of unsupervised kids were running through the midway trying to rile everybody up. [Dkt. 226-10, p. 43:7; Dkt. 226-9, p. 55:14-22]. There were fights "left and right" along with associated noise and commotion. [Dkt. 226-9, p. 51-52]. "There was . . . an awful lot of chaos going on specifically on the midway area with numerous disruptive people that were . . . just acting crazy. They were running up and down the midway in herds of 20, 30, 40 people. They were battering people along the way, that kind of behavior. In some cases, they were even stealing things off of the vendors' booths and just continuing to run. And it was – the number of incidents [5] were continuing to grow at a rapid pace." [Dkt. 226-37, p. 13:24-p.14:7].

At that time, AJIII was on the midway and had separated from some of the friends he arrived with. According to his friend CT, they saw two other friends being escorted by deputies and AJIII ran after them "like in a hurry." [Dkt. 226-4, p. 54-56; Dkt. 226-9, p. 52:7-20]. AJIII caught up to the deputies and "got involved." [Dkt. 226-11; p. 36:4-11]. RP was one of the friends being escorted and his hat fell off. [Dkt. 226-11; p. 36:9-10]. AJIII then got close enough to the escort that he was able to step in and pick up RP's hat. [Dkt. 226-11; p. 36:11]. RP told the escorting deputy (Clark) that AJIII was his "cousin" or "friend." [Dkt. 226-11, p.36:13-14].

Because AJIII's actions violated Florida Statute §616.185 (and the FSF rules),[3] Clark escorted AJIII for ejection and trespass, later telling another deputy that AJIII was "running through the midway causing disorderly conduct." [Dkt. 226-5; Dkt. 226-11, p. 36:11-18; Dkt. 255, TR 4-5].

Due to the volume of persons at the FSF,[4] all persons being ejected were taken to a designated processing area near the midway. Once there, Clark turned AJIII over to another deputy who filled out an ejection form based on what Clark told him, that [6] AJIII was being ejected for "running through the midway causing disorderly conduct." [Dkt. 226-5; 255, ¶ 5].

AJIII was in the processing area with other ejectees for about 40 minutes, during which time a background check was run and he was photographed. At approximately 8:41 p.m., AJIII and others were taken by a van to a drop-off point in the parking lot of Gate 4, and informed that they were trespassed from the FSF.

No member of the Sheriff's Office attempted to release any of the ejected minors to their parents/responsible adult or attempted to contact any of the ejected minors' parents/responsible adult. AJIII did

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[3] Florida Statute § 616.185(1)(a), prohibits any act that disrupts the orderly conduct of the Fair or the general public on the fairgrounds. Posted FSF rules allowed the removal of "any person who is disruptive." [Dkt.226-20]

[4] Nearly 100 individuals were trespassed, ejected, or arrested on Feb. 7, 2014. [Dkt. 114-17, #14].

not call his parents at any time after he was ejected, because he was afraid he would get in trouble. He also declined rides home from friends' parents while at Gate 4. When he and CT asked an officer at Gate 4 if they could reenter the fairgrounds to walk to their pre-arranged pickup point, the officer told them they could not and that they faced arrest for trespassing.

At approximately 9:30 p.m., AJIII and CT left the confines of the Gate 4 parking lot and walked down the sidewalk of Orient Road and went under Interstate 4, to the Hard Rock casino.

At approximately 10:35 p.m., Ann and CT had traveled approximately one mile from Gate 4 when they left the casino property, traversed a fence that separated the casino from the Interstate, and ran across all eight lanes of Interstate 4.

[7] Once on the other side of Interstate 4, Anil received a phone call from his friend, TD, following which he ran back across Interstate 4, with CT following. [Dkt. 226-4, P. 80:6-p. 81:5]. At approximately 10:43 p.m., after recrossing seven lanes and a large grass median, AJIII was struck and killed by a vehicle in the final, outside, westbound lane of Interstate 4. [Dkt. 226-32].

[8] **ARGUMENT AND AUTHORITIES**

(1) The Panel Failed to Account for Lack of Article III Standing

The Supreme Court and other Circuits have held that federal courts should not reach the merits of a case, including issues such as sovereign or qualified immunity, without first determining whether a "case or controversy" exists under Article III. *Steel v. Citizens*, 523 U.S. 83, 94-95 (1998); *Webb v. Dallas*, 314 F.3d 787, 790-791 (5th Cir. 2002); *Price v. Akaka*, 3 F.3d 1220, 1223-1224 (9th Cir. 1993).

Until recently, Eleventh Circuit cases clearly precluded reviewing Article III standing in an interlocutory appeal and instead allowed the Court to address the merits of a case, including sovereign or qualified immunity, under the guise of "hypothetical jurisdiction." *Summit v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), *Moniz v. Ft. Lauderdale*, 145 F.3d 1278 (11th Cir. 1998).

