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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0023p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Mark Bambach, individually and on behalf of his minor children; E.B. and M.B., in their own right,

Plaintiffs-Appellees,

v. No. 23-1372

GINA MOEGLE, individually, in her capacity as Children's Protective Services Investigator, Michigan Department of Health and Human Services; SUSAN SHAW, individually, in her capacity as Children's Protective Services Supervisor, Michigan Department of Health and Human Services,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:18-cv-14039 Denise Page Hood, District Judge.

Argued: January 24, 2024

Decided and Filed: February 8, 2024

Before: McKEAGUE, LARSEN, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Neil A. Giovanatti, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Brian M. Garner, TAYLOR BUTTERFIELD, P.C., Lapeer, Michigan, for Appellees. **ON BRIEF:** Neil A. Giovanatti, Patrick L. O'Brien, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Brian M. Garner, TAYLOR BUTTERFIELD, P.C., Lapeer, Michigan, for Appellees.

OPINION

McKEAGUE, Circuit Judge. Gina Moegle and her supervisor Susan Shaw, both employees of the Children's Protective Services program in the Michigan Department of Health and Human Services, appeal the district court's partial denial of qualified immunity for eleven claims filed against various State

of Michigan defendants by Mark Bambach and his minor children under 42 U.S.C. § 1983.

We find that no clearly established law put the state defendants on notice that they were violating the Bambachs' Fourteenth and Fourth Amendment rights. Accordingly, we **REVERSE** the district court's denial of summary judgment and **REMAND** for entry of an order dismissing the Bambachs' claims against the state defendants.

I. BACKGROUND

Mark Bambach[1] and his two children first sued Gina Moegle and Susan Shaw ("state defendants"), as well as an additional state social worker and the municipal government of Lapeer County, Michigan, on December 23, 2018. Relevant to this appeal, the Bambachs alleged five counts under 42 U.S.C. § 1983 against Moegle: that she (1) removed the Bambach children from Bambach's custody without a warrant in violation of the Fourth Amendment, (2) removed the Bambach children from Bambach's custody in violation of the Fourteenth Amendment's procedural-due-process protections, (3) removed the children in violation of the Fourteenth Amendment's substantive-due-process protections, (4) executed a removal order that Moegle knew contained falsehoods and material omissions in violation of the Fourth Amendment, and (5) violated the Fifth Amendment by failing to return

[1] Generally referred to as "Bambach." "The Bambachs" and "the plaintiffs" refer col-lectively to Bambach and his two children, on whose behalf Bambach also sues.

Bambach's children after he invoked his right against self-incrimination.

The Bambachs further alleged four counts against Shaw: that as Moegle's supervisor she implicitly authorized (1) removal of Bambach's children without a warrant, (2) violation of the Bambachs' Fourteenth Amendment procedural-due-process and (3) substantive-due-process rights, and (4) execution of a false and misleading removal order in violation of the Fourth Amendment.

Finally, the Bambachs alleged that a state social worker failed to intervene in the continued removal of the Bambach children and that Lapeer County—specifically, the county prosecutor's office—maintained policies that led to the above constitutional violations. The district court dismissed the claim against the state social worker on absolute immunity grounds. Later, the court granted summary judgment to Lapeer County, finding that because the allegations involved a county prosecuting attorney acting as a contractor for the Michigan Department of Health and Human Services—and not acting on the county's behalf—the Bambachs had presented no evidence that Lapeer County itself had established or maintained unconstitutional policies or customs. Further, the court granted judgment to Moegle on the Fifth Amendment claim, finding she had not conditioned returning Bambach's children on any admission of guilt. In this interlocutory appeal, the Bambachs cannot challenge dismissal of the claims against the state social worker and Lapeer County.

They similarly cannot challenge dismissal of the Fifth Amendment claim against Moegle.

Before us is the district court's denial of the state defendants' motion for summary judgment on the Fourth and Fourteenth Amendment claims. We construe disputed facts in the Bambachs' favor and defer to the district court's factual determinations. *See Adams v. Blount County*, 946 F.3d 940, 948 (6th Cir. 2020); *Fazica v. Jordan*, 926 F.3d 283, 288 (6th Cir. 2019).

A. Factual History

Mark and Amy[2] Bambach are parents to twin daughters, M.B. and E.B. Mark and Amy divorced in September 2013. Bambach received primary custody of the two children in November 2012. Amy did not interact much with her daughters from November 2012 to April 2015. But in May 2015, Amy began exercising her parental rights more frequently. From July to December of that year, she saw her daughters for overnight visits more than a dozen times.

Amy scheduled parenting time with M.B. and E.B. from December 23 to the morning of December 25, 2015. She picked up her daughters as scheduled on the twenty-third. According to a police statement Amy later submitted, M.B. told her mother on the evening of December 24 that Bambach, while cleaning M.B., hurt her "really bad" by sticking his finger "way up there." Amy Bambach Police Statement, R.84-3 at

[2] Referred to as "Amy" or "Amy Bambach" throughout.

PageID 2438. Amy immediately took both daughters to the emergency room for examination.

At the hospital, Amy disclosed her concerns of sexual abuse to physicians. Upon examination, emergency-room physicians diagnosed both M.B. and E.B. with acute urinary tract infections. Physicians further noted potential diagnoses of alleged sexual assault. Early the next morning, on December 25, Children's Protective Services received a third-party report of actual or suspected child abuse recounting Amy's concerns about Bambach's alleged sexual abuse of the couple's daughters. Upon receiving the report, Protective Services assigned Moegle to investigate. Shaw supervised the investigation.

Moegle began her inquiry. Among other tasks, she called Bambach on December 25 to notify him of allegations that he had sexually abused his daughters. During that call, Moegle asked Bambach if his daughters could stay with Amy during the pendency of the investigation. He agreed. Bambach admits that at no point during the call did he ever indicate that he did not consent to having his daughters stay temporarily with Amy while the investigation was performed. Indeed, Bambach acknowledges that he—at least initially—expressly consented to this temporary plan to have his daughters stay with Amy. Relatedly, Moegle and Protective Services never sought or received a court order authorizing the children's removal until a county court heard Moegle's petition on January 14, 2016. As a result, Bambach's children stayed with Amy from December 25—the day Moegle first called Bambach—to January 14—the day a county

court heard the removal petition—subject only to Bambach's initial consent to the temporary placement plan.

Four days after Moegle's first call, Bambach called her back to ask "when he was getting his kids back." Second Am. Compl., R.9 at PageID 174. He claims he "made it clear" to Moegle that he wanted to see his daughters again and that he wanted them back. Appellee's Br. 15; *see also* Bambach Dep., R.82-13 at PageID 2144. Moegle told Bambach that, pursuant to her agency's policies, she could not answer his questions during an ongoing investigation. The next day, December 30, Bambach again called Moegle. He wanted to know "what happens next" and whether "the girls have been interviewed." Investigative Report, R.82-2 at PageID 1661; *see also* Second Am. Compl., R.9 at PageID 194–95. Moegle told him that law enforcement would contact him soon for a statement. Bambach responded that he would not speak to any law enforcement officers without an attorney present. Later that day, Moegle and Bambach spoke again; she encouraged him to set up a meeting with an attorney present as soon as possible, and he reiterated that he would not speak with law enforcement and wanted to take "the 5th." Second Am. Compl., R.9 at PageID 195; *see also* Investigative Report, R.82-2 at PageID 1661. Although Bambach agreed at the time to meet later with Moegle to discuss the investigation, he subsequently changed his mind. From that point—January 5, 2016—to January 14, which is when Moegle filed a petition for removal of Bambach's

children in family court, Moegle and Bambach did not speak.

Shaw's supervision of Moegle's investigation began soon after the investigation commenced. Moegle met with Shaw on December 30 to provide her with information about the case. Moegle again met with Shaw on January 12, providing her with further updates about the investigation. Moegle claims that Shaw then read and approved the removal petition that Moegle prepared before she sent it to the county prosecuting attorney. After Moegle submitted the removal petition, she completed an investigative report on January 15 in which she concluded that a preponderance of evidence suggested Bambach had sexually abused his daughters. Shaw reviewed and approved the report on January 22.

B. Procedural History

A Lapeer County court heard preliminary arguments on Moegle's removal petition on January 14, 2016. The court temporarily approved the petition, finding probable cause supported the allegations that Bambach had abused his daughters. The court further found it would be contrary to the children's welfare to remain in Bambach's home given the abuse allegations. The case continued for months. Each set of parties deposed multiple individuals. On November 1, 2016—one day before trial was set to begin—the county prosecuting attorney agreed to dismiss the petition. The court immediately released Bambach's children to him.

Bambach filed this lawsuit on December 23, 2018. He alleged under § 1983 that Moegle, Shaw, a state social worker, and Lapeer County violated his and his daughters' Fourth, Fifth, and Fourteenth Amendment rights. Moegle, Shaw, and the social worker moved to dismiss, raising qualified and absolute immunity defenses. The district court granted the motion in part, dismissing all claims against the social worker and finding that Moegle and Shaw possessed absolute immunity as the state's legal advocates for all acts taken in initiating court proceedings, filing a removal petition, and furthering court proceedings thereafter. The court, however, denied the state defendants' qualified immunity defense against Bambach's claims for the time period prior to preparing and filing the removal petition. After more than a year of discovery, Moegle and Shaw moved for summary judgment on July 1, 2021. Both state employees raised a qualified immunity defense. Lapeer County filed a separate motion and Bambach filed a cross-motion for summary judgment against Moegle and Shaw.

In an order partially granting the defendants' motions, the district court disposed of all claims against Lapeer County, finding that the plaintiffs had presented no evidence that the county had violated the Bambachs' rights. The court further granted Moegle judgment on Bambach's Fifth Amendment claim. The court denied Moegle and Shaw summary judgment, though, on the Bambachs' Fourth and Fourteenth Amendment claims. The district court found that the key factual dispute underpinning the remaining claims was whether Bambach's children were removed from

his custody without his consent from December 29, 2015, to January 14, 2016, which is when a county court authorized the temporary removal. The court found a reasonable jury could determine that Bambach had revoked his consent to his children's placement with Amy by expressing to Moegle on December 29 and 30 that he wanted to see his children and wanted to know when they would be back. If true, the court found, that lack of parental consent to the children's continued removal would violate the Bambachs' constitutional rights.

The court's analysis of the state defendants' qualified-immunity defense, however, failed to assess whether those constitutional rights were clearly established at the time of the violations. The court solely rested its summary-judgment order on its finding that a reasonable jury could determine that Moegle and Shaw had violated the Bambachs' rights. So, the unresolved question before us, assuming Bambach did revoke consent, is whether clearly established law put Moegle and Shaw on notice that they were violating the Bambachs' constitutional rights by failing to release the children to their father.

Moegle and Shaw timely appealed the district court's order.

II. JURISDICTION

The parties dispute whether we have jurisdiction to hear this interlocutory appeal. The state defendants argue that the district court's denial of summary judgment is considered a final order under 28 U.S.C. § 1291 and the collateral-order doctrine as

applied in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The Bambachs contend that this appeal is not limited to purely legal issues, meaning that we lack jurisdiction.

We possess jurisdiction over the district court's denial of qualified immunity to Moegle and Shaw because, where we assume the plaintiff's version of any disputed facts, the district court's denial of qualified immunity constitutes an appealable collateral order. *See Coffey v. Carroll*, 933 F.3d 577, 583 (6th Cir. 2019); *Gregory v. City of Louisville*, 444 F.3d 725, 742 (6th Cir. 2006); *Mitchell*, 472 U.S. at 530. We have jurisdiction over interlocutory appeals of denials of qualified immunity that turn on legal questions. *See Bomar v. City of Pontiac*, 643 F.3d 458, 461 (6th Cir. 2011); *Coffey*, 933 F.3d at 583; *Mitchell*, 472 U.S. at 527. However, we do not have jurisdiction over appeals to the extent that they concern genuine disputes about factual questions. *See Coffey*, 933 F.3d at 583; *Bomar*, 643 F.3d at 461.

In this case, though, the state defendants do not challenge the district court's factual determinations, and we may construe any disputed facts in the Bambachs' favor in order to preserve our jurisdiction. *DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609–11 (6th Cir. 2015); *Sheets v. Mullins*, 287 F.3d 581, 585 (6th Cir. 2002); *see also Coffey*, 933 F.3d at 583–84. The state defendants do not challenge the district court's determination that genuine disputes of material fact suggest Moegle and Shaw may have committed constitutional violations. So, we assume they did. Instead, the state defendants argue only that

no clearly established law put Moegle and Shaw on notice that they may have committed constitutional violations. We may resolve that question—a purely legal question—on interlocutory appeal. *See DiLuzio*, 796 F.3d at 609.

III. ANALYSIS

A. Standard of Review

Where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law, a court must grant summary judgment. *See* Fed. R. Civ. P. 56(a). On appeal, we review de novo a district court's rejection of qualified immunity at the summary-judgment stage. *Schulkers v. Kammer*, 955 F.3d 520, 532 (6th Cir. 2020). Other than in scenarios where a plaintiff's fact characterizations blatantly contradict the record, we must construe all facts in the light most favorable to the plaintiff's version of events. *See Coffey*, 933 F.3d at 584. We ask whether a reasonable juror could find that (1) "the defendant violated a constitutional right," and (2) "the right was clearly established." *Schulkers*, 955 F.3d at 532 (quoting *Kovacic v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 724 F.3d 687, 695 (6th Cir. 2013)). Ordinarily, we may consider either prong of the inquiry first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Here, though, the state defendants have not challenged the Bambachs' assertion that a constitutional violation occurred. *See* Appellants' Br. 17–18 ("Moegle and Shaw do not contest the district court's holding as to the first element . . . ."). So, we assume Moegle and Shaw did violate the Bambachs'

rights, and we assess only the second question: were those rights clearly established? In this case, that determination turns on whether the law clearly establishes that failure to return children after an implied revocation of consent to a temporary placement plan violates the plaintiffs' Fourth and Fourteenth Amendment rights.

Qualified immunity serves to limit government officials' "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Mitchell*, 472 U.S. at 517. The immunity serves dual values: ensuring that wronged individuals can vindicate their constitutional rights while simultaneously reducing the social costs that result from subjecting public officials to increased litigation, like the distractions officials may face in contending with numerous lawsuits and the deterrent effect such litigation might have on otherwise capable people who choose not to enter public office. *Harlow*, 457 U.S. at 813–14.

State officers are shielded from civil liability for their actions unless they have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The rights must be sufficiently clear—and defined at a sufficiently precise level—to ensure that "every reasonable official would have understood that what he is doing violates" those rights. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)).

Existing law at the time of the alleged violation must have "placed the statutory or constitutional question beyond debate." *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The legal landscape at the time of the violation must give state defendants "fair warning" that their actions were unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). To be sure, officials may still be "on notice" that their conduct is unconstitutional "even in novel factual circumstances," *id.*, but the contours of the alleged rights violation must not be defined at too high a "level of generality." *Al-Kidd*, 563 U.S. at 742. It must be "apparent" from existing law that the state defendants' actions violated a "particularized" constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In short, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The immunity applies when an officer "reasonably misapprehends the law governing the circumstances she confronted," even if that misapprehension was "constitutionally deficient." *Taylor v. Riojas*, 592 U.S. 7, 8 (2020) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

The plaintiff bears the burden of showing the law was clearly established at the time of the alleged violation. *Andrews v. Hickman County*, 700 F.3d 845, 853 (6th Cir. 2012). And although we construe disputed facts in the nonmoving party's favor, we limit our consideration to those facts "knowable to the

defendant officers." *White v. Pauly*, 580 U.S. 73, 77 (2017) (per curiam).

B. Moegle Is Entitled to Qualified Immunity on the Bambachs' Fourth and Fourteenth Amendment Claims.

The Bambachs cannot point to any law clearly establishing that Moegle violated the Bambachs' constitutional rights by failing to return the Bambach children to their father in the period from December 29, 2015, to January 14, 2016. Relevant caselaw outlines two bookends to a spectrum. At one end, where state employees remove children from their parents' care without a valid court order and without either parental consent or pre-removal process, the state workers violate either the Fourth or Fourteenth Amendment—or both. *See Kovacic*, 724 F.3d at 695–700 (violation of Fourth Amendment); *Doe v. Staples*, 706 F.2d 985, 988–90 (6th Cir. 1983) (violation of Fourteenth Amendment procedural due process); *Vinson v. Campbell Cnty. Fiscal Ct.*, 820 F.2d 194, 200–01 (6th Cir. 1987) (violation of Fourteenth Amendment substantive due process). At the other end, though, where state workers receive parental consent to temporarily remove children from custody, the state employees do *not* violate any constitutional rights, even if they do not obtain a court order or follow any other process for the removal. *See Smith v. Williams-Ash*, 520 F.3d 596, 599–600 (6th Cir. 2008); *see also Teets v. Cuyahoga County*, 460 F. App'x 498, 503 (6th Cir. 2012). The Bambachs' claims sit somewhere in the middle. Here, Moegle and Shaw did not obtain a court

order until January 14, 2016. On December 25, 2015, Bambach explicitly consented to his children's removal. Then, after several days, we assume he impliedly revoked his consent to that temporary placement—but that he failed to *explicitly* revoke his consent.

We must determine whether the law clearly established in December 2015 that the failure to return the Bambach children to Bambach following his implied revocation of consent violated the Bambachs' constitutional rights. The answer is no. Not only is there no existing caselaw that clearly supports the Bambachs' argument, but the closest factual analogue the Bambachs can identify—*Smith v. Williams-Ash*—cuts in the state defendants' favor.

1. No Existing Law Clearly Established that Moegle Violated the Bambachs' Rights to Substantive or Procedural Due Process.

The Constitution clearly protects both a "procedural due process interest in parenting a child and a substantive fundamental right to raise one's child." *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000); *see also Schulkers*, 955 F.3d at 539–43 (postdating the events in this case but outlining clearly established Fourteenth Amendment precedent, all of which existed prior to December 29, 2015). The Fourteenth Amendment requires states to provide "due process of law" before depriving "any person of life, liberty, or property." U.S. Const. amend XIV, § 1. Due process has two distinct components: one procedural and one substantive. Procedural due process rights protect individuals "from deficient procedures that lead

to the deprivation of cognizable liberty interests." *Bartell*, 215 F.3d at 557; *see also Michael H. v. Gerald D.*, 491 U.S. 110, 120–21 (1989) (plurality opinion); *Matthews v. Eldridge*, 424 U.S. 319, 333–34 (1976). Substantive due process protections ensure that—regardless of the procedural protections available—the government "may not deprive individuals of fundamental rights unless the action is necessary and animated by a compelling purpose." *Bartell*, 215 F.3d at 557–58; *see also Troxel v. Granville*, 530 U.S. 57, 65–67 (2000) (plurality opinion).

The Fourteenth Amendment's procedural protections extend to the "liberty interest" in the "parent-child relation," an interest a parent may not "be deprived of absent due process of law." *Williams-Ash*, 520 F.3d at 599 (quoting *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006)). Absent certain exigent circumstances, the state's termination of or interference with parental rights—even temporarily—requires some measure of procedural protection, like proper notice and an opportunity for a hearing. *See Schulkers*, 955 F.3d at 543; *Williams-Ash*, 520 F.3d at 599; *see also Dupuy v. Samuels*, 465 F.3d 757, 760–61 (7th Cir. 2006). Another circumstance that removes the state's obligation to provide additional process before removal from custody is a parent's consent or lack of objection to the removal. *See Williams-Ash*, 520 F.3d at 599–600 ("[h]earings are required for deprivations taken over objection, not for steps authorized by consent." (quoting *Dupuy*, 465 F.3d at 761–62)). Further, although a parent can withdraw consent to temporary removal, our prior cases have suggested

that parents should "explicitly withdraw the consent they explicitly gave." *Id.* at 601. We have little caselaw on whether (and in what circumstances) parents may *implicitly* withdraw consent through ambiguous statements or conduct. *Cf. Fisher v. Gordon*, 782 F. App'x 418, 423 (6th Cir. 2019); *see also Andrews*, 700 F.3d at 861 (framing a qualified-immunity dispute by asking whether a reasonable social worker "facing the situation in the instant case" would have known her acts violated clearly established law).

Similarly, the Fourteenth Amendment's substantive protections also extend to the fundamental right that parents have to the "companionship, care, custody and management" of their children. *Schulkers*, 955 F.3d at 539–40 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)). As our caselaw acknowledges, the "right to family integrity and association without interference from the state" is, in many ways, "the paradigmatic example of a substantive due process guarantee." *Id.* at 540. That right, however, is neither "absolute nor unqualified." *Kottmyer*, 436 F.3d at 690; *see also Reno v. Flores*, 507 U.S. 292, 303 (1993). Indeed, it is "limited by an equaling compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents." *Kottmyer*, 436 F.3d at 690. As a result, an investigation into allegations of child abuse typically does not implicate the Fourteenth Amendment, *see id.* at 691, although a removal from custody without due process—except in an emergency—is typically impermissible, *id.* at 690. Like for most constitutional rights, valid consent to

waive a right to substantive due process typically extinguishes corresponding protections against state action. *See Williams-Ash*, 520 F.3d at 599–600; *Siefert v. Hamilton County*, 951 F.3d 753, 763 (6th Cir. 2020) ("[C]onsent extinguishes constitutional procedural safeguards."); *see also Andrews*, 700 F.3d at 859 (explaining that social workers may obtain consent—waiving Fourth Amendment protections—to enter a property without a warrant).

