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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Jun. 29, 2023)

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of June, two thousand twenty-three.

PRESENT:

MYRA PEREZ,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

James Doe,

Plaintiff-Appellee,

Mother Doe, John Doe, Jane Doe, Youngest Child Doe,

Plaintiffs,

v. No. 21-2847

Gladys Pisani, Daniel McAnaspie, Joseph Joudy,

Defendants-Appellants.

FOR PLAINTIFF-APPELLEE:
John R. Williams, Law Office of John R. Williams, New Haven, CT.

FOR DEFENDANTS-APPELLANTS:
KATHERINE E. RULE (Thomas R. Gerarde, *on the brief*), Howd & Ludorf, LLC, Hartford, CT.

Appeal from the portion of a ruling of the United States District Court for the District of Connecticut (Alfred V. Covello, *J.*) denying qualified immunity to Defendants.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this portion of the ruling of the district court is **REVERSED** and **REMANDED** with instructions to dismiss the claims against Defendants.

The present action arises from the investigation and prosecution for sexual abuse of James Doe ("James") initiated by allegations made by his children, John Doe ("John") and Jane Doe ("Jane"). The charges against James were dismissed after the family moved to England and would not permit the children to return to the United States to testify. Thereafter, James, his wife Mother Doe, and his children John, Jane, and Youngest Child Doe (collectively, "the Does"), sued Defendants, all members of the Newtown Police Department, in the United States District Court for the District of Connecticut (Alfred V. Covello, *J.*) pursuant to 42 U.S.C. § 1983 and Connecticut law.

Although the district court awarded summary judgment to Defendants with respect to the Does' intentional infliction of emotional distress claim, Defendants now pursue an interlocutory appeal from the portion of the district court's order that denied them qualified immunity with respect to James's malicious prosecution claims. On appeal, Defendants contend that they had arguable probable cause to submit search and arrest warrants for James Doe. We agree. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we reference only as necessary to explain our decision to reverse the portion of the district court's ruling that concluded otherwise.

I. Background

A. Underlying Events

On the night of January 18, 2013, Mother Doe was putting John and Jane to bed. Jane told Mother Doe that she did not like it when James got into bed with her. John then disclosed that James taught him to masturbate and would masturbate in front of John. John said that James would "grab[]" and "squeeze[]" John's penis and it "hurt[]." Joint App'x at 255.

Mother Doe called the Connecticut Department of Children and Families ("DCF") and reported her children's disclosures. At approximately two o'clock in the morning of January 19, 2013, officers from the Newtown Police Department (though not Defendants) arrived at the Does' home. James was escorted off the property. An officer took Mother Doe's sworn statement. Mother Doe swore to her children's disclosures. The officer then read at least some of Mother Doe's statement back to her. Mother Doe corrected the spelling of her daughter's name, but otherwise made no revisions before signing the document.

Within twenty-four hours, John told Mother Doe that his disclosures about his father had not been truthful. Mother Doe reported John's recantation to an unidentified female officer of the Newtown Police Department. She also asked to amend her statement, but the officer refused. On February 6, 2013, Mother Doe emailed Officer Pisani, the officer in charge, relaying John's recantation. Mother Doe also noted her concern

that she had misinterpreted and sexualized what Jane had told her.

On January 23, 2013, John and Jane were interviewed by a member of Family and Children's Aid. Officer Pisani observed the interviews through one-way glass. The interviewer asked both children what words they used to describe various body parts. John used the word "butt" to refer to "penis" and did so throughout the interview. In his interview, which was recorded, John stated that James came into his bedroom and encouraged John to look at his "butt" as James "touch[ed] it," and that it happened "more" than one time. *Id.* at 1586. John also reported that James showed him how to touch James's "butt" and that James would take photographs of John naked. John repeated several times that he could not remember specific incidents or when they had occurred. At the end of the interview, John also stated that "[James] didn't touch" him "[e]xcept for the spanking." *Id.* at 1591. During Jane's interview, which was also recorded, she reported that James came into her bed and "put his hands in his butt" and "hugged" her. *Id.* at 1603. Jane also confirmed that she had seen James's penis. But she denied that anyone had touched her "boobs, [] vagina, or [] bottom." *Id.* at 1608.

As part of the investigation, Officer Pisani and the Newtown Police Department spoke to John's classmates and their parents. On February 15, 2013, the parent of a child in John's class reported to the Newtown Police Department that John had told his child that James had done something to John's butt. On

March 12, 2013, another child provided a sworn statement to Officer Pisani, in which she swore that John had told her that James was arrested and that James had touched John's private parts. This child's father confirmed that the child had told him the same. John testified in the instant case that he had not told the children that James had abused him.

B. The Warrants

Throughout the course of the investigation, Defendants obtained various search warrants and an arrest warrant for James. James challenges three of the search warrants and the arrest warrant. We therefore describe them here. The three search warrants are dated January 29, 2013, February 26, 2013, and January 8, 2015. The search warrants pertained to James's person, some of the family's electronic devices, and the Does' home, respectively. Detectives McAnaspie and Joudy served as the co-affiants on the search warrant affidavits. All three search warrant affidavits summarized Mother Doe's sworn statement and the contents of the children's forensic interviews. The January 8, 2015 search warrant affidavit additionally described Mother Doe's email to Officer Pisani relaying John's recantation and Mother Doe's concerns about putting words in Jane's mouth. The January 8, 2015 search warrant affidavit also described images and videos recovered from the Does' electronics. All three search warrants were approved by a judge.

The arrest warrant was prepared by Officer Pisani on April 8, 2013. Similar to the search warrant affidavits, the arrest warrant affidavit references Mother Doe's sworn statement and John and Jane's forensic interviews. It also summarizes the corroborating information Officer Pisani obtained from John's peers and their parents. The arrest warrant affidavit notes Mother Doe's email to Officer Pisani, a statement from James maintaining his innocence, and the opinions of various medical professionals retained by the Does that James did not abuse his children. The arrest warrant was approved by a judge.

C. Procedural History

On June 15, 2016, the superior court granted James's motion to dismiss the charges against him. Thereafter, the Does brought the present action. Defendants moved for summary judgment, asserting, inter alia, that they were entitled to qualified immunity. The district court concluded that Defendants were "not entitled to the summary disposition of [James's] claims on the basis of qualified immunity" because there were issues of fact sufficient to preclude a qualified immunity determination. Special App'x at 39. Specifically, the district court identified two disputed issues of fact: (1) whether Officer Pisani mischaracterized John's statements to his classmates; and (2) whether Defendants continued to have probable cause to pursue their investigation once they learned that John and Jane claimed they were coerced into making false claims

against James in their forensic interviews. Defendants timely appealed.

II. Jurisdiction

"The denial of summary judgment is ordinarily an interlocutory decision, not a 'final decision' appealable under 28 U.S.C. § 1291[.]" *Marshall v. Sullivan*, 105 F.3d 47, 53 (2d Cir. 1996). An exception exists, however, where a defendant moves for and is denied summary judgment on the basis of qualified immunity. *See Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003). "Such 'jurisdiction is nevertheless limited to circumstances where the qualified immunity defense may be established as a matter of law.'" *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (quoting *Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir. 1992)). A "district court's mere assertion that disputed factual issues exist[ ]," however, is not "enough to preclude an immediate appeal." *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996). "Rather, we have jurisdiction to review a denial of qualified immunity to the extent it can be resolved 'on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find.'" *Escalera*, 361 F.3d at 743 (quoting *Salim*, 93 F.3d at 89). "But we may not review the district court's ruling that 'the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense.'" *Bolmer v. Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010) (quoting *Salim*, 93 F.3d at 91). "Cabined by these

constraints, our review is *de novo*." *Id.* Because this case may be resolved on the facts favorable to the plaintiff that the district court concluded the jury might find, we have jurisdiction to decide whether Defendants are entitled to qualified immunity.

