California Courts -
Appellate Court Case Information

Appellate Courts Case Information

Supreme Court

Docket (Register of Actions)

NICHOLS-STUART v. COUNTY OF AMADOR

Division SF

Case Number S270710

Date	Description	Notes
09/03/2021	Petition for review filed	Plaintiff and Appellant: Amy Nichols-Stuart Attorney: Kenneth M. Foley
09/03/2021	Record requested	The Court of Appeal record was imported and is available in electronic format.
09/08/2021	Received Court of Appeal record	One doghouse.
09/15/2021	Answer to petition for review filed	Defendant and Respondent: County of Amador Attorney: John A. Whitesides Defendant and Respondent: Shannon Sutton Attorney: John A. Whitesides

		Defendant and Respondent: Shannon Diener Attorney: John A. Whitesides
		Defendant and Respondent: Patricia Orey Attorney: John A. Whitesides
09/24/2021	Reply to answer to petition filed	Plaintiff and Appellant: Amy Nichols-Stuart Attorney: Kenneth M. Foley
10/20/2021	Petition for review denied	
10/21/2021	Returned record	1 doghouse

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

AMY NICHOLS-STUART, Plaintiff and Appellant, v. COUNTY OF AMADOR et al., Defendants and Respondents.	C087609 (Super. Ct. No. 17CVC102220) (Filed Jul. 28, 2021)

This is an action under title 2 United States Code section 1983 (section 1983) by plaintiff and appellant Amy Nichols-Stuart against defendant Amador County (County) and various respondent employees and entities of Amador County after her three-year-old son Jace was killed in an automobile accident. The boy's

father, Tyler Nichols, was the driver and had custody of the child pursuant to a juvenile court's order in a dependency action initiated by the County. Tyler had a history of alcohol abuse that included prior convictions for driving under the influence, but he was ordered to refrain from drug or alcohol use when he was awarded custody in the dependency case. Although he resumed drinking sometime after getting custody of Jace, neither the County nor its various defendant and respondent social workers sought to remove the boy from his father's custody.

Appellant appeals from the judgment of dismissal after the trial court sustained respondents' demurrer to her amended complaint without leave to amend. The trial court held respondents were not liable under section 1983 because appellant forfeited her right to contest placement of her son with his father by submitting to this placement at the jurisdiction and disposition hearing in the dependency action, and because the respondents did not have a duty to protect the boy from his father because they did not have physical custody of him and did not create or materially increase the risk to the boy from Tyler's drinking.

Appellant contends she stated a cause of action for violation of her right of familial association, she did not effect any waiver of her rights, and there was neither absolute nor qualified immunity. She also contends that the trial court's restriction on the length of her points and authorities in opposition to the demurrer violated due process.

By submitting on a disposition report that recommended custody with the father, appellant became barred from claiming the initial placement of her son with him violated her right to familial association. Since the boy was placed with a parent rather than a foster family, and since the respondents did not act to increase the danger to him, the failure to remove Jace from his father before his death did not violate substantive due process. Restricting the length of the opposition to the demurrer did not violate due process and did not prejudice her. Since there can be no federal civil rights violation, we affirm the dismissal.

BACKGROUND

On February 9, 2016, respondent Amador County initiated dependency proceedings regarding appellant's three-year-old son Jace[1] Nichols pursuant to Welfare and Institutions Code section 300.[2] Jace resided with appellant and her boyfriend Robert Stuart. Tyler Nichols was the boy's father. The petition alleged appellant failed to seek medical help after Jace fractured his leg in January. Despite his being in clear pain and notwithstanding the maternal grandmother's urgings, the fractured leg went untreated until the maternal grandmother took Jace to a doctor. Stuart had a substantial criminal record including unlawful sex with a minor and had been recently institutionalized

[1] We use Jace's full name since he is deceased.

[2] Undesignated statutory references are to the Welfare and Institutions Code.

due to methamphetamine-induced hallucinations. Although appellant had moved out after Stuart had threatened to harm Tyler, she and Jace soon returned to him. Appellant was arrested for possession of methamphetamine and drug paraphernalia in 2015.

The February 24, 2016 initial hearing report related that the current custody arrangement was Jace stayed with appellant during the week, with Tyler having custody on the weekends. Tyler had three prior convictions for driving under the influence of alcohol, most recently in 2007. He also had prior felony drug, firearm, and domestic violence convictions, with the last felony, corporal injury to a spouse, in 2014. As noted above, Stuart also had a significant criminal record. Tyler and appellant related to social workers that they were scared of Stuart; Tyler said that Stuart hit Jace.

At a dependency hearing on March 1, 2016, county counsel announced appellant and Stuart had been recently arrested for possession of methamphetamine, causing the County to recommend full custody for Tyler, with supervised visitation for appellant. County counsel recommended appellant be admitted to a rehabilitation center and substance testing for Tyler; Tyler's counsel agreed, while appellant's counsel requested additional time to investigate the rehabilitation center. The juvenile court awarded interim custody to Tyler conditioned on random substance testing, with supervised visitation for appellant, and Stuart could have no contact with Jace.

The March 2016 jurisdiction and disposition report related that Tyler and appellant married while Tyler was in county jail, but they later divorced. Appellant had declined to go to an inpatient program but had scheduled a substance abuse assessment. Jace appeared to be making a good adjustment and adequate progress since being placed with his father. The report recommended inpatient care for appellant with a substance abuse and mental health assessment for Tyler. Both parents would receive services, with Jace remaining in Tyler's custody. Tyler would refrain from using illegal drugs or alcohol.