Our inquiry for the Bambachs' Fourteenth Amendment claims largely starts and ends with *Smith v. Williams-Ash*. The Bambachs argue for an expansive definition of what it means for a right to be clearly established, pointing to *Hope v. Pelzer* for the proposition that broad legal principles can clearly establish law and provide sufficient notice to state officials even under novel factual circumstances. Appellee's Br. 22–23; *see Hope*, 536 U.S. at 741. But the factual circumstances here—especially the facts at the time as known to the state defendants—are *not* novel. And the one case—*Williams-Ash*—with similar factual circumstances cuts in the state defendants' favor. Indeed, this case's general sequence of events nearly perfectly matches that in *Williams-Ash*: first, a parent grants explicit consent to temporary placement; then, days later, asks when he could have his kids back and what would happen next in the investigation. *See Williams-Ash*, 520 F.3d at 598 (describing how "the parties agreed" to the temporary placement plan, the state social worker "launched an investigation," and then over the following two weeks the parents "cleaned their house and repeatedly asked" the social worker

"what else they needed to do to allow the children to return"). In that case, such requests were insufficient to indicate to the social worker that the parents no longer consented to their children's temporary removal from custody. On that ground, we found that the social worker did not violate the parents' right to procedural due process. *See id.* at 599–600. We also found, in an earlier appeal in the same case, that none of the social worker's conduct went so far as to "shock the conscience," indicating a violation of the parents' right to substantive due process. *Smith v. Williams-Ash*, 173 F. App'x 363, 367 (6th Cir. 2005). The same principles govern here.

Although the Bambachs fail to raise any meaningful arguments that *Williams-Ash* should not apply here, we acknowledge that the case does differ in certain aspects from the one before us. For one, the record here, unlike in *Williams-Ash*, does not contain any indication that Moegle drafted a formal, written temporary safety plan for Bambach to review and sign. *See* 520 F.3d at 598. Here, Moegle asked Bambach over the phone whether his daughters could stay with Amy. On that same call, he agreed. For another, the written placement plan in *Williams-Ash* contained an explicit opt-out mechanism, informing the parents that they "must contact [their] caseworker immediately" if they decide they "cannot or will not be able to continue following the plan." *Id.* There is no indication here that Moegle ever informed Bambach he could voluntarily withdraw his consent to the temporary placement with Amy, though the Bambachs do appear to concede that the arrangement was best characterized as a

"voluntary safety plan," like in *Williams-Ash*. Appellee's Br. 17; *see also* Pls.' Mot. for Summ. J., R.84 at PageID 2313. We relied on the existence of that opt-out mechanism to explain why it was unreasonable for the social worker in *Williams-Ash* to interpret the parents' conduct as a withdrawal of consent, because they had failed to follow the plain language of the agreement form. *See* 520 F.3d at 600–01.

These distinctions, however, do not change our analysis. While these differences suggest that the question of whether Moegle committed a constitutional violation might be debatable, the case certainly does not *clearly establish* the legal standards that govern when parents may *impliedly* revoke their consent. If anything, *Williams-Ash* arguably implies that parents must *expressly* revoke their consent and that Moegle's actions were fully within the bounds of the law. The similarities between that case and this one underscore why Moegle could not have been on notice that her conduct was unconstitutional. Moegle made sure to receive Bambach's explicit consent, like in *Williams-Ash*. She completed her investigation and petitioned for a removal order over a roughly two-week span, like the two-week investigation in *Williams-Ash*. *See* 520 F.3d at 598. And Bambach's conduct—asking when he could have his kids back without directly saying that he no longer agreed to have them stay with Amy—almost perfectly tracks the parents' conduct in *Williams-Ash*. *See id.* Like in *Williams-Ash*, Moegle could have reasonably believed that Bambach's nearly identical statements and conduct here did not suffice to withdraw his consent

under our existing caselaw. *See Williams-Ash*, 520 F.3d at 601; *Andrews*, 700 F.3d at 856 (asking in the Fourth Amendment context whether it was objectively reasonable for an officer to conclude warrantless entry was "excused by consent"); *see also Fisher*, 782 F. App'x at 423 ("We must determine if the [parents'] statements, behaviors, and lack of objections[] were enough for a reasonable official to conclude that [they] verbally consented to . . . removal."). Further, in the face of Bambach's ambiguous statements and under the apparent—if mistaken—belief that Bambach presented a danger to his daughters, nothing about Moegle's failure to return his children during the short period from December 29, 2015, to January 14, 2016, can be said to "shock the conscience" and violate his right to substantive due process. *See Siefert*, 951 F.3d at 765–67; *Williams-Ash*, 173 F. App'x at 367.

Finally, none of the cases the Bambachs cite convince us that the law clearly established in December 2015 that Moegle's actions were prohibited. As an initial matter, in their Fourteenth Amendment argument, the Bambachs cite only two cases that postdate *Williams-Ash* and predate the events of this case: *Kovavic v. Cuyahoga County Department of Children & Family Services* and an unpublished opinion in *Young v. Vega*. *See Kovacic*, 724 F.3d 687; *Young*, 574 F. App'x 684 (6th Cir. 2014), *overruled on other grounds by Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015); *see also* Appellee's Br. 34–45. Neither case addresses the key question here and in *Williams-Ash*: whether a state officer should have known that a

parent could impliedly withdraw prior explicit consent to have his children temporarily removed from his custody pending a protective services investigation. *See Kovacic*, 724 F.3d at 692–93, 695 (indicating only that social workers sought an emergency care order seeking removal of children, not that they ever sought the parents' consent); *Young*, 574 F. App'x at 687 n.2, 690–91, 691 n.6 (holding that no violation of procedural due process occurred during the "initial removal" because it was "voluntary" and assessing whether social workers later fabricated evidence in filing for immediate removal by court order). In addition, an unpublished case cannot clearly establish the governing law. *See Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022).

The two other cases the Bambachs primarily cite similarly fail to assess whether state employees violate parental rights *where the parent gives explicit consent to removal* and then attempts to impliedly withdraw that consent. *See Doe*, 706 F.2d at 987 (no consent to removal); *Vinson*, 820 F.2d at 196 (no initial consent to removal because parent not present during removal). Given the centrality that consent plays in shaping the contours of the constitutional protections available to individuals—in many cases, by removing all protections—neither of those cases defines the Bambachs' Fourteenth Amendment rights at the appropriate level of generality required under a qualified-immunity analysis. Neither does the additional case counsel invoked at argument: *Farley v. Farley*, 225 F.3d 658, 2000 WL 1033045, at *1 (6th Cir. 2000) (unpublished table decision). In *Farley*, the

mother—previously subject to a voluntary safety plan—"called" a case worker's supervisor and explicitly "asked that her children be returned to her." *Id.* at *2. Bambach never made such an explicit request. And, lastly, neither do any of the other cases cited in the Bambachs' briefing. *See Quilloin v. Walcott*, 434 U.S. 246, 247 (1978) (explicit objection to adoption); *Lassiter*, 452 U.S. at 20–21 (removal pursuant to court process); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (no consent); *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (no waiver of rights; not parental-rights case); *Parate v. Isibor*, 868 F.2d 821, 824–25 (6th Cir. 1989) (no waiver of rights; not parental-rights case); *Troxel*, 530 U.S. at 60–61 (plurality opinion) (explicit request to assert parental rights); *Bartell*, 215 F.3d at 554 (explicit request to resume custody); *Williams-Ash*, 173 F. App'x at 366–67 (earlier appeal at motion-to-dismiss stage in later published *Williams-Ash* case; no evidence temporary removal was voluntary); *Kottmyer*, 436 F.3d at 686–87 (no consent).

In sum, the scenario here goes beyond being merely a novel factual circumstance, *see Hope*, 536 U.S. at 741, and ventures into the realm of being entirely factually inapposite. Indeed, the similarity of Bambach's conduct to that of the parents in *Williams-Ash* underscores that it could not have been "apparent" to Moegle that her actions may have violated the law. *Anderson*, 483 U.S. at 640. The closer question is whether *Williams-Ash* clearly establishes that Moegle's actions were *permissible*—and the very fact that we might reasonably debate that question means

she could not have been on notice that her actions were unconstitutional. Here, we're not asking whether a violation occurred—we ask only whether the law clearly established that Moegle should have known her acts were unconstitutional. *Williams-Ash* makes clear that the answer is no. Even assuming a violation existed, then, it's clear that Moegle "reasonably misapprehend[ed] the law governing the circumstances she confronted"—*Williams-Ash*—and is entitled to qualified immunity because the Bambachs' Fourteenth Amendment rights were not clearly established under the circumstances here. *Taylor*, 592 U.S. at 8.

2. No Existing Law Clearly Established that Moegle Violated the Bambachs' Fourth Amendment Rights Against Warrantless Seizures.

Much like it did for the Bambachs' Fourteenth Amendment claims, Bambach's explicit consent to an initial removal makes all the difference in their Fourth Amendment claims. Both *Williams-Ash* opinions, as indicated above, formally apply only to Fourteenth Amendment substantive- and procedural-due-process claims. *See Williams-Ash*, 520 F.3d at 599; *Williams-Ash*, 173 F. App'x at 367. But because consent is a widely recognized and accepted exception to Fourth Amendment requirements, *see Andrews*, 700 F.3d at 854, 859, our analysis of the Bambachs' Fourteenth Amendment claims similarly illuminates why the Bambachs cannot show that their alleged

Fourth Amendment rights were clearly established in December 2015.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend IV. Searches and seizures "without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004). So, warrantless searches and seizures by a state officer violate the Fourth Amendment unless a recognized exception to the warrant requirement applies. *Andrews*, 700 F.3d at 854. Certain exigent circumstances can constitute a valid exception to the warrant requirement. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (describing emergencies like fighting fires, preventing imminent destruction of evidence, engaging in immediate pursuit of a fleeing suspect, and rendering aid to people who are seriously injured or threatened by injury). Valid consent to a search or seizure is also an exception to the warrant requirement. *Andrews*, 700 F.3d at 854. In this circuit, the Fourth Amendment clearly prohibits a child-services case worker's search of a parent's home without a valid court order. *Id.* at 859–60. Logically, it also prohibits *removal* of a child without a court order or the existence of a valid exception to the warrant requirement. *See Kovacic*, 724 F.3d at 699. Applying typical Fourth Amendment principles, then, it follows that consent to a removal or search excuses the state employee's failure to obtain a warrant or other court order. *See Andrews*, 700 F.3d at 859; *Kovacic*, 724 F.3d at 695 (affirming that social workers are governed by the Fourth Amendment's strictures with respect to removals from parental custody).

We determined above that, under the existing legal landscape, Moegle would not have reasonably understood that Bambach withdrew his consent to have his children stay with Amy temporarily while the investigation was completed. The same determination makes clear why the Bambachs' Fourth Amendment rights were not clearly established: valid consent excuses state actors from compliance with Fourth Amendment restrictions. And, per *Williams-Ash*, not every reasonable officer would have understood that Bambach's conduct legally sufficed to withdraw his consent to the continued removal of his daughters from his custody. Because it was not "apparent" that Bambach could impliedly revoke his consent, especially considering that *Williams-Ash* indicates similar conduct did not constitute a revocation, the Bambachs' Fourth Amendment rights against Moegle's failure to return the children were not clearly established in December 2015. *See Anderson*, 483 U.S. at 640.

None of the Fourth Amendment cases the Bambachs cite grapple with this case's defining characteristic: granting explicit consent to a temporary removal—which constitutes a reasonable seizure under the Fourth Amendment—and then attempting to impliedly withdraw that consent by inquiring about the status of the investigation and what Bambach needed to do to get his children back. *See Payton v. New York*, 445 U.S. 573, 577–78 (1980) (establishing only general right against warrantless searches; no consent existed for the search); *Farley*, 225 F.3d 658 (unpublished table decision) (explicit request to resume

custody); *Williams-Ash*, 520 F.3d at 598;[3] *Andrews*, 700 F.3d at 860 (state did not argue plaintiff consented to search); *Kovacic*, 724 F.3d at 695–96 (exclusive focus on exigent circumstances); *Barber*, 809 F.3d at 842 (in-school interview of children without consent).

Consent is a key exception to the Fourth Amendment warrant requirement. We need not even articulate the alleged right here overly specifically in order to find for the state defendants: through the entire time period at issue here, governing law tended to support that Bambach's conduct did not suffice to revoke his explicitly given consent. *See Williams-Ash*, 520 F.3d at 601. In essence, the law indicated it was reasonable for Moegle to believe she never lost Bambach's explicit consent to his daughters' temporary placement with Amy. Under that framing, the Fourth Amendment right here is familiar to us, and it may be answered in a familiar manner: valid consent excuses the need for a state official to seek and obtain a warrant for a search or seizure pursuant to the Fourth Amendment. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).[4]

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[3] We note that the Bambachs rely on *Williams-Ash* for the proposition that consent under the Fourth Amendment can be "revoked by a parent's conduct," including failure to cooperate with protective services, asking protective services what could be done to get the children back, and hiring an attorney. Appellee's Br. 31–32. This reliance is misplaced. As explained elsewhere, *Williams-Ash* held that such conduct was insufficient (for a claim under the Fourteenth Amendment) to indicate to a case worker that the parents had revoked their consent. 520 F.3d at 600–01.

[4] It's unclear whether a Fourth Amendment claim alleging execution of a false or misleading removal order remains before

C. Shaw Is Entitled to Qualified Immunity on the Bambachs' Fourth and Fourteenth Amendment Claims.

Much as the Bambachs' claims against Moegle must fall, so too do their claims against Shaw. The Bambachs argue only that Shaw is liable under § 1983 because she has implicitly authorized, approved, or acquiesced to Moegle's unconstitutional conduct. Appellee's Br. 45. The Bambachs further concede that Shaw's supervisory liability depends on the law clearly establishing that Moegle's actions were unconstitutional. *Id.* at 48. The Bambachs are correct that our law clearly establishes liability where a subordinate has violated the law and the supervisor has implicitly authorized, approved, or acquiesced to that conduct. *See, e.g.*, *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); *Coley v. Lucas County*, 799 F.3d 530, 542 (6th Cir. 2015). As the state defendants point out, though, a necessary predicate to that liability is the existence of clearly established law indicating the *subordinate's* actions were unconstitutional. Appellant's Br. 31; *see Taylor v. Barkes*, 575 U.S. 822,

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the district court. See Partial Grant of Defs.' Mot. for Summ. J., R.98 at PageID 3253; Partial Grant of Defs.' Mot. to Dismiss, R.50 at PageID 1068. Neither party addresses this issue in their appellate brief, and the Bambachs focused solely on the consent-to-seizure issue in their response to the state defendants' motion for summary judgment. For the sake of completeness, we reaffirm the district court's holding at the motion-to-dismiss stage that Moegle and Shaw possess absolute immunity for initiating the removal petition, meaning that claim must also be dismissed. See Partial Grant of Defs.' Mot. to Dismiss, R.50 at PageID 1045–46; see also *Barber*, 809 F.3d at 843–44.

825–27 (2015) (per curiam) (assessing whether the law was clearly established for a prison warden and commissioner by assessing whether the law clearly prohibited a subordinate contractor's conduct); *cf. McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 470 (6th Cir. 2006) ("[A] prerequisite of supervisory liability under § 1983 is unconstitutional conduct by a subordinate of the supervisor."). The Bambachs have identified no case in which we have held that the law clearly established a supervisor—but *not* a subordinate—could be liable for the subordinate's constitutional violations. *See* Appellee's Br. 48–49. Of course, logically, a supervisor might be directly liable for any constitutional violations they commit. But the Bambachs do not argue Shaw is directly liable outside her supervisory capacity. *See* Appellee's Br. 45–51.

We have determined the law did not clearly establish that Moegle's conduct violated the Constitution. Because not every reasonable officer would have understood at the time that Moegle's conduct violated the Fourth and Fourteenth Amendments, we extend that holding to Shaw. Accordingly, Shaw, like Moegle, is also entitled to qualified immunity.

IV. CONCLUSION

We **REVERSE** the district court's denial of the defendants' motion for summary judgment on the plaintiff's Fourth and Fourteenth Amendment claims and **REMAND** for entry of an order dismissing the claims against all defendants.

No. 23-1372

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK BAMBACH, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN; E.B. AND M.B., IN THEIR OWN RIGHT, Plaintiffs-Appellees,	)	O R D E R
v	)	
GINA MOEGLE, INDIVIDUALLY, IN HER CAPACITY AS CHILDREN'S PROTECTIVE SERVICES INVESTIGATOR, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; SUSAN SHAW, INDIVIDUALLY, IN HER CAPACITY AS CHILDREN'S PROTECTIVE SERVICES SUPERVISOR, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants-Appellants.	)	

BEFORE: McKEAGUE, LARSEN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Kelly L. Stephens, Clerk

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* Judge Davis recused herself from participation in this ruling.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK BAMBACH,
individually and on
behalf of his minor
children, M.B. and E.B.
in their own right,
Plaintiffs,

Case No. 18-14039
v. Hon. Denise Page Hood

GINA MOEGLE,
individually, in her
capacity as Children's
Protective Services
Investigator with the
Michigan Department
Of Health and Human
Services, SUSAN SHAW,
individually, in her capacity
as Children's Protective
Services Supervisor with
the Michigan Department
of Health and Human Services,
and LAPEER COUNTY, a
Michigan municipal corporation,
Defendants.

ORDER GRANTING LAPEER COUNTY'S MOTION FOR SUMMARY JUDGMENT [ECF No. 62], GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT FILED BY GINA MOEGLE AND SUSAN SHAW [ECF No. 82], and DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [ECF No. 84]

I. INTRODUCTION

Plaintiffs Mark Bambach and his minor children, M.B. and E.B., filed this 42 U.S.C. § 1983 action on December 23, 2018, alleging that Defendants violated their Fourth, Fifth, and Fourteenth Amendment rights: (1) during a child protective services investigation; (2) when removing Plaintiff Mark Bambach's ("Bambach") two daughters, M.B. and E.B. (the "Children"), from his home; and (3) pursuing and participating in judicial proceedings against Bambach. In this case, the key issue is if/when the Children were "removed" from Bambach's home/custody; it is an issue that permeates the claims and defenses of Plaintiffs and Defendants Gina Moegle and Susan Shaw (the "State Defendants"), respectively.

As discussed below, three motions for summary judgment have been filed, and each one has been fully briefed. On September 8, 2021, the Court held a hearing on the three motions. For the reasons that follow, the Court: (a) grants the Motion for Summary Judgment filed by Lapeer County [ECF No. 62]; (b) grants in part and denies in part the Motion for

Summary Judgment filed by the State Defendants [ECF No. 82]; and (c) denies the Motion for Summary Judgment filed by Plaintiffs [ECF No. 84].

II. BACKGROUND

Bambach and his ex-wife, Amy, are the parents of the Children. Bambach and Amy Bambach were divorced effective September 2013, and Bambach was the custodial parent, with Amy Bambach seeing the Children very little between November 2012 and April 2015. Beginning in May 2015, Amy Bambach began

seeing the Children more. Amy Bambach was scheduled to have the Children from December 23, 2015 to the morning of December 25, 2015. Instead, due to Amy Bambach's contentions that Bambach was sexually abusing the Children, the Children were not returned to Bambach on December 25, 2015, and he did not regain custodial rights until November 2016.

Plaintiffs brought this Section 1983 action against Defendants because, as a result of a Child Protective Services ("CPS") investigation and ensuing events, the Children were not permitted to return to Bambach's home for more than 10 months. Plaintiffs allege in the Second Amended Complaint that:

> On Friday, 12/25/15, ***Despite having no warrant or authorized petition***, Moegle notes, in her 12/25/15 5:30 PM entry, that "***Amy was informed that this worker will call Mark and inform him that the girls are not returning home*** until CPS can

> investigate." (see CPS Investigation Report, p. 8, 12/25/15 5:30 PM entry (emphasis added [by Plaintiffs])).

ECF No. 9, PgID 173 (¶ 39). Plaintiffs allege that Bambach was told on December 29, 2015 that the Children would not be returned to him until the CPS investigation was complete:

> On 12/29/15 at 9:22 AM, Mark called Moegle and wanted to know when he was getting his kids back. **Despite [CPS] not having a warrant or an authorized petition**, according to Moegle:
>
> > He was informed that this worker does not know the answer to his questions due to an ongoing investigation.
> >
> > ***He was informed that there is policy to follow*** and its_CPS's goal to keep the children safe. (see CPS Investigation Report, p. 9, 12/29/15 9:22 PM entry (emphasis added)).

ECF No. 9, PgID 174 (¶ 42).

Moegle, an unlicensed CPS investigator at the Michigan Department of Health and Human Services

("MDHHS") in Lapeer County, investigated the claims that Bambach sexually abused the Children until January 13, 2016, when she signed a removal petition ("Petition"), which was heard by the Lapeer County Circuit Court the next day, January 14, 2016. *Id.* at 194. Plaintiffs allege that Moegle made false statements and omissions to justify the seizure of Bambach's daughters, particularly after Bambach informed Moegle on December 30, 2015 that he would not speak to law enforcement and was taking the Fifth Amendment. *Id.* Plaintiffs further allege that Moegle "knowingly made false statements and omissions in order to 'justify' her removal of the Bambach children" from Bambach's home. ECF No. 9 at ¶¶ 153156, 165-167, 234-235.

Shaw was a licensed CPS Supervisor with the MDHHS in Lapeer County and Moegle's supervisor during the time period relevant to this action. On December 30, 2015, Moegle conducted a Case Conference with the Children's Supervisor (Shaw), who was provided information regarding the case. ECF No. 9, PgID 211.

On January 12, 2016, Moegle conducted another Case Conference with Shaw at the Lapeer County MDHHS office. Shaw was provided information regarding the case, and this Case Conference was deemed a "Successful Supervision." ECF No. 9, PgID 211. Moegle stated in her deposition that Shaw was the one who authorized the Petition. See ECF No. 9, PgID 212.

Plaintiffs assert that all of their claims for relief relate to the investigative and administrative actions

by the State Defendants: (a) removing the Children from Bambach's custody without a warrant in violation of the Fourth Amendment (Moegle); (b) removing the Children from Bambach's custody without affording Plaintiffs their procedural due process rights, in violation of the Fourteenth Amendment (Moegle and Shaw); (c) removing the Children from Bambach's custody without any justification in violation of their Fourteenth Amendment substantive due process rights (Moegle and Shaw); (d) executing a removal order in violation of the 4th Amendment which was issued based upon false statements and omissions that were made to the judge and which the judge relied upon in issuing that removal order (Moegle and Shaw); (e) implicitly authorizing, approving, or knowingly acquiescing to a subordinate's unconstitutional conduct (Shaw); and (f) imposing severe sanctions for failing to waive the Fifth Amendment right against self-incrimination (Moegle).[5]

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[5] In the Second Amended Complaint, Plaintiffs allege four claims that have been limited by this Court to allegations that "all of [their] actions [that] were investigative and administrative in nature" that "relate to the conduct of removing the Children from Bambach's custody prior to the preliminary hearing which occurred on January 14, 2016." ECF 50, PageID.1068. These claims are: (1) State Defendants violated the Children's Fourth Amendment rights by removing them from their Bambach's custodial home without judicial preapproval or warrant; (2) State Defendants violated Plaintiffs' Substantive and Due Process rights afforded to them under the Fourteenth Amendment; (3) State Defendants violated Bambach's Fifth Amendment right by compelling him to self-incriminate; and (4) supervisor liability.