III. Qualified Immunity Standard

"[A] police officer is entitled to qualified immunity where '(1) her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was "objectively reasonable" for her to believe that her actions were lawful at the time of the challenged act.'" *Betts v. Shearman*, 751 F.3d 78, 82-83 (2d Cir. 2014) (alterations adopted) (quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir.2007)).

"The right not to be arrested or prosecuted without probable cause has, of course, long been a clearly established constitutional right," *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991), as has the right not to be searched without probable cause, *see McColley v. Cnty. Of Rensselaer*, 740 F.3d 817, 823 (2d Cir. 2014). Therefore, we focus on whether the officers' probable cause determinations were objectively reasonable. *See Jenkins*, 478 F.3d at 87. "An officer's determination is objectively reasonable if there was 'arguable' probable cause . . . that is, if 'officers of reasonable competence could disagree on whether the probable cause test was met.'" *Id.* (quoting *Lennon v. Miller*, 66 F.3d 416, 423-24 (2d Cir. 1995)). "Put another

way, an . . . officer will find protection under the defense of qualified immunity unless 'no reasonably competent officer' could have concluded, based on the facts known at the time . . . that probable cause existed." *Figueroa v. Mazza*, 825 F.3d 89, 100 (2d Cir. 2016).

Under Connecticut and federal law, probable cause to arrest and to commence and continue a criminal proceeding exists when police "officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Washington v. Napolitano*, 29 F.4th 93, 104-05 (2d Cir. 2022) (quoting *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007)). Similarly, "probable cause to search is demonstrated," under Connecticut and federal law, "where the totality of the circumstances indicates a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Walczyk*, 496 F.3d at 156 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

IV. Discussion

We conclude that arguable probable cause existed at the time the defendants submitted the warrants that form the basis of James's malicious prosecution claims. "Ordinarily, an arrest or search pursuant to a warrant issued by a neutral magistrate is presumed reasonable because such warrants may issue only upon a showing of probable cause." *Walczyk*, 496 F.3d

at 155-56. James argues that qualified immunity is defeated here because material omissions and misstatements infected the issuing magistrate's probable cause determination. In particular, James contends that the applications failed to mention John's claim that the interviewer bribed him—with the promise of playing "in the room with popcorn"—to lie about James during his forensic interview, and inaccurately stated that John told children in his class that his father sexually abused him. Joint App'x at 21-22. James also alleges that the warrants paraphrased and sometimes misquoted John and Jane's forensic interviews.

In reviewing a case in which a plaintiff alleges material omissions and misstatements, "a court should put aside allegedly false material, supply any omitted information, and then determine whether the contents of the 'corrected affidavit' would have supported a finding of probable cause." *Soares v. State of Conn.*, 8 F.3d 917, 920 (2d Cir. 1993). "In performing this correcting process, we examine all of the information the officers possessed when they applied for the . . . warrant." *Escalera*, 361 F.3d at 744; *see also Ganek v. Leibowitz*, 874 F.3d 73, 82 (2d Cir. 2017).

Performing that process here, we conclude that the "corrected" warrant affidavits remain sufficient to support a finding of probable cause.[1] All four "corrected"

[1] We do not consider some of the omissions about which James complains because Defendants were not aware of the information underlying the alleged omissions when they prepared the warrant affidavits. *See Escalera*, 361 F.3d at 744. Specifically, we do not consider that John later accused the family's au pair

affidavits would have advised that (1) Mother Doe had reported to DCF that her husband was sexually abusing their children; (2) Mother Doe submitted a sworn statement recounting her children's description of the abuse in graphic detail; (3) the interviewer made promises to John that made him feel pressured to say bad things about James;[2] (4) afterwards John reported in detail that James sexually abused him, for example, that James had taught John to masturbate, had shown John pornography, and had taken photographs of John naked; (5) Jane reported, for example, that James came into her room at night, put his hands in his pants, and she did not like it; and (6) John and Jane each denied, at the ends of their interviews, that James had touched their private parts. In this analysis we do not consider the statements from John's classmates and their parents because the district court concluded that whether Officer Pisani mischaracterized these statements was a material fact in dispute.

In summary, all four affidavits would have included John and Jane's firsthand accounts of their alleged abuse, which were largely consistent with a sworn statement from their mother. That is sufficient to establish arguable probable cause. *See Smith v. Edwards*, 175 F.3d 99, 106 (2d Cir. 1999) (finding probable

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and her partner of sexual assault. As the Does concede, Mother Doe did not alert Defendants to John's disclosure until after the last search was effected.

[2] We assume without deciding that, drawing every inference in James's favor, Officer Pisani might have heard the statements that John had interpreted as bribes.

cause for plaintiff's arrest after "correcting" the arrest warrant affidavit where a child reported sexual abuse to her mother and various others and her mother provided a sworn statement confirming the same); *Escalera*, 361 F.3d at 745-46 (finding arguable probable cause for plaintiff's arrest after "correcting" the arrest warrant, notwithstanding complainant's inconsistencies and mental health issues). John's various recantations, James's protestations of innocence, and the opinions of various mental health professionals that James did not molest the children establish only "conflicting accounts," which do not negate arguable probable cause "where an . . . officer chose to believe" one credible account over others. *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001). Defendants were entitled to credit, among other things, Mother Doe's sworn statement and the children's consistent disclosures during the forensic interviews over subsequent conflicting accounts. *See Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997) ("Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest."). We cannot say that "'[*no*] reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, *could have* determined that' probable cause existed." *Triolo v. Nassau Cnty.*, 24 F.4th 98, 108 (2d Cir. 2022) (quoting *Figueroa*, 825 F.3d at 100). Thus, we find that Defendants are entitled to qualified immunity.

* * *

We have considered all of James's remaining arguments and find them to be without merit. For the foregoing reasons, we **REVERSE** the portion of the district court's ruling that denied qualified immunity to Defendants and **REMAND** with instructions to dismiss the claims against Defendants.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES DOE, MOTHER DOE, JOHN DOE, JANE DOE and YOUNGEST CHILD DOE, plaintiffs,	:	
v.	:	CIVIL NO. 3:16cv1703(AVC)
GLADYS PISANI, DANIEL MCANASPIE and JOSEPH JOUDY, defendants.	:	

RULING ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 15, 2021)

This is an action for compensatory and punitive damages in which the complaint alleges that the defendants, Gladys Pisani, Daniel McAnaspie and Joseph Joudy, violated the plaintiffs, James Doe, Mother Doe, John Doe, Jane Doe and Youngest Child Doe's civil rights with respect to James Doe's arrest and prosecution. It is brought pursuant to 42 U.S.C. § 1983,[1] the Fourth and Fourteenth Amendments to the United States Constitution, as well as state common law

[1] Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

tenets concerning malicious prosecution and intentional infliction of emotional distress. The defendants have filed a motion for summary judgment arguing that the plaintiffs' claims fail to present material issues of fact for trial. Specifically, the defendants argue that they are entitled to qualified immunity, there was probable cause to arrest James Doe, the defendants did not act with malice, there was no termination of the criminal proceedings that was sufficiently favorable to James Doe and the plaintiffs cannot establish the elements of the causes of action brought pursuant to state common law. For the following reasons, the motion for summary judgment is granted in part and denied in part.

