IN THE SUPREME COURT OF IOWA

No. 20-1148

ANDREW LENNETTE, Individually and on behalf of C.L., O.L. and S.L., minors

Plaintiff-Appellant

v.

STATE OF IOWA, MELODY SIVER, AMY HOWELL, and VALERIE LOVAGLIA,

Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR JOHNSON COUNTY THE HONORABLE MARY E. CHICCHELLY, JUDGE

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it principally presents the application of existing legal principles in the context of a ruling on Summary Judgment. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

NATURE OF THE CASE: This tort/constitutional tort action is brought by Andrew Lennette, individually and on behalf of his minor children (collectively "Andy"), arising out of the wrongful removal and continued separation of him from his home and his children under a false allegation of sexual abuse. The claim against Iowa DHS is for the wrongful removal of Andrew from his home and for a shockingly non-existent investigation of the wrongful allegations against him, all resulting in months long deprivation of and interference with his relationship with his children, with resulting trauma.

This case was before this Court on an unsuccessful Motion to Dismiss. *Lennette v. State*, 924 N.W.2d 878 (Iowa App. 2018). The case returns on a grant of summary judgment.

Andy asserts causes of action for Iowa constitutional torts and Iowa Chapter 669 common-law torts. The State sought summary judgment

contending that it was absolutely immune, qualifiedly immune, statutorily immune, and sovereignly immune.

COURSE OF PROCEEDINGS: On January 2, 2017, Andy sued three IDHS employees and two nongovernmental defendants. The case was removed to Federal Court on February 10, 2017. After Andy dismissed federal claims against the IDHS employees and dismissed them as parties, the case was remanded back to State Court on August 28, 2017. After complying with Chapter 669, Andy refiled the lawsuit against the three IDHS employees on September 7, 2017, while adding the State of Iowa as a defendant.

On February 8, 2019, the Court consolidated the new action with the original action (Linn County LACV086771) and the two actions proceeded forward under both file numbers.

After the court dismissed the lawsuit against the remaining nongovernmental defendant (GCM), Andy requested that the Court sever the two actions to allow him to directly appeal the grant of summary judgment to GCM. The Court granted the motion to sever on May 28, 2020.

In the interim, on April 21, 2020, the State of Iowa moved for summary judgment. (App. 56). The court granted summary judgment on August 12, 2020. (App. 1144). On September 4, 2020, Andy filed his Notice of Appeal. (App. 1167).

STATEMENT OF THE FACTS[1]

A. BITTER CUSTODY DISPUTE

Andrew Lennette ("Andy") married Holly Chisholm ("Holly") and they had three minor children: C.L. (male) born in 2004; O.L. (male), born in 2006; and S.L (female), born in 2009. (App. 502).

But the story begins in August 2014, when the couples' marital strife caused conflict within the family as Holly began to make threats and accusations to friends and family and to Andy, including allegations of infidelity and domestic assault by Andy. (App. 857-859; 862 and 875).

In September 2014, Holly absconded with the children to the State of Arkansas and enrolled the children in school there. (App. 537). In response, Andy filed for divorce. (App. 502). The Court ordered Holly to return the children within 48-hours. (App. 537).

On September 17, 2014, Andy raised concerns regarding Holly's accusations of marital infidelity (including group sex) being made to his children. (App. 862-884).

Holly alleged for the first time that Andy had physically hurt the two boys. No allegation of sexual abuse or neglect was made. Holly provided no corroboration. (App. 909; App. 502-505).

On September 23, 2014, the Court awarded Andy and Holly joint legal custody without a primary caretaker. (App. 502-505).

In early October, while Andy was away, Holly initialed a call to the police alleging a "home invasion" potentially by Andy. Holly reported she

[1] The facts are submitted in the light most favorable to Andy. This is a sized down version of the facts taken from the Statement of Disputed Facts, which can be found in the Appendix.

was "going thru a divorce…. nasty." When officers responded, the police indicated a possible 10-96 (psych patient). (App. 917, 927).