The combined jurisdiction and disposition hearing took place on March 24, 2016. All parties acknowledged receiving the most recent report. Both parents waived trial on the jurisdiction and submitted. Appellant's counsel agreed with the disposition plan except for the rehabilitation center recommendation. The primary concern with the rehabilitation center was appellant was concerned she could lose her job if the rehabilitation center placement lasted too long.

After confirming the parents' jurisdictional waivers, the juvenile court sustained the petition and proceeded to disposition. Appellant's counsel requested argument solely as to visitation. Finding the parties otherwise waived any right to dispute the recommended disposition, the juvenile court continued Jace's removal from appellant with twice-weekly visits for appellant, and ordered appellant to undergo inpatient rehabilitation.

On June 29, 2016, appellant told one of the respondent social workers that Tyler had resumed drinking. When so told, social workers would talk about Stuart and ignore the concerns about her son. Tyler admitted to a respondent social worker he had resumed drinking; he thought it was okay even though he had been told not to. Appellant had been told that one time Tyler was intoxicated when he dropped off Jace at daycare. Appellant reported the incident to law enforcement on July 2, 2016. The next day, the sheriff's office informed her that Jace was okay. Social workers twice warned Tyler to stop drinking but he continued to do so. On July 28, 2016, daycare confirmed that Tyler was intoxicated when he dropped off Jace. When a social worker spoke to Tyler about his drinking, he did not think there was anything wrong with it because he was off probation.

On August 2, 2016, Tyler drove while intoxicated and crashed into a tree while Jace was a passenger. On August 5, 2016, the County filed a section 387 supplemental petition seeking Jace's placement in foster care following his recovery on the ground that Tyler drank and drove even though he had been warned not to several days earlier. Jace died from his injuries on August 9, 2016.

On August 15, 2017, appellant filed a wrongful death action against respondents based on California law, asserting that she had objected to the juvenile court's placement of Jace with Tyler due to Tyler's substance abuse and subsequently warned the County about the danger multiple times. The County filed an

answer and moved for a judgment on the pleadings, asserting various defenses including waiver and statutory immunity.

After filing an opposition, appellant subsequently filed a supplemental opposition asserting she had a viable claim under section 1983 based on her right to familial association with Jace and sought leave to amend the complaint. She filed a supporting declaration asserting that everyone knew Tyler was an alcoholic at the time of the case plan, that she had told respondent and defendant social worker Shannon Diener on June 29, 2016, that Tyler had been drinking, and that she learned on July 2, 2016, that Tyler had been intoxicated when he dropped off Jace at daycare, and she had informed the sheriff's department of this.

The trial court issued a tentative ruling granting the County's motion on the ground that appellant waived her right to seek damages and requested oral argument over whether the proposed amendment could overcome the waiver. Following argument, the court dismissed the complaint with leave to amend.

Appellant then filed an amended complaint asserting a single count under section 1983 for the deprivation of her Fourteenth Amendment right to familial association. The factual allegations began with a verbatim recitation of appellant's declaration in support of the motion to amend the complaint along with the averments in the original complaint that everyone knew Tyler was an alcoholic, she objected to Jace's placement with him for that reason, Tyler's custody

required abstinence from drinking, but, despite her complaints and other signs of Tyler's alcohol abuse, Jace was not removed from Tyler.

The County filed on March 7, 2018, a request to file an oversized 20-page demurrer brief, which was granted the next day. Appellant's counsel was served with notice of this order on March 29, 2018. The County demurred on March 19, 2018.

On April 9, 2018, appellant filed a 41-page opposition that lacked a table of cases, and concurrently filed a request for leave to file an oversized brief. The trial court denied the application but authorized appellant to file a 20-page brief. Appellant never filed an opposition in conformance with the court's order.

The trial court issued a tentative ruling refusing consideration of appellant's brief to the extent it exceeded 20 pages and sustaining the demurrer without leave to amend. It found appellant waived her claim by agreeing to the original placement with Tyler and subsequently failing to seek modification of the disposition order. The court further found the County lacked a constitutional obligation to protect Jace from Tyler as Tyler had physical custody of Jace and the County had not acted to create or materially increase the risk from Tyler's drinking, which likely rendered leave to amend futile.

Following argument, the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal as to the County and the various defendants employed by the County.

DISCUSSION

I

The Demurrer was Proper

Appellant contends the court erred in granting a demurrer as her complaint properly alleged a violation of her Fourteenth Amendment right to familial association. We disagree.

A. *Standard of Review*

We "apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 563.)

While a complaint attacked by a motion to dismiss for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure (28 U.S.C.) does not need detailed factual allegations to survive, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, [citation]. Factual allegations must be enough to raise a right to relief above the speculative level. . . ." (*Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 555 [167 L.Ed.2d 929].) This standard was further clarified in *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678-679 [173 L.Ed.2d 868], a section 1983 case: "Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is

inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [Citation.] . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' [Citation.]"

On appeal, a decision to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure (28 U.S.C.), like the sustaining of a demurrer under California law, is reviewed de novo. (*Manzarek v. St. Paul Fire & Marine Ins. Co*. (9th Cir. 2008) 519 F.3d 1025, 1030; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) Similarly, a dismissal without leave to amend is reviewed for abuse of discretion under both our rules and the federal rules. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Manzarek*, at p. 1031.)