FACTS

Examination of the pleadings, affidavits, rule 56(a)(1) statements, depositions and exhibits accompanying the motion for summary judgment, and the responses thereto, discloses the following, undisputed material facts:[2]

On or about January 19, 2013, Mother Doe made the initial report to the Department of Children and Families (hereinafter "DCF") and initiated a police response. Mother Doe testified that when she was

[2] While several of the facts are undisputed, any disputed facts are noted as such and/or include the notation "the plaintiff states" or "the defendant states."

putting her children to bed on the night in question,[3] she was talking to her daughter, Jane Doe, and her son, John Doe, said to her, "Daddy comes into my bed and squeezes my penis." "After John Doe said that to her, she was sobbing and asked how long it had been happening, and he said a few years." Mother Doe stated that she "did not believe John Doe at first but then she looked into John Doe's eyes and there was no question that something had happened to him." She stated that "[s]he believes her children and believed John Doe when he made his disclosure."

Mother Doe did not wake her husband, James Doe. She "call[ed] her brother and his wife because his wife is a lawyer and a guardian ad litem." Both Mother Doe and her and her sister-in-law "were aware that a disclosure to DCF would start an investigation. It was important enough to call DCF because it was not a normal thing for an eight-year-old to say."

On January 19, 2013, the police arrived at the Doe residence, none of whom are defendants here, and Mother Doe gave a written statement. Officers corrected the misspelling of Jane Doe's name and "Mother Doe did not note any additional inaccuracies" in the statement. The parties dispute whether Mother Doe read her statement before signing it and whether she was coerced into signing it.[4] She stated that "she

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[3] In her statement to police, Mother Doe stated that this occurred "at approximately 7:30" on January 18, 2013.

[4] The plaintiffs state that police threatened Mother Doe that if she failed to sign the statement, her children would be taken away.

wish[ed] she had waited to speak to her husband before signing the statement." Mother Doe does not contest that her statement contained what John Doe told her about her father. However, she also states that "[s]tatements contained in [her] affidavit to the police in fact were made up by the police and were not said by Mother Doe."[5]

"Jane Doe only recalls seeing police come into the house. She does not recall how many officers and she stayed in her room." "Youngest Child Doe does not recall his dad being arrested. His only understanding is that his dad was taken from the home because John Doe said bad things about him when dad wanted him to do chores." "John Doe woke up for a moment when the police came. He saw the police lights, but he went back to sleep. He did not see the officers in the house that night."

Thereafter, Mother Doe told the Newtown police department that John Doe recanted his disclosure. The plaintiffs, for their part, state that Mother Doe stated that she "recanted her accusation the very next day after she had made it, before any arrest or search warrant had been requested" and "John Doe had a history of making things up." Mother Doe states that she told the defendant, Pisani, that James Doe "had no history of any sort of inappropriate behavior with children."

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[5] She also notes that she "was denied the right to have a copy of her affidavit or to correct it if necessary."

On January 23, 2013, DCF representatives[6] interviewed Jane and John Doe and thereafter determined the existence of disclosures of abuse. The plaintiffs note that DCF later admitted having erred in this determination.

The plaintiffs state that "[b]y January 24, defendants already knew that John Doe had lied about his father."

On January 24, 2013, Mother Doe gave consent to Pisani to search, and she turned over, an Apple iPad and HP Touchsmart computer.

Mother Doe states that on February 5, 2013, she "notified defendant Pisani in writing that John Doe had twice and in detail recanted his false accusations against his father."

The plaintiffs state that on February 28, 2013, "[a]ttorney Mark J. Ferraro faxed defendant Pisani a two-page letter attaching a report of Dr. Stephen M. Humphrey, all documenting in factual detail the basis for the inescapable conclusion that the accusations against the plaintiff were false."

The plaintiffs state that on March 4, 2013, Dr. J. Brien O'Callaghan concluded "that there was no sexual abuse of [John Doe] by [his father]" "[a]fter six

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[6] Although the parties agree that Donna Meyer interviewed the children, the plaintiffs state that "she was wearing an earpiece during that time and defendant Pisani was instructing her." However, the plaintiffs do not support this statement with evidence other than the fact that Meyer was wearing an earpiece.

sessions with all members of the plaintiff family." They further state that "On March 20, 2013, the Sexual Behaviors Clinic at The Sterling Center provided a detailed report documenting how the plaintiff could not have committed the crimes alleged against him."

The plaintiffs state that "On March 5, 2013, defendant Pisani stated to Mother Doe that she must never again speak to the children about their accusations against their father 'or there's gonna be some arrests made on tampering with evidence. . . . I have nothing more to say to your attorney except that we are still going forward with this. . . .' " According to the plaintiffs, "Pisani consistently concealed and failed to communicate to appropriate judicial authorities the information she received demonstrating that the plaintiff had not abused his children. Her persistent refusal to empathize with what the children were suffering as a result of the Sandy Hook Massacre could be characterized as child abuse."

On April 8, 2013, Pisani, signed an affidavit in support of an arrest warrant application with respect to James Doe, for crimes of sexual assault in the fourth degree, in violation of Connecticut General Statutes section 53a-73(a), and risk of injury to a minor, in violation of Connecticut General Statutes section 53-21(a).

With respect to John Doe, Pisani's affidavit notes that Mother Doe reported that John Doe told her that James Doe: 1) taught John how to masturbate and told John to watch James do it; 2) "pulls [John's] covers off

and grabs his thing," at which point John motioned toward his genitals; 3) James "squeezes it and it hurts;" and 4) James Doe had been sexually assaulting him "since [he] was 4."

Pisani's affidavit includes information disclosed during John Doe's forensic interview. Pisani notes that at the beginning of the interview, John Doe stated "I'm scared I don't want James to go away." Pisani attests that during the interview, John Doe recounted several occasions on which James Doe sexually abused him and also demonstrated the abuse on an anatomical doll. The parties do not dispute that John Doe stated he "said bad things about his Dad . . . because he was bribed by the interviewer."

For their part, the plaintiffs state that "John Doe also lied about his father during his forensic video with Donna Mayer, because she told him to lie about his father and that if he did lie everything would be okay and he could play in the corn pit that was outside the interview room." They also state that he lied because he was afraid of a "big woman waiting outside."

With respect to Jane Doe, Pisani attested that during her forensic interview, Jane "stated [James Doe] hugs her but she does not like it because he touches his [genitals] when he hugs her."[7] Pisani's affidavit also notes that Jane Doe reported that James Doe had come into her bedroom in the middle of the night, got into her bed and "hugged her while he put his hand on his

[7] The defendants make reference to the video evidence of the interviews to support Pisani's statements.

[genitals]." Jane Doe demonstrated what James Doe did on an anatomical doll.

The parties do not dispute that Jane Doe stated that the interviewer told her "to say bad things about her dad."[8] The plaintiffs, for their part, state that "[b]ased on her knowledge of her daughter's way of speaking, Mother Doe is certain that statements which the defendants attributed to her daughter in fact were made up by the defendants." The plaintiffs also state that James Doe never came into Jane Doe's bed during the night and that "[w]hen, at her forensic interview, Jane Doe pointed to the genital area on a doll and said sometimes her father itches himself there, she was trying to explain that he would scratch his butt, not that he would touch his penis."[9]

Pisani's affidavit also states that on February 6, 2013, Mother Doe emailed Pisani to notify her that John Doe recanted his accusations with respect to James Doe. Mother Doe contacted the police department with this information and stated that she "wanted to amend her original statement." The Pisani affidavit includes Mother Doe's statement that Jane Doe said "James had to go away because he had touched his butt and

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[8] The plaintiffs also aver that "Jane Doe was tricked by the forensic interviewer into making false accusations against her father."

[9] The plaintiffs further state that Jane Doe always said "butt" and never said that her father touched his "penis" and the woman who said that Jane said "penis" was lying. The defendants observe that during her interview, Jane Doe uses the word "butt" while also motioning to the genital area.

cuddled with her." The affidavit also includes Mother Doe's statement that she "began to worry that she had put words in Jane Doe's mouth and sexualized what Jane Doe was saying." Pisani further attests that Mother Doe stated "John Doe told [her] several times how sad he felt about lying about James and how he had not seen James do anything other than scratch himself underneath his pants."