On October 23, 2014, Holly surreptitiously moved her mother into the marital residence. On November 21, 2014, Holly's mother was ordered out of the home. (App. 933).

On December 12, 2014, Andy filed an affidavit about Holly's campaign to "falsely characterize [Andy] as an abuser…. in an effort to receive the primary care of our children" with the goal of relocating them to Little Rock. (App. 936)

On December 16, 2014, the Court granted joint physical and legal custody of the children with the stated anticipation that Holly would obtain employment and leave the residence. (App. 482).

B. HOLLY'S EFFORTS TO SUPPORT HER CUSTODY CLAIM

Holly embarked on a campaign to find a therapist or other health care provider that would support her escalating allegations against Andy. (App. 502, ¶21).

In October 2014, Holly saw Ms. Alshouse at Affiliates of Family Practice. (App. 950, p. 14). To Ms. Alshouse, *Holly's presentation was so extreme, that Alshouse believed that she was suffering from possible Bi-Polar Disorder or Munchhausen's disorder*. (App. 950, 961, 961-66) (emphasis added).

At the end of October 2014, Holly contacted therapist Lisa Hawk to provide therapy services to the children to assist them in processing the divorce. (App. 967, 970). Hawk testified that the children were very angry with their father due to mother's accusations regarding him. According to

Hawk, C.L. and S.L. believed what their mother said was true. (App. 967, 974-75). Neither child reported sexual abuse. (App. 967, 975).

According to Hawk, the children were disclosing information their mother was reporting to them about mature matters. (App. 967, 976-77). In one session, S.L. specifically regurgitated information she had heard from her mother about an affair Andy was having. (App. 967, 978). Hawk testified that the children were receiving negative information from their mom, and only their mom. (App. 967, 980).

Hawk terminated her services to the family after Holly claimed that she no longer trusted her. (App. 967, 982).

In late November 2014, Holly brought C.L. to see a new therapist, Kyle Votroubek, at Grace C. Mae. (App. 343). Andy was unaware of this. (App. 494). GCM eventually provided therapy services to all three children. (App. 267-343).

Holly had been receiving individual counseling from GCM beginning in late July or early August 2014, and she continued to receive therapy throughout this time frame. (App. 534-536). No allegations of physical or sexual abuse were made by Holly or the children when therapy began. (App. 267-343).

On December 5, 2014, Holly took all three children out of school for an appointment with yet another therapist in Coralville, Lon Marshall. (App. 576; App. 989).

On that same day, Holly called Votroubek seeking information about childhood sexual development as well as signs and symptoms of child sexual abuse. Kyle asked Holly to tell him about any "abuse she feels the children have suffered." Holly did not respond to the email. (App. 203). Kyle testified that none of the children exhibited any sexualized behaviors while

seeing him. (App. 547, 562-63).

Later that same day, Holly surreptitiously took S.L. to her pediatrician, Dr. Cearlock, seeking confirmation that a "bump" on S.L.'s mouth was evidence of an STD. (App. 994). Cearlock testified that Holly began prompting or reminding S.L. of what she needed to say to Cearlock and completed sentences for her. (App. 995, 1002-04). Cearlock testified that there was no independent evidence of physical or sexual abuse of any of the children. (App. 995, 999). Cearlock testified that he was never contacted by anyone from IDHS regarding the Lennette family. (App. 995, 997-98).

Shortly after the December 16, 2014 Court Order, Holly told Andy that the children were being seen at GCM. (App. 494).

On December 30, 2014, Andy provided GCM with all legal documents relating to the divorce and custody, including the orders relating to Holly absconding to Arkansas. (App. 568-573).

C. HOLLY SEEKS TO GET ANDY OUT OF THE HOUSE

Four days after the Court ordered Holly to find a job and move out of the house, S.L. reported that "someone" told her that "someone" was going to be moving out of the house. (App. 1009 and App. 989).