III. LEGAL STANDARD

Rule 56(a) of the Rules of Civil Procedure provides that 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). The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

IV. ANALYSIS

A. Lapeer County's Motion for Summary Judgment (Count XI)

Plaintiffs' sole claim against Lapeer County is for *Monell* liability. Lapeer County contends that Plaintiffs have not identified a single policy, procedure or custom maintained by Lapeer County that could be said to have contravened Plaintiffs' rights. The Sixth Circuit recognizes four methods by which a party can establish a *Monell* violation: "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir.2005) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)).

Plaintiffs contend that they have stated a viable *Monell* claim because: (a) Lapeer County's policies and customs violated their Fifth and Fourteenth Amendment rights; and (b) those policies and customs were the moving force behind the violations. Plaintiffs rely primarily on *Pembaur v City of Cincinnati*, 475 U.S. 46 (1986),[6] and *In re Blakeman*, 326 Mich. App.

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[6] In Pembaur, the United States Supreme Court recognized that, under the appropriate circumstances, "the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983" when the prosecutor ordered deputy sheriffs to enter a building. Pembaur, 475 U.S. at 485. As Plaintiff acknowledges, however, a county prosecutor acts as an agent of the state, rather than the county,

318 (2018). At the outset of their response brief, Plaintiffs assert:

> 1. At all times, the Lapeer County Prosecuting Attorney ("PA") was a participant in the child protection proceeding ("CPP") entitled *In the Matter of M.B. and E.B.*, Lapeer County Circuit Court ("LCCC") Case No. 16012291. Ex. A, Lapeer RTA #1.
>
> 2. Lapeer contracted with the Michigan Department of Health and Human Services ("MDHHS") for the PA to provide legal representation for MDHHS in abuse and neglect proceedings filed in the LCCC. Ex. A, #2.

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when prosecuting state criminal charges, and therefore the prosecutor's conduct in prosecuting state criminal charges cannot be used to establish a county policy in support of a municipal liability claim against the county under § 1983. Gavitt v Ionia County, 67 F.Supp.3d 838, 860 (E.D. Mich. 2014.). The Court also notes that the Pembaur court stated, "Monell held that recovery from a municipality is limited to acts that are, properly speaking, 'of the municipality,' i.e., acts that the municipality has officially sanctioned or ordered." Pembaur, 475 U.S. at 470. In this case, the alleged policy was instituted by the PA and not by Lapeer County, and no evidence exists for the contention that the Prosecuting Office took its orders from Lapeer County on its alleged practice of using civil cases as leverage on related criminal cases.

3. Ex. B is a true and correct copy of the original Agreement Number: PROFC17-44001 (hereinafter the "Contract") between MDHHS and Lapeer County ("Lapeer"). Ex. A, #3.

4. As the PA, Timothy Turkelson ("Turkelson"), signed the Contract with the MDHHS on behalf of Lapeer. Ex. A, #4.

5. As the PA, Turkelson, had the authority to administer the Contract with MDHHS on behalf of Lapeer. Ex. A, #5.

6. Because he had the authority to administer the Contract with MDHHS on behalf of Lapeer, Turkelson was the policy maker with regard to that Contract. Ex. A, #6.

7. At all relevant times, Turkelson was exercising his authority to administer the Contract with MDHHS on behalf of Lapeer. Ex. A, #7.

Based on the foregoing statements, the Court finds that the PA was acting as a contractor for MDHHS, a State of Michigan department. As a result, for purposes of investigating and/or prosecuting abuse

and neglect matters, the PA was serving as an agent of the State of Michigan, not on behalf of Lapeer County. Accordingly, the Court finds that there is no evidence that Lapeer County violated any constitutional rights of Bambach or any other Plaintiffs.

Based on the relationship between MDHHS and the PA with respect to abuse and neglect matters, it is not pertinent that several prosecutors in the PA acknowledged that the office of the PA could or would use information in a criminal case that was learned in a corresponding CPS case. ECF No. 68, Ex. C at 26-27. No criminal case was instituted against Bambach with respect to the underlying events (the PA did not even request a warrant), so the actions of the prosecutors from the PA are not relevant and cannot form the basis of a Fourth, Fifth, or Fourteenth Amendment claim against Lapeer County.

The Court further finds that there is no merit to Bambach's claim that Lapeer County violated his Fifth Amendment rights against self-incrimination. Bambach was never criminally charged, and he never had contact with the PA, as he elected not to speak to Lapeer County prosecutors (or any other investigators). There is no evidence Lapeer County took any discernible steps that violated any of Bambach's Fifth Amendment rights. "A necessary factor in all of these considerations is that, for a *Monell* claim to be viable, the municipal action (or inaction) must have been the moving force behind the constitutional harm." *Powers v. Hamilton County*

Public Defender Com'n, 501 F.3d 592, 607 (6th Cir.2007) (citing *Monell*, 436 U.S. at 694).

The Court also finds that Plaintiffs have not submitted evidence to support their allegations that Lapeer County established policies or customs that violated their Fourth, Fifth and Fourteenth Amendments rights by:

> [A]cting with deliberate indifference in implementing a policy, procedure, custom, and/or practice of inadequate training and/or supervision, and/or by failing to train and/or supervise its officers, agents, employees, and state actors, in providing the constitutional protections guaranteed to individuals, including those under the Fourth, Fifth, and Fourteenth Amendments, when performing actions related to juvenile neglect and abuse proceedings.

ECF No. 9, PageID.240.

"Deliberate indifference is a critical element of claims of municipal inaction. This is a stringent standard . . . the evidence must demonstrate more than just 'a collection of sloppy, or even reckless, oversights. Instead, the record must show that the [defendant] consciously never acted when confronted with its employees' egregious and obviously unconstitutional conduct." *France v. Lucas*, 1:07-cv-03519-DCN (#206, at p. 22-23) (N.D. Ohio Oct. 22, 2012) (internal quotation omitted) (citing *Arendale v.*

City of Memphis, 519 F.3d 587, 600 (6th Cir. 2008) (quoting *Doe v. Claiborne Cty*. 103 F.3d 495, 508 (6th Cir.1996)). "Deliberate indifference . . . requires proof a municipal actor disregarded a known or obvious consequence of his action. A standard any lower would result in a reduction to de facto respondeat superior which the Supreme Court rejected in *Monell*. *Anderson v. Jones*, 440 F.Supp.3d 819, 837-38 (S.D. Ohio 2020) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989) (internal citations omitted)). "Establishing a pattern of unconstitutional conduct is difficult because there must be a frequently recurring constitutional violation of a similar nature in advance of the violation at issue." *Anderson*, 440 F. Supp. 3d at 838 (citing *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 575 (6th Cir. 2016)).

In this case, there is no evidence that Lapeer County prosecutors engaged in any "egregious and obviously unconstitutional conduct" that violated Plaintiffs' rights. There is no evidence Lapeer County was ever "confronted with its employees' egregious and obviously unconstitutional conduct," such that it could be said to have ratified or affirmed it or shown any deliberate indifference.[7] The Court holds that Lapeer

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[7] The "tradition" that Plaintiffs insist exists in Lapeer County was not one created by Lapeer County, but by the PA. As has been held by the Sixth Circuit Court of Appeals under similar circumstances:

> The thrust of the complaint is that [the prosecutor] —and perhaps one or two other

County does not have established policies or customs that violated Plaintiffs' rights.

The Court grants Lapeer County's motion for summary judgment with respect to Count XI, the only claim Plaintiffs filed against Lapeer County.

> members of the Prosecutor's Office—instigated and implemented habitually unconstitutional practices, not that they were following municipal policy in doing so. *Municipal liability attaches only where the policy or practice in question is "attributable to the municipality*," but [plaintiff]'s complaint contains no allegations that the practice at issue here was acquiesced to or informed by municipal actors rather than by prosecutors who had adopted the strategy in order to win criminal convictions. The word 'policy' generally implies a course of action consciously chosen from among various alternatives." Municipality is liable under § 1983 only for 'a pervasive custom or practice, of which the city lawmakers know or should know." *Again, state prosecutors' actions in prosecuting state crimes cannot themselves establish municipal policy*.

D'Ambrosio v. Marino, 747 F.3d 378, 387 (6th Cir. 2014) (emphasis added by Lapeer County) (internal citations omitted).

B. State Defendants'/Plaintiffs' Motions for Summary Judgment

The State Defendants assert that there is no evidence to support a finding that: (1) Bambach failed to consent (or that he revoked his consent) to the continued placement of the Children with Amy Bambach; (2) Moegle compelled Bambach to give self-incriminating testimony; (3) Moegle required Bambach to confess to sexually abusing the Children to regain care and custody; (4) Moegle lied or made omissions while acting in her administrative and investigative capacity; or (5) Shaw possessed information that revealed a strong likelihood of Moegle's allegedly unconstitutional conduct.

Plaintiffs counter that there is no genuine dispute of material fact that: (a) the State Defendants are not entitled to absolute immunity; (b) Moegle unlawfully seized the Children without a court order; (c) Moegle did not afford Plaintiffs any procedural due process; (d) Moegle's conduct shocks the conscience; (e) Shaw implicitly authorized, approved, or knowingly acquiesced to Moegle's conduct; and (f) Moegle violated Bambach's 5th Amendment rights.

1. Fourth Amendment Claims (Counts I, IV, V, and VIII)

In the Sixth Circuit, the Fourth Amendment applies to social workers. *Andrews v. Hickman Co., Tenn.*, 700 F.3d 485, 859-60, 863-64 ("the presumption appears to be that any state officer [including a social worker] should operate with the default understanding that the Fourth Amendment applies to

her actions unless a specific exception to the requirements of the Fourth Amendment has been found to apply."). Whether a violation occurred turns on whether Plaintiffs were "seized" within the meaning of the Fourth Amendment. A "seizure occurs when, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.'" *O'Malley v. City of Flint*, 652 F.3d 662, 668 (6th Cir. 2011) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Courts generally should take the plaintiff's age into account when determining if a reasonable person would have felt free to leave. *See, e.g.*, *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005). There is a two-part test to determine whether the Fourth Amendment is implicated: was there a seizure? If so, was it a lawful seizure in compliance with the Fourth Amendment? In other words: (a) would a reasonable child feel he or she is free to leave?; and (b) Was there probable cause or an exception to the warrant requirement (*i.e.*. consent)? *Schulkers v Kammer*, 955 F.3d 520, 537 (6th Cir. 2020).

Plaintiffs allege Moegle "seized" the Children from Bambach's custody without a warrant or court order, in violation of the Children's Fourth Amendment rights. The State Defendants argue that no material evidence exists that the Children could reasonably determine whether they were free to leave. It is undisputed that the Children were 3 years-old at the time of this CPS investigation and were staying with their mother, Amy Bambach. No evidence has been submitted to the Court that either of the Children felt unsafe with Amy Bambach or demanded to be

returned to Bambach. Additionally, no evidence exists that the Children were taken into MDHHS's or State Defendants' physical custody or seized between December 25, 2015 and January 14, 2016.

The State Defendants reasonably argue that, on December 25, 2015, at the time sexual abuse complaint against Bambach was made, the Children were with their noncustodial mother, Amy Bambach, and Moegle and Shaw were required to take "necessary action to protect the health or safety of the child by working with the persons responsible and legal authorities to obtain necessary temporary care, shelter and medical care for the child." Moegle worked with Bambach and Amy Bambach to create a safety plan to ensure the Children's continued safe placement. On December 25, 2015, Amy Bambach agreed the Children would remain in her care, and, later that same day, Bambach gave Moegle his consent that the Children could remain in Amy Bambach's care.

The State Defendants accurately argue that there is no evidence that Bambach expressly revoked his consent for the Children to remain with Amy Bambach. But, Bambach called Moegle on December 29, 2015, and Bambach told Moegle that he "wanted to know when he was getting his kids back." Although this does not demonstrate, as a matter of law, that Moegle seized the Children at that time, the Court finds that it is evidence from which a factfinder could decide that Bambach had revoked his consent. And, Bambach not only asked when he would get the Children back, he told Moegle he would not talk to law

enforcement and that he was hiring an attorney to get the Children back. It is undisputed that the State Defendants knew that much.

The Court finds that this creates a genuine dispute of material fact as to whether Bambach revoked his consent on or about December 29 or 30, 2015. On this basis, Moegle's and Shaw's motion for summary judgment on the basis of consent must be denied. But, as Bambach did not expressly revoke his consent (and neither of the Children allegedly revoked her consent), Plaintiffs cannot demonstrate as a matter of law that the State Defendants seized the Children in violation of the

Fourth Amendment. Plaintiffs' motion for summary judgment on the basis of the absence of consent likewise must be denied.

The State Defendants contend that, even if a factfinder could determine that there was a seizure, they had a legitimate reason to suspect that Bambach sexually abused the Children. Citing *Schulkers*, 955 F.3d at 538. They claim that Amy Bambach reported to medical staff at Genesys Emergency Department that the girls told her that Bambach puts his finger way up there when he wipes them, and medical evidence existed that both of the Children had vaginal infections and urinary tract infections.

The State Defendants argue that there was no evidence available to them that reasonably suggested the Children had not been sexually assaulted. This argument is inconsistent with some evidence in the record, in particular the records and statements of Emergency Room Doctor Alan Janssen and Registered

Nurse Andrea Del Vecchio. Each of them stated that he/she did not communicate to Moegle that there was any evidence of sexual assault with respect to the Children, only that there were allegations of sexual assault by Amy Bambach.

For the reasons stated above, the Court denies both Plaintiffs' and the State Defendants' motions for summary judgment with respect to Counts I, IV, V, and VIII.

2. Fifth Amendment Claim Against Moegle (Count X)

As to Bambach's Fifth Amendment claim against self-incrimination, the constitutional protection is worded as one applicable to criminal cases, and thus it applies in any situation in which a criminal prosecution might follow, regardless of how likely or unlikely that outcome may seem. See *United States v Miranti*, 253 F.2d 135, 139 (2d Cir. 1958) ("We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute."). Accordingly, "[t]he privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *People v. Ferency*, 133 Mich.App. 526, 533 (1984), quoting *In re Gault*, 387 U.S. 1, 47 (1967) (quotation marks and citation omitted). Any testimony "having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich.App. 341, 346

(1992). The privilege may be invoked when criminal proceedings have not been instituted or even planned. *People v. Guy*, 121 Mich.App. 592, 609-614 (1982).

The State Defendants contend that there is no material evidence to support Bambach's allegation that Moegle violated his Fifth Amendment right by conditioning the receipt of CPS family services or reunification with the Children

on Bambach confessing to sexually abusing the Children. *In re Blakeman*, 326 Mich.App. 318, 338 (2018). They state that, on December 29, 2015, Bambach, under the advice of his attorney, told Moegle he would no longer speak with Lapeer County CPS.

The State Defendants note that Moegle offered to meet with both Bambach and his attorney, and Bambach refused to meet. Because Bambach refused to meet, they claim that they could not offer him services or work toward reunification of Bambach and the Children during the investigation. They again cite Bambach's voluntary consent to Moegle over the telephone on December 25, 2015 to placement of the Children with Amy Bambach, together with their claim that he never expressly revoked that consent or contacted Shaw. For these reasons, the State Defendants claim there is no evidence that either of them forced or required Bambach, in violation of the Fifth Amendment, to admit abusing the girls as a condition precedent to visiting with or returning the Children to his care. The Court agrees and grants the State Defendants summary judgment on Bambach's Fifth Amendment claim against Moegle (Count X).

3. Due Process Claims (Counts II, III, VI, and VII)

The State Defendants maintain that there is no evidence to support Plaintiffs' allegations that State Defendants: (a) failed or refused to follow laws, statutes, procedures in this child sexual assault investigation; (b) were not pursuing a legitimate government interest; (c) were deliberately indifferent to Plaintiffs' established constitutional rights; or (d) intended to harm Plaintiffs or exercised any willful or corrupt conduct. They also claim that no evidence exists that Plaintiffs suffered harm.

Deliberate indifference claims require "two components, one objective and one subjective." *Brown ex rel. Estate of Henry v. Hatch*, 984 F. Supp. 2d 700, 711 (E.D. Mich. 2013). The objective prong requires "'the deprivation alleged' be 'sufficiently serious[.]'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The subjective prong requires the defendant to have a "'sufficiently culpable state of mind'" such that the defendant "knows of and disregards an excessive risk to [the child's] health or safety." *Id.* (citing *Farmer*, 511 U.S. at 834); see also *Clark-Murphy v. Foreback*, 439 F.3d 280, 286 (6th Cir. 2006); *Lethbridge v. Troy*, No. 0614335, 2007 U.S. Dist. LEXIS 68281, at 15 (E.D. Mich. Sept. 17, 2007) (citing *Farmer*). This means the defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Clark-Murphy*, 439 F.3d at 286 (internal quotations omitted).

The State Defendants assert that Plaintiffs have offered no evidence to support either prong of the deliberate indifference standard. The objective prong of the deliberate indifference standard requires a "sufficiently serious" deprivation "of a constitutionally protected liberty interest to be free from the infliction of unnecessary pain." *Meador v Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Brown*, 984 F. Supp. 2d at 711. Plaintiffs cannot demonstrate that they were subjected to sufficiently serious risk of injury or abuse while Moegle conducted the investigation of the sexual abuse complaint from December 25, 2015 through January 14, 2016. See *Meado*r, 902 F.2d at 476; *Brown*, 984 F. Supp. 2d at 711.

The State Defendants also suggest that no evidence exists that Shaw knew of, acquiesced to, or suspected Moegle's conduct was unconstitutional or that she was acting contrary to Michigan law and CPS policies. The State Defendants note that, to the contrary, the Office of the Family Advocate (OFA), which investigates child welfare-related complaints directed to the OFA, investigated this matter and determined that Lapeer County CPS adhered to all appropriate law, policy, and procedure. (ECF No. 82-16, PageID.2250).

As to Plaintiffs' Fourteenth Amendment substantive due process claims, the State Defendants state that "the State has a concomitant interest in the welfare and health of children in its jurisdiction, and in certain narrowly-defined circumstances, the State's interest in a child's well-being may supersede that of a parent." *See Santosky v. Kramer*, 455 U.S. 745, 766-

67 (1982); *see also Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (recognizing that because the State has cognizable interests in the safety of children in its jurisdiction, "neglectful parents may be separated from their children").

The State Defendants assert that Moegle and Shaw have a concomitant and statutory interest in the health, well-being, and welfare of children who are alleged to be victims of sexual abuse. They believe that no material evidence exists that demonstrates Moegle's and Shaw's actions deprived Bambach of his fundamental right to provide care and custody of his children. They say that, while CPS investigated the serious allegations that Bambach sexually assaulted his daughters and until the removal petition was filed, the Children were apart from Bambach for 20 days. They claim that, in this narrowly-defined circumstance and narrow time frame, the State's interest in the Children's well-being superseded that of Bambach.

The Sixth Circuit has stated, **"**Adopting the reasoning of another circuit, this Court held that "when a parent voluntarily consents to a safety plan [in a child abuse investigation], 'no hearing of any kind is necessary; hearings are required for deprivations taken over objection, not for steps authorized by consent.'" [*Smith v. Williams-Ash*, 520 F.3d 596, 600 (6th Cir. 2008)] (quoting *Dupuy v. Samuels*, 465 F.3d 757, 761- 62 (7th Cir. 2006))." *Schulkers*, 955 F.3d at 542. The State Defendants argue that the safety plan from December 25, 2015 to January 14, 2016, to which Bambach agreed without

duress, permitted the Children to continue to reside with Amy Bambach during the pendency of the CPS sexual abuse investigation. And, the State Defendants argue, because Bambach voluntarily consented to the safety plan's placement during the CPS investigation, a hearing, warrant, or judicial pre-approval was not required. But, as noted above, there is a question of fact as to whether Bambach withdrew his consent.

Accordingly, the Court concludes that there is a genuine dispute of material fact regarding whether a hearing was necessary with respect to the deprivation of a relationship between Bambach and the Children during the entirety of the CPS sexual abuse investigation, such that a jury may could find Moegle liable for violation of Plaintiffs' procedural and substantive due process rights. The evidence does not, however, establish as a matter of law that Moegle is liable for violation of Plaintiffs' due process rights.

As to Plaintiffs' supervisory liability claims against Shaw, the State Defendants assert that no material evidence exists that Shaw violated any statutes or policies, nor is there any evidence that she caused constitutional injury. The State Defendants argue that there are no allegations that Shaw abdicated any of her responsibilities—rather they contend that Plaintiffs simply believe the State Defendants performed their duties inadequately. See *Winkler,* 893 F.3d at 899. For these reasons, the State Defendants maintain that Plaintiffs' failure to supervise claims should be dismissed.

As addressed previously, however, there is evidence that, on both December 30, 2015 and

January 12, 2016, Moegle communicated with Shaw as to how to proceed in this case and that Shaw authorized the Petition. The Court finds that evidence to be sufficient to create a genuine dispute of material fact as to whether Shaw may be liable for supervisory liability. The evidence does not, however, establish as a matter of law that Shaw is liable for supervisory liability.

For the reasons stated above, the Court concludes that both Plaintiffs' motion for summary judgment and the State Defendants' motion for summary judgment must be denied with respect to Plaintiffs' claims against Moegle and Shaw for violation of Plaintiffs' substantive and procedural due process rights. Counts II, III, VI, and VII remain before the Court.