Pisani's affidavit further includes reference to James Doe's statement, in which he professes his innocence of the charges and states that John Doe must have been lying and influenced Jane Doe. The affidavit indicates that James Doe also stated that John Doe's "lying and aggressive behavior is well-documented in school records in the months prior to the disclosure he made." Pisani's affidavit includes James Doe's statement that both children had been reprimanded in school for exposing their private parts. It also references James' statement that he had a habit of "put[ting his] hand between [his] legs and occasionally in [his] pants" while relaxing at home, which may have been "a cause of misunderstanding on [Jane Doe's] part".

Pinsani's affidavit also includes James Doe's statement that Jane Doe has a speech impediment and "is currently in a special education program" which could also be the source of misunderstanding in what she said during her interview.

The defendants cite portions of Pisani's affidavit that reference statements of John Doe's classmates regarding what he had told them about James Doe.

Specifically, the affidavit includes a statement "[t]hat on 2/15/13 [an unidentified person] came to the Newtown Police Department. She stated that her friend . . . informed her of a statement made by John Doe . . . [t]hat [he] told two girls in his third-grade class that [James Doe] taught him how to masturbate." The affidavit also includes statements regarding other classmates who made allegations in February 2013 that were consistent with the abuse acts described by John Doe on January 18, 2013. The plaintiffs dispute the accuracy of these reports and for their part cite John Doe's testimony that he only told his classmates that he had lied about his father.

Finally, Pisani's affidavit includes a reference to a February 28, 2013 fax from an attorney retained by Mother Doe. The affidavit references statements regarding John Doe's "numerous recantations" and the fact that Mother Doe engaged Stephen M. Humphrey, PhD, "as a consultant/expert." The affidavit also cites Humphrey's letter "which addresses some of the possible alternative explanations for John Doe's statements." Pisani notes that the attorney's fax suggested a more "comprehensive forensic interview" of the Doe children.[10] Pisani's affidavit also references a March 5, 2013 fax from this attorney, which includes a statement from John Doe's treating psychologist, one Dr.

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[10] The affidavit specifically notes the attorney's opinion that a comprehensive interview should "solicit[ ] responses that address all reasonable alternatives" and that the interview of the Doe children "may have inappropriately utilized anatomical dolls and suggestive leading questions."

O'Callaghan. It indicates O'Callaghan's "impression that there was no sexual abuse of John Doe by [James Doe]" and that "John Doe's initial report seems to have been an attempt to retaliate" because of John's punishment for his misbehavior.

The plaintiffs, for their part, reiterate that "Jane Doe and John Doe have stated that they were bribed and coerced to get them to say bad things about their father." The plaintiffs also state that "Pisani threatened to arrest the plaintiff mother if she sought medical treatment for the children" and they aver that the children, Jane and John Doe, are "misquoted in the arrest warrant affidavit." According to the plaintiffs' statement of fact, "Pisani would take information from one part of the video and stitch it together with her interpretation of a completely separate part of the video, basically making stuff up." The plaintiffs state that "Pisani, in her conversations with Mother Doe, made it clear that she was hostile to the plaintiff because of his English background and the fact that he drove a nice car. She conveyed the attitude that she was going to 'put him in his place.' "

The plaintiffs, for their part, state that Pisani failed to include in her affidavit the fact that John Doe had recanted and that he had a "history of making things up."[11] The plaintiffs also state that the affidavit misinterpreted the evidence and failed to mention

[11] The plaintiffs specifically note that "John Doe made up the false accusations against the plaintiff, claiming that he had done what actually his babysitter and her boyfriend had done to him."

certain facts, including the fact that in their interviews, both Jane and John Doe stated that James Doe never touched their private parts.

On April 8, 2013, the state prosecutor signed a warrant for James Doe's arrest, which, on April 9, 2013, a superior court judge signed.

Mother Doe states that Pisani "instructed her not to speak to the children about the case after Pisani had caused the plaintiff's arrest."

The plaintiffs state that on April 26, 2013, "Mother Doe sent a detailed fax to defendant Pisani and the State's Attorney explaining the fact that the accusations previously made against her husband were false."

For their part, the plaintiffs state that on October 24, 2013, the state police did not find any child pornography on the plaintiff's electronic devices and cite a state police evidence laboratory report.

On January 6, 2014, the defendant, McAnaspie, returned the state forensic lab to retrieve the electronics.[12] He then viewed the photographs and video

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[12] Despite objection to this statement of fact, and the following statements regarding McAnaspie's retrieval of the evidence and his viewing of the evidence, the plaintiffs fail to specifically identify the portion or portions of the exhibits cited which support their objection. The local rules of this district provide that an opposing party's denials in its statement of fact pursuant to rule 56(a)2 "must meet the requirements of Local Rule 56(a)3." Loc. R. Civ. P. 56(a)2. Rule 56(a) (3) requires that "each denial in an opponent's Local Rule 56(a)2 Statement, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial, or (2) other evidence that would be

on the computer at the Ansonia police department. McAnaspie reported that the photos depicted prepubescent female (photo 1) and male (photos 2 and 3) genitalia. He reported that the video depicted a "young prepubescent female" and it appears a "young male child" is operating the camera and telling the female what to do. During the video the female exposes her buttocks and genitalia after encouragement from the prepubescent male behind the camera.

The video depicted a home containing "a brown leather sofa, a blue colored leather ottoman, wood floors, a wooden side table with a tall candlestick, a Christmas tree, children's toys, a brown wood crib and green leather looking chair."

On January 8, 2015, the defendants, Joudy and McAnaspie, brought a search warrant to the court and a superior court judge signed the warrant that day. Joudy, McAnaspie and one officer Seabrook, searched the Doe home pursuant to the warrant and McAnaspie took photos of each room. The search revealed a brown leather sofa in the family room, a green leather chair in the exercise room and a blue leather ottoman in the

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admissible at trial. . . ." Loc. R. Civ. P 56(a)3. Further, "[t]he 'specific citation' obligation of this Local Rule requires parties to cite to specific paragraphs when citing to affidavits or responses to discovery requests and to cite to specific pages when citing to deposition or other transcripts or to documents longer than a single page in length." Id. The rule provides that a "[f]ailure to provide specific citations to evidence in the record as required by this Local Rule may result in the Court deeming admitted certain facts that are supported by the evidence in accordance with Local Rule 56(a)1. . . ." Id.

master bedroom. It appeared to be the same furniture from the aforementioned video.

In January of 2015, "Mother Doe went to the Newtown Police Department for an interview with Detective McAnaspie." She went "to look at some photographs and answer questions about them." The officer showed Mother Doe "a picture of a young boy peeing with a hand holding his penis, a video of John and Jane Doe in which she recognized her bathroom, and a couple pictures of the kids without clothing."

James Doe challenged the arrest warrant in the criminal proceedings. On July 8, 2015, the court found that there was sufficient probable cause to support the arrest warrant. Specifically, the court concluded that although "there are inaccuracies in the statements made by the affiant when compared with the videotaped statements. . . . having reviewed the affidavit and, after deleting all the language to which the defendant takes exception, the undersigned finds that there is still sufficient probable cause for the original charges."

With respect to the court's finding of probable cause to support the warrant, the plaintiffs state that "in-chambers communications made by the lawyers to the presiding judge, biased her against the plaintiff father with respect to the *Franks* motion before she was able to rule on it." The only evidence the plaintiffs cite to support this fact is Mother Doe's testimony based on her belief" that this was the case.

