No. 19-1419
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Dwight D. Mitchell, et al.,
Appellants
v.
Dakota County Social Services, et al.,
Appellees

Appeal from the United States District Court for the District of Minnesota
Case No. 0:18-cv-01091 (WMW/BRT)
Judge Wilhelmina M. Wright, Presiding

BRIEF OF APPELLEES DAKOTA COUNTY SOCIAL SERVICES, PATRICK COYNE, JOAN GRANGER-KOPESKY, LESLIE YUNKER, DIANE STANG, SUSAN BORELAND, CHRIS P'SIMER, CHRISTINA AKOLLY, KATHRYN SCOTT, ELIZABETH SWANK, AND DAKOTA COUNTY

Erick G. Kaardal
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55410
Telephone: (612) 341-1074
Attorney for Appellants

Kathryn Iverson Landrum
Office of the Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
Telephone: (651) 757-1189
Attorney for Appellees Emily Piper-Johnson, Jacob Trotsky-Sirr, and Tanya Derby

Helen R. Brosnahan
Jeffrey A. Timmerman
Dakota County Attorney's Office
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438
Attorneys for Appellees Dakota County Social Services, Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Chris P'Simer, Christina Akolly, Kathryn Scott, Elizabeth Swank, and Dakota County

SUMMARY OF THE CASE

This case is about a parent who is dissatisfied with the outcome of a Minnesota child protection matter. Despite conceding that he broke the law and was convicted of the offense of malicious punishment of a child by using unreasonable force or cruel discipline that was excessive under the circumstances, Dwight Mitchell alleges Dakota County and its employees committed numerous instances of misconduct, and engaged in a conspiracy with his former wife, the mother of his children Bryce Mitchell, AM and XM,[1] to return the children to her custody.

The Amended Corrected Complaint (hereinafter, the "ACC") asserts nineteen causes of action against Dakota County, Dakota County Social Services, Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Chris P'Simer, Christina Akolly, Kathryn Scott, and Elizabeth Swank, (hereinafter, the "County Appellees"), as well as three state officials. The Mitchell Appellants along with Stop Child Protection Services From Legally Kidnapping (hereinafter, "SCPS") also challenged the constitutionality of Minnesota's child protection statutes. All claims were dismissed. The decision of the District Court must be affirmed. The County Appellees request oral argument.

[1] Dwight Mitchell, Bryce Mitchell, AM and XM are hereinafter collectively referred to as the "Mitchell Appellants."

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On January 28, 2019, the District Court entered an order (hereinafter, the "Dismissal Order") granting the Appellees' motions to dismiss the claims asserted against them in Appellants' ACC. Appellants' Appendix 1-23.[2] Judgment was entered on January 29, 2019. *Id.* at 24. Appellants appealed the judgment on February 22, 2019. *Id.* at 480-481. This Court has jurisdiction over their appeal. *See* 28 U.S.C. § 1291.

[2] Appellants' Appendix is cited *infra* as "Appellants' App. __." County Appellees have filed an appendix, cited herein as "County App. __." Pincites to specific numbered paragraphs of the ACC and affidavits are included for ease of reference.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the ACC state a procedural due process claim in the absence of an allegation of any omission of process?

Most Apposite Cases

Mathews v. Eldridge, 424U.S. 319 (1976)
Forrester v. Bass, 397 F.3d 1047 (8th Cir. 2005)

2. Does the ACC state a substantive due process claim in the where there was not violation of a clearly established constitutional right and no allegations of severe abuse of power?

Most Apposite Cases

In re Scott County, 672 F.Supp. 1152 (D. Minn. 1987)
White v. Smith 696, 696 F.3d 740 (8th Cir. 2012)

3. Does the ACC state a civil rights conspiracy claim, where the Mitchell Appellants failed to plead facts tending to show a meeting of the minds among the alleged conspirators or that the County Appellees acted with class-based invidiously discriminatory animus?

Most Apposite Case

Nelson v. City of McGehee, 876 F.2d 56 (8th Cir. 1989)
Lewellen v. Raff, 843 F.3d 1103 (8th Cir. 1999)
Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986)

4. Have the Mitchell Appellants waived appellate review of their dismissed section 1985 and section1986 claims where they failed to make any argument as to why they should be revived.

Most Apposite Case

J.E.F. Industries, Inc. v. Schoemaker, 763 F.2d 348 (8th Cir. 1985)

5. Are the County Appellees entitled to sovereign immunity from the Mitchell Appellants official-capacity claims?

Most Apposite Cases

Christensen v. Mower Cnty, 587 N.W.2d 305 *(Minn. Ct. App. 1998)*

6. Does absolute immunity bar the Mitchell Appellants federal claims against the County Appellees?

Most Apposite Case

Winslow v. Smith, 696 F.3d 716 (8th Cir. 2014)
Reasonover v. St. Louis County, Mo,447 F.3d 569 (8th Cir. 2006)
Kovacic v. Cuyahoga Cnty Dept. of Children & Family Servs., 724 F.3d (6th Cir. 2013)
Thomason v. SCAN Volunteer Services, Inc. 85 F.3d 1365 (8th Cir. 1996)

7. Does absolute immunity bar the Mitchell Appellants' claims against the County Appellees?

Most Apposite Case

Cty & Cnty of San Francisco, Calif v. Sheehan, 135 S.Ct. 1765 (2015)
Ashcroft v. al-Kidd, 563 U.S. 731, 131 S.Ct. 2074 (2011)

8. Does official immunity bar the Mitchell Appellants state law claims?

Most Apposite Case

Elwood v. Rice Cnty, 423 N.W.2d 671 (Minn. 1998)
Larsen ex rel. Larson v. Independent School Distr. No. 361, 2004 WL 432218 (D. Minn. March 2, 2004)

9. Does the ACC state a claim under the UDJA when the Mitchell Appellants failed to plead any viable federal or state law claim?

Most Apposite Cases

Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611 (Minn. 2007)
Alliance for Metro Stability v. Met. Council, 670 N.W.2d 905 (Minn. App. 2003)

STATEMENT OF THE CASE

The Dismissal Order considers the facts[3] alleged in the ACC[4] and the exhibits thereto.

The Mitchell Appellants' ACC contains 19 claims against the Individual County Appellees,[5] Dakota County Social Services ("DCSS"), Dakota County, and three State Appellees, arising out of a child protection investigation, Child In Need of Protection or Services ("CHIPS") proceedings in state court, and Dwight Mitchell's corresponding criminal prosecution for malicious punishment of a child. Appellants[6] also challenged the constitutionality of several Minnesota Statutes. Each of the Mitchell Appellants' claims against the County Appellees as well as

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[3] The County Appellees do not admit the ACC's allegations but assume the veracity of those allegations for purposes of this appeal. However, conclusory allegations "are not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

[4] Dwight Mitchell filed the same lawsuit on behalf of himself and his children against the County Appellees on May 22, 2017, which he voluntarily dismissed on February 8, 2018, under Fed. R. Civ. P. 41 subsequent to the filing of a Report and Recommendation provisionally dismissing all his claims. Appellants filed a Complaint in this action on April 24, 2018 and an Amended Corrected Complaint on June 4, 2018, which contain substantially the same allegations as their prior lawsuit against the County Appellees.