B. *Waiver of Right to Familial Association*

The Supreme Court has held "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations.]" (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 [71 L.Ed.2d 599].) Similar cases generally involve minor children and a parent's primary right to make decisions about how to raise them. Further, as summarized by the Ninth Circuit Court of Appeals: "It is well established that a parent has a 'fundamental

liberty interest' in 'the companionship and society of his or her child' and that 'the state's interference with that liberty interest without due process of law is remediable under [section] 1983.' [Citations.] 'This constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents.' [Citations.] Moreover, 'the First Amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."' [Citations.]" (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 685.)

Removal of Jace from appellant's custody implicates this right. However, any analysis of the constitutionality of the removal must begin with the fact that appellant did not contest the recommendations in the jurisdictional and dispositional report other than appellant having to go to inpatient rehabilitation. She waived trial and submitted on the jurisdiction recommendations, and agreed to the disposition plan other than her concerns regarding inpatient rehabilitation. Before finding jurisdiction, the juvenile court told appellant that if she submitted, the court would find jurisdiction. Appellant stated her understanding of this consequence and made express waivers of her rights to challenge the report, ask the social worker questions, and to present a defense. Appellant likewise submitted

on the dispositional report; before entering the dispositional orders, the juvenile court found, without objection, that appellant and Tyler had waived their rights to trial, confrontation, subpoena witnesses, and present evidence, other than appellant's objection to inpatient rehabilitation.

"A plea of 'no contest' or an 'admission' (Cal. Rules of Court, rule 1449(e)) is the juvenile court equivalent of a plea of 'nolo contendere' or 'guilty' in criminal courts. A plea of 'no contest' to allegations under section 300 at a jurisdiction hearing admits all matters essential to the court's jurisdiction over the minor." (*In re Troy Z.* (1992) 3 Cal.4th 1170, 1181.) Likewise, "by submitting on the recommendation without introducing any evidence or offering any argument, the parent waived her right to contest the juvenile court's disposition since it coincided with the social worker's recommendation. He [or she] who consents to an act is not wronged by it. [Citation.]" (*In re Richard K.* (1994) 25 Cal.App.4th 580, 590; see also *In re Kevin S.* (1996) 41 Cal.App.4th 882, 886 [same].)

This carries over to suits for damages based on removal of a child from a parent. *Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268 involved an appeal from the trial court's grant of the defendants' summary judgment motion in a suit for damages by the parents and their children arising from the children's detention from their parents. (*Id.* at pp. 1270-1271.)

In action under state law (*id*. at p. 1281),[3] the Court of Appeal held "that the parents' knowing and voluntary pleas of no contest to the jurisdictional allegations during dependency proceedings defeat their claims. . . ." (*Id.* at p. 1271.) It noted that a no contest plea waives a parent's ability to challenge the waived jurisdictional and dispositional orders and findings on appeal. (*Id*. at p. 1284.) The no contest plea applied to later proceedings as well, "such as moving to reconsider the earlier finding. [Citation.]" (*Ibid*.; see *In re Andrew A.* (2010) 183 Cal.App.4th 1518, 1526-1527 [no contest plea bars motion for reconsideration unless plea set aside].) From this, the Court of Appeal concluded: "Plaintiffs' claims are fundamentally premised on their assertions that the children were wrongfully removed, detained, and subjected to the jurisdiction of the juvenile court based on the alleged intentional misconduct of the social workers. But given that their pleas admitted sufficient evidence for the court to exercise that jurisdiction, these arguments are simply untenable." (*Gabrielle A*., at p. 1284.)

We agree. While removal of a child from a parent's custody can violate the right to familial association, appellant effectively waived her right to contest the jurisdictional and dispositional orders other than the requirement that she undergo inpatient substance abuse rehabilitation. *Gabrielle A.* involved waiver of state law claims but waiver applies equally to federal constitutional claims. "'No procedural principle is more

[3] Federal law claims were previously dismissed in federal district court. (*Gabrielle A., supra*, 10 Cal.App.5th at pp. 1280-1281.)

familiar to this Court than that a constitutional right' or a right of any other sort, 'may be forfeited in criminal [cases] as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731 [123 L.Ed.2d 508, 517].) Appellant cannot now contest the actions implicated by the right to familial association, the removal of Jace from her custody and his initial placement with his father Tyler with her acquiescence.

Although appellant did not waive what happened to her son after his removal from her custody, the alleged failure of respondents to protect Jace from his father's drinking and driving does not implicate the right to familial association. Pursuant to section 388, a parent or other person with an interest in the dependent child can petition the juvenile court to "change, modify, or set aside" any previous order due to a change in circumstances. (§ 388, subd. (a).) Filing a section 388 petition is the appropriate way for a parent to change some aspect of the juvenile court's orders; telling a social worker about the alleged deficiency is insufficient, and failure to file a section 388 petition indicates a concession that any asserted claims would have failed. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1209; see also *In re Liam J.* (2015) 240 Cal.App.4th 1068, 1083 ["noncustodial parent's remedy under the circumstances here is to seek modification of the juvenile court's order under section 388"].)

"Courts have characterized the right to familial association as having both a substantive and a procedural

component. While the right is a fundamental liberty interest, [citations], officials may interfere with the right if they 'provide the parents with fundamentally fair procedures [citation.]" (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1236.) Section 388 protects a parent's right to due process in dependency proceedings. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307, 309-310.) Appellant cannot contest the court-ordered removal of her son from her custody, and did not avail herself of the procedure protecting her interest in his care and custody during the dependency proceedings. Having been provided with due process during the dependency proceedings, she cannot now claim those proceedings or any action or failure to act pursuant to them violated her right to familial association.