On June 15, 2016, the superior court, after having accepted the state's nolle and a hearing on the matter,

granted James Doe's motion to dismiss. "Mother Doe admitted in her deposition that she was refusing to let the children testify at any criminal trial." "The witnesses were living in England by this time and refused to come back to the United States."

On October 13, 2016, the plaintiffs filed the complaint in this case. On October 20, 2016, they filed an amended complaint. In count one, the plaintiff, James Doe, alleges that the defendants violated his Fourth and Fourteenth Amendment rights to be free of malicious prosecution, pursuant to 42 U.S.C. § 1983. In count two, James Doe asserts a state law claim of malicious prosecution against all three defendants. In count three, all of the plaintiffs bring a claim of intentional infliction of emotional distress pursuant to state law.

On January 13, 2017, the defendants filed a motion to dismiss, which the court denied on September 28, 2017.

On February 16, 2021, the defendants filed the within motion. On June 2, 2021, the plaintiffs filed their opposition and on August 27, 2021, the defendants filed a reply memorandum.

STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party "bears the burden of 'demonstrat[ing] the absence of a genuine issue of material fact.'" Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 114 (2d Cir. 2017) (quoting Celotex Corp., 477 U.S. at 323). The court must view all inferences and ambiguities "in a light most favorable to the nonmoving party." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991). The nonmoving party cannot, however, "'rely on conclusory allegations or unsubstantiated speculation' but 'must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact.'" Robinson v. Concentra Health Servs., 781 F.3d 42, 34 (2d Cir. 2015) (citation omitted).

"A dispute regarding a material fact is genuine 'if evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "'Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper.'" Id. (quoting Bryant, 923 F.2d at 982).

In deciding a motion for summary judgment, the court may not "make credibility determinations or weigh the evidence. . . . [because] [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are

jury functions, not those of a judge." Proctor v. LeClaire, 846 F.3d 597, 607-08 (2d Cir. 2017) (internal quotation marks and citations omitted).

DISCUSSION

I. 42 U.S.C. Section 1983 Claims

Pursuant to the Due Process Clause of the Fourteenth Amendment, no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "'The touchstone of due process is protection of the individual against arbitrary action of government.'" Bryant v. City of New York, 404 F.3d 128, 135-136 (2d Cir. 2005) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

"In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment . . . and must establish the elements of a malicious prosecution claim under state law." Manganiello v. City of New York, 612 F.3d 149, 160-61 (2d Cir. 2010) (internal citations omitted). In order to prove a claim for malicious prosecution in Connecticut, the plaintiff must prove that: "(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." Brooks v. Sweeney, 299

Conn. 196, 210-211 (2010) (quoting Bhatia v. Debek, 287 Conn. 397, 404-05 (2008)). "A claim for malicious prosecution under section 1983 requires the additional element of '(5) a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights.'" Perez v. Duran, 962 F. Supp. 2d 533, 540 (S.D.N.Y. 2013) (quoting Rohman v. N.Y.C. Transit Auth. (NYCTA), 215 F.3d 208, 215 (2d Cir. 2000)).

(a) Probable Cause

The defendants argue that there was probable cause to arrest James Doe and, therefore, the plaintiffs' malicious prosecution claims, brought pursuant to section 1983 and state common law, fail. They note that "the arrest warrant affidavit included statements and evidence that supported plaintiff's innocence or at least did not support his guilt."

The plaintiffs argue in opposition that the officers lacked probable cause. Specifically, they argue that "it is especially clear that the defendants became increasingly aware as time progressed that the father was wrongly accused yet not only did nothing to bring about the termination of the prosecution but in fact doubled down in their determination to convict an innocent man."

The defendants reply that "the information from Mother Doe's children in the warrant affidavit more than satisfies probable cause for the charges on the warrant." They go on to note that "[t]he warrant affidavit goes on to provide information from the two

recorded interviews of John and Jane Doe, which further demonstrates there was probable cause for an arrest." The defendants point out that John Doe's recantation, alleged sexual abuse by a former nanny along with his history and reference to psychologist reports favorable to the Does were included in Pisani's affidavit. The defendants aver that reading the warrant application "in its entirety and in a common sense and non-technical manner," the court should conclude that it provides the requisite probable cause. According to the defendants, the "[p]laintiffs cannot demonstrate that any alleged misstatements and omissions were 'necessary to the finding of probable cause'." Def. Reply (citing Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) (quoting Franks v. Delaware, 438 U.S. 154, 156, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978)). They note that when the superior court determined that the warrant contained probable cause, the court did so after considering a "corrected affidavit" that excluded the information with respect to which James Doe took exception.

"[P]robable cause to arrest exists when police officers have 'knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime.' " Walczyk v. Rio, 496 F.3d 139, 156 (2d Cir. 2007) (quoting Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996)). The second circuit has recognized that " 'there cannot be an allegation of a constitutional violation where probable cause justifies an arrest and

prosecution.'" Stansbury v. Wertman, 721 F.3d 84, 89 (2d Cir. 2013) (citing Panetta v. Crowley, 460 F.3d 388, 394-95 (2d Cir. 2006)). "If probable cause existed, it presents a total defense to [the plaintiff's] actions for false arrest and malicious prosecution. . . ." Id.

To satisfy probable cause, an "officer need only establish a 'probability or a substantial chance of criminal activity, not an actual showing of such activity.'" Johnson v. Ford, 496 F. Supp. 2d 209, 213 (D. Conn. 2007) (quoting Illinois v. Gates, 462 U.S. 213, 244 n. 13 (1983)). However, "easily available exculpatory evidence may void probable cause for an arrest," Marchand v. Hartman, 395 F. Supp. 3d 202, 219-220 (D. Conn. 2019), and in assessing probable cause, "an officer may not disregard plainly exculpatory evidence." Panetta v. Crowley, 460 F. 3d 388 (2d Cir. 2006). Further, "when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that might not be the case." Shattuck, 233 F. Supp. at 310 (quoting Caldarola v. Calabrese, 298 F. 3d 156, 165 (2d Cir. 2002)).

To determine whether probable cause existed, "[a] court examines each piece of evidence and considers its probative value, and then 'look[s] to the totality of the circumstances' to evaluate whether there was probable cause to arrest and prosecute the plaintiff.'" Stansbury v. Wertman, 721 F.3d 84, 89 (2d Cir. 2013) (quoting Panetta, 460 F. 3d at 395). The second circuit has recognized "that a police officer 'is not required to explore and eliminate every theoretically plausible claim of

innocence before making an arrest.'" Martinez v. Simonetti, 202 F.3d 625, 635 (2d Cir. 2000) (quoting Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997)).

"Normally, the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that was objectively reasonable for the officers to believe that there was probable cause . . . and a plaintiff who argues that a warrant was issued on less than probable cause faces a heavy burden. . . ." Golino v City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) (internal citations omitted).

The offense of sexual assault in the fourth degree pursuant to Connecticut General Statutes section 53a-73(a) provides that

> (a) A person is guilty of sexual assault in the fourth degree when: . . . (2) such person subjects another person to sexual contact without such other person's consent . . .

Conn. Gen. Stat. § 53a-73(a) (repealed 2019).[13] The offense of risk of injury pursuant to Connecticut General Statutes section 53-21 (a) provides that

> (a) Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is

[13] The October 1, 2019 version of the statute can be found at Conn. Gen. Stat. § 53a-73a.

> endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) or (3) of this subsection, and (B) a class B felony for a violation of subdivision (2) of this subsection. . . .

Conn. Gen. Stat. § 53-21(a).