Eleventh Circuit precedent precluding the review of Article III standing "should be reexamined by the Eleventh Circuit sitting *en bane." Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Circuit 2005) (*Concurring opinion*, Jordan). "Federal courts have, in the words of the Supreme Court, an 'independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines.' *U.S. v. Hays, 515* U.S. 737, 742 (1995)." *Scott v. Taylor*, 405 F.3d 1251, 1258 (11th Circuit 2005) (*Concurring opinion*, Jordan). "A panel [9] should not, however, have the discretion to bypass a core 'case or controversy'

requirement like Article III standing just because the appeal is interlocutory in nature . . . Like other circuits, this Court should ensure that there is Article III standing before resolving issues of Eleventh Amendment, sovereign, absolute, or qualified immunity in interlocutory appeals." *Scott v. Taylor*, 405 F.3d 1251, 1260-61 (11th Circuit 2005) (*Concurring opinion*, Jordan).[5]

In this case, the panel acknowledged that Appellants challenged Joseph's Article III standing, but then asserts that Appellants did not discuss the pertinent cases in the brief. As a result, the panel declined to address Joseph's lack of Article III standing.

However, Appellants' *Initial Brief* contained several pages of argument related to Joseph's lack of standing sufficient to invoke this Court's jurisdiction. (*Initial Brief* p. 70-72). The *Initial Brief* argued the relevant Supreme Court case was applicable in that, "[w]ithout jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the [10] only function remaining to the court is that of announcing the fact and dismissing the cause. *Steel v. Citizens*, 523 U.S. 83,

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[5] This Court may be receding from *Summit v. Pryor* and *Monk v. Ft. Lauderdale*, as shown by *Hunstein v. Preferred Collection*, 19-14434 (October 28, 2021), where this Court stated "First things first. Because standing implicates our subject matter jurisdiction, we must address it at the outset, before turning to the merits." *Hunstein v. Preferred Collection*, 19-14434, p. 6 (October 28, 2021).

94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868))." (*Initial Brief*, p. 71).

In addition, the *Response to Jurisdictional Questions*, submitted at the panel's request, contains additional pages of argument devoted to Joseph's lack of Article III standing and why this Court should address that issue. (*Response*, p. 8-12). Said *Response* argues that "[w]ell established jurisprudence regarding both qualified and sovereign immunities outline certain threshold issues that must be, or at least necessarily should be, addressed before proceeding to the immunity analysis. Appellants submit Article III standing, specifically the causation element, is one such issue because if there is no jurisdiction, then the case does not proceed to a review on the merits of the application of potential immunities." (*Response*, p. 9). Furthermore, the *Response* argued that "[u]nlike prior Eleventh Circuit cases which may have found against permitting interlocutory review of Article III standing . . . the present matter is somewhat unique in that any and all arguably justiciable issues are entangled with the immunity considerations . . . " (*Response*, p. 10). The standing and causation issues are intertwined with Joseph's state law claim and civil rights claim because Joseph essentially argues that the liability of Chronister and Clark originate from the initial detention and eventual ejection of AJIII.

[11] Based on the arguments in the *Initial Brief* and *Response to Jurisdictional Questions*, including the argument that Joseph's causation claim is too attenuated since the injury is the result of several

intervening, independent actions, (*See e.g. Loggerhead Turtle v. County Council*, 148 F.3d 1231 (11th Cir. 1998)), it is clear that Appellants' challenge to Joseph's Article III standing was adequately made, and that Appellants sufficiently argued that this case should be distinguished from the Eleventh Circuit cases cited in the panel opinion.

Accordingly, the panel's attempt to avoid addressing Joseph's lack of Article III standing should be revisited by the Court en bane and an opinion should be issued requiring the Eleventh Circuit to follow the Supreme Court and other Circuits in resolving disputes about Article III standing before reviewing immunity issues, including sovereign immunity and qualified immunity.

(2) The Panel Ignored Pertinent and Compelling Florida Precedent

Summary judgment should have been granted for Chronister on the state wrongful death claim because under well-established Florida law, no duty of care existed. *Milanese v. Boca Raton*, 84 So.3d 339 (Fla. 4d DCA 2012), *review denied* 103 So.3d 140 (Fla. 2012). The panel failed to address *Milanese* despite its obvious applicability.