C. *No Duty to Remove*

Although the failure to protect Jace from Tyler drinking and driving with him did not violate appellant's right to family association, Jace being removed from appellant's custody pursuant to a dependency action implicates another constitutional right. "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." (*DeShaney v. Winnebago Cty. Soc. Servs. Dept.* (1989) 489 U.S. 189, 198 [103 L.Ed.2d 249] (*DeShaney*).)

This is a narrow right. "But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its

citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. (*DeShaney, supra*, 489 U.S. at p. 195.) Accordingly, the general rule is that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." (*Id*. at p. 197.)

The *DeShaney* rule of nonliability is subject to two exceptions. The first exception applies when the state assumes some responsibility for a person's safety and general well-being, as when it "takes a person into its custody and holds him [or her] there against his will." (*DeShaney, supra*, 489 U.S. at pp. 199-200.) In this "special relationship" situation, the state's affirmative duty to protect arises from the limitation the state has imposed on the person's freedom to act for himself [or herself] "through incarceration, institutionalization, or other similar restraint of personal liberty." (*Id*. at p. 200.)

The second *DeShaney* exception applies when the state "affirmatively places the [person] in a dangerous situation." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1059; see *DeShaney*, *supra*, 489 U.S. at p. 201.) The "state created danger" exception

requires proof of "'deliberate indifference to a known or obvious danger.' [Citation.]" (*Campbell v. State Dep't of Soc. & Health Servs.* (9th Cir. 2011) 671 F.3d 837, 845.) Deliberate indifference means that "'[t]he state actor must recognize[ ] [an] unreasonable risk and actually intends to expose the plaintiff to such risks without regard to the consequences to the plaintiff.' [Citation.]" (*Id*. at p. 846.) A state created danger "'"involves affirmative conduct on the part of the state,"'" meaning the state action must have either created the danger or rendered the person more vulnerable to an existing danger. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1149.) If the state puts a person in a position of danger from private persons and then fails to protect him or her, it is as much an active tortfeasor as if it had thrown him or her into a snake pit. (*O'Dea v. Bunnell* (2007) 151 Cal.App.4th 214, 221.)

Neither exception applies here. Appellant contends *DeShaney* does not apply because, unlike the boy in *DeShaney,* Jace was under the juvenile court's jurisdiction pursuant to a dependency action. *DeShaney* involved a boy who was beaten and severely injured by his father; county social service employees had evidence that the boy had been beaten and neglected but did not intervene before he was seriously injured. (*DeShaney*, *supra,* 489 U.S. at pp. 191-193.) This is a distinction without a difference. While this case differs from *DeShaney* because Jace was under the juvenile court's jurisdiction, it is the same as *DeShaney* in the aspect crucial to the Supreme Court's decision. In both

cases, the child was in his parent's custody when he was harmed.

Courts have recognized an exception to DeShaney for dependency cases where children are harmed in foster placements. (See, e.g., *Doe v. Covington School District* (5th Cir. 2012) 675 F.3d 849, 856; *Yvonne L. By and Through Lewis v. New Mexico Department of Social Services* (10th Cir. 1992) 959 F.2d 883, 892-893; *D.R. by L.R. v. Middle Brooks Area Vocational Technical School* (3rd Cir. 1992) 972 F.2d 1364, 1369-1370, 1372.) No such exception exists for a child placed with a parent in a dependency action.

A case from the Eleventh Circuit illustrates this point. *Wooten v. Campbell* (11th Cir. 1995) 49 F.3d 696 (*Wooten*) involved a boy, Daniel, who was subject to a dependency action in the juvenile court, with mother having legal custody and father having visitation. (*Id*. at p. 698.) The father had been subject to a protective order requiring him to stay 500 yards away from Daniel; he subsequently abducted the boy and was charged with felony interference with custody. (*Ibid*.) In the ensuing dependency action, the father was allowed supervised visits at first, later he was allowed unsupervised visitation. (*Ibid*.) Following an unsupervised visit, he abducted Daniel and later murdered him before committing suicide. (*Ibid.*)

The mother filed a section 1983 action alleging a due process violation for failing to protect the son from his father. (*Wooten, supra*, 49 F.3d at p. 698.) The Eleventh Circuit reversed the district court's denial of the

defendants' motion to dismiss, finding the plaintiff failed to allege a violation of a constitutional right. (*Id.* at pp. 698, 699.)

Key to the Eleventh Circuit's analysis was the fact that Daniel was placed with his parents rather than in foster care. "The state did not so restrain Daniel's freedom or hold him against his will to such an extent that a 'special relationship' was created. The affirmative duty to protect arises from the limitation which the state imposes on an individual's freedom to act on his own behalf. The state did not impose any limitation on Daniel's personal liberty or freedom to act. The state placed Daniel in the physical custody of his natural mother and monitored Daniel's visitation with his natural father. The state's obligation did not rise to the level of an affirmative duty to protect because the state did not restrain Daniel's liberty to the extent that it rendered him unable to care for himself. [Citation.]" (*Wooten, supra*, 49 F.3d at p. 701.)