Pisani's affidavit includes reference to John Doe's statement to his mother regarding James Doe's conduct. Specifically, John Doe stated that "Daddy comes into my bed and squeezes my thing" and motioned to his genital area. John Doe said James Doe taught John how to masturbate and told John to watch James do it, "pulls [John's] covers off and grabs his thing," at which point John motioned toward his genitals, James "squeezes it and it hurts," and James Doe had been sexually assaulting him "since [he] was 4." Mother Doe signed a statement the night of John Doe's disclosure detailing these facts.[14] Although the stated

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[14] Although she states that she was coerced into signing the statement, she admits that John Doe made these allegations to her on the night in question. Mother Doe's objection to the police not permitting her to amend her statement does not create a

conduct falls squarely within the provisions of sections 53a-73(a) and 53-21(a), the plaintiffs challenge Pisani's affidavit with respect to her descriptions of John and Jane Doe's statements and/or behaviors during the interviews. The plaintiffs aver that "the child's claims to the forensic interviewer were confusing, inconsistent, and not adequately documented in the interviewer's report." They dispute the accuracy of Pisani's interpretation of the interviews and cite the fact that the affidavit fails to state that the children, in their interviews, both denied that James Doe ever touched their private parts.

The court notes that Pisani's affidavit in support of the warrant was inclusive of much of the information on which the plaintiffs rely. Specifically, her affidavit includes information regarding John Doe's recantation and his history, Mother Doe's subsequent statements regarding the recantation and inaccuracy of Jane Doe's accusations, James Doe's attestations of his innocence and alternative explanation for the children's statements, and the reports of two psychologists, one of whom found "possible alternative explanations for John Doe's statements" and the other of whom found no sexual abuse. Pisani also notes that the

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material issue for trial with respect to the warrant. The plaintiffs' memorandum does not specifically state how Mother Doe would amend her statement, other than her repeated references to John Doe's recantation. That recantation, however, is also included in Pisani's affidavit. The affidavit additionally includes reference to Mother Doe's concern that she may have incorrectly "sexualized" what Jane Doe said and Mother Doe's statement with respect to John Doe feeling badly about lying about his father.

Mother Doe's attorney suggested a more "comprehensive forensic interview" of the Doe children.

In addition, considering all of the information in Pisani's affidavit, a superior court judge signed the warrant for James Doe's arrest. Further, after the plaintiff challenged the warrant in the criminal case, the superior court concluded that although "there are inaccuracies in the statements made by the affiant when compared with the videotaped statements. . . . having reviewed the affidavit and, after deleting all the language to which the defendant takes exception, the undersigned finds that there is still sufficient probable cause for the original charges."[15]

As previously noted, "[n]ormally, the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that was objectively reasonable for the officers to believe that there was probable cause. . . ." Golino v City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) (internal citations omitted). However, "[w]here, as here, a plaintiff argues that 'material omissions infected the issuing magistrate's probable cause determination,' the materiality of these omissions presents a mixed

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[15] When determining "whether a false statement was necessary to a finding of probable cause, [a court must] consider a hypothetical corrected affidavit, produced by deleting any alleged misstatements from the original warrant affidavit and adding to it any relevant omitted information." Ganek v. Leibowitz, 874 F.3d 73, 82 (2d Cir. 2017). In this case, the superior court undertook this analysis and determined that the corrected affidavit still established probable cause to arrest.

question of fact and law.'" Chase v. Nodine's Smokehouse, Inc., No. 3:18cv00683(VLB), 2020 WL 8181655, at *12 (D. Conn. Sept. 29, 2020) (quoting Walczyk v. Rio, 496 F.3d 139, 157-58 (2d. Cir. 2007) (citing Velardi v. Walsh, 40 F.3d 569, 574 (2d Cir. 1994)). "'The legal component depends on whether the information is relevant to the probable cause determination under controlling substantive law. But the weight that a neutral magistrate would likely have given such information is a question for the finder of fact, so that summary judgment is inappropriate in doubtful cases.'" Id. Velardi, 40 F.3d at 574 (citing Golino, 950 F.2d at 871), quoted in McColley v. County of Rensselaer, 740 F.3d 817, 823 (2d Cir. 2014)).

The plaintiffs have presented evidence in support of issues of fact sufficient to preclude a determination with respect to probable cause to arrest or continue the prosecution.

With respect to the arrest warrant, the plaintiffs state that Pisani's affidavit improperly cites evidence of John Doe's classmates' statements regarding alleged abuse by James Doe. In denying this corroborating evidence, the plaintiffs state that police improperly characterized John Doe's statements to his classmates. Specifically, the plaintiffs cite John Doe's testimony that he did not tell other students about any sexual abuse, but instead told some classmates on the bus that he had lied about his father. It is unclear whether the superior court's finding of probable cause on a "corrected warrant" included consideration of this issue. The court concludes that this dispute of fact presents

an issue for the jury with respect to whether the warrant was supported by probable cause.

The plaintiffs also rely on the assertion that the DCF interviewer, Meyer,[16] bribed John and Jane Doe and told them to lie about James Doe's conduct. Although it is questionable whether the plaintiffs' submit sufficient evidence that Pisani was aware of any alleged coercion of the children at the time she submitted her affidavit, there remains a question for the jury whether, after becoming aware of the alleged coercion, the officers lacked probable cause to continue the prosecution of James Doe.

"'Ordinarily, in the absence of exculpatory facts which became known after an arrest, probable cause to arrest is a complete defense to a claim of malicious prosecution.'" Butler v. Sampognaro, 2019 WL 3716595, * (D. Conn. Aug. 7, 2019) (quoting D'Angelo v. Kirschner, 288 F. App'x 724, 726 (2d Cir. 2008); see also Kinzer v. Jackson, 316 F.3d 139, 143-44 (2d Cir. 2003)). In this case, however, there remains an issue of fact regarding whether potentially "exculpatory facts . . . became known after [the] arrest. . . .

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[16] The court notes that there is no assertion that the defendant police officers bribed the children directly or told them to lie. The plaintiffs only assertion of fact that the defendants could have been somehow involved in such conduct is their statement that "Pisani was instructing [the interviewer]." The only evidence the plaintiffs offer in support of this statement is James Doe's testimony that Meyer was wearing an earpiece and left the interviews "halfway through and left the room and presumably had a conversation with the viewer behind the glass."

The court concludes that viewing all inferences and ambiguities "in a light most favorable to the nonmoving party," Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), the plaintiffs have "come forward with specific evidence demonstrating the existence of a genuine dispute of material fact.'" Robinson v. Concentra Health Servs., 781 F.3d 42, 34 (2d Cir. 2015) (citation omitted). Considering "the totality of the circumstances," Stansbury v. Wertman, 721 F.3d 84, 89 (2d Cir. 2013) (quoting Panetta, 460 F. 3d at 395), summary judgment is not warranted on the current record, and the defendants' motion is denied on this issue.

(b) Malice

The defendants argue that "there is no evidence that the defendants acted with malice." Specifically, the defendants note that while "[t]he [p]laintiffs admit that Mother Doe, John Doe and Jane Doe made disclosures of abuse . . . they simply claim that those disclosures should not have been credited."

The plaintiffs argue in opposition that "[o]rdinarily malice is proven by the lack of probable cause for the arrest or the prosecution. . . . Malice, therefore, is not an issue here."

"The element of malice implicates an evil or unlawful purpose." Pinsky v. Duncan, 79 F.3d 306, 313 (2d Cir. 1996); McHale v. W.B.S. Corp., 187 Conn. 444, 447 (1982) (recognizing that the fourth element of malicious prosecution is that "the defendant acted with

malice, primarily for a purpose other than bringing an offender to justice.").