On January 5, 2015, GCM received an email from Holly in which Holly made various claims of abuse that, if true, would constitute abuse. (App. 608). The email contained Holly's "dump thoughts and observations" regarding behavior of the children allegedly occurring from September through December of 2014, six pages in length and titled "Things I've Thought Are Strange, Bad or Inappropriate". (App. 608). Nevertheless, GCM did not file a report of possible abuse with DHS.

On January 6, 2015, S.L. "confidently" denied to the GCM therapist

that anyone touches her private areas. (App. 267). Votroubek specifically reported that he briefly processed this with Holly because *Holly* was concerned about alleged sexual behaviors. (App. 267).

On January 12, 2015, Holly reported to GCM that *two days prior, on January 10, 2015*, S.L. had made an allegation of sexual abuse to her. This included an allegation that the child had stated that her father "urinated" in her mouth. (App. 492).

On the morning of January 12, 2015, Andy put all three children on the school bus on his way to the airport. (App. 857, 861:5-24). Rather than immediately go to the authorities, Holly went about a normal day, sending the kids off to school. (App. 1013, 1016).

Holly made a visit at the end of the day to GCM and spoke with Bekah Andrews, an unlicensed social worker. Ms. Andrews sent an email to her colleague and made a report to DHS, while directing Holly to take S.L. to the ER. Her email was prepared at 4:45 pm. (App. 492).

Three hours later, at approximately 8:12 p.m., Holly arrived at St. Luke's ER with S.L. for a "well child exam." (App. 371).

According to the physician's assistant, Jeff Cater, when Holly and S.L. arrived at the hospital, Holly did not report concern for sexual abuse at the front desk or to the triage nurse. It was not until Mr. Cater met Holly in the patient room that he became aware of some "vague" allegations of abuse. Cater testified that Holly and S.L.'s demeanor was calm, normal, unconcerned. (App. 1017, 1026-27). Mr. Cater found Holly's behavior inconsistent with any alleged sexual abuse of a child that he had seen in his years of practice; in a word "inappropriate." (App. 1017, 1030-31).

Cater questioned the veracity of the complaint, eventually noting in the chart "questionable abuse per mother's report." While he had his own

concerns about Holly's claims, he allowed the social worker and nurse to also evaluate the situation. In a conference after the visit, they all agreed upon the lack of veracity of the mother. (App. 1017, p. 1036-37) Mr. Cater testified that he "found her statements to be unbelievable, given the circumstances. Additionally, my staff found them to be unbelievable as well." (App. 1017, 1040).

Mr. Cater was never contacted by DHS. (App. 1017, 1038).

D. DHS' NON-EXISTENT INVESTIGATION

Melody Siver ("Siver") was employed by DHS as a Child Protection Worker. (App. 807). She had held that position with the Linn County DHS for 9.5 of her 17 years with DHS. (App. 807-808).

Amy Howell ("Howell") was employed by DHS as a CPW Supervisor. (App. 784, 786). Howell was Siver's direct supervisor. (App. 735, 741).

Valarie Lovaglia ("Lovaglia") was supervisor to Amy Howell. (App. 735, 741-42).

On January 13, 2015, Siver was assigned to investigate and complete an assessment regarding allegations of sexual abuse by Andy. (App. 807, 810). Siver was immediately aware of divorce and custody proceedings. (App. 807, 819). Siver admitted that such proceedings impact an assessment, and the information and its source should be considered. (App. 807, 819-20).

On January 13, 2015, Siver obtained background information solely from Holly. This was before S. L. was interviewed. (App. 223). Siver then observed the CPC interview of S.L. (App. 807, 812).

Holly's report of S.L.'s statements changed from what she told Bekah Andrews and St. Luke's on January 12, 2015, and what she told the CPC

staff and Siver on January 13, 2015. (Compare App. 492, 371 and 223).

The January 13, 2015 physical exam of S.L. at CPC showed no evidence of any physical or sexual abuse. (App. 223). Two days later, the boys were examined and interviewed. They had normal physical examinations and did not claim any abuse of any kind. (App. 1111).

1. CPC Interview:

Siver admitted there was no evidence of sexualized behaviors by S.L. besides Holly's report. (App. 735, 755-56).

Howell admitted that for purposes of a child's CPC interview, the assessment of the child's credibility is done by DHS. (App. 784, 786).

Howell admitted that she did not recall anyone making a credibility assessment with regard to the child. (App. 784, 801-02).

Siver claimed that the staff at CPC told her that S.L. was a credible witness. (App. 735, 766). However, the CPC report makes no claim as to the credibility of the child and makes no recommendation as to removal of the child or a parent. (App. 223, 230).

Moreover, CPC personnel testified they do not offer any recommendations as to what to do with the child, nor, contrary to Siver's testimony, do they make any credibility assessments of the child. (App. 844, 847-48).

The CPC made no recommendation for removal of Andy from the home or to have no contact with his children. (App. 223 and App. 849, 852).

Dr. Stuart Bassman is a Psychologist and an expert on sexual abuse and sexual disorders. Dr. Bassman performed an analysis of the CPC forensic interview of S.L. (App. 711).

Dr. Bassman concluded that the interview of S.L. "is not seen as having sufficient reliability and consistency for a standard of practice on

which a preliminary conclusion that sexual abuse occurred would be warranted." (App. 711, 733).

2. Collateral Sources:

Howell conceded that when there is no physical evidence of abuse, a child's statements are corroborated by collaterals, including anyone the child may have talked to about the allegations. Collaterals include teachers, pediatricians, and counselors. (App. 784, 802).

Siver admitted that anybody with firsthand knowledge of a sexual abuse allegation in a contentious divorce setting is relevant for purposes of assessment. (App. 735, 751). This could include teachers, therapists, medical personnel, and law enforcement. (App. 735, 751).

In fact, Howell admitted that the CPW is trained to talk to collateral sources and document those contacts, whether they gain information that helps them in either direction. (App. 784, 802).

Howell confirmed that those collateral sources, if connected in some way to the allegation, are to be reflected in the assessment report. (App. 784, 803).

Howell confirmed that if professionals, like teachers, counselors or physicians have records, they typically obtain those records. (App. 784, 803).

Siver states that people who could provide pertinent information include everyone in the household, counselors for those people, or anybody else that may have heard a disclosure. (App. 735, 782).

Howell admitted that both in the interview on February 17, 2015, and beforehand, Andy and his lawyer provided a lot of information including witnesses, places to get records, or actually provided records. (App. 784, 804).

Howell states that DHS accepts what the child has said as true and then investigates. (App. 784, 804). While investigating, DHS needs to get a court order that removes the dad from the home on the assumption that what the child is telling is the truth. (App. 784, 804-05). The balance of the 20 business days to investigate is focused on trying to corroborate the child's story. (App. 784, 805).

3. **Lack of Contacts and Review of Documents**:

Siver made no effort to speak with or obtain the initial report from Bekah Andrews. Siver made no effort to contact Jeffrey Cater at St. Luke's ER or to review S.L.'s records at St. Luke's, even though CPC is located at St. Luke's. (App. 149, ¶s172-213).

Siver made no effort to corroborate any of the behaviors alleged with Holly's father or S.L.'s brothers. (App. 149, ¶s172-213).

Siver made no attempt to follow up with Votroubek. (App. 149, ¶s172-213).

In between January 13, 2015 and January 28, 2015, DHS did not conduct a single interview of any collateral sources. (App. 246; App. 149, ¶s172-213).

Plaintiffs' Exhibit 31 (App. 490) is a list of all witnesses and available documents pertaining to the children. Ms. Siver was shown Exhibit 31 and admitted that she did not talk to any of the 21 witnesses listed. (App. 735, 761)

Siver never looked at any of the court records in the divorce. (App. 735, 761).

Siver did not look at any of the St. Luke's records on any of the children. (App. 735, 761). Nor did she try to obtain any of the St. Luke's records before going to see the judge. (App. 735, 761).

Siver admitted she had not read any therapy notes and did not speak with those therapists. (App. 807, 832).

Siver never sought, nor obtained, any pediatric records for any of the children. (App. 735, 761).

Siver never spoke with the children's pediatricians. (App. 807, 830-31).

Siver did not look at or try to obtain counseling records. (App. 735, 761).

Siver never obtained or reviewed any school records. (App. 735, 762).

Siver never obtained any records from the Police department. (App. 735, 762).

Siver admitted that with two exceptions she made no contacts with anyone between February 10 and March 13, 2015. The exceptions were interviewing Andy Lennette on February 17, 2015 and purportedly calling GCM on March 12, 2015. (App. 735, 775).

Siver did not follow up on any of the documents provided by Andy or his lawyer on February 17, 2015, or the documents filed with the Court. (App. 735, 775).

Siver stated that Amy Howell would decide which of Andy's witnesses and documents would be followed up on because there were so many documents. (App. 735, 775).

Siver claimed that anybody that she decided to contact was documented in the report. (App. 735, 775).

Siver did not read the polygraph, psychosexual evaluation or any of the other documents provided to her on February 17, 2015. (App. 735, 776).

Siver claimed that Amy Howell went through the documents provided to DHS at the interview with Andy on February 17, 2015. (App. 735, 776).

Contrary to Siver's testimony, Howell testified that Siver never asked her to review the information or assist with the review of the exculpatory information provided by Andy and his lawyers. (App. 784, 799).

Howell specifically denied doing any investigative work on the Lennette case. (App. 784, 798). Howell did not assist in any review of any records or conduct any investigation between February 10, 2015 and March 10, 2015. (App. 784, p. 799) and she did not assist Siver in completing her reporting between March 10 and March 13, 2015. (App. 784, 799).

Howell testified that Siver is responsible to follow up with law enforcement with a phone call or email asking for the status of the investigation. (App. 784, 800). Any contact with law enforcement, including the final decision from law enforcement, should be noted in the final assessment. (App. 784, 800).

Siver's conclusion was based solely on what Holly and S.L. said. (App. 807, 837).

4. The Lie about the Police:

On February 10, 2015, Siver placed the abuse assessment on addendum status, a method used to delay the completion of the assessment. The report indicated that the reason was because law enforcement was still investigating. (App. 234).

Siver claimed that there were two reasons for doing so: first, they needed to interview Andy, and second, they were waiting for the result of the criminal investigation conducted by the Cedar Rapids Police Department. (App. 735, 737). Siver claimed that she maintained contact with the CRPD investigator and was told that the investigation was still open. (App. 735, 771-72).

The evidence contradicts her claim. On February 9, 2015, the day before the assessment was placed on addendum status, Linn County Attorney Jerry Vander Sanden rejected CRPD's warrant request, stating that "I don't believe we could prove her allegation against her dad given the false allegations against her brothers." (App. 917, 926).

Siver did not have an explanation for why she was unaware that the Linn County Attorney's office had decided not to proceed with any criminal charges because of a lack of credibility of the child before she filed her first addendum on February 10, 2015. (App. 735, 772).

Siver claimed that she had several conversations with Jennifer Roberts from the Police Department about the pending investigation of Andy. (App. 735, 782). None of those conversations were ever recorded in her assessment. (App. 246).

A month later, the March 10, 2020 report was again put on addendum status because Siver hadn't heard from law enforcement regarding their investigation even though she should have been aware by then. (App. 784, 799-800).

5. The Claimed Contact with GCM:

On March 12, 2015, Siver purportedly made a single contact with GCM, not for purposes of investigation, but because of Andy's Emergency Motion to Vacate. (App. 246; App. 807, 821).

The next day the Department issued a founded abuse report against Andy for sexual abuse. (App. 246).

The audit trail for the Assessment report contradicts the claim made by Siver that she spoke with Bekah Andrews on March 12, 2015. It shows that Howell put the purported call into the computer. (App. 1070, 1076).

This is despite the fact that Howell testified that she did not conduct any investigation into the allegations against Andy.

The existence of this purported phone call on March 12, 2015 is further undermined by the testimony of Ms. Andrews, who claimed in her CINA testimony that she did not have an opinion regarding contact between father and his children. (App. 639, 647). If she had no such opinion, and the audit trail reflects that Ms. Siver did not place the call, then the statement made in the abuse assessment that she obtained such an opinion is untruthful. (App. 246).

6. The Court Ordered Removal of Andy:

A day after S.L.'s interview, Sivers met with Howell to discuss a Court Order to remove Andy from the home, without having pursued any collateral information and without having completed the interview of the boys. (App. 735, 767).

On January 16, 2020, Siver filed an affidavit with the Juvenile Court in support of an Ex Parte Order to Vacate the Home and for No Contact between Andy and his children. (App. 486). She conceded that the only information she had was the child protection intake (allegation) and information gathered at the CPC. (App. 735, 759-60). Her affidavit failed to disclose that the two boys were unharmed and denied that any abuse had occurred in the home. (App. 486).

The Court granted Siver's request. (App. 615).

The Court's Order was predicated solely on the DHS Affidavit filed by Siver. In the Affidavit, she stated that "(S.L.) had knowledge that a child of her age could not know otherwise. I found her interview to be credible." (App. 486). Siver went on to say that S.L. has exhibited some sexualized behaviors recently, based only on the report of her mother. Siver further

alleged domestic abuse and violence between the children, obtained only from Holly and not corroborated by any other source, as grounds for the removal. (App. 486).

Siver conceded that the references to domestic abuse or issues between children would not have been an independent basis for obtaining an order. (App. 735, 763).

Siver admitted that she did not tell the court in the affidavit that Holly had surreptitiously taken her children to Arkansas and could not recall if she told the court. (App. 735 763-64). Siver admitted she did not tell the court the existence of an existing court order in the divorce relating to custody and admitted that she had not seen the court order. She also did not know that the Order required Holly to look for a place to live outside the family home. (App. 735, 764).

7. Ignoring Pleas for a Thorough Investigation:

On January 23, 2015, Attorney Rich Mitvalsky provided Siver with background information regarding the bitter divorce, including the kidnapping to Arkansas. He also told DHS that Lisa Hawk would have information. (App. 246, 257).

On February 3, 2015, Mitvalsky sent an email outlining information to Siver for purposes of her investigation. This included police reports pre-dating the allegation of sexual abuse and information regarding the children's therapists. (App. 495). He stated that the documents raised "serious questions you should investigate and give a broader view to the events and toxicity surrounding the allegations you are investigating." (App. 495). Mitvalsky stated that given a "nasty" divorce and evidence that Holly was asking leading and suggestive questions of S.L., the investigation required the "highest scrutiny." (App. 495).

Mitvalsky pointed out that S.L. was parroting information provided by her mother, contradicting the claim made by Siver in her Affidavit to the Court that the child had knowledge "she would not have otherwise known." (App. 495).

None of Mitvalsky's concerns, requests, nor documentation, were made a part of the DHS abuse assessment. (App. 246).

On February 4, 2015, Attorney Cronk contacted Siver to alert her that S.L. had been exposed to sexual conversations with her mother, which was well documented in the dissolution case. (App. 1065).

On February 5, 2015, Randy Lowenberg, a friend of the Lennette family who had witnessed S.L. restate inappropriate sexual information from her mother, contacted DHS about his concerns regarding the allegations against Andy. After not receiving a return call, Randy Lowenberg presented in person at the Linn County DHS and left a letter and the affidavit from the divorce case. (App. 862).

On February 13, 2015, Cronk sent another email to DHS requesting that Siver follow up with concerns regarding Holly's mental health, and asking Siver to contact Dr. Alshouse. (App. 1108).

On February 16, 2015, Cronk provided DHS with the full medical file from St. Luke's ER, and included an expert report regarding allegations of child abuse in the context of divorce proceedings. (App. 1109).

In response, DHS presumed Andy's guilt and planned to work around the only evidence that it had used to justify an *ex parte* order. (App. 1048). In response to Mr. Lowenberg's contact, DHS made fun of the need to follow-up. (App. 1082). The contact by Randy Lowenberg was not followed up on nor made a part of the assessment. (App. 246; App. 149, ¶172-213).

On February 11, 2015, Lovaglia stated that DHS should inform Cronk

that "we have no other documents to share with her and that we will not be seeking any other documents." (App. 1107).

On February 17, 2015, Siver and Howell, met with Andy and attorney Cronk under the auspices that they were interested in conducting a complete investigation. (App. 989).

At the interview, DHS was provided a lot of information, including a psychosexual evaluation, and audio discs containing audio recordings of all three children reflecting that they had been exposed to ongoing sexual innuendo, sexual information, and other inappropriate adult information by their mother. (App. 488; App. 989).

Andy also provided DHS with an audio/video descriptions log which reflected what was contained in the audios themselves. This would allow DHS to easily locate relevant audio recordings, without having to listen to each recording. (App. 1009).

Andy left the meeting believing that DHS was not seriously interested in investigating his concerns. (App. 989).

At the hearing, Siver stated she had been provided numerous recordings and had listened to them. (App. 807, 822). These alleged efforts were not corroborated by her report. (App. 246).

E. PLAINTIFF'S EXPERT WITNESS PAULA ROHDE

Andy hired Paula Rohde to evaluate the DHS investigation. (Ex. 666). Ms. Rohde was qualified to comment by virtue of her experience in the same field as DHS. (App. 666, 669 and 698). Ms. Rohde concluded that the DHS investigation was "not compliant with the relevant Iowa Code and Iowa Administrative Services Code, were seriously deficient in thoroughness and completeness… [and] reflects pervasive deliberate indifference to exculpatory evidence and consistent bias against the

children's father". (App. 666, 670). As a result of this pervasive deliberate indifference, Andy and his children suffered trauma. (App. 666, 668 and 680).

APPEAL ARGUMENT

Introduction

"Separating children from parents has a negative impact on children… The inability to form attachments may permanently impair a child's ability to form living relationships." *In re T.R.*, 460 N.W.2d 873, 876 (Iowa Ct. App. 1990).

Iowa law mandates an abuse assessment and report conducted by IDHS with statutorily circumscribed procedures. Iowa Code § 232.71B(4) (assessment process); Iowa Code § 232.71B(11) (assessment report). The foundation of Andy's claim is that DHS Investigators wholly failed to conduct an appropriate investigation *mandated by Iowa law*, and *refused to consider and investigate exculpatory information* provided by Andy and his attorneys. "The comprehensive nature of the assessment process reveals the importance of accurate assessment. *Grant v. IDHS*, 722 N.W.2d 169, 176 (Iowa 2006). *See* Iowa Code § 235A.12 ("[V]igorous protection of rights of individual privacy is an indispensable element of a fair and effective system of collecting, maintaining and disseminating child abuse information.".

The undisputed evidence is that DHS was made aware of 20 or more witnesses and failed to contact any of them; DHS was also alerted to or handed numerous court records (including records showing mother had

secretly taken the kids to Arkansas and tried to register them in school there), medical records, therapy records, school records, law enforcement records, and video and audio recordings but failed to look at any of those records---not a one. When questioned about what they looked at, DHS employees pointed a finger at each other as being responsible for looking at the information. This lack of effort and interest on the part of DHS demonstrated a "deliberate indifference" or a reckless disregard for the constitutional rights of Andy.

While DHS was doing nothing to investigate the allegations, it sought court intervention based on allegations supported by two elements: the claims of a troubled and manipulative mother in the midst of a bitter divorce, and a CPC interview that lacked trustworthiness, one deemed by law enforcement to lack credibility. To hide their lack of investigation, DHS delayed their child abuse assessment claiming that they were waiting for a final decision by law enforcement before completing their report. This was untrue, as law enforcement had already decided not to proceed due to the lack of credibility of the child's allegations. This was a day before DHS would begin its efforts to delay their reporting and 32 days before DHS would claim a founded report of abuse, having ignored a plethora of

witnesses and documents that would completely obliterate DHS' conclusions.