The panel concluded *DeShaney* controlled. "The present case is similarly analogous to *DeShaney* and the above-referenced cases to warrant our conclusion that Wooten has no claim under substantive due process. In those cases, like here, the children remained in the physical custody of their parents who were free to take steps to protect them from harms perpetrated by other persons. The key inquiry in this case is whether the county caseworkers controlled Daniel's life to such an extent that Wooten could not reasonably be expected to protect him. The answer is that they did not. Accordingly, Wooten's complaint fails to state a claim

upon which relief can be granted and should have been dismissed." (*Wooten, supra*, 49 F.3d at p. 701.)

Other courts have come to the same conclusion, finding under *DeShaney* there is no deprivation of a constitutional right where a child in a dependency action is harmed while placed with a parent. (See, e.g., *Burton v. Richmond* (8th Cir. 2004) 370 F.3d 723, 727; *A.S. By and Through Blalock v. Tellus* (D. Kam. 1998) 22 F.Supp.2d 1217, 1221; *Briggs v. Oklahoma ex. rel. Oklahoma Dept. of Human Services* (W.D. Okla. 2007) 472 F.Supp.2d 1294, 1301-1302.) We agree. "Only if the state deprives an individual of the ability to look after himself, or in the case of children, to rely on their parents or guardians for protection and life's necessities, is the state deemed to assume an affirmative obligation to carry out the duties of self-preservation normally left to individual citizens. [Citations.]" (*Pearson v. Miller* (M.D. Penn. 1997) 988 F.Supp. 848, 855.) The parent with whom the child is placed in a dependency proceeding has a due process right to familial association with that child. (*In re J.P.* (2014) 229 Cal.App.4th 108, 125.) While that parent may be subject to the orders of the juvenile court or judicially authorized directives from social workers, the child is nonetheless in the custody of the parent, rather than the state. Jace's placement with his father precludes the special relationship exception to *DeShaney.*

We also find the state-created danger exception to *DeShaney* inapplicable. The danger Jace tragically succumbed to was created by his father rather than any government actor. Tyler had an alcohol abuse problem,

but abstaining from drugs and alcohol was part of his case plan when he was awarded custody at the disposition hearing. While none of the respondents sought to remove Jace when they learned Tyler started drinking again, they did remind Tyler of his obligation and warned him not to resume drinking. Respondents neither created the danger nor rendered Jace more vulnerable to the existing danger. The alleged inaction of respondents does not support the second *DeShaney* exception.

Since there are no possible grounds to support a constitutional violation, the trial court was correct to grant the demurrer without leave to amend and enter the judgment of dismissal.[4]

II

The Nonconforming Brief

Appellant also contends the trial court's failure to consider the last 21 pages of her 41-page opposition to the demurrer deprived her of due process.

A brief in support of or in opposition to a demurrer is limited to 15 pages, absent leave from the court that was requested at least one day before the oversized brief's filing. (Cal. Rules of Court, rule 3.113(d), (e).) Respondents filed an oversized 20-page brief in support of the demurrer, but not before obtaining the court's leave to do so in accordance with the rules. The

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[4] As we find no violation of a constitutional right, we decline to address whether absolute or qualified immunity applies here.

trial court's ruling was served on appellant by mail on March 29, 2018.

On April 9, 2018, appellant sought to file a 41-page brief, but leave to file the oversized brief was filed simultaneously with the brief. The trial court amended the application to a request to file a 20-page brief and granted the request as modified. Appellant never filed a new brief conforming to the court's order.

The trial court's tentative ruling was to sustain the demurrer and to refuse to consider appellant's brief to the extent it exceeded 20 pages. At the demurrer hearing the following day, appellant's counsel admitted the application to file an oversized brief was untimely but asserted he had not been served with its denial, leading him to believe leave had been granted. The court told appellant's counsel that since his request was untimely, the court would have allowed him to file a brief as long as the one in support of the demurrer. Counsel replied, "Had I known, I would have jumped to conform and probably slash and burn to get it down to 20 pages. But we didn't have a clue." The court replied that it was surprised not to receive an amended opposition from him. The matter was not addressed any further.

There is no due process right to ignore court rules. Even assuming some due process right is implicated by defective notice, appellant has the burden of establishing prejudice. (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) She cannot do so. Appellant

was able to brief the issues raised in her opposition in this appeal, and was able to file an opening and reply brief that both exceeded the 41 pages of the partially rejected trial brief. Applying a de novo standard of review, we concluded the trial court's ruling was correct. Since her complaint was properly dismissed without leave to amend, she cannot establish prejudice for failure to consider the full 41 pages of her trial brief.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/ Blease
BLEASE, Acting P. J.

We concur:

/s/ Hull
HULL, J.

/s/ Hoch
HOCH, J.

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PUBLIC ENTITY, FILING FEES WAIVED PURSUANT TO GOV'T CODE §6103

SUPERIOR COURT OF CALIFORNIA

COUNTY OF AMADOR

AMY NICHOLS-STUART, Plaintiff, vs. AMADOR COUNTY DEPARTMENT OF SOCIAL SERVICES, and COUNTY OF AMADOR, SHANNON SUTTON, SHANNON DIENER, PATRICIA OREY, TYLER NICHOLS, and DOES 1 through 50, inclusive, Defendants.	Case No.: 17-CV-10220 **JUDGMENT OF DISMISSAL** **Assigned for All Purposes to The Honorable Renee C. Day** (Filed May 16, 2018)

Whereas, on May 4, 2018 at the hearing on the County Defendants' Demurrer to the First Amended Complaint, the Court adopted its tentative ruling as its order sustaining the demurrer without leave to amend (a copy of the tentative ruling is attached hereto as **Exhibit A** and incorporated fully by reference);

IT IS HEREBY DECREED that judgment of dismissal be entered against the First Amended Complaint of Plaintiff AMY NICHOLS-STUART and in favor of Defendants COUNTY OF AMADOR (also sued as "AMADOR COUNTY DEPARTMENT OF SOCIAL SERVICES"), SHANNON SUTTON, SHANNON DIENER, and PATRICIA OREY.