As previously stated, the plaintiffs have presented evidence to raise issues of fact with respect to probable cause. Similarly, with respect to malice, issues of fact prevent summary judgment. Mother Doe presents evidence that Pisani threatened to arrest her if she spoke to the children about the case or sought medical treatment. The plaintiffs also submit deposition testimony calling into question the accuracy of the warrant affidavit regarding John Doe's classmates' statements, and testimony that the children were bribed and told to lie in their forensic interviews. There remain questions of fact for the jury with respect to the issue of malice.

(c) Favorable Termination

The defendants argue that because the "underlying criminal proceedings were not terminated 'in a manner that is indicative of Plaintiff's innocence,'" there was no favorable termination in this case." Specifically, the defendants note that "[t]he witnesses were living in England by this time and refused to come back to the United States. The reason that the State did not pursue the charges was that the family was beyond subpoena power."

The plaintiffs argue in opposition that the dismissal here constitutes a favorable termination for purposes of the malicious prosecution claims. Specifically, the plaintiffs note that after the prosecutor informed

the court that the state could not produce any witnesses, "[o]ver the prosecutor's objection, the Court then dismissed the case with prejudice. That decision was final and is the judgment in the underlying prosecution. It simply cannot be disputed that this was a 'favorable termination' as required by both state and federal law on malicious prosecution in this District and State."

The defendants reply that "the prosecution was not pursued based upon jurisdictional considerations. There were no affirmations of innocence." The defendants again note that "[t]he reason that the State did not pursue the charges was that the family was beyond subpoena power. Plaintiffs' criminal counsel admitted and stipulated that Mother Doe was refusing to have her children come back to testify."

In Spak v. Phillips, the second circuit recognized that "the merits of [section 1983 malicious prosecution] claims are analyzed under the law of the state where the tort occurred." 857 F.3d 458, 462 (2d Cir. 2017). The court noted that

> "Under Connecticut law, a prosecutor may decline to prosecute a case by entering a *nolle prosequi.* Conn. Practice Book § 39-31 (2017). The effect of a *nolle* is to terminate a particular prosecution against the defendant. However, a *nolle prosequi* is not the equivalent of a dismissal of a criminal prosecution with prejudice, because jeopardy does not attach."

Id. (citing Roberts v. Babkiewicz, 582 F.3d 418, 420 (2d Cir. 2009) (per curiam) (quoting Cislo v. City of Shelton, 240 Conn. 590, 599 n.9 (1997)).

The second circuit has recognized that "Connecticut law adopts a liberal understanding of a favorable termination for the purposes of a malicious prosecution claim." Roberts v. Babkiewicz, 582 F.3d 418, 420-21 (2d Cir. 2009) (citing See v. Gosselin, 133 Conn. 158, 48 A.2d 560, 561 (1946)). "The majority of cases from Connecticut courts interpret Connecticut law so that a nolle prosequi satisfies the 'favorable termination' element as long as the abandonment of the prosecution was not based on an arrangement with the defendant." Id. "The answer to whether termination is indicative of innocence depends on the nature and circumstances of the termination; the dispositive inquiry is whether the failure to proceed impl[ies] a lack of reasonable grounds for prosecution." Murphy v. Lynn, 118 F.3d 938, 948 (2d Cir. 1997) (internal quotations and citation omitted).

In Lanning v. City of Glens Falls, 908 F.3d 19, 25 (2d Cir. 2018), the second circuit clarified that "federal law defines the elements of a § 1983 malicious prosecution claim, and that a State's tort law serves only as a source of persuasive authority rather than binding precedent in defining these elements." The court held that its "prior decisions requiring affirmative indications of innocence to establish 'favorable termination' therefore continue to govern § 1983 malicious prosecution claims. . . ." Id.

In Virgil v. City of New York, 2019 WL 4736982 (E.D.N.Y. Sept. 27, 2019), the court concluded "that *post-Lanning*, a dismissal based on the state's express inability to prove its case beyond a reasonable doubt is sufficient to show a favorable termination for a § 1983 malicious prosecution claim."[17]

As this court has recognized,

> *Spak* generally presumes a nolle prosequi to be a favorable termination, unless there are shown "reasons that are not indicative of the defendant's innocence." 857 F.3d at 464. By contrast, *Lanning* declines to presume any termination of a prosecution is a favorable termination absent "affirmative indications of innocence." 908 F.3d at 25. This distinction in formulation may prove significant in the not-uncommon situation where the state court

[17] The court stated that "[e]ven though *post-Lanning*, the bar to demonstrate favorable termination is higher for a § 1983 malicious prosecution action, the Court finds that a termination on the ground that the prosecution is unable to prove its case beyond a reasonable doubt is still sufficient to show favorable termination." Id. (internal citations and quotation marks omitted). The court observed that "the prosecutor's statement that it could not prove the charges beyond a reasonable doubt" went "to the sufficiency of the evidence against Plaintiff. Given that a lack of sufficient evidence in a criminal case entitles a defendant, as a matter of law, to a judgment of acquittal, such a dismissal is more than one that leaves the question of guilt or innocence unanswered. Rather, the state is explicitly stating that it cannot overcome the presumption of innocence afforded to Plaintiff. Without sufficient evidence, Plaintiff reverts back to his presumptive state of innocence." Id. (internal citations and quotation marks omitted).

> record of a nolle proceeding does not clearly establish the reason for the disposition.

Butler v. Sampognaro, No. 3:18-cv-00545 (JAM), 2019 WL 3716595, at *4 (D. Conn. Aug. 7, 2019).[18]

Under either standard, the court's dismissal of the charges against the defendant based on the lack of witnesses to prosecute the case amounts to a favorable termination for purposes of the plaintiffs' malicious prosecution claims. Despite the fact that the witness unavailability was based on Mother Doe's refusal to return to the United States,[19] "the prosecutor's statement that it could not prove the charges beyond a reasonable doubt" went "to the sufficiency of the evidence against Plaintiff." Virgil v. City of New York, 2019 WL 4736982

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[18] In Thompson v. Clark, the Supreme Court granted certiorari to address this distinction regarding the level of proof required with respect to favorable termination in a section 1983 action for unreasonable seizure based on legal process. Thompson v. Clark, 794 Fed. Appx. 140 (2d Cir. Feb. 24, 2020), cert. granted, 141 S. Ct. 1682 (2021) (No. 20-659).

[19] The defendants also cite Chase v. Nodine's Smokehouse, Inc., No. 3:18-CV00683 (VLB), 2020 WL 8181655, at *16 (D. Conn. Sept. 29, 2020) for the observation that "*Spak*, like *Roberts* explains that some *nolles* do not constitute a favorable termination as a matter of substantive law, narrowly, situations where they are ". . . . caused by the defendant – either by his fleeing the jurisdiction to make himself unavailable for trial or delaying a trial by means of fraud" Id. at 16 (quoting Spak v. Phillips, 857 F.3d 458, 464 (2d Cir. 2017)). In this case, however, the defendants do not present evidence that James Doe, the defendant in the underlying criminal case, "fle[d] the jurisdiction to make himself unavailable for trial or delay[ed] a trial by means of fraud." Id. There is no evidence that Mother Doe's decision to remain in England and not return to the United States children is attributable to James Doe.

(E.D.N.Y. Sept. 27, 2019). Therefore, the superior court's dismissal after the prosecutor's nolle, because he no longer had and witnesses to testify at trial, amounts to a favorable termination and the defendants' motion for summary judgment is denied on this issue.

(d) Qualified Immunity

The defendants argue that even if they are not entitled to judgment on the malicious prosecution claims, they are entitled to qualified immunity because "[t]he undisputed evidence in the instant matter unequivocally demonstrates the existence of arguable probable cause for plaintiff's arrest and search warrants. . . ." Specifically, they argue that "[t]he officers had credible reports from both the children, classmates of John Doe, the children's mother made the initial report, and there were credible findings based upon the forensic interviews." The defendants also cite the superior court's determination of probable cause.