[5] "Individual County Appellees" refers collectively to Appellees Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Chris P'Simer, Christina Akolly, Kathryn Scott, and Elizabeth Swank. Each Individual Appellee is referred to by their last name where applicable.

[6] "Appellants" refers collectively to the Mitchell Appellants and the SCPS.

the claims challenging the constitutionality of Minnesota's child-protection statutes were dismissed by the district court.

I. Dwight Mitchell's boys removed from his care in response to maltreatment report.

Dwight Mitchell ("Mitchell") is a New Jersey resident and father of three boys: Bryce Mitchell, XM (born in 2004), and AM (born in 2008). Appellants' App. 26 ¶6. He came to Minnesota on a temporary work assignment with his three boys, his wife at the time (Litvinenko), and her son, ML. *Id.* at 31 ¶A, 37 ¶27.

On February 15, 2014, XM "received a spanking" from Mitchell for "months of repeated offenses" after Mitchell's attempts to correct XM's behavior using non-corporal measures failed. *Id.* 32 ¶28. The following evening, Mitchell and Litvinenko went to dinner and left XM, AM, and ML with a babysitter. *Id.*

The babysitter called the police at XM's behest to report the spanking. *Id.* ¶29. Apple Valley police immediately removed all three children from the home without first obtaining permission from Mitchell or a court order. *Id*. at 32 ¶29, 34 ¶*34*.

Upon arriving at the police station, Mitchell was immediately arrested and booked on a charge of malicious punishment of a child and advised not to have any contact with his boys. *Id.* at 34 ¶34. Police and Boreland proceeded to interview Litvinenko, XM, AM, and ML. *Id.* at 33 ¶31. Litvinenko denied Mitchell was abusive, claiming she had no knowledge of him ever using corporal punishment

and was not present when XM was spanked. *Id.* at 35 ¶39. Boreland did not believe Litvinenko and vowed to permanently remove the boys from Mitchell's care. *Id.* at 36 ¶40.

II. The alleged Campos conspiracy.

According to the Mitchell Appellants, Boreland orchestrated the removal of XM and AM from Mitchell's care on February 16, 2014, because she was intent on reuniting them with their biological mother, Eva Campos (hereinafter "Campos"), who resides in Spain. *Id*. at 33 ¶33, 36 ¶41, 130 ¶549. There is no indication in the ACC that Boreland and Campos were previously acquainted in any way.

Campos has a sordid criminal past and spent time in prison in New Jersey for (among other things) plotting to kill Mitchell and abscond to Spain with the children. *Id.* at 37-40 ¶¶45-61. She also raised unsubstantiated abuse allegations against Mitchell in New Jersey and made false reports of abuse concerning Mitchell in Spain. *Id*. at 33 ¶32.

Boreland and Campos spoke several times on February 16, 2014. *Id.* at 33 ¶¶32-33. During those conversations, Campos accused Mitchell of abusing their boys for ten years and urged Boreland to use the Minnesota court system to punish Mitchell because New Jersey courts and social services had failed to intervene. *Id.* The Mitchell Appellants characterize Campos' abuse allegations as outlandish, yet Boreland believed them. According to the Mitchell Appellants, Boreland and

Campos entered a scheme that day to permanently divest Mitchell's parental rights. *Id. at 34 ¶ 34, 46 ¶86.*

The Mitchell Appellants believe the scope of this conspiracy was breathtaking. They claim, for instance, that Boreland manufactured a fake interview with one of his former nannies and that Borland, P'Simer, Scott, Swank, and Sir orchestrated Bryce Mitchell's expulsion from boarding school to facilitate his return to Minnesota (and, in turn, his escape to Spain). *Id*. at 40 ¶157, 66 ¶160, 70 ¶170.

III. CHIPS case commences.

At an emergency hearing on February 20, 2014, Boreland reiterated that she would do everything in her power to ensure Mitchell's children were permanently removed from his custody. *Id*. at 41 ¶68. Mitchell told Boreland that Campos and the children were lying about prior instances of abuse. *Id.* at 43 ¶*75*. In response, Boreland asked "why are all black families so quick to spank their children?" *Id*.at 41 ¶*70.*

The hearing followed the filing of a state-court petition Boreland prepared.[7] *Id.* at 44 ¶76. The Mitchell Appellants claim Boreland lied to the court by failing to disclose she was in cahoots with Campos, by referencing prior abuse allegations

[7] The petition Appellants reference is a CHIPS petition. *See* Minn. Stat. §260C.141.

"she knew were not true," by stating Mitchell was uncooperative, and by representing that alternative out-of-home placement options had been pursued and ruled-out. *Id.* ¶77. Based on these alleged omissions and misrepresentations, the state court granted the CHIPS petition. *Id.* at 52 ¶103.

After the hearing, Boreland served Litvinenko with a separate CHIPS petition concerning ML. *Id.* at 45 ¶78. Boreland warned Litvinenko that ML would be removed from her care unless they lived apart from Mitchell. *Id.* at 45-46 ¶¶79-85. This caused Mitchell and Litvinenko to live separately for five months. *Id.* Akolly, the DCSS social worker assigned to Litvinenko's case, was complicit in keeping Mitchell and Litvinenko apart. *Id.* at 56 ¶¶124-28. The separation impelled Mitchell and Litvinenko's decision to divorce. *Id.* at 84-85 ¶¶218-19.

Boreland submitted an amended CHIPS petition that was heard on February 26, 2014. *Id.* ¶87. It did not reflect that Mitchell's children had resided in New Jersey or that they were subject to a custody order entered by a New Jersey court. *Id.* at 47 ¶88. This information was intentionally omitted from the amended CHIPS petition, the Mitchell Appellants say, "to keep the case in Minnesota." *Id.* Additionally, they claim the amended petition failed to disclose XM's and AM's conflicting statements and other "exculpatory evidence." *Id.* at 48-50 ¶¶89-96. Scott, an assistant county attorney, reviewed and made a "sworn certification" of

the amended petition,[8] which the state court granted. *Id.* at 50 ¶98, 52 ¶¶103-105, 118 ¶359.

XM and AM were resultantly left in DCSS's custody for placement in foster care. *Id.* at 52 ¶106, 118 ¶359. The state court directed DCSS to prepare and file a case plan; Mitchell was never provided said case plan. *Id.* at 52-53 ¶¶108-9. Boreland, P'Simer and Scott subsequently received a copy of the New Jersey custody order on March 5, 2014, but did not contemporaneously disclose it to the state (Minnesota) court. *Id.* at 52-54 ¶¶110-13.

IV. The UCCJEA and its supposed role in the alleged Campos conspiracy.

Much of the Mitchell Appellants' ACC is devoted to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). They allege under the UCCJEA, the Minnesota court lacked subject-matter jurisdiction to adjudicate Mitchell's parental rights. Appellants' App. at 47 ¶88, 51 ¶¶99-101, 54 ¶112, 57-58 ¶¶136-141. Instead, they claim, only the New Jersey court could alter his custodial rights. *Id.*

The Mitchell Appellants accuse Boreland, P'Simer, Akolly, Stang, Yunker, Kopeskey, Coyne, and Scott of hijacking the New Jersey court's jurisdiction in furtherance of the conspiracy to reunite Mitchell's children with Campos in Spain.

[8] Scott approved the Petition as to form after determining reasonable grounds existed for the Petition. *See* Minn. Stat. §260C.141, subd. 4.

Id. at 57-58 ¶¶139-42. They further accuse the other County Appellees of participating in this supposed jurisdiction-wrangling scheme, along with XM's public defender (Derby) and a court-appointed guardian ad litem (Trotzky-Sirr)—each of whom, supposedly, conspired collectively to aid Campos. *Id.* ¶¶142.

V. Subsequent CHIPS proceedings.

DCSS ultimately made a maltreatment finding against Mitchell. *Id*. at 62 ¶153. He sought reconsideration of the finding with Yunker, Kopesky, and Coyne, and notified them of Boreland's race-based comments and his interpretation of the UCCJEA. *Id.* at 62-63 ¶¶153-56.

Meanwhile, P'Simer, the new child protection worker assigned to Mitchell's case, likewise did not disclose the New Jersey custody order to the Minnesota court, insisting instead that Minnesota had jurisdiction over the family. *Id.* at 53 ¶¶110-11. P'Simer did this, the Mitchell Appellants say, in furtherance of the burgeoning Campos conspiracy. *Id.* at 54 ¶113, 64 ¶157, 66 ¶159, 76 ¶196, 80 ¶200. They also claim P'Simer and others failed to complete case, reunification, safety, or visitation plans and submit them to the parties and court. *Id.* at 53 ¶109, 75 ¶192, 82 ¶204, 90 ¶251, 93-96 ¶¶261-65, 100 ¶277. And, according to the Mitchell Appellants, the reports and other documentation that P'Simer and others did submit to the court were false. *Id.* at 67 ¶¶161-62, 77 ¶198, 80 ¶200, 81 ¶202, 89 ¶247, 101 ¶283, 102 ¶286.)

Mitchell was permitted to have supervised visitations with AM and did so approximately three times per week. County App. 94, (ACC Exhibit 13 COMPL 000072). XM refused to participate, showing no interest in visiting with Mitchell. *Id*. XM and AM were forced into therapy against Mitchell's wishes. Appellants' App. at 75 ¶190, 91 ¶254. Finally, Mitchell was allowed to speak with XM, who asked why Mitchell had not contacted him and claimed Boreland and P'Simer, Sir and Derby had falsely stated that Mitchell "wanted nothing more to do with him." *Id*. at 85 ¶222.

At a settlement conference on July 10, 2014, Mitchell was presented with a quandary: he could return to New Jersey with Bryce and AM, but only if he agreed that XM—the subject of the DCSS maltreatment report—was in need of long-term protective services and should remain in Minnesota. *Id.* at 74-75 ¶¶188-92. Mitchell reluctantly agreed and returned to New Jersey with Bryce and AM on July 21, 2014. *Id.* at 75 ¶193. P'Simer ultimately moved to terminate Mitchell's parental rights[9] vis-à-vis XM and notified the court for the first time of the New Jersey custody order. *Id.* at 103 ¶288.

Mitchell was ultimately reunited with XM on December 4, 2015, after his CHIPS case was voluntarily dismissed. *Id.* at 87 ¶228. In all, Mitchell was

[9] The motion was to *transfer custody* not to terminate Mitchell's parental rights. *See* County App. 9-47.

separated from AM for five months and XM for 22 months. *Id.*, 159 ¶573.

VI. Mitchell's criminal case.

While the CHIPS case was proceeding, Mitchell was also criminally charged with malicious punishment of a child.[10] *Id*. at 68 ¶165. Swank, the prosecutor, unsuccessfully sought a no-contact order to prevent Mitchell from exposing Campos' lies to their children. *Id.* The Mitchell Appellants claim Swank worked in concert with Boreland, P'Simer, and others to transfer custody of AM and XM to Campos *Id*. at 46 ¶86, 47 ¶88, 61 ¶150. Ultimately, Mitchell pled guilty to and was sentenced. *Id* at 73 ¶184, Exhibit 25.[11]

SUMMARY OF THE ARGUMENT

Disregarding this Court's guidance that "a brief addressing more than four or five issues is too diffuse and gives the reader the impression that no single issue is very important," 8th Cir. IOP §III(I)(4) (2013), Appellants seek to reverse the decision of the district court. They do so by recycling arguments the district court rejected and improperly raising new legal theories that they did not ask the district court to consider.

The Dismissal Order is correct in all regards. The Mitchell Appellants failed

[10] *See* County App. 130-33, ACC Exhibit 25, Order Warrant of Commitment in *State v. Mitchell*, 19HA-CR-14-711 (Dakota County Dist. Ct.)

[11] See County App. 130-33, ACC Exhibit 25, Order Warrant of Commitment in *State v. Mitchell*, 19HA-CR-14-711 (Dakota County Dist. Ct.)

to allege anything other than conclusory and speculative allegations which fail to state a claim. The Mitchell Appellants substantive and procedural due process claims fail. While they are dissatisfied with the outcome of the CHIPS proceedings, it is not a cognizable due process claim.[12] Similarly, the Mitchell Appellants claims are too speculative and fail to allege conscience-shocking conduct.

As to the Mitchell Appellants constitutional claims against the County,[13] they are based solely on the individual Mitchell Appellants' interactions with various Individual County Appellees and do not provide any indication of a widespread County policy. Further, the Mitchell Appellants fail to plead facts suggesting that a deliberately indifferent County policy or custom caused the alleged constitutional violations.

The Mitchell Appellants conspiracy claims are based wholly on fantastical allegations that the County Appellees manufactured evidence with Campos to return physical custody of the three children to her in Spain, as well as to ensure that Bryce Mitchell was expelled from his high school. However, nothing other

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[12] To the extent that Appellants challenge the outcome of any state court proceeding the federal courts lack subject matter jurisdiction to entertain such challenges. *P.G. v. Ramsey Cnty*, 141 F. Supp. 2d 1220, 1229-30 (D. Minn. 2001)(citing *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

[13] "County" refers to Dakota County.

than conclusory allegations were pled to show a meeting of the minds of the alleged conspirators.

Finally, the County Appellees are entitled to immunity for discretionary acts during the CHIPS proceeding. Indeed, the Mitchell Appellants concede that the Individual County Appellees have immunity because, according to them, Minnesota law requires them to treat spanking as child abuse and the federal courts have not resolved the constitutionality of CHIPS intervention based upon a parent's use of force on a child.

ARGUMENT

I. The Mitchell Appellants claims fail.

Parents have a fundamental interest in the care, custody, and management of their children. *Fitzgerald v. Williamson*, 787 F. 2d 403, 407 (8th Cir. 1986); *Ruffalo by Ruffalo v. Civiletti*, 702 F.2d 701, 715 (8th Cir. 1983)). That right is not absolute, however. *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987), *abrogated on other grounds*, *Burns v. Reed*, 500 U.S. 478 (1991); *see also Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994) ("The right to familial integrity, however has never been deemed absolute or unqualified.").

"[T]he liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents

themselves." *Myers*, 810 F.2d at 1462. To that end, "[t]he right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Thomason v. SCAN Volunteer Services, Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996).

The Mitchell Appellants claim their substantive and procedural due process rights were violated by the Individual County Appellees failure to comply with the UCCJEA and Minnesota law, and that the Individual County Appellees interfered with their familial relationship. The district court properly found the Mitchell Appellants failed to state any actionable due process claim.

A. Procedural and substantive due process.

The Mitchell Appellants continue to expend significant effort attempting to boot strap their 42 U.S.C. § 1983 claims to the Individual County Appellees alleged violation of the UCCJEA. This is a red herring because the UCCJEA is immaterial to the analysis of the Mitchell Appellants' constitutional claims and any violation of the UCCJEA cannot support a § 1983 claim. *See Slaven v. Engstrom*, 848 F. Supp. 2d 994, 1002 (D. Minn. 2012). The UCCJEA merely establishes an administrative process by which interjurisdictional custody disputes are resolved. *See generally* Minn. Stat. § 518D.101 et seq. In the instant case, the children were removed under exigent circumstances by the police and an Emergency Protective

Care hearing was held on Feb. 20, 2014.[14] *See* Minn. Stat. § 260C.175 subd. 1, (2). The state court exercised jurisdiction over the proceedings starting with the EPC hearing on February 20, 2014. *Id.*

1. The Mitchell Appellants procedural due process claims fail.

To state a claim for a violation of procedural due process, a plaintiff must allege that defendants deprived them of a protectable liberty or property interest without providing adequate safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332-333, 96 S.Ct. 893, 901-902 (1976), *see also* Dismissal Order, Appellants' App. 9.

In *Board of Regents v. Roth*, the Supreme Court explained that to have a property interest in a benefit, an individual "must have more than an abstract need or desire…[or] a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." 408 U.S. 564, 576-77 (1972). A state-created liberty interest arises when a state imposes "substantive limitation on official discretion." *Forrester v. Bass*, 397 F.3d 1047, 1055 (8th Cir. 2005). Put otherwise, a state creates a liberty interest by mandating the outcome to be reached upon finding particular criteria have been met. *Id.*

Minnesota's child welfare statutes and related procedural regulations

[14] *See* County App. 1-8, Findings and Order Emergency Protective Custody Hearing (hereinafter "EPC").

do not "bestow…a property interest in social services[,] nor create a constitutional liberty interest in due process." *Doe v. Hennepin Cnty.*, 858 F.2d 1325, 1328 (8th Cir. 1998); *Myers*, 810 F.2d at 1469. In *Myers*, the court concluded that, at most, Minnesota law "establishes guidelines to be followed as a matter of state law and neither confers nor embodies any constitutionally-protected rights." 810 F.2d at 1459. In *Doe*, the Court determined "to have a legitimate entitlement, the benefit must be specific, i.e., clearly definable, such as public assistance, social security, or unemployment benefits." *Forrester*, 397 F.3d at 1056 (citing *Doe*, 858 F.2d at 1328).

Just as in *Doe*, *Myers*, and *Forrester*, the statutes the Mitchell Appellants claim the Individual County Appellees violated contain no substantive predicates expressly limiting the discretion of public officials by dictating particular outcomes. These laws simply provided the Mitchell Appellants an expectation that certain procedures will be followed—not that a particular outcome would result. *See Forrester*, 397 F.3d at 1057 ("[P]rocedures themselves are not benefits within the meaning of

Fourteenth Amendment jurisprudence") (other citation omitted).[15] No precedent exists suggesting that a failure to strictly follow the UCCJEA or a state's codification thereof rises to the level of a constitutional violation. Plaintiffs' procedural due process claim fails for this reason alone.

Inapposite to Mitchell's claims, the ACC affirmatively demonstrates that Mitchell *was* provided adequate due process before his children were removed. An EPC hearing was held less than a week after the removal and a CHIPS hearing within a week after that. (*See* County App. 61 (Notice of EPC Hearing); County App. 1-8 (Emergency Protective Care Hearing Findings and Order); Appellants' App. 41 ¶ 68, 42-45 ¶¶74-79, 46 ¶86[16].) These prompt post-deprivation hearings satisfy due process. *In Re Scott Cnty.*, 672 F.Supp. 1152, 1170 (D. Minn. 1987). The district court properly found the ACC contains no allegations of any omission of procedural

[15] The Mitchell Appellants fail to acknowledge that they, too, had an equal obligation to notify the state court of the New Jersey custody order. *See* Minn. Stat. § 518D.209 (d) ("*Each* party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding")(emphasis added).

[16] While Mitchell fails to acknowledge that an EPC Hearing occurred on 2-20-14, he was present, and acknowledged service of the Court's order that AM and XM continue to be placed in foster care until the 2-26-14 hearing. *See* Feb. 20, 2014 Order, County App 1-8.

safeguards, thus the district court properly found the Mitchell Appellants failed to state a claim.

Similarly, Mitchell has failed to state a due process claim related to the alleged deprivation of his interest in living with Litvinenko. It is unclear whether living with a spouse is subject to due process protections. *See* Appellants' App. 9 (Dismissal Order), citing *Kerry v. Din*, 135 S.Ct. 2128, 2133-35 (2015) (plurality) ("holding that spousal cohabitation is not a protected interest under procedural due process and explaining that procedural safeguards are not triggered merely because 'a regulation in anyway touches upon an aspect of the marital relationship'"). Whether or not due process protections apply is immaterial because the ACC does not allege how any Individual County Appellee deprived Mitchell of spousal cohabitation. Appellants' App. 9. The ACC alleges that county officials warned Litvinenko that she could lose custody of her child, ML, at least temporarily, if she continued to reside with Mitchell. At some unspecified time after this conversation, Litvinenko moved. *Id*. The district court properly found no nexus between the Individual County Appellee's conduct and Mitchell's separation from Litvinenko. *Id*. at 10-11.

2. The Mitchell Appellants' substantive due process claims fail.

"The substantive component of the due process clause bar[s] certain government actions regardless of the fairness of the procedures used to implement them…[and thereby] serves to prevent government power from being used for purposes of oppression." *In re Scott Cnty*, 672 F.Supp. at 1164 (internal quotations and citations omitted). "Before official conduct or inaction rises to the level of a substantive due process violation[,] it must be so egregious or outrageous that it is conscience-shocking." *Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2004). The Supreme Court has cautioned that the Due Process Clause does not impose liability whenever a state actor causes harm. *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48 (1998). Negligence is categorically beneath the threshold of constitutional due process. *Id*. at 848-49.

"Conscience-shocking behavior includes "[o]nly the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." Appellants' App. 11, citing *White v. Smith*, 696 F.3d 740, 757-58 (8th Cir. 2012). An officer relying on coerced testimony, even though the witness's proffered time, location, and description of a

murder were incorrect, constitutes conscience-shocking conduct. *Id*. 11-12. An officer's unsubstantiated and inaccurate statement in minor reports, such as shoplifting reports, do not shock the conscience. *Id*. *citing Krogh v. Sweeney*, 195 F.Supp.3d 1049, 1054 (D. Minn. 2016).

The Mitchell Appellants lose sight of the fact that the purpose of CHIPS proceedings is to protect the welfare and safety of children. *See* Minn. Stat. § 260C.001, subd. 2. The Mitchell Appellants argue notifying the CHIPS court of the existence of the New Jersey custody order would have stopped the CHIPS proceeding in Minnesota. This assertion is absurd. Indeed, the New Jersey custody order is a red herring in this case. Taken to its logical conclusion, no parent who abuses their child can be subject to a CHIPS proceeding if parenting/custody has been established by a court in another state. This is not the law. *See Slaven*, 710 F.3d at 779-80 (there is no constitutional right to be free from child abuse investigations, particularly where the state's interest in protecting children is considered necessary against the parents themselves).

Similarly, the notion that Boreland or any other Individual County Appellee should have accepted the "exculpatory evidence provided by the Mitchell babysitter" and decided that no child abuse occurred is equally

absurd. Babysitters typically are not privy to child abuse. Rather, the failure to inform the CHIPS court about the New Jersey order, or including unverified or inaccurate statements in a report, is akin to the conduct in *Krogh*, neither is conscience-shocking. *See Id*. citing *Krogh.*

B. The Mitchell Appellants did not state any conspiracy claim.

The Mitchell Appellants argue the ACC purports to state conspiracy claims against the Appellees. Appellant's Brief at 39, 47. Allegations of a conspiracy requires a showing "that [a] defendant conspired with others to deprive [Appellants] of constitutional rights." *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008); *Marti v. City of Maplewood*, 57 F.3d 680, 686, (8th Cir. 1995); *see also Lewellen v. Raff*, 843 F.2d 1103, 1116 (8th Cir. 1988) (§ 1986 claim is dependent on valid § 1985 claim).

"Allegations of a conspiracy must be pleaded with sufficient specificity and factual support to suggest a meeting of the minds directed toward an unconstitutional action." *Nelson v. City of McGehee*, 876 F.2d 56, 59 (8th Cir. 1989) (quotations and citations omitted).

Here, the Mitchell Appellants' conspiracy claims are premised entirely on the fact that multiple Individual Appellees were involved in their related CHIPS proceeding in state court in which both Mitchell, and at times XM, refused to engage in a reunification plan as the law required them to do. It does not give rise

to a conspiracy to deprive them of their constitutional rights. The ACC is replete with conclusory allegations of conspiracy.[17] The ACC does not contain any "specific facts tending to show a meeting of the minds among the conspirators." *Livers v. Schenck*, 700 F.3d 340, 360-61 (8th Cir. 2012). Put otherwise, while the ACC conceivably supports an inference that the Individual County Appellees had an opportunity to communicate with one another, it pleads no facts plausibly suggesting that they conspired to deprive the Mitchell Appellants of their constitutional rights. The district court was justified in dismissing the conspiracy claims.

The Mitchell Appellants' §§ 1985 and 1986 claims fail for an additional reason. Namely, to establish a conspiracy claim under §§ 1985(2) or (3) – and by extension, under § 1986 – they were required to plead facts plausibly suggesting that the County Appellees acted with class-based, invidiously discriminatory animus. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1442, 1429-30 (8th Cir. 1986). Finally, by failing to raise and pursue the dismissal of the § 1985 and §1986 claims in their initial brief, Appellants have abandoned them. *J.E.F. Industries, Inc. v. Shoemaker*, 763 F.2d 348, 351 (8th Cir. 1985) (failure to argue

[17] Who orchestrated this supposed conspiracy? The Mitchell Appellants say it was his ex-wife Campos. Appellants' Brief 7-8; Appellants' App. 32 ¶29, 33 ¶¶32-33, 37-40

any alleged error in the dismissal "must be considered as abandonment of any claimed error in that regard.").

Accordingly, Appellants' Section 1985 and 1986 conspiracy claims fail.

C. The Mitchell Appellants' Equal Protection claims fail.

The Mitchell Appellants assert Dakota County liability can be inferred from Boreland's alleged discriminatory remarks. Appellants' Brief 43-44. They now assert that Boreland violated Section 1981. Both claims fail.

1. Appellants waived any Section 1981 claim.

Appellants did not raise any 42 U.S.C. § 1981 claims in response to the County Appellees dismissal motion in the district court and have, therefore, abandoned it. *See Morrow v. Greyhound Lines, Inc*., 541 F.2d 713, 724 (8th Cir. 1976) ("It is old and well-settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal."); *Richardson v. Sugg*, 448 F.3d 1046, 1059 (8th Cir.2006) (noting that this Court does "not consider arguments raised for the first time on appeal"); *see, e.g., Snider v. United States*, 468 F.3d 500, 512 (8th Cir. 2006) (declining "to broadly review issues not raised and ruled upon by the District Court").

2. Appellants failed to state an Equal Protection Claim.

The Mitchell Appellants failed to allege they were treated differently than similarly situated individuals and that treatment was based upon a suspect classification or a

fundamental right. *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992) ("you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence"), *aff'd on other grounds*, 510 U.S. 266 (1994); *Booher v. United States Postal Serv.*, 843 F.2d 943, 944 (6th Cir. 1988) ("The equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class."). But the relevant prerequisite is unlawful discrimination, not whether Appellants are part of a victimized class.

The Mitchell Appellants allege invidious discrimination was behind Boreland's alleged discriminatory comment. Appellants' App. at 41 ¶71, 62-64 ¶¶153-156, 138 ¶481, 144 ¶501; Appellants' Brief 46. These conclusory allegations are insufficient to show any Individual County Appellee's conduct was motivated by intentional discrimination. *See Armour & Co. v. Inver Grove Heights*, 2 F.3d 276, 279 (8th Cir. 1993). The Mitchell Appellants merely speculate as to Boreland's state of mind. *See Mann v. Yarnell*, 497 F.3d 822, 827 (8th Cir. 2007); *see also Windmar v. Sun Chemical Corp.*, 772 F.3d 457, 461 (7th Cir. 2014) (explaining evidence speculating about an employer's state of mind in an employment discrimination suit was insufficient to establish a claim).

The Mitchell Appellant's reliance on a reference in a 2002 Department of Human Services Report, reflecting the racial disparity between African-American

and white parents and children, to support their class-of-one claim is misplaced. The report does not address or pertain to any disparity existing in Dakota County's treatment of African-American and white families and therefore, is immaterial to any claims against Dakota County. Further, identifying the disparity in treatment is especially important in class-of-one cases. *Barstad v. Murray Cnty.*, 420 F.3d 880, 884 (8th Cir. 2005). Class-of-one "plaintiffs must provide a specific and 'detailed account of the nature of the preferred treatment of the favored class,' especially when the state actors exercise broad discretion to balance a number of legitimate considerations." *Nolan v. Thompson*, 521 F.3d 983, 990 (8th Cir. 2008)(other citations omitted). The District Court properly found the Mitchell Appellants failed to allege "invidiously dissimilar treatment relative to similarly situated persons." Appellant's App. 13.

D. The Mitchell Appellants' Fourth Amendment claims fail.

The Mitchell Appellants now argue the ACC asserts the initial seizure of XM and AM was unconstitutional. Appellants' Brief 19-20. This claim fails for three reasons. First, the Mitchell Appellants did not raise Fourth Amendment claims in response to the County Appellees dismissal motion in the district court and have, therefore, abandoned it. *See Morrow*, 541 F.2d at 724 ("It is old and well-settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal."); *Richardson*, 448 F.3d at 1059 (noting that this

Court does "not consider arguments raised for the first time on appeal"); *see, e.g.*, *Snider*, 468 F.3d at 512 (declining "to broadly review issues not raised and ruled upon by the district court").

Second, no Individual County Appellee removed the children. Rather, the Apple Valley Police Department seized the children. *See* County App 66 ¶f (ACC Exhibit 7); Minn. Stat. 260C.175. The County Appellees cannot be held liable for the actions of the Apple Valley Police Department.

Third, reasonable suspicion of child abuse existed to remove the children. *See K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006). Here, AM and XM were removed based upon sufficient allegations and physical manifestations of abuse perpetrated by Mitchell. Appellants' App. 32 ¶28, 34 ¶34; County App. 51, 66 ¶¶b-f, 7 (ACC Exhibits 4, 7, 11). The Mitchell Appellants admit that XM reported being abused to the babysitter, the police were called and XM and AM were interviewed. Appellants' App. 32 ¶29, 33 ¶31. There were observable injuries on both boys. County App. 51, 66 ¶¶b-f, 7 (ACC Exhibits 4, 7, 11). Dwight Mitchell told two of the Individual County Appellees to "look to XM's mother for permanent placement." (County App. 85, 138-39 (ACC Exhibits 13, 39 COMPL 000305-306).

Any claim for a violation of the Fourth Amendment against any of the Mitchell Appellant's fails.

E. Mitchell Appellants did not state a viable claim against the County.

Next, the Mitchell Appellants contend the district court erred in dismissing their official-capacity §1983 claims against the County for its policies and employees' unlawful practices and for its failure to train and supervise. Appellants Brief 46, 49, 52. These claims fail. First, absent a constitutional violation, no *Monell*,[18] supervisory, or failure-to-intervene liability attaches. Appellants must as a condition precedent plead facts establishing an underlying constitutional violation. *See Brockington v. City of Sherwoord*, 503 F.3d 667, 673-74 (8th Cir. 2007); *Brown v. City of Bloomington*, 280 F.Supp. 2d 889, 894 (D. Minn. 2003). The Mitchell Appellants have failed to do so. County and supervisory liability are available under §1983 where "an action pursuant to official municipal policy of some nature caused a constitutional tort. *Ulrich v. Pope County*, 715 F.3d 1054, 1061 (8th Cir. 2013) (citations omitted). Similarly, official capacity claims require proof of a policy or custom resulting in the constitutional violation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("More is required in an official-capacity action, however, for a government entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation") (citations omitted).

The Mitchell Appellants have failed to identify any particular custom or

[18] *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658 (1978).

policy that led to any alleged constitutional deprivations. *See Id.*(finding plaintiff's allegations that defendant's supervision and training practices were "inadequate" to support the claim.) In the instant case, the Mitchell Appellants essentially restate their general allegations related to their interactions with the County Appellees but point to no facts other than their own experience with a single CHIPS proceeding. Appellants' App. 148 ¶521)

The Mitchell Appellants merely allege generally that the County's failures to properly train and supervise were the moving force behind the constitutional violations alleged in their ACC. (*Id.* at 148-151 ¶¶521-26). The Mitchell Appellants only allege the County "knew or should have known, that by breaching the above mentioned duties and obligations that it was foreseeable that said failure would, and did, cause Mitchell and his children to be injured and damaged, and his constitutional rights to be impaired by the wrongful policies and acts as alleged herein, and that such breaches occurred in contravention of public policy and [Appellees'] legal duties and obligations to Mitchell and his children; and that such policies, practices, customs and procedures were the moving force behind the constitutional violations alleged herein above." Appellants' App. 151 ¶526.

As the district court properly concluded, the allegations in the ACC are "rooted in the individual plaintiffs' interactions with particular [Appellees]" and "provide no indication of a widespread policy." Appellants' App. 16. Rather, the

Mitchell's *Monell* claims are pled in conclusory fashion and fail to identify any specific County policies, practices or specific incidents suggesting failure to train leading to constitutional violations. (Appellants' App. 516, Appellants Brief. 48) Mechanical allegations of this ilk are insufficient *ipso facto* to raise an inference of *Monell*, supervisory, or failure-to-intervene liability. *See Ulrich*, 715 F.3d at 1061.

Had the Mitchell Appellants established a causal link, they nevertheless failed to plead any facts—other than their own isolated example—to support their official-capacity §1983 claims. The ACC alleges the County customarily fails to be compliant with jurisdictional requirements in CHIPS proceedings, while simultaneously conceding that the County does in fact observe the jurisdictional rules. (Appellants' App. 47 ¶88, 54-55 ¶116). As a matter of law, that is not enough to state a *Monell* claim against the County. *Ulrich*, 715 F.3d at 1061 ("Generally, an isolated incident of alleged police misconduct … cannot, as a matter of law, establish a municipal policy or custom creating liability under § 1983.") (citation omitted). What's more, Mitchell did not plead any facts supporting an inference that the County adopted these supervision and training practices with deliberate indifference to the constitutional rights of others, or that these practices were the product of the County's deliberate and conscious choices. *Id.*

F. The County Appellees are immune from liability.

1. Sovereign Immunity for Official-Capacity Claims

The district court correctly ruled that the federal courts lack subject matter jurisdiction over the Mitchell Appellants tort claims against the County Appellees. Municipalities and their officials are not liable for tort claims arising from an official's discretionary acts. Minn. Stat. § 466.03 subd. 6. Appellants' App. 19. Discretionary acts "balance policy objectives such as economic, social, and political factors." (*Christensen v. Mower Cnty*., 587 N.W.2d 305, 307 (Minn. Ct. App. 1998). Appellants' App. 19. All of the allegations in the ACC against the Individual County Appellees involve the exercise of their individual judgment during a CHIPS proceeding. *Id*. The investigation of child-abuse allegations and making case management decisions necessarily involves the "balancing of the parents' interest in the care and management of their children with the state's interest in the welfare of children." *Id*. As such, Minnesota has not waived sovereign immunity to the Mitchell Appellant's suit. *Id*. at 20.

2. Absolute immunity bars all federal claims against the County Appellees.

In the alternative, Swank, Scott, Boreland and P'Simer are immune from suit. "Prosecutors are entitled to absolute immunity from civil liability under § 1983 when they are engaged in prosecutorial functions that are intimately associated with the judicial process. Actions connected with the initiation of

prosecution, even if those actions are patently improper are immunized. *Winslow v. Smith*, 696 F.3d 716, 739 (8th Cir. 2012); *see also Reasonover v. St. Louis County, Mo*, 447 F.3d 569, 580 (8th Cir. 2006) ("immunity is not defeated by allegations of malice, vindictiveness or self-interest."). "Deciding which allegations to charge is the heart of prosecutorial discretion, absolutely protected by immunity. *Simes v. Ark. Jud. Discipline Comm'n*, 734 F.3d 830, 834 (8th Cir. 2013) (noting absolute prosecutorial immunity applies to decisions to bring an indictment "whether [the prosecutor] has probable cause or not." (citation omitted)).

A county attorney is likewise absolutely immune for the function of initiating juvenile dependency and neglect proceedings. *Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980); *see also Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984) (county attorney has absolute immunity for the initiation of child protective litigation). Here, the Mitchell Appellants' claims against Scott and Swank all relate to their actions in prosecuting the child protection matter or criminal charges, and both are absolutely immune from suit.

Similarly, social workers are entitled to absolute immunity when they engage in conduct "intimately associated with the judicial phase of the criminal process." *Kovacic v. Cuyahoga Cnty. Dept. of Children & Family Servs.*, 724 F.3d 687, 694 (6th Cir. 2013). "Social workers who initiate the judicial proceedings against those suspected of child abuse or neglect perform a prosecutorial duty, and

so are entitled to absolute immunity." *Rippy v. Hattaway*, 270 F.3d 416, 421 (6th Cir. 2001) (internal quotation marks omitted). "Filing the complaint for abuse, neglect, and temporary custody…, which initiated formal court proceedings, is clearly prosecutorial in nature …, and protected by absolute immunity." *Kovacic*, 724 F.3d at 694. Boreland and P'Simer are shielded by absolute immunity for initiating or maintaining judicial proceedings. *See Thomason*, 85 F.3d at 1373 ("To the extent [a child welfare worker is] sued for initiating judicial proceedings, [the worker's] role was functionally comparable to that of a prosecutor.

3. Qualified immunity bars the Mitchell Appellants claims.

The Individual County Appellees are entitled to qualified immunity. Public officials are immune from suit under § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Cty & Cnty of San Francisco, Calf. v. Sheehan*, 135 S.Ct. 1765, 1775 (2015) (internal quotation marks omitted). An official cannot be said to have violated a "clearly established law" unless the contours of a right were sufficiently clear that every reasonable official would have understood that what he is doing violates that right, meaning that "existing precedent…placed the statutory or constitutional questions beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 2083 (2011) (other citations and quotations omitted). This exacting standard "gives government officials breathing room to make reasonable but

mistaken judgments" by protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id*. at 743, 131, S.Ct. at 2085; *Sheehan*, 135 S.Ct. at 1774 (2015); *Gilmore v. City of Minneapolis*, 2015 WL 11189832 at *9 (D. Minn. Mar. 16, 2015).

The qualified immunity defense is "difficult to overcome." *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505, 510 (8th Cir. 1995). Even where this balancing reveals a constitutional violation, qualified immunity still applies unless the violation was so clear an objectively reasonable officer under the circumstances would have recognized the disproportionality or lack of reasonable suspicion. *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005).

The Mitchell Appellants' claims fail for two reasons. First, the two minor children were removed based upon sufficient allegations of physical abuse perpetrated by Mitchell. Appellants' App. 32 ¶28, 34 ¶34; County App. 51, 66 ¶¶b-f, 75 (ACC Exhibits 4, 7, 11). The Mitchell Appellants admit that XM reported being abused to the babysitter, the police were called and XM and AM were interviewed. Appellants' App. 32 ¶29, 33 ¶31. There were observable injuries on both boys. County App. 51, 66 ¶¶b-f, 75 (ACC Exhibits 4, 7, 11). Dwight Mitchell told two of the Individual County Appellees to "look to XM's mother for permanent placement." County App. 85, 138-39 (ACC Exhibits 13, 39 COMPL 000305-306).

Indeed, the Mitchell Appellants concede the Individual County Appellees are entitled to qualified immunity. The Mitchell Appellants assert "[I]t is apparent that the Appellee-Defendants treated spanking as child abuse per se. And, Minnesota statutes require Appellee-Defendants to do [sic] because there is no parental defense of reasonable force to protect or discipline a child." (Appellants' Brief 28-29). "[T]he spanking of X.M. is not child abuse even though Minnesota Statutes define it as such." *Id*. at 30. "Finally, federal courts have not resolved the constitutionality of child protection services' intervention based on a parent's use of reasonable force to protect or discipline a child." *Id*. at 35. "County officials used an unconstitutional legal standard because Minnesota Statutes equate actions to discipline a child as 'child abuse.'" *Id*. at 36.

The Mitchell Appellants can't simultaneously claim that statutes are unconstitutional either facially or as applied and argue that officials exceeded their authority in implementing these same statutes. As such, the Individual County Appellees are entitled to qualified immunity on the Plaintiffs' claims.

4. Official immunity bars the Mitchell Appellants state claims.[19]

Just as qualified immunity bars the Mitchell Appellants federal claims,

[19] Notwithstanding the application of the Official Immunity Doctrine, the ACC fails to allege facts to sustain any state law tort claims.

official immunity bars their state claims against the County Appellees. The official immunity doctrine protects public officials charged by law to exercise judgment and discretion from personal liability for damages unless the official commits a willful or malicious wrong. *Elwood v. Rice Cnty*, 423 N.W.2d 671, 677 (Minn. 1998). An official's purely ministerial acts are not protected by official immunity. An act is ministerial "when it is absolute, certain and imperative involving merely the execution of a specific duty arising from fixed and designated facts." *Id*. (quotation omitted). The purpose of official immunity is to protect the "public official from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Id.* at 678 "Malice" in this context is an act the official believes is legally prohibited. *Larson ex rel. Larson v. Independent School Dist. No. 361*, 2004 WL 432218 (D. Minn. March 2, 2004); *See also Kelly v. City of Minneapolis*, 598 N.W.2d 657, 663 (Minn. 1999).

The Mitchell Appellants continue to argue that Boreland's alleged statement that she would do "whatever was in her power to see that the children are never returned to [Mitchell's] custody" constitutes willful and malicious conduct. Appellants' Brief 51. The statements, however, are conclusory about Boreland's perceived bias and speculate as to her state of mind. The district court properly determined the ACC failed to allege malice by any County Appellee. First, the district court correctly found, the ACC alleges negligence in the investigation of

the accusations of child abuse, and in the training and supervision of social workers. Appellants' App. 21(Dismissal Order). Negligence by definition is not intentional conduct. *Id*.

Second, the district court correctly determined the ACC alleges the Individual County Appellees submitted unreliable information to the CHIPS court and pursued the CHIPS proceeding with the aim of terminating Mitchell's parental rights and removed the children from Mitchell's custody. *Id.* These allegations also do not rise to the malicious standard because the Individual County Appellees provided an objectively reasonable basis for their actions – the state's well-established interest in protecting children and preventing child abuse. *Id.*

Finally, the district court found the allegations that the Individual County Appellees concealed documents relating to jurisdiction does not qualify as malicious conduct, noting that Mitchell had both access to and the ability to present the documents to the CHIPS court. *Id.* at 22.

The Dismissal Order is correct in all respects. The Individual County Appellees are entitled to immunity in their individual and official capacities.

G. The Mitchell Appellants failed to state a claim under the Declaratory Judgement Act.

1. The Mitchell Appellants waived any claim based on the cessation of illegal activity.

This court "does not consider claims that were not raised below. *Alexander v.*

Pathfinder, Inc., 189 F.3d 735, 740 (8th Cir. 1999) (citations omitted). "It is old and well-settled law that issues not raised in the trial court cannot be considered by this court as a basis for reversal." *Morrow,* 541 F.2d at 724; *Richardson*, 448 F.3d at 1059 (noting that this court does not consider arguments raised for the first time on appeal); *see e.g. Snider*, 468 F.3d at 512 declining "to broadly review issues not raised and ruled upon by the district court.").

2. The Mitchell Appellants failed to plead any viable federal or state law claim.

The Mitchell Appellants assert they are entitled to reversal because they requested monetary damages under the Declaratory Judgment Act ("UDJA"). The UDJA gives courts "within their respective jurisdictions" the power to "declare rights, status, and other legal relation of any interested party." 28 U.S.C. §2201; Minn. Stat. § 555.01. But the UDJA "cannot create a cause of action that does not otherwise exist." *Alliance for Metro Stability v. Metro Council,* 670 N.W.2d 905, 916 (Minn. App. 2003). A declaratory judgement action must present a justiciable controversy or a district court has no jurisdiction to declare rights under the act. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W. 2d 611, 617 (Minn. 2007). The UDJA does not by itself confer jurisdiction on a court over the action. *Alliance for Metro Stability*, 671 N.W.2d at 915. A justiciable controversy exists if the "claim (1) involves definite and concrete assertions of a right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with

adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Onvoy, Inc.*, 736 N.W.2d at 617-18.

The Mitchell Appellants failed to plead any viable federal or state law claim defeating their claim for declaratory relief.

All told, the Dismissal Order is correct in every respect. It must be affirmed.

CONCLUSION

The Mitchell Appellants' failed to state any claims against the County Appellees. The County Appellees are entitled to sovereign, absolute, qualified and official immunity. Mitchell would have the Court believe he did nothing wrong, that everything that happened to him and his children was catalyzed by a far-reaching conspiracy that his ex-wife orchestrated—that she enlisted the aid of numerous County staff, a child protection attorney, and a prosecutor to deprive him of the custody of his children. That's not merely implausible, it's absurd.

It suffices that the Dismissal Order was properly decided. It must be affirmed.

Dated: June 7, 2019

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: s/Helen R. Brosnahan
Helen R. Brosnahan, # 0266887
Jeffrey A. Timmerman, # 0352561
Assistant Dakota County Attorneys
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438

ATTORNEYS FOR APPELLEES
Dakota County Social Services, Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Chris P'simer, Christina Akolly, Kathryn Scott, Elizabeth Swank, And Dakota County

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: June 7, 2019

By: s/Helen R. Brosnahan
Helen R. Brosnahan

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I caused the Brief of Appellees Dakota County Social Services, Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Kathryn Scott, Elizabeth Swank, and Dakota County to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that upon receipt of notice that the Brief of Appellees Dakota County Social Services, Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Kathryn Scott, Elizabeth Swank, and Dakota County has been filed, I will cause copies of the same to be served, via United States mail, on:

Erick G. Kaardal
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, MN 55410
Telephone: (612) 341-1074
Attorney for Appellants

Katheryn Iverson Landrum
Office of the Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
Telephone: (651) 757-1189
Attorney for Appellees Emily Piper-Johnson, Jacob Trotsky-Sirr, and Tanya Derby

Dated: June 7, 2019

By: s/Helen R. Brosnahan
Helen R. Brosnahan