Dated: MAY 16 2018 /s/ RENÉE C. DAY
RENEE C. DAY
JUDGE OF THE
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA

COUNTY OF AMADOR

AMY NICHOLS-STUART,

Plaintiff,

vs.

AMADOR COUNTRY DEPARTMENT OF SOCIAL SERVICES, et al.,

Defendants

TENTATIVE RULING:
Filed 5/4/2018

The court rules on the Motion of Defendants COUNTY OF AMADOR, SHANNON SUTTON, SHANNON DIENER, and PATRICIA OREY for Demurrer to the First Amended Complaint as follows:

(1) REQUEST FOR JUDICIAL NOTICE

Plaintiff's request for judicial notice is granted. Defendants' request for judicial notice is granted.

Plaintiff and Defendants have each filed a request for judicial notice, requesting the court take notice of the same 12 exhibits. Defendants and Plaintiff both request the court take judicial notice of the following :

1. Initial juvenile dependency petition filed 2/9/2016 (16 DP 0617), In Re Jace N. – Exhibit A.

2. Initial hearing report filed by Amador County on 2/24/2016 – Exhibit B.

3. The reporters transcript for the hearing held on 2/25/2016 – Exhibit C.

4. The reporter's transcript for the hearing held on 3/1/2016 – Exhibit D.

5. The Order After Initial Hearing filed on 3/1/2016 – Exhibit E.

6. The Jurisdiction/Disposition hearing report filed by Amador County on 3/21/2016 – Exhibit F.

7. The reporter's transcript for the hearing held on 3/24/2016 – Exhibit G.

8. The Findings and Orders After Jurisdictional Hearing filed on 3/24/2016 – Exhibit H.

9. The Findings and Orders After Dispositional Hearing filed on 3/24/2016 – Exhibit I.

10. The supplemental juvenile dependency petition filed on 8/5/2016 – Exhibit J.

11. The absence of a petition, motion, or request by Plaintiff (mother) filed in case 16-DP-0617 between 2/9/2016 and 8/2/2106 regarding terminating or restricting Tyler Nichols' (father) custody of Jace.

12. The Order After Judicial Review filed 9/28/2017 – Exhibit K. Judicial notice is requested under the authority of Evidence Code § 452(d). Judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

GRANTED as to requests 1-10, and 12, pursuant to Evidence Code §452(d) as a record and file of the Amador County Superior Court, but only as to their occurrence and the contents' existence, but not as to the truth of any statements or representations contained therein.

GRANTED as to request 11 as the Court may take judicial notice of any official acts of the legislative, executive, and judicial department of the United States and-of any state of the United States. Evidence Code § 452(c). This includes the power to take judicial notice of official records and absence of such records . Chas. L Harney, Inc. v. State (1963)217 Cal.App.2d 77, 85; Fowler v. Howell (1996) 42 Cal.App.4th 1746, 1752-53. (See Gong v. City of Rosemead (2014) 226 Cal.App.4th 363, 377 [taking judicial notice of claim presentation to ascertain deviations from complaint regarding demurrer].)

(2) DEFENDANTS' DEMURRER TO THE FIRST AMENDED COMPLAINT IS SUSTAINED WITHOUT LEAVE TO AMEND.

In reaching this tentative ruling, the court considers only those matters appropriately before the court. Plaintiff's opposition consisting of a 41 page memorandum of points and authorities was filed April 9, 2018. The page limit for such an opposition is 15 pages. (CRC 3.113(d).) Concurrently with the over-length memorandum, an ex parte application to file longer memorandum was filed.

Plaintiff failed to apply to the court at least 24 hours before the memorandum was due for permission to file a longer memorandum. (CRC, rule 3.1113(e).) The oversized memorandum further does not meet format requirements as it does not include a table of contents and table of authorities. (CRC, rule 3.1113(f).) Plaintiff was granted an allowance of an additional 5 pages, allowing for a 20 page memorandum. Plaintiff did not subsequently file an amended opposition consistent with the 20 page limitation. A memorandum that exceeds the page limits of the Rules of Court must be filed and considered in the same manner as a late-filed paper. (CRC 3.1113(g).) Under the Rules of Court, if the court in its discretion refuses to considers late filed paper, the minutes or order must so indicate. (CRC 3.1300(d).) The court here has not considered any pages of the over-length opposition beyond the 20 pages allowed per the court's April 9, 2018 order. As such, pages 21-41 of Plaintiff's opposition have not been reviewed and were not considered by the court.

Demurrer

For the purposes of testing a cause of action, a demurrer admits the truth of all material facts properly pleaded. Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967. The issue upon demurrer is whether the complaint states a valid cause of action, not whether the facts alleged in the complaint are true. Therefore, no matter how unlikely the facts are, the plaintiff's allegations must be accepted as true for the purposes of ruling on a demurrer. Del E. Webb v.

Structural Materials Co. (1981) 123 Cal.App.3d 593, 604. The exception to this rule is that allegations In the complaint will not be taken as true if they are contradicted or inconsistent with facts judicially noticed by the court. Id.

The grounds for demurrer must appear on the face of the challenged pleading or be based upon facts that the court may judicially notice. Blank v. Kirwan (1985) 39 Cal.3d 311, 318.