The plaintiffs argue in opposition that "[t]his defense is foreclosed in a malicious prosecution case when, as here, the basis of the case is the failure of the police to disclose evidence that undermines the chance of a successful prosecution."

In their reply, the defendants reiterate their argument that they are entitled to qualified immunity based on the existence of arguable probable cause.

The doctrine of qualified immunity balances two important interests: the need to hold public officials

accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

According to the second circuit, when a plaintiff sues an official in his or her individual capacity, the qualified immunity doctrine shields the defendant from civil liability for money damages "if their actions were objectively reasonable, as evaluated in the context of legal rules that were 'clearly established' at the time." Bizarro v. Miranda, 394 F.3d 82, 8586 (2d Cir. 2005) (quoting Poe v. Leonard, 282 F.3d 123, 132 (2d Cir. 2002) (citation omitted)). The second circuit considers the following three factors in determining whether a particular right was clearly established: "(1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991); Everitt v. DeMarco, 704 F. Supp.2d 122, 136 (2010); see also Saucier v. Katz, 533 U.S. 194, 202 (2001) (holding that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). Therefore, in light of pre-existing law, "the unlawfulness of the action in question must be

apparent," Wilson v. Layne, 526 U.S. 603, 615 (1999), so that "a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987); Connell v. Signoracci, 153 F.3d 74, 90 (2d Cir. 1998). Ultimately, "[t]he question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct." McCullough v. Wyandanch Union Free Sch., 187 F.3d 272, 278 (2d. Cir 1999). If the law was "clearly established, the [qualified] immunity defense ordinarily . . . fail[s], since a reasonably competent official should know the law governing his conduct." Harlow, 457 U.S. at 818-19.

Although qualified immunity is a question of law, if there is a dispute of fact as to the officer's conduct, "the factual questions must be resolved by the fact-finder" before qualified immunity can be determined. Zellner v. Summerlin, 494 F.3d 344, 368 (2d Cir. 2007). "Where the circumstances are in dispute, and contrasting accounts present factual issues . . . a defendant is not entitled to judgment as a matter of law on a defense of qualified immunity." Curry v. City of Syracuse, 316 F.3d 324, 334 (2d Cir. 2003).

For the same reasons that the defendants are not entitled to summary judgment on the merits of the malicious prosecution claims, they are not entitled to the summary disposition of such claims on the basis of qualified immunity. See Zellner v. Summerlin, 494 F.3d 344, 368 (2d Cir. 2007); Hemphill v. Schott, 141 F.3d 412, 418 (2d Cir. 1998) (recognizing that "summary

judgment based either on the merits or on qualified immunity requires that no disputes about material facts remain."). Issues of fact exist with respect to both prongs of the qualified immunity inquiry. The plaintiffs have raised issues of fact regarding the warrant submissions and whether the children's statements that they were coerced to lie in their interviews amounts to exculpatory evidence requiring termination of the criminal prosecution. See Dufort v. City of New York, 874 F.3d 338, 354 (2d Cir. 2017) (holding that qualified immunity was inappropriate at the summary judgment stage where the plaintiff had "established a dispute of material fact as to whether the Defendants intentionally withheld or manipulated key evidence during his arrest and prosecution."). Therefore, the motion for summary judgment is denied with respect to the issue of qualified immunity.

II. Intentional Infliction of Emotional Distress

At the outset, the court notes its exercise of supplemental jurisdiction in determining the validity of the remaining state law claims.[20] Discovery in this case has closed and "the state-law claims involve[] only settled principles, rather than legal questions that [are] novel." Valencia ex rel. Franco v. Lee, 316 F.3d 299, 306 (2d Cir. 2003). Therefore, the court exercises its supplemental jurisdiction based on "values of judicial

[20] The plaintiffs' state law claim for malicious prosecution fails for the same reasons articulated above with respect to the federal claim.

economy, convenience, fairness, and comity. . . . Winter v. Northrup, 334 F. App'x. 344, 345 (2d Cir. 2009) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)).

The defendants argue that the plaintiffs fail to state a claim for intentional infliction of emotional distress under Connecticut law. Specifically, they note that Mother Doe initiated the police response, and "[t]he plaintiffs have offered no evidence that the Defendants intended to cause mental distress of any kind to any of the five plaintiffs or were the direct cause of any emotional distress." They also note caselaw suggesting that when an arrest is supported by probable cause, "'[s]ubjecting a government official or employee to litigation for infliction of emotional distress arising from a valid arrest would be contrary to public policy and inhibit the enforcement of the law.'" Def. Memorandum at 41 (quoting Brooks v. Sweeney, CV 06 5005224S, 2008 WL 5481203 (Conn. Super. Ct. Nov. 28, 2008), aff'd, 299 Conn. 196 (2010)).

The plaintiffs argue in opposition that they "seek justice pursuant to the Connecticut common law prohibiting what is called the 'intentional infliction of emotional distress.'" Specifically, they argue that reckless behavior is sufficient to satisfy the standard applicable to such claims. The plaintiffs maintain that the defendants' conduct here meets the "extreme and outrageous" component of a claim for intentional infliction of emotional distress and that "there is enough evidence in this case to afford all of the plaintiffs the right to submit their claims to a properly instructed jury."

The defendants reply that the plaintiffs have failed to offer evidence of sufficient intent on the part of the defendants to cause the plaintiffs to suffer emotional distress. Specifically, they note that Mother Doe initiated police response in this case and "[t]he plaintiffs make no effort to break down the five different plaintiffs' allegations of direct cause to each of them or argue that each plaintiff suffered severe emotional distress as required. They just state that 'all of the plaintiffs seek justice' in conclusory fashion with no citations to the record."

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must show: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." Appleton v. Bd. of Educ. of Town of Stonington, 254 Conn. 205, 210 (2000) (citing Petyan v. Ellis, 2000 Conn. 243, 253 (1986), superseded by statute on other grounds as stated in Chadha v. Charlotte Hungerford Hosp., 272 Conn. 776 (2005)). "Conduct 'that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." Carrol v. Allstate Ins. Co., 262 Conn. 433, 443 (2003). "Under Connecticut law, whether a defendant's conduct is sufficiently 'extreme and outrageous' to support a claim for intentional infliction of

emotional distress is initially a question for the court to determine, and will be submitted to a jury '[o]nly where reasonable minds disagree.'" Winter v. Northrup, 334 F. Applx 344, 347 (2d Cir. 2009) (quoting Appleton v. Bd. of Educ. of Town of Stonington, 254 Conn. 205, 210, 757 A.2d 1059 (2000)).

The court concludes that the plaintiffs have failed to make out such a claim in this case. Indeed, as the defendants note, the plaintiffs fail to differentiate the five different plaintiffs' claims and the direct cause with respect to each of them, nor do they sufficiently state that each plaintiff suffered the requisite severe emotional distress. The plaintiffs' conclusory statement that "all of the plaintiffs seek justice" with no citations to the record regarding emotional injuries and/or causation for any such injuries is insufficient. The plaintiffs' generalized and unsupported statements fail to identify evidence "that the defendant's conduct was the cause of the plaintiff's distress . . . and . . . that the emotional distress sustained by the plaintiff was severe." Appleton v. Bd. of Educ. of Town of Stonington, 254 Conn. 205, 212 (2000). The allegations are, therefore, "insufficient to form the basis of an action for intentional infliction of emotional distress." The defendants' motion for summary judgment on this claim is granted.

CONCLUSION

Based upon the foregoing, the defendants' motion for summary judgment (document no. 96) is granted in part and denied in part.

It is so ordered, this 15th day of October 2021, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge