UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No: 18-cv-1091-WMW-BRT

Dwight D. Mitchell,
Individually and on behalf of
his children X.M., A.M., and Bryce Mitchell;
and Stop Child Protection Services from Legally
Kidnapping,

Plaintiffs,

MEMORANDUM IN SUPPORT OF DAKOTA COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED CORRECTED COMPLAINT

v.

Dakota County Social Services; et al,

Defendants.

INTRODUCTION

Plaintiffs'[1] Amended Corrected Complaint ("ACC")[2] contains 19 claims against the Individual County Defendants,[3] Dakota County Social Services

[1] "Plaintiffs" refers collectively to Dwight Mitchell ("Mitchell") and his children, Bryce Mitchell, XM, and AM.

[2] Dwight Mitchell filed the same lawsuit on behalf of himself and his children the County Defendants on May 22, 2017, which he voluntarily dismissed on February 8, 2018, under Fed. R. C. P. 41 subsequent to the filing of a Report and Recommendation provisionally dismissing all his claims. Plaintiffs 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

("DCSS"), Dakota County, and three State Defendants, arising out of a child protection investigation, Child In Need of Protection or Services ("CHIPS") proceedings in state court, and Mitchell's corresponding criminal conviction of malicious punishment of a child. Plaintiffs also challenge the constitutionality of several Minnesota Statutes. Each of Plaintiffs' claims against the County Defendants[4] must be dismissed for the reasons stated below.

SUMMARY OF PLAINTIFFS' FACTUAL ALLEGATIONS[5]

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

Dwight Mitchell is a New Jersey resident and father of three boys: Bryce Mitchell, XM (born in 2004), and AM (born in 2008). (ACC ¶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.* P.7 ¶A, ¶27.)

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lawsuit against the County Defendants. County Defendants seek to dismiss the Amended Corrected Complaint.

[3] "Individual County Defendants" refers collectively to defendants Patrick Coyne, Joan Granger-Kopesky, Leslie Yunker, Diane Stang, Susan Boreland, Chris P'Simer, Christina Akolly, Kathryn Scott, and Elizabeth Swank.

[4] "County Defendants" refers collectively to Dakota County and the Individual County Defendants.

[5] The County Defendants do not admit the ACC's allegations, but assume the veracity of those allegations for purposes of Fed. R. Civ. P. 12(b)(6). However, conclusory allegations are "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

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.* 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.* ¶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.* ¶34.) Police and Boreland proceeded to interview Litvinenko, XM, AM, and ML. (*Id.* ¶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.* ¶35.) Boreland did not believe Litvinenko and vowed to permanently remove the boys from Mitchell's care. (*Id.* ¶40.)

II. The alleged Campos conspiracy.

According to Plaintiffs, 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, who resides in Spain. (*Id.* ¶¶33, 41, 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.* ¶¶45-105.) She also raised unsubstantiated abuse allegations against Mitchell in New Jersey and made false reports of abuse concerning Mitchell in Spain. (*Id.* ¶32.)

Boreland and Campos spoke several times on February 16, 2014. (*Id.* ¶¶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.*) Plaintiffs characterize Campos' abuse allegations as outlandish, yet Boreland believed them; Boreland and Campos entered schemed that day to permanently divest Mitchell's parental rights. (*Id. ¶ 34, 86*)

Plaintiffs 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 the 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*. ¶¶157, 160, 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.* ¶74.) Mitchell told Boreland that Campos and the children were lying about prior instances of abuse. (*Id.*, ¶*75*) In response, Boreland asked "why are all black families so quick to spank their children?" (*Id.*)

The hearing was prompted by a state-court petition Boreland prepared.[6] (*Id.* ¶76.) Plaintiffs claim Boreland lied to the court by failing to disclose she was in cahoots with Campos, by referencing prior abuse allegations "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.* ¶103.)

After the hearing, Boreland served Litvinenko with a separate CHIPS petition concerning ML. (*Id.* ¶¶78.) Boreland warned Litvinenko that ML would be removed from her care unless they lived apart from Mitchell. (*Id.* ¶79.) 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.* ¶¶124-28.) The separation impelled Mitchell and Litvinenko's divorce. (*Id.* ¶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

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

Jersey or that they were subject to a custody order entered by a New Jersey court. (*Id.* ¶88.) This information was intentionally omitted from the amended CHIPS petition, Plaintiffs say, "to keep the case in Minnesota." (*Id.*¶88.) Additionally, Plaintiffs claim the amended petition failed to disclose XM's and AM's conflicting statements and other "exculpatory evidence." (*Id.* ¶¶89-96.) Scott, an assistant county attorney, reviewed and made a "sworn certification" of the amended petition,[7] which the state court granted. (*Id.* ¶¶98, 103-105, 359.)

XM and AM were resultantly left in DCSS's custody for placement in foster care. (*Id.* ¶¶106, 359.) The state court directed DCSS to prepare and file a case plan; Mitchell was never provided said case plan. (*Id.* ¶¶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.* ¶¶110-13.)

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

Much of Plaintiffs' ACC is devoted to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Plaintiffs allege under the UCCJEA, the Minnesota court subject-matter jurisdiction to adjudicate Mitchell's parental

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

rights. (ACC ¶¶88, 99-101, 112, 136-139.) Instead, Plaintiffs claim, only the New Jersey court could alter his custodial rights. (*Id.*)

Plaintiffs 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. (*Id.* ¶¶139-42.) They further accuse the other County Defendants 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 to aid Campos. (*Id.* ¶¶142.)

V. Subsequent CHIPS proceedings.

DCSS ultimately made a maltreatment finding against Mitchell. (ACC ¶153.) He sought reconsideration of the finding with Yunker, Kopesky, and Coyne, and notified them of Boreland's racist comments and his interpretation of the UCCJEA. (*Id.* ¶¶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.* ¶¶110-11.) P'Simer did this, Plaintiffs say, in furtherance of the burgeoning Campos conspiracy. (*Id.* ¶¶113, 157, 159, 196, 200.) Plaintiffs also claim P'Simer and others failed to complete case, reunification, safety, or visitation plans and submit them to

the parties and court. (*Id.* ¶¶109, 192, 204, 251, 261-65, 277.) And, according to Plaintiffs, the reports and other documentation that P'Simer and others did submit to the court were false. (*Id.* ¶¶161-62, 198, 200, 202, 247, 283, 286.)