In ruling on the demurrer, the court is to give the Complaint a reasonable interpretation, reading It as a whole and its parts and their context. Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126. The court must determine whether a cause of action has been stated under any legal theory. Ochs v. Pacific Care of California (2004) 115 Cal.App.4th 782, 788.

California follows federal pleading standards for § 1983 claims. Bach v. County of Butte (1983) 147 Cal.App.3d 554, 564. (See Catsouras v. Department of California Highway Patrol (2010) 181 Cal.App.4th 856, 891 [quoting Bach].) Federal procedure requires historical facts to state a cognizable claim; mere conclusions do not suffice, even if couched as factual. Ashcroft v. Iqbal (2009) 556 U.S. 662, 677-678.

Even construing the First Amended Complaint liberally with a view to substantial justice between the parties, the court finds the complaint fails to state facts sufficient to state a cause of action. CCP §§ 452, 430.10(e).

Waiver

Plaintiff's express agreement in Jace's dependency proceeding to the disposition of Jace's custody to his father, and Plaintiff's subsequent failure to seek a modification of custody, waived her right to seek civil damages for harm foreseeable caused by that custody.

Waiver is the intentional relinquishment of a known right. Lynch v. California Coastal Commission (2017) 3 Cal.5th 470. A parent in a juvenile dependency proceeding who expressly waives her right to challenge jurisdiction or disposition may not, in a subsequent civil suit for damages, base theories of liability on the wrongful nature of the social worker's corresponding recommendations. Gabrielle Av. County of Orange (2017) 10 Cal.App.5th 1268, 1284. The shift to a constitutional theory of liability does not avoid waiver as a bar to suit.

Defendants' cite U.S. v. Olano: "'No procedural principle is more familiar to this court than a constitutional right' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'".U.S. v. Olano (1993) 507 U.S. 725, 731 [quoting Yakus v. United States (1944) 321 U.S. 414, 444].) Thus constitutional rights can be waived, either expressly or impliedly, with waiver measured in the standard manner of a voluntary relinquishment of a known right. Id. at 733.

Defendants' assert Gabrielle A. exemplifies constitutional waiver In the dependency context. There the

parents' civil suit began in superior court but was removed to federal court where the district judge "dismissed a number of federal claims" and gave leave to amend those federal theories remaining. 10 Cal.App.5th at 1279-1280. Defendants in Gabrielle A. obtained summary judgment on federal claims including those under the Fourteenth Amendment partially because "they were barred by parents' pleas of no contest in the dependency court." (Id.)

In the instant case, Plaintiff did not enter a no contest plea. However, the juvenile records reflect Plaintiff submitted to the dispositional issue on the County's custody recommendation. Plaintiff was represented by counsel. Plaintiff did not subsequently seek rescission or modification of her submission to the jurisdictional issue.

Defendants acknowledge the general legal distinction between electing to "submit" the jurisdictional questions on the facts as stated in the social worker's report versus admitting them or pleading no contest. Submitting on the jurisdictional facts alone preserves the party's right to challenge those facts as insufficient to support the court's conclusion, Further, submitting on the social worker's report alone allows a party to retain the right to argue the recommendation. (See In re T.V. (2013) 217 Cal.App.4th 126, 136 [disposition not conceded where father's submission was exclusively as to report but not also recommendation]; In re Ricardo L. (2003) 109 Cal.App.4th 552, 565 [submitting on report, but not on recommendation, didn't waive the right to dispute jurisdiction.].)

The instant motion rests on the dispositional order that decided where the child would live while under the court's supervision. This act precludes the parent from challenging the evidence to support the dispositional order because the parent has acquiesced to the recommendation. (In re Richard K. (1994) 25 Cal.App.4th 580, 589-590.) Plaintiff's waiver as to custody in the juvenile court bars corresponding civil liability to the County Defendants, consistent with the holding in Gabrielle A.

Plaintiff waived all claims arising from the dispositional order. The juvenile court ordered father's custody after Plaintiff submitted the dispositional issue on the County's custody recommendation. Plaintiff, represented by counsel, waived her right to challenge that recommendation. Further, on a procedural basis, Plaintiff failed to oppose the defense of waiver (by Plaintiff's stipulation to jurisdiction and to the dispositional order) placing Jace with his father. Plaintiff failed to oppose her failure to thereafter seek a change in custody. The absence of substantive response effectively concedes these defenses. Estate of Cairns (2010) 188 Cal.App.4th 937, 951 [court may deem waived an issue unsupported by authority or legal analysis].

Plaintiff's Opposition addresses the waiver issue. Plaintiff asserts there was no waiver. (See generally Opposition 16:24-19:11.) Plaintiff argues that "Rio constitute waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent

to enforce the right in question as to induce a reasonable belief it has been relinquished." Outboard Marine v. Superior Court (1975) 52 Cal.App. 3d 30, 41.

Plaintiff in Opposition appears to argue that she didn't knowingly relinquish her right to require the social workers to enforce Tyler's case plan as to alcohol use. Plaintiff contends she only "submitted" as to disposition conditioned on Tyler staying sober. (Opposition 2:6-12.) However, the hearing transcripts confirm Plaintiff conditioned her dispositional agreement only regarding her in-patient rehabilitation treatment. (RJN, Ex. D, pp. 4-9.) Further, Plaintiff ignores her own conduct in failing to petition the court to change Jace's placement under Welfare & Institutions Code § 388. The Opposition is silent on this issue.