4. Qualified Immunity

The Court previously addressed and denied the State Defendants' claim of qualified immunity in their motion to dismiss, and they raise the issue again in their Motion for Summary Judgment. They argue that neither Moegle nor Shaw had any reason to suspect or understand that they violated any clearly established right. They contend that they had no fair warning their conduct during the investigation could have been viewed as unconstitutional, especially as Bambach never took any actions to have the girls returned to his care and he ceased all contact with Moegle on January 5, 2016, nine days before the petition was filed. The State Defendants, however, again ignore that a question of fact exists whether Bambach

revoked his consent to the Children being with Amy Bambach.

Defendants also cite the findings of the OFA that they acted appropriately ("After careful review, the OFA has determined Lapeer County CPS has adhered to all appropriate law, policy, and procedure in the matter. CPS filed a removal petition after receiving two independent medical examinations of the children that resulted in concerns of sexual abuse. Mr. Bambach has refused to cooperate with CPS during the investigation."). For these reasons, the State Defendants claim that no material evidence exists that any reasonable official in Moegle's or Shaw's shoes would have understood their actions were unconstitutional.

The State Defendants assume too much, however, because they frame the primary issue as whether Bambach revoked his initial consent to placement of the Children with Amy Bambach. As discussed above, there is a question of fact whether a reasonable social worker investigating this case would have understood Bambach's December 29, 2015 conversation with Moegle as a revocation of Bambach's consent to the continued placement of the Children with Amy Bambach. For that reason, qualified immunity is denied again.

V. CONCLUSION

Accordingly,

IT IS ORDERED that Lapeer County's Motion for Summary Judgment [ECF No. 62] is GRANTED and LAPEER COUNTY is DISMISSED from this action.

IT IS FURTHER ORDERED that the State Defendants' Motion for Summary Judgment [ECF No. 82] is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment [ECF No. 84] is DENIED.

IT IS FURTHER ORDERED Counts I, II, III, IV, V, VI, VII, and VIII, to the extent provided for in this Order and the Court's Order dated May 29, 2020 (ECF No. 50), remain before the Court.

IT IS FURTHER ORDERED that Counts IX, X, and XI have been DISMISSED.

IT IS ORDERED.

Date: March 31, 2023

s/Denise Page Hood
DENISE PAGE HOOD
United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK BAMBACH, *et al.*,

Plaintiffs, Case No. 18-14039
Hon. Denise Page Hood

v.

LAPEER COUNTY, *et al.*,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART STATE DEFENDANTS' MOTION TO DISMISS [#31], GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO STRIKE [#32], GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO STRIKE [#33], GRANTING PLAINTIFFS' MOTION TO STRIKE [#35]

I. INTRODUCTION

Plaintiffs Mark Bambach and his minor children, M.B. and E.B., filed this 42 U.S.C. § 1983 action on December 23, 2018, alleging that Defendants violated their Fourth, Fifth, and Fourteenth Amendment rights:

(1) during a child protective services investigation; (2) when removing Plaintiff Mark Bambach's ("Bambach") two daughters from his home; and (3) pursuing and participating in judicial proceedings against Bambach. On July 5, 2019, Defendants Gina Moegle ("Moegle"), Susan Shaw ("Shaw"), and Stacy May ("May"), all employees of the Michigan Department of Health and Human Services ("MDHHS") in Lapeer County (collectively, the "State Defendants") filed a Motion to Dismiss Plaintiff's Second Amended Complaint. [ECF No. 31] Plaintiffs filed a response, to which the State Defendants replied. On July 8-9, 2019, Plaintiffs filed three Motions to Strike the State Defendants' Affirmative Defenses. [ECF Nos. 23, 33, 335] The State Defendants filed a collective response to the Motions to Strike. The Court held a hearing on September 11, 2019 on the four motions.

For the reasons that follow, the Court grants in part and denies in part the Motion to Dismiss [ECF No. 31]; grants in part and denies in part the Motion to Strike the State Defendants' Affirmative Defenses 2, 4, 12, 17, 18, 19, 20, 21, 22, 30, 32, 33, and 37 [ECF No. 32]; grants in part and denies in part the Motion to Strike the State Defendants' Affirmative Defenses 8, 14, 16, 30, 35, 38, 39, and 40 [ECF No. 33]; and grants the Motion to Strike the State Defendants' Affirmative Defenses 3, 6, 23, 24, 25, 26, 27, and 29 [ECF No. 35].

II. BACKGROUND

Bambach and his ex-wife, Amy, were the parents of minor children, Plaintiffs M.B. and E.B. (the "Children"). Bambach and Amy were divorced effective

September 2013, and Bambach was the custodial parent, with Amy seeing the Children very little between November 2012 and April 2015. Beginning in May 2015, Amy began seeing the Children more. Amy was scheduled to have the Children from December 23, 2015 to the morning of December 25, 2015. Instead, due to Amy's contentions that Bambach was sexually abusing the Children, the Children were not returned to Bambach on December 25, 2015 and he did not regain custodial rights until November 2016.

Plaintiffs brought this Section 1983 action against Defendants after a Child Protective Services ("CPS") investigation and ensuing events resulted in the Children not being permitted to return to Bambach's home for more than 10 months. Plaintiffs allege in the Second Amended Complaint that:

> On Friday, 12/25/15, ***Despite having no warrant or authorized petition***, Moegle notes, in her 12/25/15 5:30 PM entry, that "***Amy was informed that this worker will call Mark and inform him that the girls are not returning home*** until CPS can investigate." (see CPS Investigation Report, p. 8, 12/25/15 5:30 PM entry (emphasis added [by Plaintiffs])).

ECF No. 9, PgID 173 (¶ 39). Plaintiffs allege that Bambach was told on December 29, 2015 that the Children would not be returned to him until the CPS investigation was complete:

> On 12/29/15 at 9:22 AM, Mark called Moegle and wanted to know when he was getting his kids back. **Despite [CPS] not having a warrant or an authorized petition**, according to Moegle:
>
> > He was informed that this worker does not know the answer to his questions due to an ongoing investigation. ***He was informed that there is policy to follow*** and its CPS's goal to keep the children safe. (see CPS Investigation Report, p. 9, 12/29/15 9:22 PM entry (emphasis added)).

ECF No. 9, PgID 174 (¶ 42).

Plaintiffs allege that Moegle, an unlicensed CPS investigator at the MDHHS in Lapeer County, was investigating the claims that Bambach sexually abused his daughters until January 13, 2016, when she signed a removal petition, which was heard by the Court the next day. *Id*. at 194. Plaintiffs allege that Moegle made false statements and omissions to justify the seizure of his daughters, particularly after Bambach informed Moegle on December 30, 2015 that he would not speak to law enforcement and was taking the Fifth Amendment. *Id*. Plaintiffs further allege that Moegle "knowingly made false statements and omissions in order to 'justify' her removal of the

Bambach children" from Bambach's home. [ECF No. 9 at ¶¶ 153-156, 165-167, 234-235]

Shaw was a licensed CPS Supervisor with the MDHHS in Lapeer County and Moegle's supervisor during the time period relevant to this action. Plaintiffs allege that, on December 30, 2015, Moegle conducted a Case Conference with the Children's Supervisor (Shaw), who was provided information regarding the case. ECF No. 9, PgID 211. On January 12, 2016, Moegle conducted another Case Conference with Shaw at the Lapeer County MDHHS office. Shaw was provided information regarding the case, and this Case Conference was deemed a "Successful Supervision." ECF No. 9, PgID 211. Moegle stated in her deposition that Shaw was the one who authorized the Petition. See ECF No. 9, PgID 212.

May was a CPS Ongoing Worker with the MDHHS in Lapeer County with a Master's in Social Work and a limited licensed Counselor requiring supervision by someone fully licensed. May did not become involved in the MDHHS case until after the Court ordered the Children removed from Bambach's custody. Plaintiffs allege that May, as the Ongoing Worker on the MDHHS case, "knew or should have known that the order to remove the Bambach Children . . . was based upon Moegle knowingly making falsities and omissions." [ECF No. 9 at ¶¶ 271-272, 275]

Plaintiffs assert that all of their claims for relief relate to the investigative and administrative actions by the State Defendants: (a) removing the Children from Bambach's custody without a warrant in violation of the 4th Amendment (Moegle); (b) removing the

Children from Bambach's custody without affording Plaintiffs their procedural due process rights, in violation of the 14th Amendment (Moegle and Shaw); (c) removing the Children from Bambach's custody without any justification in violation of their 14th Amendment substantive due process rights (Moegle and Shaw); (d) executing a removal order in violation of the 4th Amendment which was issued based upon false statements and omissions that were made to the judge and which the judge relied upon in issuing that removal order (Moegle and Shaw); (e) implicitly authorizing, approving, or knowingly acquiescing to a subordinate's unconstitutional conduct (Shaw); (f) failing to intervene when May knew that Moegle executed a removal order in violation of the 4th Amendment which was issued based upon false statements and omissions that were made to the judge and which the judge relied upon in issuing that removal order (May); and (g) imposing severe sanctions for failing to waive the 5th Amendment right against self-incrimination (Moegle).

III. MOTION TO DISMISS

A. Applicable Standard

In deciding a motion brought pursuant to Rule 12(c), the standard is the same as that used in evaluating a motion brought under Fed.Civ.P. 12(b)(6). *See, e.g., Stein v U.S. Bancorp, et. al*, 2011 U.S. Dist. LEXIS 18357, at *9 (E.D. Mich. February 24, 2011). A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the plaintiff's complaint. The Court must accept all well-pleaded factual allegations as true and review the complaint in the light most favorable to the

plaintiff. *Eidson v. Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007); *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006).

As a general rule, to survive a motion to dismiss, the complaint must state sufficient "facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must demonstrate more than a sheer possibility that the defendant's conduct was unlawful. *Id.* at 556. Claims comprised of "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Analysis

In this case, the key issue is when the Children were "removed" from Bambach's home/custody; it is an issue that permeates the claims and defenses of Plaintiffs and the State Defendants, respectively.

The State Defendants assert that the Children were not removed until January 15, 2016, when the Lapeer County Family Court issued an Order of Removal that preliminarily and temporarily but formally deprived Bambach of custodial rights. The State Defendants suggest that Bambach could have pursued his rights to custody of the Children at any time prior to the entry of the Order of Removal, as he had custodial rights of

the Children between December 25, 2015 and January 15, 2016.

Plaintiffs contend that the Children were removed from Bambach 20 days earlier, on December 25, 2015, when Moegle determined that she would call Bambach and "inform him that the girls are not returning home until CPS can investigate." ECF No. 9, PgID 173 (¶ 9). Plaintiffs also allege that "Moegle removed the Bambach Children from their custodial home [at Bambach's home] on 12/25/15 . . . without first obtaining judicial pre-approval or a warrant." ECF No. 9, PgID 194. For these reasons, Plaintiffs allege that the removal of the Bambach Children occurred without notice or consent; that Bambach was not given an opportunity to present witnesses or evidence prior to their removal. *Id.* at 198-99.

Plaintiffs argue that the Children could be and were seized and removed from Bambach's home, even though such seizure and removal did not occur at the home. Citing *In re Detmer/Beaudry*, 321 Mich.App.49, 54 (2017). As Plaintiffs acknowledge, the removal in that case occurred when "[t]he trial court's order moved AB's residence to his nonrespondent-father's home and conditioned respondent-mother's visitation on the discretion of DHHS . . . [such that] the trial court 'removed' AB from the respondent-mother." *Id.* at 64. Accordingly, the removal in *Detmer/Beaudry* stemmed from a court order, not the act of a social worker.

Plaintiffs argue that, even though Bambach may have initially consented to the Children staying with their mother and the implementation of a safety plan, Bambach's consent was withdrawn and became

involuntary no later than December 29, 2015, when Bambach called Moegle and demanded to know when he was getting the Children back (by which point Moegle knew that Bambach intended to hire an attorney to accomplish that), long before the Order of Removal was issued on January 15, 2016.

Plaintiffs allege that Bambach never gave consent to the Children being left with their mother, nor did Moegle offer him that opportunity. As indicated above, Plaintiffs allege that Moegle had determined that the Children would be placed with their mother on December 25, 2015, and would not be returning to Bambach, even before Moegle spoke to Bambach. ECF No. 9, PgID 173 (¶ 9). For purposes of addressing the Motion to Dismiss, the Court accepts as true Plaintiffs' allegations that Moegle (CPS) removed the Children from Bambach's custody because Moegle told him that she would not return them to Bambach during the pendency of the CPS investigation.

Plaintiffs also allege that, in addition to other items identified above, Moegle's notes reflect:

(a) Moegle claimed on the evening of December 25, 2015 that Bambach agreed that the Children could stay with Amy while Moegle investigated the child abuse claims;

(b) Amy advised Moegle on the morning of December 28, 2015, that Bambach was hiring a lawyer to get his kids back;

(c) Bambach spoke to Moegle on the phone on December 29, 2015 and demanded to know when he was getting the Children back, who completed the exam on them, and indicated that he suspected that Amy was involved in the accusations;

(d) On December 30, 2015, Bambach first demanded to know what would happen next, asked if the Children had been interviewed, and informed Moegle he would not speak to law enforcement without his attorney present; and

(e) On December 30, 2015, Bambach later told Moegle that he would not speak to law enforcement, he was invoking his right under the Fifth Amendment to remain silent, and he did not sexually abuse the Children.

ECF No. 9, PgID 194-95. Although the allegations include that Bambach initially agreed to have the Bambach Children stay with Amy while Moegle investigated the claims, it is further alleged that on December 28, 2015, Bambach told his family he was hiring an attorney to get them back and that on December 29, 2015, Bambach asked Moegle on a phone call when the Children would be returned to him and demanded to know what would happen next. *Id.* at 194.

Plaintiffs rely on *Davis v. Kendrick*, No. 14-12664, 2015 WL 6470877 (E.D. Mich. Oct. 27, 2015), and *Farley v. Farley*, 225 F.3d 658, 2000 WL 1033045 (6th Cir. 2000). The *Davis* court denied summary judgment to a social worker defendant where the custodial mother never consented to a safety plan. *Davis*, 2015 WL 6470877 at *8 (the court must accept as true for purposes of a summary judgment motion plaintiff's testimony that she "adamantly maintain[ed] – that she never consented to the imposition of a safety plan requiring her daughter be placed with [the child's father] instead of going home with" plaintiff). The *Farley* court denied summary judgment because the plaintiff's consent to placement of the children with their father "was not voluntary during the entire time period involved." *Farley*, 2000 WL 1033045, at *7.[8]

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[8] The Farley court found the following facts to be material:

> (1) Ms. Farley was coerced into signing the voluntary plan of action, having been made to feel she had no choice in the matter; (2) on several occasions both Brock and Grissom failed to comply with Ms. Farley's demands for her children's return and seemed to imply she had no such right; and (3) Brock and Grissom attempted to intimidate Ms. Farley to submit to the continued removal of her children, culminating in Brock's threat to take away Ms. Farley's third child, Dustin, should she hire an attorney in an attempt to regain physical custody of Christina and David, Jr.

Id. at 7. The court ruled that if found to be true, these facts would support the conclusion that the defendants violated the plaintiff's

For purposes of assessing the Motion to Dismiss, the Court must accept as true Plaintiffs' allegations that Bambach did not consent or revoked his consent to the imposition of a safety plan that required the Children to be placed with Amy.

1. Absolute Immunity

The State Defendants assert that they are entitled to absolute immunity because the Children were not removed until the January 15, 2016 Order of Removal issued by the Lapeer County Circuit Court, Family Division (the "Lapeer Family Court"). Plaintiffs complain that Moegle's removal petition, filed on January 13, 2016, included the following false statements and omissions:

> a) Moegle's claim that Dr. Janssen indicated that he had a "serious" suspicion of sexual abuse, when he never indicated that he had a serious suspicion; b) Moegle's claim that Dr. Janssen indicated that the girls' vaginal areas were red and irritated, when he never made any such observation; c) Moegle's claim that "a child" made the statement during the forensic interview that "he put his fingers in there", but neglected to mention that the child was pointing to her chest and then denied that Mark had put his fingers anywhere else; d) Moegle's insinuation

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constitutionally protected rights, and determined that consent, even if voluntarily given, can be revoked. *Id*.

> that when one of the girls said it was "a secret" that the secret had to do with some kind of sexual abuse, when the child was talking about Chapstick; e) Moegle's claim that Del Vecchio, the SANE Nurse Examiner, indicated the girls' vaginal openings indicated digital penetration when no such statement was made by Del Vecchio, but rather was stated by Amy to Del Vecchio; f) Moegle's claim that E.B. also disclosed to Amy that Mark had put his fingers inside her, when Amy never made any such accusation in any of her statements that E.B. disclosed; and g) Moegle's claim that the alleged disclosures were "spontaneous" when she completely ignored exculpatory evidence—Amy's conflicting statements to the Almont Village P.D. where she admitted she had been talking to the girls since October about good-touch/bad-touch and asking if anyone inappropriately touches them as well as her 7-Page Hand-Written Statement.

See ECF No 9, PgID 202-03.

Plaintiffs allege that Shaw conducted two Case Conferences with Shaw (acting as the Children's Supervisor), on December 20, 2015 and January 12, 2016, at the Lapeer County MDHHS office. ECF No. 9, PgID 211. Moegle further stated in her deposition that Shaw was the one who authorized the Petition.

See ECF No 9, PgID 212 (¶ 190). Plaintiffs allege that May was required to have reviewed the entire case file and would have learned of Moegle's falsities and omissions. ECF No 9, PageID.233. Plaintiffs claim that, by May's failure to intervene in the continued execution of the order removing the Children from their custodial home when she knew that the removal order was based upon Moegle's falsehoods and omissions, May deprived the Children of their right to be free from unlawful searches and seizures in violation of the Fourth Amendment of the United States Constitution. ECF No. 9, PgID 233.

The law is well-established that social workers are entitled to absolute immunity with respect to any actions taken as a "legal advocate when initiating court proceedings, filing child-abuse complaints, and testifying under oath, . . . even under allegations that the social worker intentionally misrepresented facts to the family court." *Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015) (citing *Pittman v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 640 F.3d 716, 723-25 (6th Cir. 2011)). *See also Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (*en banc*) (absolute immunity extends to social workers "when they are acting in their capacity as legal advocates–initiating court actions or testifying under oath-not when they are performing administrative, investigative, or other functions.").

Pursuant to *Barber* and *Pittman*, the Court concludes that all three of the State Defendants (Moegle, Shaw, and May) are entitled to absolute

immunity with respect to acting as legal advocates when: (1) initiating the court proceedings to seek removal of the Children from Bambach; (2) the filing of the removal petition; and (3) any actions taken in furtherance of the child-custody proceedings involving the Children.

The Court makes this finding even if, as Plaintiffs argue, their claims in Counts IV, VIII, and IX are based on the principle that a state actor cannot rely on a judicial determination of probable cause to justify executing a warrant if that officer knowingly makes false statements and omissions to the judge. The Sixth Circuit has clearly established that the doctrine of absolute immunity applies in exactly those circumstances. *See Pittman*, 640 F.3d at 723-25 (social worker making misrepresentations in child-abuse complaint and supporting documents has absolute immunity because she was acting "in her capacity as a legal advocate"); *Barber*, 809 F.3d at 844 (social worker entitled to absolute immunity when making false and misleading statements of fact in a protective-custody petition because he did so "in his capacity as a legal advocate initiating a child-custody proceeding in family court"). Accordingly, the State Defendants enjoy absolute immunity regarding the alleged false statements and omissions to the Lapeer County Family Court.

The Court also concludes that May is entitled to absolute immunity with respect to all of Plaintiffs' allegations against her. A social worker who fails to "perform[] an adequate investigation at any time after" the child's removal from the plaintiff's home by

the juvenile court is entitled to absolute immunity. *Rippy v. Hattaway*, 270 F.3d 416, 422 (6th Cir. 2001). Plaintiff has alleged that May "fail[ed] to intervene in the continued execution of the order removing the Bambach Children from their custodial home because [May] knew that the order was based upon Moegle's falsehoods and omissions." ECF No. 9, PgID 233 (Paragraph 270). Plaintiffs allege that May acted (or failed to act) on July 27 and 29, 2016, August 31, 2016, and September 28, 2016. *Id.* at PgID 188-89 (Paragraphs 90-97). All of Plaintiffs allegations against May occurred after the January 15, 2016 Order of Removal was entered.

The Court is not persuaded by Plaintiffs' argument that "[a] CPS worker, such as May, is not entitled to absolute immunity for the removal of children from a home because, in such circumstances, the social worker is acting in a police capacity rather than as a legal advocate." Citing *Kovacic v.Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 724 F.3d 687, 694 (6th Cir 2013)). Plaintiffs' allegations do not support a finding that May was acting in a police capacity. Plaintiffs allege only that May supported and sought continuation of the existing order of removal, not that May was involved in the actual removal of the Children from Bambach's home. *Kovacic*, 724 F.3d at 694-95 (citations omitted) ("Concerning the removal of the children from the home, the district court did not err in denying the social workers' motion for absolute immunity. When the social workers removed the

children from the home, they were acting in a police capacity rather than as legal advocates.").

As explained in *Barber*, a social worker may not invoke absolute immunity with respect to her investigative actions preceding the preparation, filing, initiation, and efforts in pursuing approval of the removal petition. *Id.* at 844 (citing *Pittman*, 640 F.3d at 724). For that reason, the Court denies absolute immunity for the State Defendants other than May (Moegle and Shaw) with respect to "all of Defendants' actions [that] were investigative and administrative in nature[, as] Plaintiffs' claims for relief [in Counts] I, II, [III], V, VI, and VII relate to the conduct of removing the [C]hildren from [Bambach's] custody prior to the preliminary hearing which occurred on January 14, 2016–without a warrant, without procedural due process, and in violation of substantive due process." *See* ECF No. 41, PgID 944-45.

2. Qualified Immunity

The State Defendants argue that they are entitled to qualified immunity, and the Court must consider whether Moegle and Shaw are entitled to qualified immunity with respect to their alleged conduct prior to the preparation and filing of the removal petition. As recently stated by the Supreme Court:

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional

> rights of which a reasonable person would have known. A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (citations and quotation marks omitted).