Mitchell was permitted to have supervised visitations with AM and did so approximately three times per week. (ACC Ex. 13 COMPL 000072). XM refused showed no interest in visiting with Mitchell. (*Id.*) XM and AM were forced into therapy against Mitchell's wishes. (*Id.* ¶¶190, 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.* ¶¶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.* ¶¶188-92.) Mitchell reluctantly agreed and returned to New Jersey with Bryce and AM on July 21, 2014. (*Id.* ¶¶193.) P'Simer ultimately moved to terminate Mitchell's parental rights vis-à-vis XM and notified the court for the first time of the New Jersey custody order. (*Id.* ¶288.)

Mitchell was ultimately reunited with XM on December 4, 2015, after his CHIPS case was voluntarily dismissed. (*Id.*) In all, Mitchell was separated from AM for five months and XM for 22 months. (*Id.* ¶228, 573.)

VI. Mitchell's criminal case.

While the CHIPS case was proceeding, Mitchell was also criminally charged with malicious punishment of a child.[8] (ACC ¶165.) Swank, the prosecutor, unsuccessfully sought a no-contact order to prevent Mitchell from exposing Campos' lies to their children. (*Id.*) Plaintiffs claim Swank worked in concert with Boreland, P'Simer, and others to transfer custody of AM and XM to Campos (*Id.* ¶¶86, 88, 150.) Ultimately, Mitchell pled guilty to and was sentenced. (*Id.*, ¶184, exhibit 25).[9]

LEGAL ANALYSIS

I. THE DISMISSAL STANDARD FOR FAILURE TO STATE A CLAIM

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court is required to "accept as true all factual allegations set out in the complaint and to construe the complaint in the light most favorable to the [plaintiffs], drawing all inferences in [the plaintiffs'] favor." *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009) (quotation omitted). However, conclusory and purely speculative

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

[9] See Exhibit 25, Order Warrant of Commitment (May 27 Order).

allegations are "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level…." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts require more than "'shotgun' or 'kitchen sink' style pleadings." *Larson ex rel. Larson v. Indep. Sch. Dist. No. 361*, CIV.02-3611(DWF/RLE), 2004 WL 432218, at *20 (D. Minn. Mar. 2, 2004).

To withstand dismissal under Rule 12(b)(6), Plaintiffs must properly plead their claims under Rule 8 and satisfy the Supreme Court's pleading standards. *Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 678. That is, the ACC "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "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." *Id*. at 667. Determining whether the ACC states a plausible claim is "context-specific" and requires this Court to "draw on its experience and common sense." *Id.* at 663-64.

II. THE COMPLAINT FAILS TO STATE A FEDERAL CLAIM[10]

Plaintiffs assert various constitutional claims against the County Defendants under 42 U.S.C. § 1983, including alleged violations of the Due Process Clause (Counts 7-8), the First Amendment(Count 12), the Fourteenth Amendment (Counts 7-17[11]), and the Equal Protection Clause (Count 10); and various state-law tort claims (Counts 18-25). However, the actual conduct of which Plaintiffs complain amounts to a criminal prosecution resulting in criminal convictions for two counts of malicious punishment of a child and a child protection proceeding resulting in temporary separation of Mitchell from his children.

A. Due Process Claims

The Fourteenth Amendment provides that no state "shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV. Parents have a fundamental liberty interest in the care, custody, and management of their children. *Fitzgerald v. Williamson*, 787 F.2d 403, 407 (8th

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[10] To the extent Plaintiffs challenge the outcome of any state court proceeding, this Court lacks subject matter jurisdiction to entertain such challenges. *P.G. v. Ramsey Cnty.*, 141 F. Supp. 2d, 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)).

[11] As to Counts 8 and 9 "a person may be held personally liable for a constitutional violation only if his own conduct violated a clearly established constitutional right."(*Baribeau v. City of Minneapolis, 596 F. 3d 465, 482 (8th Cir. 2010)*.

Cir. 1986); *Ruffalo by Ruffalo v. Civiletti*, 702 F.2d 710, 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).

Plaintiffs claim their substantive and procedural due process rights were violated by the Individual County Defendants' failure to comply with the UCCJEA and Minnesota law, and that the Individual County Defendants interfered with their familial relationship. Accepting everything Plaintiffs allege as true, they have not stated any due process claim.

1. Substantive Due Process

"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. Master Docket*, 672 F.Supp. 1152, 1164 (D. Minn. 1987) (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, 848 (1998). Negligence is categorically beneath the threshold of constitutional due process. *Id*. at 848-49.

Plaintiffs contend the Individual County Defendants made misrepresentations to the state court and failed to disclose exculpatory evidence disproving child abuse. Taken as true, these allegations are insufficient to state a substantive due process claim.

2. Procedural Due Process

While the Fourteenth Amendment prohibits deprivation of "life, liberty or property, without due process of law," property interests are not created by the Constitution, but rather, "are created and … defined by existing rules or understandings that stem from an independent source such as state law." *Forrester v. Bass*, 397 F.3d 1047, 1054 (8th Cir. 2005).

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*, 397 F.3d at 1055. 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 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 Plaintiffs claim the Individual County Defendants violated contain no substantive predicates

expressly limiting the discretion of public officials by dictating particular outcomes. These laws simply provided Plaintiffs 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).[12] What's more, 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.

Further still, the ACC affirmatively demonstrates that Mitchell *was* provided adequate due process before his children were removed. An emergency protective-care hearing was held less than a week after the removal and a CHIPS hearing within a week after that. (See Exhibit 6 (Notice of Emergency Protective Care Hearing); ACC ¶¶ 68, 74-79, 86[13].) These prompt

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[12] Plaintiffs 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).

[13] While Mitchell fails to acknowledge that an Emergency Protective 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 attached as Exhibit 1 to the Affidavit of Helen R. Brosnahan ("Brosnahan Aff."). This court may take judicial notice of and consider the Order without transforming this motion into one for summary judgment. *See, e.g.*, *Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d 928, 936 n.3 (8th Cir. 2012) ("courts additionally consider matters incorporated by

post-deprivation hearings satisfy due process. *Scott Cnty.*, 672 F.Supp. at 1170. This additional ground compels dismissal of Plaintiffs' procedural due process claim.

B. Plaintiff's associational rights claims fail.

The Supreme Court enunciated two types of associational rights in *Roberts v. United States Jaycees*: freedom of expressive association (rooted in the First Amendment) and freedom of intimate association (characterized as "an intrinsic element of personal liberty"). 468 U.S. 609, 620 (1984). The analysis is the same for each theory: to state a familial association claim, a plaintiff must show the defendant intended to interfere with the relationship. *Singleton v. Cecil*, 133 F.3d 631, 635 (8th Cir. 1998); *Reasnover v. St. Louis Cnty., Mo.*, 447 F.3d 569, 585 (8th Cir. 2006). Moreover, each requires weighing associational rights against the state's interest in infringing on those rights. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982); *see also Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014) ("In conducting this balancing, the court will consider, among other things, the severity of the infringement on the protected relationship, the need for defendants' conduct, and possible alternative courses of action.").

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reference or integral to the claim, items subject to judicial notice, matters of public record [and] orders…without converting the motion into one for summary judgment") (internal quotations and citation omitted).

Mitchell no doubt had a protected interest in associating with his wife. Likewise, the County Defendants had a legitimate interest in protecting ML from the physical abuse Mitchell's children suffered. Taken as true, Plaintiffs' allegations permit an inference that Mitchell and Litvinenko were asked to live separately only out of concern for ML's safety—not because any defendant intended (let alone maliciously) to ruin their marriage. Plaintiffs cannot, therefore, state a First or Fourteenth Amendment familial association claim. ("However, the right to family integrity clearly does not include a constitutional right to be free from child abuse investigations, as the state has a strong interest in protecting the safety and welfare of minor children, particularly where protection is considered necessary as against the parents themselves." *Slaven v. Engstrom*, 710 F.3d 772, 779–80 (8th Cir. 2013) (quotation, alteration, and citation omitted)).

C. Plaintiffs fail to state a conspiracy claim.

Plaintiffs assert four counts of conspiracy under 42 U.S.C §§ 1983 and 1986. (ACC Counts 15-18). Specifically, Mitchell and his children allege the defendants conspired to deprive them of their constitutional rights under the Fourteenth Amendment to transfer custody of the children to Campos in Spain and to inflict emotional distress upon them. *Id*.

To prove a conspiracy, plaintiffs must show that the defendants conspired with the intent to deprive them of their constitutional rights, and that at least one conspirator acted in furtherance of the conspiracy and plaintiffs were deprived of a right as a result. *Askew v. Millard*, 191 F.3d 953, 957 (8th Cir. 1999). Plaintiffs have not established a constitutional violation; their conspiracy claims fail for this reason alone. Here, the allegations in the ACC along with the accompanying exhibits illustrate that the County Defendants acted within the constructs of an on-going CHIPS proceeding in which both the parent, and at times XM, refused to engage in a reunification plan. *See* Exhibit 13 COMPL 000062. The cooperation of various participants in a child protection matter as the law requires them to do, does not give rise to a conspiracy to deprive Plaintiffs of their constitutional rights.

While Plaintiffs appear to allege a § 1985 conspiracy claim, they have failed to plead any claims against the County Defendants. (*See* ACC ¶1, and pp. 106-143) Plaintiffs have also failed to allege any facts suggesting (let alone plausibly) that the Individual County Defendants acted with the purpose to deprive them of their civil rights or the Defendants acted with class-based, invidiously discriminatory animus—as is required to state a conspiracy claim under both §§1985(2) and 1985(3).[14] Mitchell also told P'Simer that they needed to look to

[14] *See infra* II.D (equal protection).

XM's mother for permanent placement. (ACC Exhibit 13 COMPL 000062, Exhibit 39, pp. 00305-306.)

A claim under § 1986 "is dependent upon a valid § 1985 claim." *Sundae v. Anderson*, 2003 WL 22077742, at *6 (D. Minn. Sept. 2, 2003). Because Plaintiffs' §1985 claims are not pled at all or pled inadequately, their dependent §1986 claim must be dismissed.

D. Plaintiffs' equal protection claim fails.

In order to establish an equal protection claim, Plaintiffs must allege they were treated differently than similarly situated individuals and the different 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 plaintiff is part of a victimized class. As Justice Frankfurter explained in his concurring opinion in *Snowden v. Hughes*:

> The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure

> from a norm must be rooted in design and not derive merely from error or fallible judgment.

321 U.S. 1, 15 (1944).

The key requirement is that Plaintiffs allege and prove unlawful, purposeful discrimination. *Batra v. Bd. of Regents of Univ. of Nebraska*, 79 F.3d 717, 721-22 (8th Cir. 1996). Plaintiffs state invidious racial discrimination was the motivating force behind Boreland's alleged discriminatory comment. (ACC ¶¶71, 153-56, 481, 501.) These conclusory statements are insufficient to show any Defendant's conduct was motivated by intentional discrimination. *See Armour & Co v. Inver Grove Heights*, 2 F.3d 276, 279 (8th Cir. 1993). Plaintiffs' conclusory statement about Boreland's perceived bias or discriminatory intent likewise is insufficient because it merely speculates 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 that evidence speculating about an employer's state of mind in an age discrimination suit was insufficient).

Despite how offensive, distasteful, and inexcusable such remarks are, to sufficiently sustain an equal protection claim, remarks must be made by a decision-maker, around the time of the challenged decision, and in reference to a challenged decision. *See Amawi v. Walton*, No. 3:13-cv-00866-JPG-RJD, 2016 WL 7364768, at *7-8 (S.D. Ill. Nov. 17. 2016) (applying "stray remarks" concept from

employment context to §1983 equal protection claim). Plaintiffs' acknowledge Boreland transitioned off the child protection case in March 2014. (ACC ¶199.)

E. Plaintiffs' class-of one claim fails.

Plaintiffs essentially list all of their previous conclusory allegations to allege the County Defendants violated their equal protection rights by treating them differently than Litvinenko. The threshold inquiry in a class-of-one inquiry claim is whether plaintiffs' are similarly situated to others who allegedly received preferential treatment. *Domina v. Van Pelt*, 235 F.3d 1091, 1099 (8th Cir. 2000). Absent such a threshold showing, Plaintiffs' do not have a viable equal protection claim. *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994). To be similarly situated for purposes of a class-of-one equal protection claim, the persons alleged to have been treated more favorably must be identical or directly comparable to the plaintiff in all material respect." *Reget v. City of La Crosse*, 595 F.3d 691, 695 (7th Cir. 2010).

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). A class-of-one plaintiff must therefore 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). Here

Plaintiffs allege that Litvinenko received preferential treatment because the County Defendants (apparently all of them) insured that Litvinenko had a UCCJEA subject matter hearing, but did not for Mitchell. Not only are Mitchell and his children a "class-of-one" but their preferential treatment class consists of one member. Plaintiffs' class-of-one equal protection claim must fail.

F. Plaintiffs' unlawful seizure claim fails.

Plaintiffs allege that AM and XM were unlawfully seized(Count 7). But none of the County Defendants seized AM or XM. Rather, they were removed from Mitchell's home by police based on observable physical injuries and their own assertion that Mitchell had inflicted the wounds. (ACC ¶¶28, 34, 76 Exhibit 7 COMPL 000022 ¶¶b-c, f) Minnesota law allows peace officers to take children "into immediate custody" "when a child is found in surroundings or conditions which endanger the child's health or welfare or which such peace officer reasonably believes will endanger the child's health or welfare." Minn. Stat. §260C.175, subd. 1(2)(ii); *State v. Johnson*, 423 N.W.2d 100, 101 (Minn. App. 1988) ("The statute authorizes warrantless detention when police 'reasonably believe' the child is in danger."). XM and AM's continued placement away from Mitchell was supported by evidence of physical abuse, the filing of a CHIPS petition, and subsequent rulings from the state court. *See id.* §260C.176, subds. 1-2. Plaintiffs

have failed to allege facts establishing XM or AM were unlawfully seized; Count 7 fails.

G. Plaintiffs' *Monell*[15] claims fail.

Plaintiffs' supervisory and failure-to-intervene claims fail. First, absent a constitutional violation, no *Monell*, supervisory, or failure-to-intervene liability attaches. Plaintiffs must, as a condition precedent, plead facts establishing an underlying constitutional violation. *See Brockington v. City of Sherwood*, 503 F.3d 667, 673-74 (8th Cir. 2007); *Brown v. City of Bloomington*, 280 F.Supp.2d 889, 894 (D. Minn. 2003). Plaintiffs have not done so, as such, any *Monell*, supervisory, and failure to intervene §1983 claims fail.

In Count 13 of their ACC, Plaintiffs allege the County failed to

> establish, implement and follow the correct and proper Constitutional policies and procedures, customs and practices; by failing to properly select, supervise, train, control, and review its agents and employees as to their compliance with Constitutional safeguards with deliberate indifference; and by knowingly, or with deliberate indifference, permitting [individual defendants] inclusive to engage in the unlawful and unconstitutional conduct as herein alleged.

(ACC ¶525.)

County and supervisory liability are available under §1983 where an "action pursuant to official municipal policy of some nature caused a

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

constitutional tort." *Ulrich v. Pope Cnty.*, 715 F.3d 1054, 1061 (8th Cir. 2013). Similarly, official-capacity claims also 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 governmental entity is liable under §1983 only when the entity itself is a 'moving force' behind the deprivation.").

Plaintiffs have failed to identify any particular custom or 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, Plaintiffs essentially restate their general allegations related to their interactions with the County. (ACC ¶521) Plaintiffs 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.* ¶¶521-26.) Similarly, rather than providing any specific allegations showing the County knew of training deficiencies leading to a constitutional violation, Plaintiffs allege only 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 Defendants' 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." (ACC 526).

Without any specific County policies or practices or specific incidents suggesting failure to train leading to constitutional violations, Plaintiffs' allegations are conclusory. Mechanical allegations of this ilk are insufficient *ispo facto* to raise an inference of *Monell*, supervisory, or failure-to-intervene liability. *See Ulrich*, 715 F.3d at 1011.

IV. ABSOLUTE AND QUALIFIED IMMUNITY BARS ALL FEDERAL CLAIMS AGAINST THE COUNTY DEFENDANTS

A. Swank and Scott 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 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*, 447 F.3d at 580 ("Immunity is not defeated by allegations of malice, vindictiveness or self-interest.").

"Absolute immunity covers prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial

and other conduct that is intimately associated with the judicial process." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1266-67 (8th Cir. 1996); *see also Saterdalen v. Spencer*, 725 F.3d 838, 842-43 (8th Cir. 2013) (prosecutor absolutely immune from suit because "acts in reviewing and approving the complaint were taken to initiate the criminal prosecution"). "Deciding which allegations to charge is the heart of prosecutorial discretion, absolutely protected by immunity." *Simes v. Ark. Jud. Discipline & Disability Comm'n*, 734 F.3d 830, 834 (8th Cir. 2013) (noting absolute prosecutorial immunity applies to decision 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, Plaintiffs' claims against Scott and Swank all relate to their actions in prosecuting the child protection matter or criminal charges; they are absolutely immune from suit.

B. Boreland and P'Simer are immune from suit.

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 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 under this standard and thus protected by absolute immunity." *Kovacic*, 724 F.3d at 694.

Absolute immunity shields Boreland and P'Simer from liability 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."); *Myers*, 810 F.2d at 1452 ("Accordingly the decision to file charges is protected, even in the face of accusations of: vindictive prosecution, or reckless prosecution without jurisdiction, or conspiracy to prosecute for a crime that never occurred." (internal citations omitted)).

C. Qualified immunity bars Plaintiffs' federal claims.

The Individual County Defendants are entitled to qualified immunity on Plaintiffs' federal claims. Public officials are immune from suit under 42 U.S.C. §1983 unless they have "violated a statutory or constitutional right that was

clearly established at the time of the challenged conduct." *City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1775 (2015) (internal quotation marks omitted). An official "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," meaning that "existing precedent ... placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. ––––, ––––, 131 S.Ct. 2074, 2083 (2011). 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 ––––, 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).

Parents have an important but limited substantive due process right in the care and custody of their children. *Manzano v. South Dakota Dept. of Soc. Servs.*, 60 F.3d 505, 509-10 (8th Cir. 1995). The right is limited because the state has a conflicting, compelling interest in the safety and welfare of the children. *Id.* at 510 ("[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." (quotation omitted)).

Courts must weigh the interests of the state and child against those of the parents to determine whether a constitutional violation has occurred. Under this balancing test, the officials' actions must have been based on a reasonable suspicion of abuse and must not have been disproportionate under the circumstances. *Thomason*, 85 F.3d at 1371-72 (The question is "whether the actions taken by the defendants and the resulting disruption to plaintiffs' familial relations with [the child] were so disproportionate under the circumstances as to rise to the level of a constitutional deprivation."); *see Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005).

The qualified immunity defense is "difficult to overcome." *Manzano*, 60 F.3d at 510. Even where this balancing reveals a constitutional violation, qualified immunity still applies unless the constitutional violation was so clear an objectively reasonable official under the circumstances would have recognized the disproportionality or lack of reasonable suspicion. *Abdouch*, 426 F.3d at 987.

Plaintiffs have failed to plead any viable federal claim. The two minor children were removed based upon sufficient allegations of physical abuse perpetrated by Mitchell. (ACC ¶¶28, 34, Exhibits 4, 7 COMPL 000022; 11 COMPL 000049). "In cases in which the imminent threat to the child's health or welfare, emergency removal of children without a court order is constitutionally

permitted." *K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006). "Exigent circumstances arise when an emergency situation demands immediate police action that excuses the need for a warrant," including "the need to assist persons who are seriously injured or threatened with such injury." *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir. 2010) (internal quotation marks omitted). "Preventing imminent or ongoing physical abuse within a home qualifies as an exigent circumstance." *Schreiber v. Moe*, 596 F.3d 323, 330 (6th Cir. 2010); *see also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (Exigent circumstances, such as "the need to assist persons who are seriously injured or threatened with such injury," make warrantless search objectively reasonable under the Fourth Amendment.). In addition to providing an exception to the warrant requirement under the Fourth Amendment, exigent circumstances may alter the notice and hearing requirements typically required under the Fourteenth Amendment in child-removal cases. *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983).

Plaintiffs admit XM reported being abused to a babysitter, the police were called, and XM and AM were interviewed. (ACC ¶29, 31.) There were observable injuries on both boys. (ACC ¶ 39, exhibits 4, 7, 11) Mitchell told two of the Defendants to "look to XM's mother for permanent placement." (*Id.* Exhibits 13 COMPL 000062, 39, COMPL 000305.) Mitchell was convicted of two counts of

malicious punishment of a child. (*Id.* Exhibit 25.) As such, the Individual County Defendants are entitled to qualified immunity on Plaintiffs' claims.

V. PLAINTIFFS FAIL TO STATE A STATE-LAW CLAIM

A. Supplemental Jurisdiction

Plaintiffs assert several state-law tort claims: intentional infliction of emotional distress, two counts of negligence, and negligent infliction of emotional distress, malicious prosecution and abuse of process, False Imprisonment, and Declaratory Relief (Counts 18-25 of ACC). Although none of the federal claims survive this rule 12 motion, it is within the Court's discretion to extend supplemental jurisdiction over these state-law claims. 28 U.S.C.A. §1367(a), (c) (providing supplemental jurisdiction of state law claims). The County Defendants request the Court exercise its supplemental jurisdiction and dismiss each of Plaintiffs' state-law claims for the reasons provided below.

B. Intentional Infliction of Emotional Distress[16]

"Claims for intentional infliction of emotional distress are disfavored under Minnesota law." *Njema v. Wells Fargo Bank, N.A*, 124 F.Supp.3d 852, 875

[16] Plaintiffs label Count 14 "Intentional Infliction of Emotional Distress and Conspiracy," however, they do not address the elements for a state-law claim of conspiracy. Furthermore, a conspiracy claim must be supported by an underlying tort; as explained in this section, Plaintiffs have failed to state a claim for any tort and therefore their conspiracy claim must also fail. *See D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn.App. 1997).

(D.Minn. 2015). To establish an intentional infliction of emotional distress ("IIED") claim, Plaintiffs must plead facts showing the: (1) conduct is extreme and outrageous; (2) conduct was intentional or reckless; (3) conduct caused emotional distress; and (4) distress suffered was severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). IIED claims are "sharply limited to cases involving particularly egregious facts." *Id.* at 439. "[T]he limited scope ... reflects a strong policy to prevent fictitious and speculative claims." *Id.*

1. No extreme and outrageous conduct alleged.

Conduct is extreme or outrageous only when it is "so atrocious that it passes boundaries of decency and is utterly intolerable in a civil community." *Id.*; *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F.Supp.2d 1128, 1146 (D. Minn. 2012) (noting the alleged behavior was "a callous, intrusive, and insensitive abuse of power," but finding that "a reasonable fact-finder could not find it so 'utterly intolerable' or 'particularly egregious' as to support an IIED claim").

Plaintiffs allege:

> Boreland, P'Simer, Akolly, Sirr, Derby, Stang, Yunker, Kopesky, and Coyne acted individually and in concert to illegally force the separation of Mitchell from his wife, conceal UCCJEA hearing requirements for subject matter jurisdiction, formed a conspiracy to terminate the parental rights of Mitchell and transfer custody to Campos, manufacture inculpatory evidence and to conceal exculpatory evidence for the purpose of perpetuating a civil action against the Mitchell's

> in furtherance of said conspiracy, manipulating witnesses with the intention of perpetuating civil proceedings against the Mitchell's, illegally detaining AM for 5 months, and illegally detaining XM for 22 months, while refusing Mitchell all visitation and communication, and while simultaneously refusing to create a reunification or out-of-home placement plan as required by law.

(ACC ¶573.)

Here, Plaintiffs essentially list conclusory allegations. As explained above, none of these claims survive this rule 12 motion. Further, mere legal conclusions "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 662. Any "facts" Plaintiffs attempt to allege to show any extreme and outrageous conduct are insufficiently speculative to withstand Rule 12(b)(6) scrutiny. *See Magee v. Trustees of Hamline Univ.*, 957 F.Supp.2d 1047, 1077 (D.Minn. 2013) ("Despite numerous additional allegations, [plaintiff] offers insufficient facts to raise a right to relief above the speculative level …. [Plaintiff's] … claim does not withstand Rule 12(b)(6) scrutiny."), *aff'd sub nom. Magee v. Trustees of Hamline Univ.*, 747 F.3d 532 (8th Cir. 2014).

2. Plaintiffs fail to allege severe emotional distress.

Conduct aside, Plaintiffs fail to allege any *severe* emotional distress. The Plaintiffs bear a heavy burden of production to allege facts sufficient to show emotional distress meets the requisite severity. *Njema*, 124 F.Supp.3d at 875.

The Minnesota Court of Appeals has held allegations of "mental anguish, humiliation, embarrassment, and other damages" are conclusory statements "insufficient to survive a motion to dismiss." *Clemons v. MRCI WorkSource*, 2014 WL 2178938, at *3 (Minn.App. May 27, 2014). The severity standard is high. *See Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn.App. 1995) ("insomnia, crying spells, a fear of answering her door and telephone, and depression, which caused her to seek treatment" do not "state a valid claim"); *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 379 (Minn. App. 1984) (humiliation, embarrassment, loss of sleep, depression, a nervous condition, and stress "did not meet the threshold required to go to a jury on this claim").

Here, Mitchell claims to have suffered "the trauma of having his children removed, the loss of familial association and paternal-child bond, opportunity to bond with stepmother Litvinenko and stepbrother, lost enjoyment of life, anger at being wrongly accused, fear, powerlessness, confusion, anxiety, a severe major depressive disorder, emotional distress, sleeplessness, headaches, fatigue, malaise, irritability, inability to focus, a generalized fear of authority figures, loss of appetite, loss of weight and resulting work disability." (ACC ¶218.) Mitchell claims he suffered Post Traumatic Stress Disorder (PTSD) as a result of his separation from Litvinenko and the continued detention of XM. (*Id.*) The ACC does not contain any reference to opinions from mental health or any reference to

opinions or statements from "trained professionals". Plaintiffs further allege that Mitchell and his children suffered "economic, physical, mental, emotional injury, loss of liberty, loss of privacy and irreparable harm to his reputation all to an extent and in an amount subject to proof at trial." (*Id.* ¶562.) Plaintiffs have plainly failed to allege any "specific symptoms that could constitute severe emotional distress." *See Kuelbs v. Williams*, 609 N.W.2d 10, 17 (Minn. App. 2000). Conclusory and vague allegations are insufficient to state a viable claim of IIED, "considering the high standard required for a claim of intentional infliction of emotional distress." *Id*. Indeed, Plaintiffs have co-mingled their collective symptoms and damages such that which plaintiff suffered which symptom and incurred what damage is indecipherable.

C. Negligence

1. DCSS Workers Did Not Owe Mitchell a Duty.

Plaintiffs allege negligence by the Individual County Defendants who are employed as social services workers ("workers"). The elements of negligence under Minnesota law are duty, breach, causation, and injury. *Varga v. U.S. Bank Nat'l Ass'n*, 952 F.Supp.2d 850, 861 (D. Minn. 2013). "Any legal analysis of an action … alleging negligence must begin with an inquiry into whether the [defendant] owed the [plaintiff] a duty." *Louis v. Louis*, 636 N.W.2d 314, 318

(Minn. 2001). "Existence of a duty in a negligence case is a question of law." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

Plaintiffs' negligence claim is limited to allegations that the workers owed *Mitchell* and his children a duty to use due care, breached that duty to Mitchell, and caused injury. (ACC Count 19 ¶578-83.) Plaintiffs have failed to sufficiently allege that workers owed Mitchell a legal duty. Plaintiffs attempt to create a duty by stating the workers owed Mitchell "a duty to use due care with respect to statements concerning the investigation of the 'Campos' claims" and "with respect to the investigation of 'Campos' allegations." (*Id.*) But the workers did not owe *Mitchell* a duty in the reporting, investigation, and court proceedings; instead, they owed a duty to the children.

Minnesota law states, "The paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the *child*." Minn. Stat. §260C.001, subd. 2(a) (emphasis added). And the Minnesota Child Abuse Reporting Act states: "[T]he public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse…. [T]he health and safety of the children must be of paramount concern." Minn. Stat. §626.556, subd. 1(a). This statutory framework imposes a special duty upon the worker to the child, *not* the parent, in child protection investigations and court proceedings. Child protection workers owed "a special

duty to [the child] once they received reports identifying him as a suspected victim of abuse." *Radke v. County of Freeborn*, 694 N.W.2d 788, 798 (Minn. 2005). Mitchell, as the parent of children who were suspected victims of abuse, is clearly not among the class of persons the statutory scheme is intended to protect. Therefore, no duty was owed to him. Mitchell's negligence claim fails on this basis alone.

2. DCSS Supervisors Did Not Owe Mitchell a Duty.

Plaintiffs also allege negligence by the Individual County Defendants who are employed as social services supervisors ("supervisors"). This claim is duplicative of Count 19, where Plaintiffs allege supervisors acted negligently to cause injury to them. (ACC ¶¶585-592.)

"Liability for negligent supervision of an employee is imposed under a theory of respondeat superior." *Oslin v. State*, 543 N.W.2d 408, 414-15 (Minn. App. 1996). "The basis of liability is that the tortious act is committed in the scope of employment…." *Id.* "To prevail on a claim of negligent supervision, a plaintiff must prove that the employee's conduct was foreseeable and that the employer failed to exercise ordinary care when supervising the employee." *Id.* at 415. The plaintiff must show the employer-defendants owed him a legal duty to avoid his injuries. *Id.*

As with the negligence claim against the workers, Plaintiffs' claim against the supervisors fails to establish the supervisors owed Mitchell a legal duty. As discussed above, the duty is owed to the children suspected to be the victim of abuse. *See* Minn. Stat. §§626.556, subd. 1(a) and 260C.01, subd. 1. The supervisors did not owe Mitchell a duty and therefore his negligence claim against them must be dismissed. Additionally, no employee committed a tortious act, so no claim of negligent supervision may stand.

3. Plaintiffs fail to state a claim the workers or the supervisors acted negligently toward AM and XM.

As explained above, the Minnesota statutory framework imposes a duty upon child-protection workers "to protect children whose health or welfare may be jeopardized." Minn. Stat. §626.556, subd. 1. The workers and supervisors owed a duty to AM and XM to protect them from suspected abuse. Here, there were observable physical injuries on the children, which the children stated were inflicted by Mitchell. (ACC ¶28-29, 31, Exhibits 4, 7 COMPL 000022; 11 COMPL 000049). The workers and supervisors acted upon their duty to protect these children's health and welfare by investigating the abuse. Plaintiffs have failed to state a sufficient claim for negligence against either the workers or the supervisors.

D. Negligent Infliction of Emotional Distress[17]

To establish a negligent infliction of emotional distress (NIED) claim, Plaintiffs must establish these same four elements for negligence plus: presence in the zone of danger of physical impact, reasonable fear for their safety, and severe emotional distress "with attendant physical manifestations." *Thomsen v. Ross*, 368 F.Supp.2d 961, 977 (D. Minn. 2005); *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). Plaintiffs' NIED claim fails because they have not alleged (1) a legal duty owed to Mitchell; (2) any zone-of-danger facts nor met an exception to the zone-of-danger requirement; and (3) severe emotional distress with corresponding physical symptoms.

1. *No legal duty.*

For the same reason the claims for negligence fail above in relation to Mitchell, this NIED claim must also fail: they have not and cannot establish the Individual County Defendants owed Mitchell a legal duty. While the workers and supervisors owed a duty to AM and XM to protect them from suspected abuse. Here, there were observable physical injuries on the children, which the children stated were inflicted by Mitchell and which Mitchell admitted were

[17] Although Plaintiffs title Count 21 "Negligent Infliction of Emotional Distress," they blatantly copy and paste the allegations for *intentional* infliction of emotional distress and fail to allege facts necessary to state a separate claim for NIED. Under this cause of action, which is supposed to be based upon *negligent* conduct, Plaintiffs allege Defendants acted *intentionally*. (ACC¶595-98.)

inflicted by him. (ACC ¶28-29, Exhibits 4, 7, 11 and 25. Plaintiffs have failed to state a sufficient claim for negligence against either the workers or the supervisors.

2. *No breach of duty to AM or XM*

As stated above, the workers and supervisors owed a duty to AM and XM to protect them from suspected abuse. Here, there were observable physical injuries on the children, which the children stated were inflicted by Mitchell. (ACC ¶28-29, 31, Exhibits 4, 7, and 11). The workers and supervisors acted upon their duty to protect these children's health and welfare by investigating the abuse. Plaintiffs have failed to state a sufficient claim for negligence against either the workers or the supervisors

3. *No allegations Plaintiffs within zone of danger or that an exception applies.*

The only exception to the zone-of-danger requirement is when the plaintiff demonstrates severe emotional distress is the result of an intentional tort. *Oslin*, 543 N.W.2d at 417 ("The zone of danger requirement may be replaced by an intentional tort such as defamation[.]"). Plaintiffs have failed to allege any emotional distress was the result of an intentional tort. Plaintiffs have attempted to state a claim for IIED, but that claim fails as explained above. When underlying intentional-tort claims fail, NIED claim must fail as well. *See id.* (When underlying tort claims failed, NIED claims fail.)

4. *No severe emotional distress with physical manifestations alleged.*

To state a viable NIED claim, Plaintiffs must allege sufficient facts showing they suffered severe emotional distress with physical manifestations. *Thomsen*, 368 F.Supp.2d at 977. Plaintiffs allege they suffer "from emotional and mental conditions generally recognized and diagnosed by trained professionals." (ACC ¶597). Plaintiffs have not alleged any facts to demonstrate how this alleged distress was in fact severe. Moreover, Plaintiffs have utterly failed to allege "physical manifestations" of the severe distress, as is required to state a claim for relief on this basis. The NIED claim must be dismissed. *See Bahr v. County of Martin*, 771 F.Supp. 970, 979 (D. Minn. 1991) ("[R]ecovery requires a physical symptom or manifestation of the alleged emotional distress, or other assurance of the genuineness of the claim." (quotation omitted)).

E. Malicious Prosecution

Plaintiffs allege the County Defendants engaged in malicious prosecution in the civil child-protection proceedings. (ACC ¶600) To state a viable claim for malicious prosecution, Plaintiffs must demonstrate that the action was brought without probable cause or a reasonable belief that the plaintiff in the underlying action would ultimately prevail on the merits; the action was prosecuted with malicious intent, and the action must terminate in favor of Plaintiffs in the instant case. *Kellar v. VonHoltum*, 568 N.W.2d 286, 192 (Minn. App. 1997) *review denied*

(Minn. Oct. 31, 1997). Probable cause for a civil action consists of such facts and circumstances that warrant a cautious, reasonable and prudent person in the honest belief that the action and the means taken in prosecution of it are just, legal and proper. *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. App. 2006) (citations omitted). Only "reasonable belief" that probable cause exists is necessary to negate a malicious prosecution claim. *Kellar*, 568 N.W.2d at 192. Malicious prosecution "has always been carefully circumscribed, and not favored in law, the reason being that 'public policy favors ... prosecutions and affords such protection of another in good faith and on reasonable grounds as is essential to public justice.'" *Dunham* 708 N.W.2d at 569 (citations omitted).

In this case, not only were there visible injuries observed on XM and AM, but Mitchell ultimately convicted of malicious punishment of a child. (*See* ACC Exhibits 4, 7, and 25). The CHIPS proceedings that Plaintiffs complain were prolonged as result of both Mitchell and XM's refusal to participate in reunification. (See ACC Exhibit 13 COMPL 000062)

F. Abuse of Process

The two essential elements of an abuse-of-process claim under Minnesota law are (1) "the existence of an ulterior purpose"; and (2) "using the process to accomplish a result not within the scope of the proceedings in which it was

issued, whether such result might otherwise be lawfully obtained or not." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997) (*citing Hoppe v. Klapperich*, 28 N.W.2d 780, 786 (Minn. 1947)). Contrary to Plaintiffs' assertions the County did not initiate a Termination of Parental Rights Petition, but rather a Transfer of Custody Petition.[18] The TOC Petition was necessitated by Plaintiff Mitchell and XM's refusals to participate in reunification and his statements that the County needed to "look to XM's mother for permanent placement." ACC Exhibit 13 COMPL 000062. *See also* Brosnahan Aff Ex. 2.

G. False Imprisonment

Plaintiffs allege Defendants illegally detained and falsely imprisoned AM and XM for 5 and 22 months respectively. (ACC ¶620-21). Any claim for False Imprisonment of AM and XM is time-barred. See Minn. Stat. §541.07(1) (providing a two-year statute of limitations for False Imprisonment).

H. Defendants Entitled to Immunity for the State-Law Tort Claims

Not only have Plaintiffs failed to state viable claims for IIED, negligence, NIED, Malicious Prosecution, Abuse of Process, and False Imprisonment but the County Defendants are also immune from suit for these state-law tort claims.

[18] See Transfer of Custody Petition ("TOC"), a copy of which is attached as Exhibit 2 to the "Brosnahan Aff."

1. Defendants entitled to official immunity.

"The official immunity doctrine provides that a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Elwood v. Rice Cnty.*, 423 N.W.2d 671, 677 (Minn. 1988) (quotation omitted). 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). Official immunity "protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Id.* at 678. "Malice, in the official immunity context, means intentionally committing an act that the official has reason to believe is legally prohibited." *Larson,* 2004 WL 432218, at *19. "This is an objective inquiry that examines the legal reasonableness of an official's actions. To overcome a defense based on official immunity, a plaintiff cannot rely on 'bare allegations of malice'; rather, plaintiff must present specific facts evidencing bad faith." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) and citing *Beaulieu v. Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994)).

Plaintiffs' allegations in the state-law tort claims stem from DCSS employees acting within their scope of employment while investigating

allegations of child abuse, formulating case management plans, and participating in the child protection court proceedings. Defendants are entitled to official immunity for these acts.

Social workers are entitled to official immunity in the formulation of case plans. *See Olson v. Ramsey Cnty.*, 509 N.W.2d 368, 372 (Minn. 1993) (designing a suitable child protection case plan "required the exercise of judgment in determining what services should be provided, who should provide them, their frequency, and the nature and extent of agency supervision"). Social workers are entitled to official immunity for their decisions in investigating allegations of child abuse. *See S.L.D. v. Kranz*, 498 N.W.2d 47, 52 (Minn. App. 1993) ("[S]ocial workers must exercise their professional judgment, based on training and experience, to determine whether a given set of allegations constitutes neglect."). Social workers are entitled to immunity for their initiation and participation in child protection court proceedings. *See Abdouch*, 426 F.3d at 989 ("[T]he district court correctly applied absolute immunity to shield the defendants from liability for initiating or maintaining judicial proceedings."). Lastly, supervisors of social workers are entitled to official immunity because their supervision and management of cases require the exercise of reason and professional judgment; thus their acts were discretionary. *Porter v. Williams*, 436 F.3d 917, 923 (8th Cir. 2006).

2. County entitled to vicarious official immunity.

Determining whether the County is entitled to vicarious official immunity is "ultimately a policy decision." *Miskovich v. Indep. Sch. Dist. 318*, 226 F.Supp.2d 990, 1029 (D. Minn. 2002). When policy considerations are at the heart of the decisions forming the basis of the allegations, courts grant the County vicarious official immunity. *Id.* at 1031. As explained above, the alleged conduct of the Individual County Defendants is the product of discretionary policy decisions where the Defendants were required to exercise their judgment in investigating alleged child abuse, initiating court proceedings, and formulating case plans. The individual defendants are entitled to official immunity for these claims. "[T]o grant immunity to the social worker while denying it to the County would still leave the focus of a stifling attention on the social worker's performance, to the serious detriment of that performance." *Olson*, 509 N.W.2d at 372; *see also Larson*, 2004 WL 432218, at *19 ("Because the Court finds that there is no basis for imposing liability on [individuals], there is no basis for imposing vicarious liability on the … County Defendants."); *Dokman v. County of Hennepin*, 637 N.W.2d 286, 297 (Minn. App. 2001) ("Vicarious official immunity protects a governmental entity from liability based on the acts of an employee who is entitled to official immunity."); *S.L.D.*, 498 N.W.2d at 53 ("If the county is not immune from liability based on the decisions of its social workers in this

situation the courts would have to scrutinize the decision-making of the social workers.").

3. County entitled to statutory immunity for negligent supervision claim.

The County is also entitled to statutory immunity under Minnesota law for the state-law claim of negligent supervision. Minnesota Statutes section 466.03, subd. 6, establishes a municipality is immune from tort liability for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." *See Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 412-13 (Minn. 1996). When government entities are alleged to have inadequately trained or supervised their employees, statutory immunity applies because the training and supervision of employees is a policy decision requiring discretion. *Ivory v. City of Minneapolis*, CIV. 02-4364JRTFLN, 2004 WL 1765460, at *8-9 (D. Minn. Aug. 4, 2004); *see also Maras v. City of Brainerd*, 502 N.W.2d 69 (Minn. App. 1993) (determining "the training a city provides to its police officers is a policy decision" that is "protected by discretionary immunity" under Minnesota law).

VII. Declaratory Relief

Plaintiffs request declaratory relief. (ACC ¶631.) The Declaratory Judgment Act (UDJA) gives courts "within their respective jurisdictions" the power to "declare rights, status, and other legal relations," 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). Thus, a disputed fact in a declaratory-judgment action is established upon proof by a preponderance of the evidence. *See Wick v. Widdell,* 276 Minn. 51, 53–54, 149 N.W.2d 20, 22 (1967) ("In an ordinary civil action the plaintiff has the burden of proving every essential element of his case ... by a fair preponderance of the evidence."). A declaratory-judgment 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.

As outlined above, Plaintiffs have failed to plead any viable federal or state claim, as such their claim for declaratory relief fails.

VIII. DCSS AND DCAO CANNOT BE SUED

To the extent Plaintiffs are suing the Dakota County Social Services or the Dakota County Attorney's Office, the individual departments are not subject to suit and the claims against them must be dismissed. *See* Minn. Stat. §466.01; *In Re Scott Cnty.*, 672 F.Supp. at 1163 n.1; *see also Anderson v. City of Hopkins*, 805 F.Supp.2d 712, 719 (D. Minn. Mar. 28, 2015) (municipal police departments are not legal entities subject to suit under § 1983).

CONCLUSION

Plaintiffs' ACCC must be dismissed in its entirety: they have failed to state a claim for any of the nineteen counts against the County Defendants; each Individual County Defendant is entitled to immunity under theories of absolute, qualified, and official immunity; and the County is entitled to vicarious immunity. For these reasons, it is respectfully requested the Court grant the County Defendants' motions to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6).

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