The court finds Plaintiff fails to plead facts sufficient to state a cause of action due to Plaintiff's waiver. Plaintiff's submission to Jace's disposition was express agreement to at least temporary custody to his father. Plaintiff's subsequent failure to seek. modification of custody constituted conduct inconsistent with her intent to enforce the right of placement.

14th Amendment Did Not Require Removal from Father's Custody

Even if the Court were to find there was no waiver, the Fourteenth Amendment claim fails. The Fourteenth Amendment's Due Process Clause did not require Defendants to remove, or seek to remove, Jace from his father's custody, despite knowledge of his peril. The

Due Process Clause forbids, rather than compels, state interference with family relations. DeShaney v. Winnebago County Dep't of Social Services (1989)489 U.S. 189, 201. ("Its [the 14th Amendment's] purpose was to protect people from the State, not to ensure that the State protected them from each other.")

The Supreme Court has identified the Due Process Clause as protecting the right to cohabitate with relatives (Moore v. City of E. Cleveland, Ohio (1977) 431 U.S. 494, 499-500 [ordinance prohibiting residency with grandchildren]), but it has not yet articulated the parameters of that liberty interest protection (Kottmyer v. Maas (6th Cir. 2006) 436 F.3d 684, 690 ["the Supreme Court has yet to articulate the parameters of this right"]). A majority of the circuit courts hold the right to familial association precludes government from removing a child from its parent's)' custody absent judicial authorization or exigent circumstances (defined as reasonable cause to believe the child faces imminent danger of serious bodily injury, such that removal is necessary to avoid that harm, before a warrant/order can be obtained.) Wallis v. Spencer (9th Cir. 2000) 202 F.3d 1126, 1136 and 1138; Welfare & Institutions Code § 305(a).

Here, the juvenile court authorized Jace's removal from Plaintiff's custody. This created a situation where the child was removed from a parent's custody with judicial authorization. That precludes Plaintiff from bringing a disassociation of familial rights claim under Wallis, supra.

Plaintiff argues that Defendants could have removed Jace for Tyler's violation of the case plan and violation of the dispositional order, or under W&I Code § 305 by simply calling law enforcement. The Opposition relies in good part on the existence of exigency for warrantless removal.

Defendants' provide good authority that, despite what we now know in hindsight, this was not a situation where Jace could have been physically removed from his father without prior juvenile court approval. That Jace sometimes went too long without a bath or clean clothes placed him in no immediate danger of serious bodily harm. See Rogers v. County of San Joaquin (9th Cir. 2007) 487 F.3d 1288, 1295 (household squalor, tooth decay, and modest malnutrition did not pose emergency situation justifying warrantless removal). Nor did the events raised in the FAC show substance abuse in a manner generally detrimental to Jace. See, e.g., In re Drake M. (2012) 211 Cal.App.4th 754, '764 ("the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found"). Tyler's use of alcohol increased the possibility of harm to Jace, but fell short of what courts have defined as an immediate risk. See Tenenbaum v. Williams (2d. Cir. 1999) 193 F.3d 581, 594.

The principle set forth in DeShaney controls here – the government has no obligation to protect a child in a parent's custody from his parents. DeShaney v. Winnebago County Dep't of Social Services (1989) 489 U.S. 189, 201. The DeShaney court recognized only two exceptions to its general rule of no municipal duty to

rescue: First, where the government creates a special relationship with the victim by taking physical custody of him and assuming responsibility for his basic life needs (e.g. after arrest incarceration, or other involuntary confinement); and second where the agency affirmatively acts to create or materially increase the danger the victim faced. Id. at 199-201.

The court finds DeShaney bars liability for subsequent non-removal because (1) Jace's father, not the County (through a foster home or other) had custody of Jace when Jace was killed; (2) Tyler's drinking was a pre-existing peril Defendants' neither created nor materially amplified by affirmative act.

Because the court finds Plaintiff is barred from proceeding on the First Amended Complaint due to waiver, and in the alternative, in the absence of waiver that her Fourteenth Amendment claim fails under DeShaney, the court does not make a finding on the merits of Defendants' remaining bases for demurrer.

Leave to Amend

A demurrer should be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists the defect can be cured by amendment. Blank v. Kirwan (1985) 39 Cal.3d 311, 318; Lacher v. Superior Court (1991) 230 Cal.App.3d 1038, 1043. Denial of leave to amend is an abuse of discretion if there is any reasonable possibility that the defect can be cured by an amendment. Fox v. JAMDAT Mobile, Inc. (2010) 85 Cal.App.4th 1068, 1078. However, the

burden of proving such a reasonable possibility rests squarely on the plaintiff. Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1041; Blank, 39 Cal.3d at 318; Lacher, 230 Cal.App 3d at 1043. (Emphasis added.)

Plaintiff's Opposition requests leave to amend upon the facts being stated "[Of the Court believes all or a portion of the demurrer is well taken: (Opposition, 4:6-11.) Plaintiff does not further detail how the complaint might be amended. On the pleadings, Plaintiff does not meet her burden of proving a reasonable possibility of amendment exists to cure the defects of the FAC. Absent new information presented at oral argument, leave to amend should be denied. Denial of leave to amend is a harsh result, but nonetheless appropriate "where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result." Haro v. Ibarra (2009) 180 Cal.App.4th 823, 835.

Unless a hearing is requested, this ruling is effective immediately. Neither further notice of the ruling nor a formal order per CRC 3.1312 is required.