Qualified immunity is a two-step process. *Saucier v. Katz*, 533 U.S. 194 (2001), overruled on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009). First, the Court determines whether, based upon the applicable law, the facts viewed in a light most favorable to the plaintiff show that a constitutional violation has occurred. Second, the Court considers whether the violation involved a clearly established constitutional right of which a reasonable person in the defendant's position would have known. *Id.*; *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005). The Court need not decide whether a constitutional violation has occurred if it finds that government official's actions were reasonable. *Jefferson v. Lewis*, 594 F.3d 454, 460 (6th Cir. 2010). Only if the undisputed facts or the evidence, viewed in a light most favorable to the plaintiff, fail to establish a prima facie violation of clear constitutional law can this

court find that the Defendants are entitled to qualified immunity. *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997).

Once a government official has raised the defense of qualified immunity, the plaintiff "bears the ultimate burden of proof to show that the individual officers are not entitled to qualified immunity." *Cockrell v. City of Cincinnati*, 468 F. App'x 491, 494 (6th Cir. 2012) (citation omitted). A plaintiff also must establish that each individual defendant was "personally involved" in the specific constitutional violation. *See Salehphour v. University of Tennessee*, 159 F.3d 199, 206 (6th Cir. 1998); *Bennett v. Schroeder*, 99 F. App'x 707, 712-13 (6th Cir. 2004) (unpublished) ("It is well-settled that to state a cognizable Section 1983 claim, the plaintiff must allege some personal involvement by the each of the named defendants").

The Sixth Circuit has recognized that the Fourth Amendment applies to social workers, such that they are not entitled to qualified immunity if they effectuate a warrantless removal of children from their homes, *Barber*, 809 F.3d at 845; *Kovacic*, 724 F.3d at 699, and that the Fourteenth Amendment requires that parents be given notice – and a full opportunity for a hearing to present witnesses and evidence on their behalf – before a child is removed. *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983); *Kovacic*, 724 F.3d at 700 (relying on *Doe*) (""[n]o reasonable social worker could conclude that the law permitted her to remove a child without notice or a pre-deprivation hearing where there was no emergency"). Plaintiffs argue that this law was clearly established on December 25, 2015, when the State

Defendants removed the Children from the custody of Bambach, that a warrant and an opportunity to be heard was required before removing them.

In the Sixth Circuit, a plaintiff must "show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Coley v. Lucas Cnty.*, 799 F.3d 530, 542 (6th Cir. 2015) (quoting *Taylor v. MDOC*, 69 F.3d 76, 81 (6th Cir. 1995); *Schulkers v. Kammer*, 367 F.Supp.3d 626, 647 n.12 (E.D. Ky. 2019). Plaintiffs argue that this law was clearly established before Shaw began working with Moegle in late December, 2015. A social worker has a duty to intervene when a co-worker engages in unconstitutional conduct. *Durham v. Nu'Man*, 97 F.3d 862, 868 (6th Cir. 1996) ("the precedent holding police officers and correctional officers liable for failure to intervene was sufficient to place a nurse who caused the conflict on notice that she had a duty to protect plaintiff while under her charge."). Plaintiffs contend that this law was clearly established before May commenced as the Ongoing Worker in January 2016.

a. Fourth and Fourteenth Amendment Claims

The State Defendants contend that they did not remove the Children from Bambach's home. They assert that the Family Court made the decision to remove the Children from Bambach's home, so the State Defendants did not violate Bambach's or the Children's constitutional rights. Citing *Pittman*, 640 F.3d at 729; *Krantz v. City of Toledo Police Dep't*, 197 F.

App'x 446, 453 n.5 (6th Cir. 2006). The State Defendants argue that Plaintiffs premise their claims on the belief that the Children were removed by Moegle on December 25, 2015. The State Defendants argue that Plaintiffs' belief is erroneous because there was no warrantless entry into Bambach's home, nor any removal of the Children prior to the entry of the January 15, 2016 Order of Removal by the Lapeer Family Court. The State Defendants suggest that the Children were with their mother, who consented to Moegle entering her home and evaluating the Children's examinations. The State Defendants offer that the Children then remained with their mother and were not taken or removed from Bambach's custody. They argue that, if Bambach did not want the Children to remain with their mother, even if their mother would not allow the Children to return to Bambach, Bambach could have enforced his custody order.

The State Defendants also assert that, even if the allegations support a violation of Plaintiffs' Fourth and Fourteenth Amendment rights, those rights were not clearly established and the State Defendants could have reasonably believed that their actions were lawful. The State Defendants indicate that they did not make a warrantless entry or remove (physically take) the Children from Bambach's home, and there was no reason for them to believe that having the Children remain with their mother violated any of the Plaintiffs' clearly established constitutional rights.

Plaintiffs contend that their Fourth and Fourteenth Amendment claims are premised on the fact that the State Defendants took the Children from Bambach's

custody without a court order on December 25, 2015 when they "seized" the Children from him (the custodial parent) and placed the Children with Amy (the non-custodial parent). Citing *Davis*; *Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"). Plaintiffs argue that Moegle determined – without even talking to Bambach — that she would not let the Children return to him.

Plaintiffs assert that a social worker denies substantive and procedural due process rights when he or she lies, coaches false allegations of abuse, and summarily denies a parent lawful custody of his child. Citing *Davis*, 2015 WL 6470877, at *10. Plaintiff contends that the law was clearly established that a social worker cannot execute a removal if she knowingly made false statements and omissions to the court that issued the removal order, where such order would not have been issued but for such falsities and omissions. Citing *Barber*, 809 F.3d at 848.

Plaintiff allege that Shaw implicitly authorized, approved, or knowingly acquiesced to: (1) Moegle seizing the Children from their custodial home on December 25, 2015; (2) executing a petition for order of removal that contained falsehoods and omissions; and (3) barring the Children from the care, custody, education, and association of Bambach without first obtaining judicial pre-approval or a warrant, without notice prior to the removal of the reasons for removal, nor a full opportunity at the hearing to present witnesses and evidence on their behalf. ECF No. 9,

PgID 217. Plaintiffs believe all of this was done in violation of the Substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution. ECF No. 9, PgID 224. Plaintiffs also allege that conduct deprived the Children of their right to be free from unlawful searches and seizures in violation of the Fourth Amendment of the United States Constitution. See ECF No 9, PageID 229.

The Court finds that, for purpose of evaluating the Motion to Dismiss, Plaintiffs allegations regarding the conduct of Moegle and Shaw are sufficient to establish that they undertook a warrantless removal of the Children from Bambach's home, without notice and a full opportunity for a hearing to present witnesses and evidence. *Doe v. Staples*, 706 F.2d at 990; *Kovacic*, 724 F.3d at 700. Plaintiffs also have set forth allegations that "show that a supervisory official [Shaw] at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Coley,* 799 F.3d at 542. The Court denies the Motion to Dismiss Moegle and Shaw on the basis of qualified immunity with respect to Plaintiffs' Fourth and Fourteenth Amendment claims.

b. Fifth Amendment Claim

The State Defendants contend that Moegle is entitled to qualified immunity with respect to Bambach's Fifth Amendment claim. They argue that Bambach cannot succeed on his claim because there was no criminal proceeding against him and the child protection petition was dismissed. The State Defendants argue that, for these reasons, Bambach

cannot show that illegally obtained statements were used against him, nor are there any allegations that such statements were used against him. *McKinley v. City of Mansfield*, 404 F.3d 418, 430 (6th Cir. 2005). The State Defendants assert that Plaintiff has alleged only that Moegle "refused to offer any services to [Bambach] and refused to work towards a goal of reunification . . . because [he] had refused to waive his Fifth Amendment right against compelled self-incrimination." ECF No. 9, PgID 236 (at Paragraphs 288-89). The State Defendants claim this is not enough.

Plaintiffs do not address the *McKinley* case. Instead, Plaintiffs argue that "a constitutional violation arises when a person is subject to severe consequence unless he . . . waives the Fifth Amendment right against compelled self-incrimination." ECF No. 41, PgID 451-52 (citing – but not quoting – *McKune v. Lile*, 536 U.S. 24, 35 (2002); *In re Blakeman*, 326 Mich. App. 318, 338 (2018) ("By requiring respondent to confess to the criminal abuse of the toddler in order to regain care and custody of his children, the trial court was requiring an inculpatory admission against respondent's penal interests.").

The Court is not persuaded that *McKinley* is relevant because there is no allegation that Bambach made any statement that was compelled, nor is *In re Blakeman*, on its face, applicable to the instant case because that case was based upon the fact that the *court* would not allow a parent unsupervised visitation unless the parent failed to confess to fracturing the child's skull. The Court also does not find that the *McKune*

court stated what Plaintiffs suggest – that there is a constitutional violation if a person is subjected to severe consequence unless he waives his Fifth Amendment right against compelled self-incrimination. Rather, the *McKune* court, in the course of addressing a claim by a prisoner, stated that the Fifth Amendment "constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony." *McKune*, 536 U.S. at 36 (citations internal quotations omitted) (emphasis in original).

The Court is persuaded that the rationale of the *In re Blakeman* decision is applicable to this case. As that court stated:

> The preservation of one's parental rights presents an imperative at least as great as continued municipal employment, eligibility for public contracting, and maintenance of one's professional license, and if the latter may not be used to condition the waiver of one's right against self-incrimination, neither should one's parental rights. By requiring respondent to confess to the criminal abuse of the toddler in order to regain care and custody of his children, the trial court was requiring an inculpatory admission against respondent's penal interests. This could also be self-defeating because such an admission may lead to criminal charges that end with respondent being taken

> away from his children for incarceration. This practice offends due process when a respondent is required, on pain of being deprived of the care and custody of his children, to confirm the trial court's determination that he had committed severe child abuse. Even more, requiring respondent to admit to the child abuse after he had already testified at trial and denied any wrongdoing would subject him to possible perjury charges. The record clearly shows that the trial court violated respondent's Fifth Amendment right against self-incrimination when it conditioned unsupervised visitation and eventual reunification on respondent's admission to the child abuse.

In re Blakeman, 326 Mich. App. at 339.

Plaintiffs assert that they have alleged a valid Fifth Amendment claim on behalf of Bambach against Moegle, as she was requiring him to confess to sexually abusing the Children in order to receive any services from Child Protective Services. Citing *In re Blakeman*, 326 Mich. App. at 338. Plaintiffs state that Bambach told Moegle he would not speak to law enforcement, was invoking his Fifth Amendment rights, and did not sexually abuse his daughters, which resulted in Moegle refusing to offer him any services or work toward reuniting Bambach and the Children, with the Lapeer County Prosecutor's Office still threatening to issue

criminal charges against him. Plaintiffs specifically alleged:

> 289. Moegle refused to offer any services to Mark and refused work towards a goal of reunification with Mark and his minor children because Mark had refused to waive his Fifth Amendment right against compelled self-incrimination in order to receive those services and in order to work towards that goal of reunification.
>
> 290. Moegle (acting under color of state law), violated Mark's Fifth Amendment right against compelled self-incrimination by subjecting him to a severe consequence of the loss of his constitutional right to provide for the care, custody, and management of his children unless he waives that right.
>
> 291. At all relevant times, the Lapeer County Prosecutor's Office was still waiting to issue criminal sexual conduct charges against Mark. Even as late as 10/13/16, Hoebeke sent a letter to Assistant Prosecuting Attorney David Campbell requesting that the Prosecutor's Office take the criminal charges off the table; however, APA Campbell refused and continued to hold the threat of those charges over Mark's head.

> 292. Any compelled self-incriminating statement made by Mark to Moegle in response to the severe consequence of the loss of his constitutional right to provide for the care, custody, and management of his children made in order to receive services and to be reunified with his children, would have been used against him by the Prosecutors in their issuance of the criminal sexual conduct charges.

ECF No. 9, PgID 236 (¶¶ 289-92).

The alleged actor in this case (Moegle) is not a judge, but she is a state actor. By conditioning any services or working toward reunification of the Children with Bambach on Bambach agreeing to talk (make statements) to the State Defendants, Moegle was requiring a (possible) inclupatory admission from Bambach against his penal interests, which could result in Bambach being deprived of the Children for an even longer period of time than he was, both in late December 2015 and until November 2016. The Court concludes that the allegations against Moegle sufficiently allege the violation of a clearly established constitutional right of which any reasonable person in her position would have known. The Court denies qualified immunity for Moegle with respect to Bambach's Fifth Amendment claim against her.

3. Failure to State a Claim

The State Defendants argue that Plaintiffs claims fail because they are all premised on the belief that the Children were removed on December 25, 2015. As the Children were not removed until the Order of Removal was issued on January 15, 2016, the State Defendants argue, there is no basis for a Fourth or Fourteenth Amendment claim. For the reasons stated above, the Court rejects this argument with respect to the allegations against Moegle and Shaw that are not dismissed pursuant to absolute immunity. More specifically, as discussed above, based on the allegations, the Court is not persuaded that Shaw "merely supervised Moegle" and did not make any decisions regarding the Children. Plaintiffs have alleged that Shaw had two case conferences with Moegle, allegedly approving the removal petition and removal of the Children from Bambach's custody. For that reason, the Court cannot conclude that the allegations regarding Shaw are based only on respondeat superior. Rather, the Court must instead treat those allegations as stemming from Shaw's possession of information that "reveal[ed] a strong likelihood of Moegle's unconstitutional conduct," as evidenced by Moegle's Investigative Report stating that Moegle had two successful supervisions with Shaw.

As discussed above, the Court dismisses Plaintiffs' claims against May based on absolute immunity and need not evaluate the sufficiency of Plaintiffs' allegations regarding May.

IV. MOTIONS TO STRIKE

After the State Defendants filed an answer to the Amended Complaint, Plaintiffs filed three separate Motions to Strike the State Defendants' Affirmative Defenses.

A. Applicable Law

Federal Rule of Civil Procedure 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A motion to strike an affirmative defense is properly granted when "plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Operating Eng'rs Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015). *See also Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2nd Cir. 2003) (an affirmative defense is something specific – "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.").

As another Eastern District of Michigan Judge stated, there are two viewpoints regarding the specificity required when asserting an affirmative defense. *See Exclusively Cats Veterinary Hosp., P.C. v. Pharm. Credit Corp.*, No. 13-CV-14376, 2014 WL 4715532, at **2–3 (E.D. Mich. Sept. 22, 2014). In *Exclusively Cats*, the court reasoned:

> The Sixth Circuit has not yet determined whether the heightened pleading

standard applicable to claims for relief also applies to affirmative defenses. Defendant cites *Lawrence v. Chabot,* a case decided before *Twombly* and *Iqbal,* in which the Sixth Circuit upheld a magistrate judge's refusal to strike affirmative defenses under the fair notice standard. 182 F. App'x 442, 456–57 (6th Cir. 2006) ("An affirmative defense may be pleaded in general terms and will be held to be sufficient ... as long as it gives plaintiff fair notice of the nature of the defense"). In this regard, the Sixth Circuit (again pre-*Twombly* and *Iqbal*) has held the affirmative defense "Plaintiffs' claims are barred by the doctrine of *res judicata*" sufficient under Rule 8(c). *Davis v. Sun Oil Co.,* 148 F.3d 606, 612 (6th Cir. 1998). Defendant maintains that, in the absence of Sixth Circuit guidance to the contrary, *Lawrence* still controls. *See Hahn v. Best Recovery Servs., LLC,* No. 10–12370, 2010 WL 4483375, at *2 (E.D. Mich. Nov. 1, 2010).

Another Sixth Circuit case, *Montgomery v. Wyeth,* 580 F.3d 455, 467–68 (6th Cir. 2009), lends support to defendant's position. In *Montgomery,* decided after both *Twombly* and *Iqbal,* the court held that "[t]he Federal Rules of Civil Procedure do not require a heightened

pleading standard for a statute of repose defense." *Montgomery,* 580 F.3d at 468. The court went on to cite Rule 8(b)(1)'s requirement that a party "state in short and plain terms its defenses to each claim," as well as the fair notice standard in *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Montgomery,* 580 F.3d at 468.

District courts in this Circuit are divided over the application of *Twombly* and *Iqbal* to affirmative defenses. *Compare, e.g., Safeco,* 2008 WL 2558015, at *1 (applying *Twombly* standard to affirmative defenses) with *Int'l Outdoor, Inc. v. City of Southgate,* No. 11–14719, 2012 WL 2367160, at *7–9 (E.D. Mich. Apr. 6, 2012) (declining to apply *Twombly* and *Iqbal* to affirmative defenses and citing cases). The primary reasons courts give for applying the heightened standard to affirmative defenses are the desirability of avoiding unnecessary discovery costs and the similarity in language between Rules 8(a) and 8(b). *See HCRI TRS Acquirer, LLC v. Iwer,* 708 F.Supp.2d 687, 690–91 (N.D. Ohio 2010).

Courts declining to apply the heightened pleading standard to affirmative defenses have tended to focus on the difference in

language of Rules 8(a) and 8(b), or on the fact that the holdings in *Twombly* and *Iqbal* were limited to Rule 8(a). As to language, Rule 8(a) requires a "short and plain statement of the claim *showing* the pleader is entitled to relief" (emphasis added), while Rule 8(b) only requires a statement "in short and plain terms" of "defenses to each claim." *See Iqbal,* 556 U.S. at 679 (stating that "where 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 shown—that the pleader is entitled to relief" (internal quotation marks omitted)). Moreover, as at least one other decision in this district has pointed out, Rule 8(c) governs affirmative defenses and contains no language similar to that in Rule 8(a). *First Nat. Ins. Co. of America v. Camps Servs., Ltd.,* No. 08–12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009).

In sum, controlling Sixth Circuit law and the language of the applicable rules weigh against application of *Twombly* and *Iqbal*'s heightened pleading standard to defendant's affirmative defenses here. The policy rationale of containing discovery costs, while undeniably important, is not enough to tip the scales

> in the other direction. The Court will therefore apply the fair notice pleading standard in determining whether defendant's affirmative defenses merit a more definite statement under Rule 12(e) or striking under Rule 12(f).

Exclusively Cats, 2014 WL 4715532, at **2–3 (emphasis in original). For the same reasons espoused by the *Exclusively Cats* court, this Court is persuaded that it is most appropriate to apply the fair notice pleading standard when determining whether Defendants sufficiently pleaded their affirmative defenses.

Finally, although there are some exceptions, it is generally understood that the failure to allege an affirmative defense in the first responsive pleading may result in a waiver of the defense. *See Horton v. Potter*, 369 F.3d 906, 911-12 (6th Cir. 2004). The purpose of such a general rule is to "give the opposing party notice of the affirmative defense and a chance to rebut it." *Moore, Owen, Thomas & Co. v. Coffey*, 992 F2d 1439, 1445 (6th Cir 1993). For this reason, at the outset of a case, without the luxury of time or the benefit of discovery, defendants are required to plead all of their affirmative defenses or risk waiving those that are not pled along with the answer. *See Paducah River Painting, Inc. v. McNational, Inc.*, 2011 WL 5525938, at *2 (W.D. Ky. Nov. 14, 2011); *Lane v. Page*, 272 F.R.D. 581, 596 (D.N.M. 2011) ("Plaintiffs can prepare their complaints over years, limited only by the statute of limitations, whereas defendants have only twenty-one days to file

their answers."). Taking those considerations into account, the Court now turns to Plaintiffs' challenges to the State Defendants' affirmative defenses, noting that the State Defendants filed a response, but no reply was filed regarding any of the Motions to Strike.

B. ECF No. 32

In their first Motion to Strike, Plaintiffs ask the Court to strike the following affirmative defenses asserted by the State Defendants: 2, 4, 12, 17, 18, 19, 20, 21, 22, 30, 32, 33, and 37. In their response, the State Defendants agree to withdraw affirmative defenses 12, 17, and 37. [ECF No. 40, PgID 896] Accordingly, the Court must rule only on affirmative defenses 2, 4, 18, 19, 20, 21, 22, 30, 32, and 33. The State Defendants acknowledge that affirmative defense 2, but only to the extent it asserts sovereign immunity and Eleventh Amendment immunity, does not apply to the claims against them. *Id.* The State Defendants also acknowledge that affirmative defenses 18, 19, 20, and 21 do not apply to any of Plaintiffs' federal constitutional tort claims. *Id.* at PgID 897. The State Defendants also acknowledge that affirmative defense 30 is inapplicable, except with respect to collateral estoppel and res judicata. *Id.* at PgID 897-98. The State Defendants further acknowledge that the portion of affirmative defense 32 pleading that they "acted in good faith [and] without malice, while performing discretionary activities" should be removed. *Id.* at PgID 898-99.

Plaintiffs argue that affirmative defenses 2 and 18-21 should be stricken because they rely on state law

immunity defenses that are not relevant in this action that is based solely on federal claims pursuant to Section 1983. The Court finds that, among other defenses in affirmative defense 2, the State Defendants assert absolute immunity and qualified immunity, both of which are appropriate defenses in this cause of action (and are the primarily bases for the Motion to Dismiss, discussed above). Although the State Defendants acknowledge that affirmative defenses 18-21 do not apply to any of Plaintiffs' federal claims (all Plaintiffs' claims are federal), the Court notes that the defenses regarding gross negligence (19), objective reasonableness (20), and social worker/absolute immunity (21) are reasonable defenses in this action. The Court agrees that immunity based on the discharge of governmental function (18) is solely state law based on and not pertinent in this cause of action and may be stricken.

Plaintiffs arguments that affirmative defenses 2, 4, and 22 should be stricken because an absolute immunity defense is insufficient as a matter of law lacks merit – and is disingenuous – for the reasons discussed above. As to affirmative defense 30, to the extent it relies on res judicata or collateral estoppel, the Court finds that it would be premature to strike those defenses, as it is too early in litigation to determine how or whether either could or could not apply. The Court is not persuaded that affirmative defense 32 should be completely stricken, as it is premature to make a factual determination regarding probable cause. The Court agrees that affirmative defense 32 should be revised to remove the components of that defense

grounded in "good faith" and "without malice." Plaintiffs' motion to strike affirmative defense 33 is denied, as a determination of whether constitutional rights were clearly established is a critical component of a qualified immunity defense, which is an appropriate defense.

Accordingly, the Court grants in part and denies in part the first Motion to Strike. Specifically, (1) the Court strikes affirmative defenses 12, 17, 18, and 37; (2) the Court denies the motion as to affirmative defenses 4, 22, and 33; and (3) the Court orders that affirmative defenses 2, 19-21, 30, and 32 be revised consistent with the terms of this Order and within 21 days of the date of this Order.