Milanese v. Boca Raton, is a factually similar case where an officer pulled [12] Milanese's truck over and determined that Milanese appeared impaired. The officer took Milanese into custody and took him to the police station. Shortly thereafter, the officer called a

cab for Milanese and, when the cab arrived, the officer escorted Milanese (who was still impaired) to the front door of the station and released him from custody. The cab driver did not see Milanese and left. About an hour later, Milanese was laying on nearby railroad tracks and was struck and killed by a passing train. In that case, the Court determined that no duty of care or zone of risk was created because law enforcement: (a) did not create or permit dangers to Milanese; (b) were no longer holding Milanese in custody; (c) were no longer detaining Milanese; and (d) did not otherwise subject Milanese to danger. *Milanese v. Boca Raton*, 84 So.3d 339, 341 (Fla. 4d DCA 2012).

In this case, the undisputed facts establish that: (a) Appellants did not create or permit the danger to AJIII of being struck by a car while crossing Interstate 4 two times and two hours after AJIII was dropped off in the fenced parking lot of Gate 4, which was approximately one mile from where AIM ran across the Interstate. In addition, AJIII crossed Interstate 4 the second time solely due to instructions he received from his friend TD; (b) Appellants did not have custody of AIM for two hours before he crossed Interstate 4 the second time; (c) Appellants had released AJIII from detention two hours before he crossed Interstate 4 the second time; and [13] (d) Appellants did not subject AJIII to the dangers of crossing Interstate 4 when they dropped him off in the fenced parking lot of Gate 4 two hours before and a mile away from where AJIII crossed Interstate 4 twice. Furthermore, once AJIII safely ran across the Interstate the first time, Appellants clearly

had no involvement in AJIII's decision to cross Interstate 4 a second time since that decision was made due to instructions AJIII received from his friend TD.

"[A] legal duty does not exist merely because the harm in question was foreseeable. *Aguila v. Hilton*, 878 So. 2d 392, 396 (Fla. 1st DCA 2004). Instead, the defendant's conduct must create the risk or control the situation before liability may be imposed. *Jordan v. Nienhuis*, 203 So. 3d 974, 978 (Fla. 5th DCA 2016)." *Lee v. Harper*, 2021 WL 4771260 (Fla. 1st DCA 2021). Accordingly, the panel erroneously affirmed the denial of summary judgment for Chronister when it failed to consider relevant Florida law, including *Milanese v. Boca Raton*, because no duty of care or "zone of risk" was created.

(3) The Panel Failed to Properly Account for Certain Facts and Improperly Analyzed Florida Statute §616.185

The panel opinion erroneously affirmed the denial of summary judgment for Clark on Count VI of the *Third Amended Complaint*, finding that the facts interpreted in the light most favorable to Joseph did not amount to probable cause or [14] arguable probable cause for AJIII's detention.

It is not disputed that, at the summary judgment stage, the evidence must be viewed in the light most favorable to the non-moving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). However, this does not mean that other undisputed or stipulated evidence should be

ignored. *See e.g. Celotex v. Catrett*, 477 U. S. 317 (1986); *Scott v. Harris*, 550 U.S. 372 (2007); *Makro v. UBS*, 372 F. Supp. 2d 623, 627 (S.D. Fla. 2005). In this case, the panel misinterpreted or ignored pertinent facts, and failed to objectively analyze whether Clark had, at least, arguable probable cause that AJIII violated Florida Statute §616.185(1)(a),

Florida Statute §616.185(1)(a), prohibits "committing any act that disrupts the orderly conduct of any authorized activity of the fair association . . . or the general public on those grounds or facilities."[6]

In affirming the denial of summary judgment for Clark, the panel found that AJIII was not committing a crime or breaking any rule. (*Panel Opinion*, p. 8). However, there is no requirement in Florida law, as the panel suggests, that a violation of Florida Statute §616.185(1)(a), requires than an offender run after the officers, that running to pick up a hat is *per se* insufficient to violate the statute, or [15] that violating that statute somehow requires obstructing the officers in the performance of their duties. (*Panel Opinion*, p. 7). The plain language of Florida Statute § 616.185(1)(a) requires only that an offender commit *any act* that disrupts the orderly conduct of a fair activity or the general public. The panel's attempt to add elements to §616.185(1)(a), underscores the fact that there are no Florida cases interpreting or applying §616.185(1)(a), that the panel's analysis was faulty, and that Clark

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[6] Posted FSF rules also allowed the removal of "any person who is disruptive." [Dkt.226-20].

could not possibly have known his actions amounted to a constitutional violation.

At the time AJIII was detained, the FSF midway was very crowded and chaotic, with large groups of unsupervised kids acting "crazy," running through the midway in herds of 20, 30, or 40 people, trying to rile everybody up, getting in fights, battering people, and stealing things off vendors' booths.

In the midst of this AJIII ran after friends being escorted by deputies "like in a hurry" and caught up to the deputies and "got involved" by stepping in picking up his friend's hat. As a result, Clark detained AJIII for ejection under Florida Statute §616.185, because AMU was "running through the midway causing disorderly conduct." [Dkt. 226-5].[7]

The panel's failure to properly analyze the facts of this case as applicable to [16] Florida Statute §616.185, is compounded by the panel's failure to properly appreciate whether Clark's actions were "clearly established" as unconstitutional. "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)." *Rivas-Villegas v. Cortesluna*, 595 U.S. ___, (2021). *See also Terrell v. Smith*, 668 F.3d 1244 (11th Cir. 2012).

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[7] As stipulated by Joseph pursuant Dia. 254, ¶ 5 and Dkt. 255, ¶ 4.

The panel inappropriately focused on "how or why a reasonable officer could have believed or thought that picking up a friend's hat and attempting to give it to him was behavior that disrupted the orderly conduct of the FSF . . . " (*Panel Opinion*, p. 8). However, the panel clearly ignored or misinterpreted many other pertinent facts including the volatile midway scene and the actions of AJIII in "running through the midway causing disorderly conduct."

The plain language of Florida Statute §616.185(1)(a), requires only *any act* that disrupts the orderly conduct of any authorized activity of the fair or the general public. Depending on the circumstances, such an act could conceivably include running on the midway, running after officers escorting detainees, or becoming "involved" in a police escort.

Accordingly, the totality of events involving ABU on February 7, 2014, could reasonably have been found to violate Florida Statute §616.185(1)(a), and it is [17] obvious that not every official would have understood that detaining AJIII, under those circumstances, amounted to a constitutional violation.

Because the panel misapplied Florida law to the facts, it failed to find that AJIII's actions amounted to, at least, arguable probable cause that AJIII had violated Florida Statute §616.185(1)(a). It was not clearly established that Clark's detention of AJIII was unconstitutional and therefore the panel inappropriately affirmed the denial of summary judgment for Clark.

(4) The Panel Erroneously Applied Florida Statute §985

The panel opinion erroneously adopted the District Court's conclusion that Florida Statute §985.101(3), required that Appellants notify AJIII's parents and that Florida Statute §985.115(2)(a), required that Appellants release AJIII to his parents, after the temporary detention of AJIII for ejection and trespass.

In this case, when Clark temporarily detained AJIII due to his violation of Florida Statute §616.185, his sole intent was to eject and trespass AJIII from the fair in conformity with the FSF Event Action Plan. [Dkt. 226-21].

Such circumstances are not clearly established as triggering the obligations in Florida Statutes, Chapter 985. The only potentially applicable provision in Florida Statute §985.101, is Section (1)(b), which applies *only* to situations where a juvenile is taken in to custody pursuant to an arrest, which was not what Clark did pursuant [18] to the FSF Event Action Plan. Likewise, Florida Statute §985.115(2) applies *only* to the methods of releasing a juvenile who has been arrested and not the legal fiction created by the District Court of a "de facto" arrest.

AJIII was never charged with committing any crime. There is no legal authority supporting the conclusion that either of these statutes apply to a situation involving a high volume of ejections from one central location, necessitating a process and procedure for such temporary detentions before ejection and

trespass. The District Court's lengthy and labored analysis in finding that AJIII was subject to de facto arrest only supports the conclusion that it was not clearly established that Chapter 985 would apply to these facts.

AJIII was not taken into custody as contemplated and intended by the plain language of Florida Statutes, Chapter 985, and therefore the notification and other specified procedures therein are inapplicable. To hold otherwise would be to subject virtually every temporary detention of a minor by law enforcement to the requirements of Florida Statutes, Chapter 985. To hold otherwise would subject Clark to an interpretation of the statute when its applicability is not clear and other interpretations are reasonable.

Accordingly, the panel inappropriately applied the obligations in Chapter 985 in an effort to buttress a finding of a lawful duty on the part of Appellants and to [19] affirm the denial of summary judgment.

CONCLUSION

The denial of summary judgment for Chronister and Clark should be revisited because the Supreme Court and other Circuits require a finding of Article III standing before resolving issues of immunity, including Sovereign Immunity and Qualified Immunity.

The Court en bane should apply the analysis of *Milanese v. Boca Raton*, to these facts, because no duty

of care or zone of risk was created by Appellants' actions on February 7, 2014.

The Court en banc should consider all of the relevant facts and should properly analyze Florida Statute §616.185, which upon appropriate review, will result in a finding of, at least, arguable probable cause to detain AJIII for violating Florida Statute §616.185.

Finally, it was not adequately shown that the requirements of Florida Statutes, Chapter 985, apply to these unique facts and circumstances.

Accordingly, the Court should rehear this case en banc.

[Certificate Of Compliance Omitted]

[Certificate Of Service Omitted]

[Exhibit A Omitted]