C. ECF No. 33

In their second Motion to Strike, Plaintiffs ask the Court to strike the following affirmative defenses asserted by the State Defendants: 8, 14, 16, 30, 35, 38, 39, and 40. In their response, the State Defendants agree to withdraw affirmative defenses 8, 14, and 16 [ECF No. 40, PgID 896], leaving affirmative defenses 30, 35, 38, 39, and 40 for the Court to decide.

As determined above, affirmative defense 30 is to be revised consistent with this Order. Affirmative defense 35 ("Defendants did not violate their own procedures or rules as they relate to this case") may not be relevant to this cause of action, but at this stage of the proceedings, the Court finds that it would be premature to strike that defense. The Court will not strike affirmative defense 38 (reserving as an affirmative defense any defense set forth in the State Defendants answers to the Second

Amended Complaint) or affirmative defense 40 (reserving the right to amend their affirmative defenses), but in order to accomplish either, the State Defendants will need to seek leave of the Court (absent a stipulation of Plaintiffs). With respect to affirmative defense 39 (incorporating the affirmative defenses of Defendant Lapeer County), the Court will not strike it because the affirmative defenses which it incorporates are readily available to Plaintiffs – they need only look at Defendant Lapeer County's answer to the Second Amended Complaint. ECF No. 12, PgID 314-16.

Accordingly, the Court grants in part and denies in part the second Motion to Strike. Specifically, (1) the Court strikes affirmative defenses 8, 14, and 16; and (2) the Court denies the motion as to affirmative defenses 30, 35, 38, 39, and 40.

D. ECF No. 35

In their third pending Motion to Strike, Plaintiffs ask the Court to strike the following affirmative defenses asserted by the State Defendants: 3, 6, 23, 24, 25, 26, 27, and 29. In their response, the State Defendants expressly agree to withdraw affirmative defenses 3, 6, 23, 24, 25, 26, and 29 [ECF No. 40, PgID 896], seemingly leaving only affirmative defense 27 for the Court to address. The State Defendants, however, subsequently state that they "agree to remove standing as an affirmative defense" [ECF No. 40, PgID 897], because it need not be pleaded as an affirmative defense and can be raised at any time. Citing *Binno v. American Bar Assoc.*, 826 F.3d 338, 344 (6th Cir. 2016); *Wolfinger v. Standard Oil Co.*, 442 F.Supp.928, 931 (1977).

Accordingly, the Court grants Plaintiff's Motion to Strike Affirmative Defenses 3, 6, 23, 24, 25, 26, 27, and 29.

V. CONCLUSION

For the reasons stated above,

IT IS ORDERED that the Motion to Dismiss [ECF No. 31] is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Defendant Stacy May is DISMISSED.

IT IS FURTHER ORDERED that Defendants Gina Moegle and Susan Shaw are entitled to absolute immunity and all claims against them are DISMISSED insofar as they were acting as legal advocates when: (1) initiating the court proceedings to seek removal of the Children from Bambach; (2) filing the removal petition; and (3) taking any actions in furtherance of the child-custody proceedings involving the Children.

IT IS FURTHER ORDERED that Plaintiff's claims REMAIN against Defendants Gina Moegle and Susan Shaw with respect to "all of [their] actions [that] were investigative and administrative in nature," namely Plaintiffs' claims for relief in Counts I, II, III, V, VI, and VII that relate to the conduct of removing the Children from Bambach's custody prior to the

preliminary hearing which occurred on January 14, 2016.

IT IS FURTHER ORDERED that the Motion to Strike the State Defendants' Affirmative Defenses 2, 4, 12, 17, 18, 19, 20, 21, 22, 30, 32, 33, and 37 [ECF No. 32] is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that (1) affirmative defenses 12, 17, 18, and 37 are STRICKEN; affirmative defenses 4, 22, and 33 REMAIN; and (3) affirmative defenses 2, 19-21, 30, and 32 SHALL BE REVISED consistent with the terms of this Order, within 21 days of the date of this Order.

IT IS FURTHER ORDERED that the Motion to Strike the State Defendants' Affirmative Defenses 8, 14, 16, 30, 35, 38, 39, and 40 [ECF No. 33] is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that (1) affirmative defenses 8, 14, and 16 are STRICKEN; and (2) affirmative defenses 30, 35, 38, 39, and 40 REMAIN.

IT IS FURTHER ORDERED that the Motion to Strike the State Defendants' Affirmative Defenses 3, 6, 23, 24, 25, 26, 27, and 29 [ECF No. 35] is GRANTED and affirmative defenses 3, 6, 23, 24, 25, 26, 27, and 29 are STRICKEN.

IT IS FURTHER ORDERED that the remaining State Defendants (Gina Moegle and Susan Shaw) shall re-file their Affirmative Defenses in a format that: (a) maintains the same numerical order; (b) states "Stricken" next to any affirmative defense number that the Court has ordered stricken; and (c) includes revised language consistent with this Order for any affirmative defense ordered to be revised.

IT IS ORDERED.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: May 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1372

MARK BAMBACH, individually and on behalf of his minor children; E.B. and M.B., in their own right,

Plaintiffs - Appellees,

v.

GINA MOEGLE, individually, in her capacity as Children's Protective Services Investigator, Michigan Department of Health and Human Services; SUSAN SHAW, individually, in her capacity as Children's Protective Services Supervisor, Michigan Department of Health and Human Services,

Defendants - Appellants,

STACY MAY; LAPEER COUNTY, MICHIGAN,

Defendants.

Before: McKEAGUE, LARSEN, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of summary judgment is REVERSED, and the case is REMANDED for entry of an order dismissing Plaintiffs' claims against Gina Moegle and Susan Shaw.

ENTERED BY ORDER OF THE COURT

s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK BAMBACH, et al.,
Plaintiffs,
v. Case No. 18-14039
Hon. Denise Page Hood
GINA MOEGLE, et al.,
Defendants.
_____/

ORDER DISMISSING DEFENDANTS

On February 8, 2024, the Sixth Circuit of Appeals issued an Opinion and Judgment reversing this court's denial of the defendants' motion for summary judgment and remanding the matter for entry of an order dismissing the claims against all defendants. (ECF No. 104; *Bambach v. Moegle,* Case No. 23-1372 (6th Cir. Feb. 8, 2024)). The Mandate issued on March 20, 2024. (ECF No. 105)

For the reasons set forth in the Sixth Circuit's Opinion,

IT IS ORDERED that Defendants Gina Moegle and Susan Shaw are DISMISSED with prejudice from this action.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: March 28, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK BAMBACH, et al.,
Plaintiffs,

v. Case No. 18-14039
Hon. Denise Page Hood

GINA MOEGLE, et al.,
Defendants.
_____/

JUDGMENT

This action, having come before the Court and the Court having issued various orders dismissing claims and Defendants this date, on May 29, 2020, and March 31, 2023 (ECF Nos. 50 and 98) and the Sixth Circuit having remanded the matter (ECF No. 104), accordingly,

Judgment is entered against Plaintiffs and in favor of all Defendants.

KINIKIA D. ESSIX
CLERK OF COURT

Approved: By: s/LaShawn Saulsberry
Deputy Clerk

S/DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge
DATED: March 28, 2024
Detroit, Michigan

USCS Const. Amend. 4 provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCS Const. Amend. 14 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1291 of Title 28 of the U.S. Code provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

§ 1292(b) of Title 28 of the U.S. Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the

> ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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,

> except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed R Civ P 56(a) provides:

> Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. 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. The court should state on the record the reasons for granting or denying the motion.

No. 23-1372
In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BAMBACH, *et al*,
Plaintiffs-Appellees,
v.
GINA MOEGLE, *et al*,
Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Denise Page Hood

BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: August 14, 2023

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellants request oral argument for this appeal. As addressed below, the issues before the Court are straightforward and the record plainly shows that the district court erred. Even so, Defendants-Appellants request oral argument if the Court deems it necessary to assist the panel in resolving any remaining questions.

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Mark Bambach sued under 42 U.S.C. § 1983 for alleged violations of his constitutional rights. The district court held jurisdiction over this matter as Bambach raised a federal question. 28 U.S.C. § 1331.

The district court granted in part and denied in part Defendants-Appellants Gina Moegle and Susan Shaw's motion for summary judgment on March 31, 2023. (Order Granting in Part and Denying in Part Mtn. for Summary Judgment by Gina Moegle and Susan Shaw 3/31/23 ("SJ Order"), R. 98, PageID#3237–62.) Relevant to this appeal, the district court denied Defendants-Appellants Moegle and Shaw qualified immunity. (*Id.* at PageID#3260–62.)

This Court has jurisdiction under 28 U.S.C. § 1291 as the district court's order denying qualified immunity is considered a "final order." *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

The district court entered its order denying qualified immunity on March 31, 2023. (SJ Order, R. 98.) Defendants-Appellants timely filed and served a notice of appeal on April 20, 2023. (Notice of Appeal 4/20/23, R. 100, PageID#3265–3267.) *See also* Fed. R. App. Proc. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED

1. Government employees are entitled to qualified immunity from liability for civil damages when their conduct does not violate a clearly established statutory or constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). Bambach consented to the temporary removal of his children on December 25, 2015, pending a Child Protective Services investigation; then, on December 29th and December 30th, Bambach asked Gina Moegle—the CPS worker—when his children would be returned to his custody. Bambach alleges violations of his Fourth and Fourteenth Amendment rights when Moegle did not return the children following their discussions as Moegle did not consider Bambach's questions to be a revocation of his consent to the children's temporary placement. Is Moegle entitled to qualified immunity when there is no precedent that clearly establishes a constitutional right that would have required Moegle to return the children to Bambach's care following his discussions with Moegle on December 29th and December 30th?

2. Bambach alleges that Defendant-Appellant Susan Shaw is liable for failing to supervise Moegle. Like Moegle, Shaw is entitled to qualified immunity from liability for civil damages when her conduct did not violate a clearly established statutory or constitutional right. *Pearson*, 555 U.S. at 244. After Bambach consented to the removal of his children from his care, Shaw spoke with Moegle about her CPS investigation twice between December 25, 2015, and January 14, 2016. Is Shaw entitled to qualified

immunity when there is no precedent clearly establishing that a CPS worker's supervisor violates a parent's rights when (a) the parent asks the CPS worker when his child will return to his custody and (b) the supervisor does not instruct the worker to return the child to the parent's care?

INTRODUCTION

Mark Bambach agreed that his two daughters (M.B. and E.B.) could temporarily be placed with their mother (Bambach's former wife), pending a CPS investigation into allegations that he had sexually abused his daughters. The CPS investigation spanned twenty days, from December 25, 2015, to January 14, 2016, and resulted in a petition to remove the children from Bambach's care and a court order authorizing the children's removal. Bambach now claims that he revoked his consent to place the children with their mother during the twenty-day period. But Bambach never expressly revoked his consent or otherwise made clear to CPS investigator Gina Moegle that he no longer consented to the children's continued placement with their mother.

The district court wrongly denied summary judgment in favor of Moegle and her supervisor Susan Shaw, holding that a question of fact remained on whether Bambach revoked his consent. But neither Bambach nor the district court identified caselaw clearly establishing a constitutional right that would have required Moegle to return the children to Bambach's care following his discussions with Moegle on December 29 and December 30. No reasonable CPS worker would have interpreted Bambach's *questions* about the CPS investigation as revoking his consent to the two children's placement with Bambach's former wife. Accordingly, Moegle and Shaw are entitled to qualified immunity. This Court should reverse the district court's denial of summary

judgment and remand for entry of judgment in favor of Moegle and Shaw.

STATEMENT OF THE CASE

A. The CPS investigation.

On December 23, 2015, Amy Bambach, M.B.'s and E.B.'s mother, picked the girls up from their father, Mark Bambach, for her scheduled parenting time. (Amended CPS Petition 1/13/16, R. 82-3, p. 3, PageID#1670; Bambach Dep. 11/16/20, R. 82-13, pp. 40:19–40:20, 41:13–41:16, PageID#2163–64.) During this parenting time, M.B. told Amy Bambach that Mark Bambach inappropriately touched her. (Amended CPS Petition 1/13/16, R. 82-3, p. 3, PageID#1670; CPS Investigation Report, R. 82-2, p. 14, PageID#1665.) On December 24, 2015, Amy Bambach took M.B. and E.B. to Genesys Health System Emergency Room for a medical examination; Genesys medical staff diagnosed both minor children with (a) alleged sexual assault and (b) acute urinary tract infections. (Genesys Records 12/24/15, R. 82-4, PageID#1702, 1735.)

The next day, CPS received a report of suspected child abuse alleging that the minor children "told Mom 'when he wipes me he sticks his finger way up there and it hurts.'" (Report of Actual or Suspected Child Abuse or Neglect 12/25/15, R. 82-5, PageID#1739; see also CPS Investigation Report, R. 82-2, p.1, PageID#1652; Moegle Dep. 2/1/21, R. 82-6, p. 76:16–76:18, 76:23–76:25, PageID#1761.) CPS assigned Moegle to investigate the sexual abuse allegations levied by E.B. and M.B. against Bambach.

(Moegle Dep. 2/1/2021, R. 82-6, p. 77:1–77:3, PageID#1761.) Shaw was Moegle's supervisor at the time and supervised the investigation. (*Id.* at 14:25–15:10, PageID#1745–1746; Shaw Dep. 2/5/21, R. 82-8, p. 73:11–73:12, PageID#1962.)

After assignment, Moegle interviewed many potential witnesses; M.B. and E.B. were forensically interviewed and were examined by a Pediatric Sexual Assault Nurse Examiner (SANE). (*See generally* CPS Investigation Report, R. 82-2, PageID#1652–66; *see also* SANE examination 12/25/15, R. 82-10, PageID#1797–2000; Moegle Dep. 2/1/16, R. 82-6, pp. 79:21–80:12, 81:18–81:21, PageID#1762.)

1. Moegle's contacts with Bambach during the CPS investigation.

On December 25, 2015, the same date CPS received the allegations of sexual abuse, Moegle created a safety plan for M.B. and E.B. to remain in Amy Bambach's care during the CPS investigation's pendency. (CPS Investigation Report, R. 82-2, pp. 6–8, PageID#1657– 1659.) Moegle spoke with Bambach over the telephone, advising him of the sexual abuse allegations. (CPS Investigation Report, R. 82-2, p. 8, PageID#1659; Bambach Dep. 11/16/20, R. 82-13, p. 16:8–16:13, PageID#2139.) During the call, Bambach affirmatively agreed to leave the children with Amy Bambach during the pendency of the investigation. (CPS Investigation Report, R. 82-2, p. 8, PageID#1659; Bambach Dep. 11/16/20, R. 82-13, pp. 16:25–17:8, 20:23–20:25, PageID#2139–2140, 2143.) At no point during this December 25th call did

Bambach ask for the minor children's return to his care. (Bambach Dep. 11/16/20, R. 82-13, pp. 16:25–17:2, PageID#2139–40.)

Four days later, on December 29, 2015, Bambach contacted Moegle to ask "when he c[ould] get his kids back." (CPS Investigation Report, R. 82-2, p. 9, PageID#1660; Second Amended Complaint 1/29/19, R. 9, PageID#194.) Bambach testified that, during the call, he told Moegle: "I wanted them back, . . . I wanted to see them." (Bambach Dep. 11/16/20, R. 82-13, p. 21:9–21:10, PageID#2144.)

Moegle informed Bambach that "there is policy to follow and that it is CPS's goal to keep children safe" and "that his children are safe at this time." (CPS Investigation Report, R. 82-2, p. 9, PageID#1660.) Later that day, Bambach and Moegle spoke again about Bambach providing Amy Bambach a copy of the children's health insurance card; Bambach made no mention of the girl's placement with Amy Bambach. (*Id.*; Bambach Dep. 11/16/20, R. 82-13, p. 40:10–40:15, PageID#2163.)

The next day, December 30, 2015, Bambach phoned Moegle to ask "what happens next" and "if the girls had been interviewed." (CPS Investigation Report, R. 82-2, p. 10, PageID#1661; Second Amended Complaint 1/29/19, R. 9, PageID#194–195.) Moegle responded that "law enforcement would contact him soon for his side of the story." (CPS Investigation Report, R. 82-2, p. 10, PageID#1661.) Bambach said that he would refuse to speak to law enforcement without an attorney present. (CPS Investigation

Report, R. 82-2, p. 10, PageID#1661; Second Amended Complaint 1/29/19, R. 9, PageID#194–95.)

Hours later, Moegle and Bambach spoke on the phone again; Moegle encouraged Bambach "to set up a meeting with his attorney as soon as possible" as it "would help the investigation move along." (CPS Investigation Report, R. 82-2, p. 10, PageID#1661; Second Amended Complaint 1/29/19, R. 9, PageID#195.) But Bambach said he was "not going to talk to [law enforcement] and he is taking the 5th." (*Id.*; Second Amended Complaint 1/29/19, R. 9, PageID#195; *see also* Moegle Dep. 2/1/21, R. 82-6, p. 88:7–88:9, PageID#1764.) After Bambach said he was "taking the 5th," Bambach agreed to meet with Moegle on January 5, 2016. (CPS Investigation Report, R. 82-2, p. 10, PageID#1661.)

On January 5, 2016, Bambach advised Moegle that he would not come to the DHHS office for their scheduled meeting on the advice of his counsel. (*Id.* at 11, PageID#1662; *see also* Moegle Dep. 2/1/21, R. 822, p. 87:24, 89:4–89:12, PageID#1764.) Moegle suggested that Bambach ask his attorney to come to the DHHS office to discuss the allegations; Bambach again refused, and no meeting occurred. (*Id.*)

Bambach made no attempt to contact Moegle before a January 14, 2016, court hearing. Likewise, no attorney contacted Moegle during this time on Bambach's behalf. At no point between December 25, 2015, and January 14, 2016, did Bambach or his attorney demand his daughters' return to his custody or state that Bambach no longer consented to the children remaining with Amy Bambach pending the

CPS investigation. Likewise, Bambach took no court action to regain physical custody of his daughters. And despite an ongoing custody case, Bambach filed nothing in the custody case to regain custody between December 25, 2015, and January 14, 2016—the date the removal order was filed with the family court. (Bambach Dep. 11/16/20, R. 82-13, p. 21:21–21:25, PageID#2144.)

2. Shaw's involvement and the CPS investigation's result.

During the investigation, Moegle held case conferences with Shaw on December 30, 2015, and on January 12, 2016, to discuss the case. (CPS Investigation Report, R. 82-2, pp. 10, 12, PageID#1661, 1663; Moegle Dep. 9/30/16, R. 82-7, pp. 80:3–81:23, PageID#1847–48; *see also* Shaw Dep. 2/5/21, R. 82-8, p. 73:16–73:21, PageID#1962.) Shaw did not speak with Bambach or his counsel. (Bambach Dep. 11/16/20, R. 82-13, p. 44:19–44:22, PageID#2167.) And Shaw did not have any concerns with Moegle being truthful in her investigation report. (Shaw Dep. 2/5/21, R. 82-8, pp. 79:24–80:2, 86:18–86:23, PageID#1964–65.)

At the conclusion of the CPS investigation, Moegle found a preponderance of evidence of sexual abuse and substantiated Bambach for sexual abuse of M.B. and E.B. (CPS Investigation Report, R. 82-2, p. 13, PageID#1665.) Moegle signed and submitted the completed CPS Investigation Report to Shaw for approval on January 15, 2016. (*Id.* at 15, PageID#1666; Moegle Dep. 9/30/16, R. 82-7, pp. 81:24–

82:2, PageID#1848–49; *see also* Shaw Dep. 2/5/21, R. 82-8, p. 75:6–75:8, PageID#1963.) Shaw approved and signed the report on January 22, 2016. (CPS Investigation Report, R. 82-2, p. 15, PageID#1666; Moegle Dep. 9/30/16, R. 82-7, p. 82:2–82:3, PageID#1849; Shaw Dep. 2/5/21, R. 82-8, p. 86:14–86:17 PageID#1965.)

B. The Family Court proceedings.

After the case conference with Shaw on January 12, 2016, Moegle prepared a removal petition for filing in family court. (Amended CPS Petition 1/13/16, R. 82-3, PageID#1668–1671; Moegle Dep. 9/30/16, R. 82-7, p. 84:6–84:22, PageID#1851.) Shaw reviewed and approved the petition before it was sent to the local prosecutor. (Moegle Dep. 9/30/2016, R. 82-7, pp. 86:24, 88:8–88:13, PageID#1853, 1855.) Lapeer County Assistant Prosecuting Attorney, Ariana Heath, then signed and filed an amended petition with the Lapeer County Circuit Court - Family Division on January 13, 2016. (Amended CPS Petition 1/13/16, R. 82-3, PageID#1671; Moegle Dep. 9/30/2016, R. 82-7, p. 86:12–86:18, PageID#1853.)

On January 14, 2016, following a hearing, the Lapeer County Circuit Court executed an order authorizing the removal of E.B. and M.B. from Bambach's custody. (Court Transcript 1/14/16, R. 82-17, p. 29:8–29:15, PageID#2281; Order After Preliminary Hearing 1/15/16, R. 31-4, PageID#603–607; Second Amended Complaint 1/29/19, R. 9, p. 17, 23, PageID#181, 187; Bambach Dep. 11/16/20, R. 82-13, pp. 21:16– 21:22, 56:5–56:7, PageID#2144, 2179.)

The family court case then proceeded for months. The petition was ultimately dismissed, and the children were returned to Bambach's care in November 2016. (Second Amended Complaint 1/29/19, p. 29, PageID#193; Shaw Dep. 2/5/21, R. 82-8, p. 87:3–87:7, PageID#1966; see also Stipulation for Dismissal 11/1/16, R. 31-5, PageID#609; Order of Dismissal 11/1/16, R. 31-6, PageID#611–612.)

C. Proceedings before the district court.

Bambach initiated this case on December 23, 2018, naming Moegle, Shaw, CPS Ongoing Worker Stacy May, and Lapeer County as defendants. (Complaint 12/23/18, R. 1.) The operative pleading is the Second Amended Complaint, filed on January 29, 2019. (Second Amended Complaint 1/29/19, R. 9, PageID#165–243.) In the Second Amended Complaint, Plaintiffs asserted violations of the Fourth, Fifth, and Fourteenth Amendments. (*Id.* at PageID#193–241.)

1. Defendants' motion to dismiss.

On July 5, 2019, Defendants Moegle, Shaw, and May moved to dismiss, arguing they are entitled to absolute and qualified immunity, and that Bambach failed to state a viable claim. (State Defs.' Mtn. to Dismiss 7/5/19, R. 31, PageID#546–588.) The district court granted in part and denied in part the motion to dismiss on May 29, 2020. (Mtn. to Dismiss Order 5/29/20, R. 50, PageID#1033–1069.) In its Order, the Court dismissed all claims against Defendant May and held that Moegle and Shaw were entitled to

absolute immunity for all claims based on alleged conduct that occurred after the family court issued its order authorizing the children's removal from Bambach's care on January 14, 2016. (*Id.* at PageID#1043–1048.) As the district court specified:

> Plaintiff's claims REMAIN against Defendants Gina Moegle and Susan Shaw with respect to "all of [their] actions [that] were investigative and administrative in nature," namely Plaintiff['s] claims for relief in Counts I, II, III, V, VI, and VII that relate to the conduct of removing the Children from Bambach's custody *prior to the preliminary hearing which occurred on January 14, 2016*.

(*Id.* at PageID#1068 (emphasis added).) In other words, the scope of the claims narrowed to the period beginning on the date the investigation began, December 25, 2015, until the date the family court issued its order on January 14, 2016.

As to qualified immunity, the district court denied the motion to dismiss, holding that Plaintiff's allegations regarding the conduct of Moegle and Shaw were "sufficient to establish" viable constitutional violations. (*Id.* at PageID#1054, 1058.) Notably, the Court did not address the second element of the qualified immunity analysis—i.e., if caselaw clearly established the right at issue.

2. Defendants' motion for summary judgment.

Following discovery, on July 1, 2021, Defendant Moegle and Shaw moved for summary judgment. (State Defs.' Mtn. for Summary Judgment 7/1/21, R. 82, PageID#1592–1648.) Relevant to this appeal, Moegle and Shaw argued that they are entitled to qualified immunity as a matter of law. (*Id.* at PageID#1631–1638.)

On March 31, 2023, the district court granted in part and denied in part Moegle and Shaw's motion for summary judgment. (SJ Order 3/31/23, R. 98, PageID#3237–3262.) The Court held there is "a genuine dispute of material fact as to whether Bambach revoked his consent on or about December 29 or 30, 2015." (*Id.* at 16, PageID#3252.) Accordingly, as to Moegle, the Court permitted Bambach's claims of unlawful seizure under the Fourth Amendment and due process violations under the Fourteenth Amendment to proceed to trial. (*Id.* at 16, 23, PageID#3252, 3259.) As to Shaw, the Court held that Bambach's supervisory liability claims could proceed due to the same question of fact. (*Id.* at 24, PageID#3260.)[9]

The Court denied immunity, finding a question of whether Bambach revoked his consent to the children remaining with their mother during the CPS

[9] The Court granted Moegle summary judgment on Bambach's Fifth Amendment claim, finding there is no evidence that Bambach was forced to admit to abusing the girls. (SJ Order, R. 98, p. 19, PageID#3255.) And the Court granted summary judgment in favor of Lapeer County. (*Id.* at 13, PageID#3249.)

investigation's pendency. (*Id.* at 24–25, PageID#3260–61.) The Court failed to analyze the second element of the qualified immunity analysis, never identifying case law that demonstrates the alleged conduct violates a clearly established statutory or constitutional right. In fact, the Court failed to cite any caselaw in its qualified immunity analysis. (*See id.*)

Moegle and Shaw now appeal from the district court's order denying summary judgment.

STANDARD OF REVIEW

This Court reviews "a grant or denial of summary judgment *de novo*, using the same Fed. R. Civ. P. 56(c) standard as the district court." *Summers v. Leis*, 368 F.3d 881, 885 (6th Cir. 2004). Questions of law are reviewed *de novo*. *United States v. Demjanjuk*, 367 F.3d 623, 636 (6th Cir. 2004). A district court's findings of fact are reviewed under the clearly erroneous standard. *United States Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 778 (6th Cir. 1995).

SUMMARY OF ARGUMENT

The district court failed to analyze the second prong of the qualified immunity analysis: was there a clearly established right at the time of the defendant's conduct. The Court's failure to conduct this analysis requires reversal, especially considering the caselaw from the Supreme Court and this Circuit. Indeed, no caselaw clearly establishes that Moegle's decision not to return the children to Bambach following their December 29th and 30th phone calls

violated Bambach's Fourth and Fourteenth Amendments rights. Likewise, no caselaw demonstrates that Shaw's conduct—meeting with Moegle on December 30th and January 12th and not instructing Moegle to return the children to Bambach as a result of these meetings—constituted a violation of a clearly established right.

ARGUMENT

I. Moegle and Shaw are entitled to qualified immunity as neither Bambach nor the district court identified caselaw that clearly established the rights at issue.

Qualified immunity protects government officers from liability under 42 U.S.C. § 1983 if they (1) have not "violated a federal statutory or constitutional right" (2) that was "clearly established at the time." *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Mullenix v. Luna*, 577 U.S. 7, 11 (2015).

For this appeal, Moegle and Shaw do not contest the district court's holding as to the first element, for which the district court found a question of material fact. However, because the district court failed to address the second element, this Court should reverse the district court's holding on this ground alone. And considering the second element, no prior precedent clearly establishes a right that would have required Moegle—and by extension Shaw—to return the children to Bambach's care following his discussions with Moegle on December 29th and December 30th, during which Bambach did not clearly revoke his consent to the children's continued placement with

their mother. The district court should have afforded qualified immunity to Moegle and Shaw and the remaining claims dismissed.

A. A clearly established right must be supported by precedent that squarely governs a defendant's conduct.

A right is clearly established if "'it would be clear to a reasonable officer that his conduct was unlawful in the [particular] situation he confronted.'" *Hernández v. Mesa*, 582 U.S. 548, 554 (2017) (quoting *Saucier v. Katz*, 33 U.S. 194, 202 (2001)); *see also Wesby*, 138 S. Ct. at 589; *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). Only the facts known or "knowable" to the officer in the moment may be considered when evaluating immunity. *Hernández*, 582 U.S. at 554 (citing *White v. Pauly*, 580 U.S. 73, 77 (2017)). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments.'" *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). "When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft*, 563 U.S. at 743 (internal quotations omitted).

Crucial to the instant case, the clearly established analysis must be "particularized" and not framed in broad or high-level terms. *White*, 580 U.S. at 79 (citing *Ashcroft*, 563 U.S. at 742); *see also Mullenix*, 577 U.S. at 12. In other words, unless a prior case "squarely governs" an officer's conduct, qualified

immunity prevents liability from attaching. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 577 U.S. at 13); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004); *see also Rivas-Villegas v Cortesluna*, 142 S. Ct. 4, 9 (2021) (requiring "sufficiently similar" precedent). Put another way, the existence of the right must be "settled" and "beyond debate." *Wesby*, 138 S. Ct. at 589 (internal quotations omitted); *see also White*, 580 U.S. at 79 (quoting *Mullenix*, 577 U.S. at 14 (plaintiffs must demonstrate that there is caselaw that puts the "'statutory or constitutional question beyond debate.'")); *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (same).

In the last decade, the Supreme Court has emphasized the requirement for *particularized* precedent to clearly establish the right at issue—repeatedly reversing courts of appeals on this basis. *See, e.g.*, *Rivas-Villegas*, 142 S. Ct. 4 (reversing the Court of Appeals' failure to identify sufficiently similar precedent to meet the clearly established element of the qualified immunity analysis); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021); *Wesby*, 138 S. Ct. 577 (same); *White*, 580 U.S. 73 (same); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (same); *Kisela*, 138 S. Ct. 1148 (same); *Mullenix*, 577 U.S. 7 (same); *Taylor*, 575 U.S. 822 (same). The Supreme Court was explicit: "We have repeatedly told courts not to define clearly established law at too high a level of generality." *Bond*, 142 S. Ct. at 11.

This Court likewise emphasized that "the question must be so settled that 'every reasonable official would

have understood that what he is doing violates [the] right' at issue." *Vanderhoef v. Dixon*, 928 F.3d 271, 279 (6th Cir. 2019) (quoting *Ashcroft*, 563 U.S. at 741). To find that a clearly established right exists, "the district court must find binding precedent by the Supreme Court, [the Sixth Circuit], the highest court in the state in which the action arose, or itself, so holding." *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994); *see also Vanderhoef*, 938 F.3d at 279.[10] It is not up to defendants to prove that the law was not clearly established. Rather, "[t]he burden of convincing a court that the law was clearly established rests squarely with the plaintiff." *Key v. Grayson*, 179 F.3d 996, 1000 (6th Cir. 1999).

Here, Moegle and Shaw are shielded from liability because the purportedly violated rights were not clearly established at the times applicable to this case.

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[10] The Supreme Court also has questioned if lower court precedents— including courts of appeals precedents—can clearly establish a right for purpose of avoiding qualified immunity. See *Rivas-Villegas*, 142 S Ct. at 8 ("Neither [the plaintiff] nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here. . . . Even assuming that Circuit precedent can clearly establish law for purposes of §1983. . . ."); see also *Taylor*, 575 U.S. at 826 ("Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, . . ."). If a plaintiff must identify a sufficiently similar Supreme Court precedent to clearly establish at right, Bambach—and the district court—presented zero Supreme Court precedent that present similar facts to the instant case and would establish that Moegle's and Shaw's conduct violated Bambach's constitutional rights.

B. Bambach did not demonstrate—nor did the district court identify—particularized precedent that clearly established a right that Moegle allegedly violated.

Bambach's remaining claims against Moegle stem from the removal of the children from his physical custody. Bambach claims that the removal was an unlawful seizure under the Fourth Amendment (Counts I, IV), violated his substantive due process rights (Count III), and violated his procedural due process rights because he did not receive a hearing before the purported removal (Count II). (*See* Second Amended Complaint 1/29/19, R. 9, PageID#193–208.) Yet, Bambach consented to the children's removal on December 25, 2015[11]—a fact not in dispute—so the sole issue is if he later revoked his consent through his discussions with Moegle on December 29th and 30th. But the unique situation Moegle confronted during

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[11] When a parent voluntarily consents to a safety plan that includes the temporarily removal for the children from the parent's care, no constitutional violation results from the removal. See *Smith v. Williams-Ash*, 520 F.3d 596, 599–600 (6th Cir. 2008); see also *Schulkers v. Kammer*, 955 F.3d 520, 543 (6th Cir. 2020) (holding that "[t]he only exception" to "the well-established rule that a state must afford a parent fair process . . . is when a parent voluntarily consents to the terms of a safety plan without duress."); *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 763 (6th Cir. 2020) ("[C]onsent extinguishes constitutional procedural safeguards."); *Teets v. Cuyahoga Cnty.*, 460 F. 498, 503 (6th Cir. 2012) ("[A] parent's voluntary consent to a safety plan obviates the need for any additional due process procedures on the part of the agency seeking to remove the child from a parent's custody.").

these calls lacks any precedent that "squarely governs" a CPS worker's conduct. Thus, no precedent "clearly established" a right that Moegle violated.

Indeed, the district court did not identify a single case that could clearly establish a right under the circumstances confronted by Moegle. (See SJ Order 3/31/23, R. 98, PageID#3260–3262.) On this basis alone, qualified immunity applies to Moegle's conduct because the second qualified immunity element has not been established.

1. The caselaw identified by Bambach does not clearly establish a right applicable to this case.

Bambach pointed to three cases that he contended clearly established his rights had been violated. (See Pls.' Response in Opp. to State Defs.' Mtn. for Summary Judgment 7/24/21, R. 90, PageID#2788, 2806, 2809, 2812 (citing *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015); *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983); *Vinson v. Campbell Cnty. Fiscal Court*, 820 F.2d 194 (6th Cir. 1987).) But none of these cases provide factual circumstances "particularized" to the instant case, and instead establish general principles, which are insufficient to clearly establish a right. *White*, 580 U.S. at 79.

First, Bambach cites *Barber* to support his Fourth Amendment claim, asserting that the case "clearly established since [December 5, 20]15 that a social worker, (absent consent/exigent circumstances) needs a court order to seize a child." (See Pls.' Response in Opp. to State Defs.' Mtn. for Summary Judgment

7/24/21, R. 90, pp. v, 17 n.99, PageID#2788, 2806.) But Bambach's reliance on *Barber* is misplaced in multiple respects. Factually distinct from the instant case, *Barber* addressed if a CPS worker could (a) conduct in-school interviews with children without parental consent and (b) pick up children from school with a court order. *Barber*, 809 F.3d at 845–48. Beyond these distinctions, *Barber* affirmed dismissal of claims against a CPS worker because the Fourth and Fourteenth Amendment rights claimed to be violated by the plaintiff were *not* clearly established, and qualified immunity barred the claims. *Id.* Thus, *Barber* did not clearly establish any right—it did the opposite, identify rights that were *not* clearly established. And, if Bambach relies on *Barber* for the broad proposition that a warrantless removal of children from their parents constitutes a Fourth Amendment violation,[12] this "general proposition" of law is insufficient to show a clearly established right here. *See Brosseau*, 543 U.S. at 198. *Barber* actually supports Moegle's position because the case never clearly established any rights at issue here.

Second, Bambach cited *Doe* in support of his procedural due process claim. (See Pls.' Response in Opp. to State Defs.' Mtn. for Summary Judgment 7/24/21, R. 90, pp. v, 19 n.102, PageID#2788, 2808.)[13]

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[12] The district court cited Barber for this general proposition in its order denying in part defendants' motion to dismiss. (See 5/29/20 MTD Order, R. 50, PageID#1050.)

[13] The district court also cited Doe in its order denying in part defendants' motion to dismiss. (See 5/29/20 MTD Order, R. 50, PageID#1050.)

Like *Barber*, *Doe* is factually distinct. *Doe* centers on a child's removal by CPS without a court order and without the parent's consent. *Doe*, 706 F.2d at 987. But unlike in *Doe*, Bambach consented to the children's temporary placement with his ex-wife. (CPS Investigation Report, R. 82-2, p. 8, PageID#1659; Bambach Dep. 11/16/20, R. 82-13, pp. 16:25–17:8, 20:23–20:25, PageID#2139–2140, 2143.) *Doe* accordingly has no relevance here: it does address when a parent seeks to revoke their consent to temporary placement outside of their care because the mother in *Doe* never consented to the removal. At best, *Doe* provides the general proposition that parents are typically entitled to procedural due process before a child's removal.

Third, like the previous two cases, *Vinson* is factually distinct from this case, and only provide a general proposition of law to support Bambach's claims. (See Pls.' Response in Opp. to State Defs.' Mtn. for Summary Judgment 7/24/21, R. 90, pp. v, 19 n.102, PageID#2788, 2808.) Unlike this case, the *Vinson* children were removed from the parent due to truancy concerns and the parent never consented to the children's removal. *Vinson*, 820 F.2d at 196. Like the distinction from *Doe*, here, Bambach consented to the removal of the children, so *Vinson* has no applicable value as it does not address a parent's *revocation* of consent. Broadly, *Vinson* stands for the proposition that a parent's "interest in the physical custody of [their] children could not be terminated without compliance with the requirements of due process." *Id.* at 200–01. But, due to the factual

distinctions and the broad nature of the relevant holdings in *Vinson*, the case does not clearly establish a right here.

Since *Barber, Doe,* and *Vinson* do not clearly establish any right, Bambach—like the district court—failed to identify any factually similar case that established a right applicable here. The district court thus erred in refusing to afford Moegle qualified immunity. *See, e.g.*, *Fisher v. Gordon*, 782 F. App'x 418, 423–24 (6th Cir. 2019) (affording qualified immunity because it was not clearly established that the plaintiff's conduct was sufficiently clear for the CPS worker to understand that the plaintiff did not consent to his children's removal); *see also Schattilly v. Daugharty*, 656 F. App'x 123, 130 (6th Cir. 2016) (holding that "officials do not violate clearly established First Amendment or Fourteenth Amendment rights by threatening removal proceedings in order to secure parents' consent to the temporary placement of their children").

2. No other caselaw supports a clearly established right applicable to this case.

For completeness, and far beyond her burden,[14] Moegle addresses two Sixth Circuit cases addressing situations in which a CPS worker was confronted with a parent who claimed to have revoked their consent to a safety plan: *Farley v. Farley*, 225 F.3d 658 (6th Cir.

[14] Bambach bears the burden to show precedent squarely governing Moegle's conduct. Key, 179 F.3d at 1000.

2000) (unpublished opinion available at 2000 U.S. App. LEXIS 17580) and *Smith v. Williams-Ash*, 520 F.3d 596 (2008). Neither case clearly establishes that Bambach's rights were violated by Moegle.

Farley does not help Bambach's argument that Moegle violated Bambach's clearly established rights. Not only is it unpublished and therefore unable to clearly establish a right at issue in this case, *Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022), *Farley* is also factually distinct for at least five reasons. First, *Farley* addresses an instance when it was unclear whether the mother truly consented to the children's initial removal. *Farley*, 2000 U.S. App. LEXIS 17580, at *20. Here, Bambach undisputedly consented to the children's placement with their mother. (CPS Investigation Report, R. 82-2, p. 8, PageID#1659; Bambach Dep. 11/16/20, R. 82-13, pp. 16:25–17:8, 20:23– 20:25, PageID#2139–40, 2143.) Second, unlike the *Farley* mother, Bambach never explicitly asked for the children to be returned to his physical custody. *Farley*, 2000 U.S. App. LEXIS 17580, at *5. (Bambach Dep. 11/16/20, R. 82-13, pp. 16:25–17:2, PageID#2139–40.) Third, Moegle never threatened to remove another child from his care like the *Farley* caseworker. *Farley*, 2000 U.S. App. LEXIS 17580, at *20. Fourth, Moegle obtained a court order authorizing the children's placement out of Bambach's home within twenty days; whereas the children in *Farley* remained out of their mother's care for three months and the CPS worker never obtained a written court order authorizing their removal. *Id.* at *6, 9–10. Fifth, unlike the parent and caseworker in *Farley*,

Bambach and Moegle spoke on the phone multiple times— two times on both December 29th and December 30th—without any indication that Bambach was pursuing the return of his children. (CPS Investigation Report, R. 82-2, pp. 9–10, PageID#1660–1661; Second Amended Complaint 1/29/19, R. 9, PageID#194–95.) Bambach and Moegle even scheduled a meeting for January 5th that Bambach ultimately cancelled. (CPS Investigation Report, R. 82-2, p. 10, PageID#1661.) These factual distinctions placed *Farley* beyond the "particularized" requirement set forth by the Supreme Court for such precedent to clearly establish a right. *White*, 580 U.S. at 79.

Smith is the closest to the instant case factually—and it supports Moegle's claim of qualified immunity. In *Smith*, this Court held the plaintiff parents were not entitled to due process protections when their children were removed because they consented to the removal of the children pursuant to a safety plan. *Smith*, 520 F.3d at 599–600. The *Smith* court held that the parents did not revoke their consent through "their repeated inquiries to [the CPS worker] about both her investigation's length and what they needed to do to speed the children's return." *Id.* at 600–01. And particularly apt to this case, the Court explained:

> We do not doubt that the [plaintiffs], as any parents likely would, resented the safety plan from the beginning. But mere displeasure and frustration fails to negate their consent. Rather than

> remind [the CPS worker] of what she already knew—that they disliked the plan—the [plaintiffs] needed to explicitly withdraw the consent they explicitly gave, thus requiring Children's Services to either return the children or file a formal complaint against them. In light of their admitted failure to do so, the [plaintiffs] were not entitled to a hearing.

Id. at 601. Like the parents in *Smith*, "there is no evidence that Bambach expressly revoked his consent for the Children to remain with Amy Bambach." (SJ Order 3/31/23, R. 98, PageID#3252.)

Considering the precedent established by *Smith*, Moegle could not have understood that not returning the children to Bambach following his December 29th and 30th calls would violate Bambach's rights. *See Ashcroft*, 563 U.S. at 741. Precedent does not clearly establish that a parent's inquiries about a CPS investigation revoke consent to a safety plan and the temporary placement of children outside of the alleged abuser's care. Accordingly, this Court should reverse the district court's holding and grant Moegle qualified immunity to the remaining claims.

C. Bambach did not demonstrate—nor did the district court identify—particularized precedent that clearly established a right that Shaw allegedly violated.

Bambach's claims against Shaw each contend that she failed to supervise Bambach, resulting in the purported unlawful seizure and denial of due process. (*See* Second Amended Complaint 1/29/19, R. 9, PageID#208–230 (Counts V–VIII).) Like the Moegle analysis, the district court identified no precedent clearly establishing that Shaw's decision to not instruct Moegle to return the children to Bambach following their case conferences violated Bambach's constitutional rights. With the absence of analysis by the district court, its decision should be reversed, and Shaw should be afforded qualified immunity.

Moreover, "a prerequisite of supervisory liability under § 1983 is unconstitutional conduct by a subordinate of the supervisor." *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 470 (6th Cir. 2006). Because Moegle is due qualified immunity because she did not violate a clearly established right, so is Shaw.

Likewise, *Barber, Doe*, and *Vinson* center on a CPS worker's actions—not their supervisor's. So even if the cases had clearly established an applicable right, Shaw is a step removed from the *Barber, Doe*, and *Vinson* defendants. Because these cases do not clearly establish a right that Moegle allegedly violated, the cases certainly do not go one step further and clearly establish a right that supervisor Shaw violated.

The *Shehee* and *Lynn* cases do little to help Bambach's claim that Shaw violated his clearly established rights. (See Pls.' Response in Opp. to State Defs.' Mtn. for Summary Judgment 7/24/21, R. 90, pp. vi, 24 n.114, PageID#2788, 2813 (citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); *Lynn v. City of Detroit*, 98 F. App'x 381 (6th Cir. 2004).) *Shehee* involves retaliation and discrimination claims against prison officers and supervisors; *Lynn* addresses the potential liability of a police supervisor of four police officers accused of "a string of illegal searches, false arrests, and thefts." *Shehee*, 199 F.3d at 298; *Lynn*, 98 F. App'x at 382. Given these obvious factual distinctions, *Shehee* and *Lynn* do not "squarely govern" Shaw's actions in this case. *See Kisela*, 138 S. Ct. at 1153.

Instead, Bambach cites *Shehee* and *Lynn* for the general propositions regarding supervisory liability. But, as addressed above, a "general proposition" of law is not sufficient to demonstrate a clearly established right for this case. *Brosseau*, 543 U.S. at 198.

With no caselaw identified by the district court or Bambach showing that Shaw's conduct give rise to liability, Shaw, like Moegle, is entitled to qualified immunity.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants-Appellants Moegle and Shaw respectfully request that this Honorable Court reverse the district court's decision denying Defendants summary judgment, direct the district court to enter judgment in Defendants-Appellants'

favor, and grant Defendants-Appellants such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 5,976 words.

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CERTIFICATE OF SERVICE

I certify that on August 14, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellants, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry	Page ID No.
Complaint	12/23/18	R. 1	PageID# 1–73
Second Amended Complaint	1/29/19	R. 9	PageID# 165–243
State Defendants' Motion to Dismiss	7/5/19	R. 31	PageID# 546–588
Order After Preliminary Hearing, Case No. 16012291-NA, Lapeer County Circuit Court - Family Division	1/15/16	R. 31-4	PageID# 603–607

Stipulation for Dismissal, Case No. 16-012291-NA, Lapeer County Circuit Court - Family Division	11/1/16	R. 31-5	PageID# 609
Order of Dismissal, Case No. 16-012291-NA, Lapeer County Circuit Court - Family Division	11/1/16	R. 31-6	PageID# 611–612
Order Granting in Part and Denying in Part State Defendants' Motion to Dismiss [#31], Granting in Part and Denying in Part Plaintiffs' Motion to [#32], Granting in Part and Denying in Part Plaintiffs' Motion to Strike [#33], Granting Plaintiffs' Motion to Strike [#35]	5/29/20	R. 50	PagID# 1033–1069
State Defendants' Motion for Summary Judgment	7/1/21	R. 82	PageID# 1592–1648

CPS Investigation Report	Undated	R. 82-2	PageID# 1652–1670
Amended CPS Petition, Case No. 16-012291-NA, Lapeer County Circuit Court - Family Division	1/13/16	R. 82-3	PageID# 1668–1671
Genesys Health System Emergency Records for M.B. and E.B.	12/24/15	R. 82-4	PageID# 1673–1737
Report of Actual or Suspected Child Abuse or Neglect	12/25/15	R. 82-5	PageID# 1739
Deposition of Gina Moegle	2/1/21	R. 82-6	PageID# 1741–1766
Deposition of Gina Moegle	9/30/16	R. 82-7	PageID# 1768–1941
Deposition of Susan Shaw	2/5/21	R. 82-8	PageID# 1943–1967

Lapeer County Sexual Assault Nurse Examiner (SANE) exam records for M.B and E.B	12/25/15	R. 82-10	PageID# 1979–2000
Deposition of Mark Bambach	11/16/20	R. 83-13	PageID# 2122–2206
Plaintiffs' Response in Opposition to State Defendants' Motion for Summary Judgment	7/24/21	R. 90	PageID# 2781–2818
Order Granting Lapeer County's Motion for Summary Judgment [ECF No. 62], Granting in Part and Denying in Part Motion for Summary Judgment Filed by Gina Moegle and Susan Shaw [ECF No. 82], and Denying Plaintiff's Motion for Summary Judgment [ECF No. 84]	3/31/23	R. 98	PageID# 3237–3262

Notice of Appeal	4/20/23	R. 100	PageID# 3265–3267

No. 23-1372
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BAMBACH, *et al*,
Plaintiffs-Appellees,

v.

GINA MOEGLE, *et al*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Honorable Denise Page Hood

PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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Rule 35(b)(1) Statement and Introduction

The Panel's decision conflicts with *Smith v Williams-Ash*, 520 F 3d 596 (6th Cir 2008), where this Court adopted the reasoning set forth by Judge Posner in *Dupuy v Samuels*, 465 F 3d 757, 760-61 (7th Cir 2006), which found that hearings are required when deprivations are taken over the objection of parents to child protective services' seizure of their children. Had the Smiths acted as Bambach did, this Court would have found that they explicitly revoked their consent forcing child protective services to return the children or file a complaint against them. Yet, the Panel failed to determine that Bambach's statements and behaviors were enough that a reasonable official could conclude Bambach revoked his consent. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

The Panel's decision also conflicts with *Tolen v Cotton*, 572 US 650; 134 S Ct 1861; 188 L Ed 2d 895 (2014), where the Supreme Court found that if the legal question—here, consent—turns on the resolution of disputed fact issues, a jury must determine liability. Yet, the Panel decided disputed factual issues in a light most favorable to the Defendants at the summary-judgment stage, in an appeal from a denial of qualified immunity, when determination of qualified immunity turned on those issues of fact. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

If left undisturbed, the Panel's opinion will have far-reaching and unintended consequences, as it has

been recommended for publication. The lower courts will be bound by a ruling that analyzes the clearly established prong of qualified immunity with such specificity that issues of fact, which should be decided by a jury, are used as tools in finding qualified immunity. This is of exceptional importance because it is contrary to *Tolen*. Furthermore, these conflicting cases will breed chaos in the courts of this circuit.

Background

I. Factual Background

The following is the Bambachs' version of the facts. These facts appear in the Panel's Opinion unless there is a specific citation to the record. *See* Op. 3-5.

Mark and Amy Bambach are parents to twin daughters, M.B. and E.B. Mark and Amy divorced in September 2013. Bambach received primary custody of the two children in November 2012. Amy did not interact much with her daughters from November 2012 to April 2015. But in May 2015, Amy began exercising her parental rights more frequently. From July to December of that year, she saw her daughters for overnight visits more than a dozen times. Amy scheduled parenting time with M.B. and E.B. from December 23 to the morning of December 25, 2015. However, due to Amy Bambach's contentions that Bambach was sexually abusing the Children, they were not returned to him, and he did not regain custody of them until November 2016. Or. for P.S.J., R. 98, PageID 3239.

Moegle was assigned to investigate, and Shaw supervised her investigation. They both admit that a

CPS investigator must obtain a court order to remove a child. Moegle's Amend. Resp. to Req. for Admis., R. 84-4, PageID 2443-2447; Moegle's (sic) Amend. Resp. to Req. for Admis., R. 84-5, PageID 2462-2466. Additionally, Moegle admits that she knows a voluntary safety plan can be cancelled if the parents change their mind. Moegle 2/1/21 Dep., R. 84-6, PageID 2484.

On December 25, 2015, Moegle informed Amy Bambach that she "will call Mark and inform him that the girls are not returning home until CPS can investigate." Investigative Report, R. 84-9, PageID 2504. Later that day, Moegle called Bambach to notify him of allegations that he had sexually abused his daughters. During that call, Moegle asked Bambach if his daughters could stay with Amy during the pendency of the investigation. He agreed. Three days later, Moegle documented, "[a]ccording to Amy, she talked to Mark's aunt and [Bambach] told everyone during the Christmas holiday that the girls are not with him because Amy would not give them back. According to Amy, Mark told his family that he is going to get an attorney to get the girls back." Investigative Report, R. 84-9, PageID 2504.

Four days after being informed of the allegations, Bambach called Moegle wanting to know when he was getting his kids back, and "[h]e was informed that this worker does not know the answer to his questions due to an ongoing investigation. He was informed that there is policy to follow and its CPS's goal to keep the children safe." Investigative Report, R. 84-9, PageID 2505. During that phone call, Bambach made it clear

to Moegle that he wanted his girls back and that nothing had happened. Bambach Dep., R. 84-2, PageID 2360. Bambach further stated that Moegle warned him not to contact the girls in any manner and said, "if I tried to contact them or see them or anything she would take out a PPO against me." Bambach Dep., R. 84-2, PageID 2358-2359. Also, during that phone call, Bambach asked Moegle who completed the exam on the girls, Moegle states "[h]e was informed the exam was done by professionals." She also noted in her report that Bambach asked when the sexual abuse was supposed to have taken place." Investigative Report, R. 84-9, PageID 2505.

The following day, Mark told Moegle, "he is not going to talk to LE [law enforcement] and he is taking the 5th. Mark stated he did not sexually abuse his daughters." Investigative Report, R. 84-9, PageID 2506. A few days later (on January 4, 2016), Moegle documented that she informed Amy Bambach, "at this time Mark has refused to talk to LE and is willing to come into DHHS and talk to this worker." Investigative Report, R. 84-9, PageID 2506. The very next day, "Mark stated that he is not coming in to the DHHS office to talk to this worker. According to Mark he was advised not to talk to LE or CPS…Mark [again] stated he did not sexually abuse his daughters." Investigative Report, R. 84-9, PageID 2507. From January 5, 2016 to January 14, Moegle and Bambach did not speak. Moegle and Protective Services never sought or received a court order authorizing the children's removal until a county court heard Moegle's petition on January 14, 2016.

Bambach alleged that Moegle made false statements and omissions to justify the seizure of his daughters, particularly after Bambach informed Moegle on December 30, 2015 that he would not speak to law enforcement and was taking the Fifth Amendment. Second Am. Compl., R. 9, PageID 194. Bambach further alleged that Moegle "knowingly made false statements and omissions in order to 'justify' her removal of the Bambach children" from Bambach's home. Second Am. Compl., R. 9, PageID 202-207, 221-223.

II. Procedural Background

Bambach filed a complaint alleging 42 U.S.C. § 1983 violations by Moegle (CPS worker) and Shaw (CPS supervisor) for depriving them of their Fourth and Fourteenth Amendment rights to be free of unlawful seizures, for failing to afford them procedural due process prior to seizure, and for seizing the Bambach children when there was no justification for the seizure contrary to their substantive due process rights. Defendants filed for summary judgment asserting qualified immunity and arguing that Bambach had consented to the seizure. The District Court found that "there is a question of fact whether a reasonable social worker investigating this case would have understood Bambach's December 29, 2015 conversation with Moegle as a revocation of Bambach's consent to the continued placement of the Children with Amy Bambach. For that reason, qualified immunity is denied again." Or. for P.S.J., R. 98, PageID 3261-3262.

Defendants then filed a notice of appeal. In their brief on appeal, Defendants argue for the first time ever that it was not clearly established that Bambach's statements to Moegle revoked his consent to the seizure of the children. On January 24, 2024, this Court held oral arguments.

III. Panel Opinion

On February 8, 2024, in an opinion recommended for publication, the Panel reversed the District Court's denial of Defendants' motion for summary judgment. In its Opinion, the Panel acknowledged the Parties' dispute of jurisdiction. Speaking to Bambach's assertion that there was no jurisdiction, the Panel stated (1) "where we assume the plaintiff's version of any disputed facts, the district court's denial of qualified immunity constitutes an appealable collateral order" and (2) "[h]owever, we do not have jurisdiction over appeals to the extent that they concern genuine disputes about factual questions." Op. 7. The Panel then determined that "the unresolved question before us, ***assuming Bambach did revoke consent***, is whether clearly established law put Moegle and Shaw on notice that they were violating the Bambachs' constitutional rights by failing to release the children to their father." Op. 7 (emphasis added). But then, in a series of modifications, the Panel changed the question as follows:

1. to add the word *implied* to revocation, and the question now became, "[w]e must determine whether the law clearly established in December 2015 that the

failure to return the Bambach children to Bambach following his ***implied*** revocation of consent violated the Bambachs' constitutional rights." Op. 10 (emphasis added);

2. to add the words *impliedly withdrew prior explicit* to consent, and the question now became, "whether a state officer should have known that a parent could ***impliedly withdraw prior explicit consent*** to have his children temporarily removed from his custody pending a protective services investigation." Op. 14 (emphasis added);

3. to add the word *explicit* to consent and the words *attempts to impliedly withdraw*, and the question now became, "whether state employees violate parental rights where the parent gives ***explicit consent*** to removal and then ***attempts to impliedly withdraw*** that consent." Op. 15 (emphasis added); and

4. to add the words *which constitutes a reasonable seizure*, then adding *attempting to impliedly withdraw*, and *by inquiring about the status of the investigation and what Bambach needed to do to get his children back*, and the question finally became, whether state employees violated the Fourth Amendment when a parent "grant[s] explicit consent to a temporary removal—***which constitutes a reasonable seizure*** under the Fourth Amendment—and then ***attempting to impliedly withdraw*** that consent ***by inquiring about the status of the investigation and what Bambach needed to do to get his children back.***" Op. 17 (emphasis added).

In answering this final version of the question, the Panel determined that "Moegle ***would not have reasonably understood that Bambach withdrew his consent*** to have his children stay with Amy temporarily while the investigation was completed" Op. 17 (emphasis added) and that "it was reasonable for Moegle ***to believe she never lost Bambach's explicit consent***" Op. 18 (emphasis added). The Panel "determined the law did not clearly establish that Moegle's conduct violated the Constitution. Because not every reasonable officer would have understood at the time that Moegle's conduct violated the Fourth and Fourteenth Amendments, we extend that holding to Shaw. Accordingly, Shaw, like Moegle, is also entitled to qualified immunity." Op. 19.

Argument

I. The Panel Misapplied *Smith v William-Ash* Causing an Unjust Result.

In *Williams-Ash*, this Court found that "the Smiths needed to explicitly withdraw the consent they explicitly gave". *Williams-Ash*, 520 US at 601. To have *explicitly withdrawn the consent they explicitly gave*, this Court determined that the Smiths simply needed to follow the safety plan's instructions "contact your caseworker immediately if you decide you cannot or will not be able to continue following the plan." *Id*. at 600. This Court notes that the Smiths only allege that they "repeatedly asked Williams-Ash what else they needed to do to allow the children to return". *Id*. at 598. However, the Smiths did not "allege that they attempted to contact Williams-Ash--or anyone else at

Children's Services--to revoke their consent" by indicating that they "cannot or will not be able to continue following the plan." *Id*. at 600. This Court correctly found, "in light of the Smith's admitted failure to utilize the safety plan's clear, simple mechanism for rescinding the plan, they fail to raise a genuine issue of material fact with respect to their continuing consent to the plan." *Id*. at 601.

The Panel (incorrectly) finds that "Bambach's conduct—asking when he could have his kids back without directly saying that he no longer agreed to have them stay with Amy—almost perfectly tracks the parents' conduct in *Williams-Ash*." However, this simply isn't so. In *Williams-Ash*, the Smiths conduct clearly illustrates that they were always acting within the plan ("repeatedly asked Williams-Ash ***what else they needed to do*** to allow the children to return". *Id*. at 598 (emphasis added)). Where, Bambach was uncooperative with Moegle, changed his mind about meeting with her and meeting with law enforcement, unlike the Smiths, Bambach did not continue to act within a plan, and he did call Moegle. Four days after being informed of the allegations, Bambach called Moegle wanting to know when he was getting his kids back. Investigative Report, R. 84-9, PageID 2505; during that phone call, Bambach ***made it clear*** to Moegle that he wanted his girls back. Bambach Dep., R. 84-2, PageID 2360; Moegle warned him not to contact the girls in any manner and said, "if I tried to contact them or see them or anything she would take out a PPO against me." Bambach Dep., R. 84-2, PageID 2358-2359; the following day, Mark told

Moegle, "he is not going to talk to LE and he is taking the 5th". Investigative Report, R. 84-9, PageID 2506; and "Mark stated that he is not coming in to the DHHS office to talk to this worker. According to Mark he was advised not to talk to LE or CPS". Investigative Report, R. 84-9, PageID 2507. Defendants even acknowledge that "Bambach refused to work with Lapeer County CPS, even after Moegle offered to meet with both Bambach and his attorney." Def. Mot. for S.J., R. 82, PageID 1626. Defendants further admit that they knew Bambach changed his mind about working with CPS because Bambach, under the advice of his attorney, told Moegle on December 29, 2015 that he would no longer speak with Lapeer County CPS. Def. Mot. for S.J., R. 82, PageID 1626.

Moreover, if the Smiths would have done what Bambach did, they would have triggered the mechanism for rescinding the plan—indicating to William-Ash that they "cannot or will not be able to continue following the plan", and this Court would have found that they explicitly revoked their consent, "***thus requiring Children's Services to either return the children or file a formal complaint against them.***" *Williams-Ash*, 520 F3d at 600-01 (emphasis added). However, unlike *Williams-Ash*, these facts do raise a genuine issue of material fact with respect to Bambach explicitly (or expressly) withdrawing his consent to the temporary placement of his daughters with Amy Bambach. As this Court acknowledged in *Fisher v Gordon*, 782 F App'x 418, 423 (6th Cir 2019) (unpublished opinion), "[w]e next must determine if the Fishers' statements, behaviors,

and lack of objections, were enough for a reasonable official to conclude that the Fishers verbally consented to B.N.F.'s removal", so logically this Court must acknowledge that Bambach's conduct, behaviors, and statements were enough that a reasonable official could conclude Bambach verbally or explicitly revoked his consent.

II. The Panel Erred by Departing from the Summary Judgment Standard and Not Viewing the Facts in a Light Most Favorable to the Bambachs.

In holding that Moegle's actions did not violate clearly established law, the Panel failed to view the facts at summary judgment in a light most favorable to the Bambachs. The Panel is not supposed to "weigh the evidence" and resolve factual disputed issues in favor of the moving party. *Anderson v Liberty Lobby, Inc*, 477 US 242, 249; 106 S Ct 2505; 91 L Ed 2d 202 (1986).

Resolving the question of qualified immunity at summary judgment requires a two-pronged inquiry where "[t]he first asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury…show the officer's conduct violated a [federal] right'" and "[t]he second prong of the qualified-immunity analysis asks whether the right in question was 'clearly established' at the time of the violation." *Tolan*, 572 US at 655-56. Courts have discretion to decide the order in which to analyze the two prongs of qualified immunity. *Pearson v Callahan*, 555 US 223, 236; 129 S Ct 808; 172 L Ed 2d 565 (2009). However,

"under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 US at 656.

The Supreme Court stressed, in qualified immunity cases, the importance of drawing inferences in favor of the nonmovant, even when a court only decides the clearly established prong. *Id*. at 657. While the Supreme Court has "instructed that courts should define the 'clearly established' right at issue [in fourth amendment cases] on the basis of the 'specific context of the case'", it also warned that courts "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id*. at 657. In other words, the Panel cannot decide disputed factual issues at the summary-judgment stage, and if the appeal from a denial of qualified immunity turns on an issue of fact, the court may not exercise jurisdiction. *Johnson v Jones*, 515 US 304, 319-20; 115 S Ct 2151; 132 L Ed 2d 238 (1995).

Here, the Panel improperly took the facts in a light most favorable to the Defendants, thereby, weighing the evidence and resolving the disputed issues in favor of the *moving* party. More specifically, the Panel relied on its view of the evidence that "asking when he could have his kids back without directly saying that he no longer agreed to have them stay with Amy" did not suffice to withdraw his consent Op. 14, when (as discussed above) Bambach was uncooperative with Moegle, changed his mind about meeting with her and meeting with law enforcement, told her he wanted his kids back, refused to talk to her or law enforcement, and stated he was pleading the 5th. The Panel also

stated that Bambach never made an *explicit* request to Moegle asking that his children be returned Op. 15, when Bambach testified in his deposition that during a phone call with Moegle, he "made it clear" that he wanted his girls back. Bambach Dep., R. 84-2, PageID 2360. Despite Bambach's statements and conduct, the Panel states that "it was reasonable for Moegle to believe she never lost Bambach's explicit consent to his daughters' temporary placement with Amy" Op. 18, which is a factual determination. Considered together, the particular facts of this case lead to the inescapable conclusion that the Panel failed to properly view key evidence in a light most favorable to the Bambachs. Where the legal question—here, consent—turns on the resolution of disputed fact issues, a jury must determine liability. *Tolan*, 572 US at 656-57.

III. Had the Panel Use Bambachs' Facts, It Would Have Easily Determined the Rights Were Clearly Established.

The Panel's use of the facts in light most favorable to the Defendants—that Bambach's revocation of consent was "implicit"—required the Panel to resolve a factual argument before it could reach the second prong of the qualified immunity analysis. Defendant's argument throughout summary judgment was that Bambach did not revoke. Until the appeal, Defendants never made a 'clearly established law' argument.

Bambach asserts he made it very clear that he revoked his consent. Using the facts in light most favorable to the Defendants, the Panel fashioned the

question to ask, "whether state employees violated the Fourth Amendment when a parent "grant[s] explicit consent to a temporary removal—***which constitutes a reasonable seizure*** under the Fourth Amendment—and then ***attempting to impliedly withdraw*** that consent ***by inquiring about the status of the investigation and what Bambach needed to do to get his children back.***" Op. 17 (emphasis added).

Had the Panel actually taken the facts in light most favorable to the Plaintiffs, as is required, there would be no need to resolve a factual argument before reaching the second prong. They must be asked as if Bambach *in fact*, revoked consent, whether expressly or explicitly, but *not* implicitly. Under those facts since consent was revoked and no longer exists, the law is clear. It has been ***clearly established*** (at minimum) since ***December 5, 2015*** that, absent consent or exigent circumstances, a ***social worker cannot seize a child without a warrant.*** *Barber v Miller*, 809 F3d 840 (6th Cir 2015). Likewise, it has been ***clearly established*** since ***1983***, and more recently in ***2013***, that the ***Fourteenth Amendment*** requires a social worker to provide a parent ***procedural due process before seizing a child from that parent's custody***. *Doe v Staples*, 706 F2d 985 (6th Cir 1983); *Kovacic v Cuyahoga County Dept of Children and Family Services*, 724 F3d 687 (6th Cir 2013). If Moegle then refuses to return the children or hold a hearing, she will have unequivocally and knowingly violated the Bambachs' Fourth and Fourteenth Amendment protected rights.

This case is, therefore, especially appropriate for *en banc* review.

Conclusion

For the foregoing reasons, the Court should grant rehearing *en banc*.

Respectfully submitted,

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