Eventually, Andy was vindicated and gained sole custody of his children, but not before significant harm was done to Andy and his children. As a result of this unprofessional and outrageous conduct, they were deprived of their constitutionally protected relationship and suffered injury. Any form of a reasonable investigation would have revealed that the red flags raised by the setting of these scurrilous allegations were ominous warnings to all but the lazy and disinterested.

I. THE DISTRICT COURT MISAPPLIED THIS COURT'S DECISION IN *MINOR V. STATE* IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF ABSOLUTE IMMUNITY.

Preservation of Error.

The Court granted summary judgment on August 12, 2020 on this issue. Andy filed a timely Notice of Appeal on September 4, 2020. Andy preserved error for review.

Standard of Review.

The standard of review on a ruling granting summary judgment is for errors at law. "In assessing whether summary judgment is warranted, we view the entire record in a light most favorable to the nonmoving party. We also indulge in every legitimate inference that the evidence will bear in an effort

to ascertain the existence of a fact question. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

Merits.

In *Venckus v. City of Iowa*, 930 N.W.2d 792 (Iowa 2019), this Court upheld the use of absolute immunity as to prosecutors. In doing so, the Court stated:

> While the absolute immunity is necessary for the proper functioning of the judicial process, *it does not give government officials carte blanche to engage in misconduct. The judicial process immunity is narrowly tailored to immunize only conduct "intimately associated with the judicial phase of the criminal process." See Minor v. State*, 819 N.W.2d 383, 394-95 (Iowa 2012) (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976).

Venckus at 802-03 (Emphasis added).

One of the cases cited by the Court is *Minor v. State*, 819 N.W.2d 383 (Iowa 2012), a case involving a claim against Iowa DHS for wrongfully removing a child from the custody of a parent. In that case, the Court set forth the standard when analyzing whether to apply absolute immunity or qualified immunity *in the context of a 42 U.S.C. §1983 claim*.[2] In *Minor*, the Iowa Supreme Court summarized its holding as follows:

> [W]e conclude a social worker is entitled to absolute immunity when the social worker functions in the role of a prosecutor, such as when the

[2] Andy will later discuss the differing standards when applying qualified immunity to claims under the Iowa Constitution.

> social worker files a petition to initiate a CINA proceeding. Further, a social worker is entitled to absolute immunity when the social worker functions in the role of an ordinary witness, such as when the social worker files an affidavit after the initiation of CINA proceedings. *Additionally, a social worker is entitled to qualified immunity when he or she acts in the role of a complaining witness, such as when the social worker files an affidavit in support of a CINA petition. Similarly, a social worker is entitled to qualified immunity for his or her investigatory acts*.

Id. at 389. (Emphasis added).

To the extent that defendants can show that Andy's claim is premised on any conduct by the social worker's functioning in the role of a prosecutor or in the role of an ordinary witness then they are entitled to absolute immunity.

However, Andy's claims are premised on a non-existent investigation that reflected a deliberate indifference or reckless disregard for their rights and interests.[3] Andy's claim rests on a review of the investigatory effort expended by the defendants and implicates two roles: investigatory acts or failure to act, and actions taken as a complaining witness. At no time relevant to Andy's allegations did the defendants act as ordinary witnesses or as

[3] Andy's expert describes it as a "deliberate indifference." However, Iowa law on Constitutional violations only demands a showing of something more than all due care. *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018).

prosecutors.[4] Accordingly, the DHS Investigators are not entitled to absolute immunity regarding all claims associated with investigatory acts or acts as complaining witnesses.

The District Court failed to make this distinction and considered all DHS conduct as being part of the judicial process. This ignores the statutory obligation to conduct a thorough investigation and a complete assessment, regardless of the filing of a CINA action. This Court's decision in *Minor* requires the District Court to separate those functions that are investigatory. It also requires the District Court to distinguish affidavits submitted as a complaining witness from testimony in a CINA hearing. The District Court made no such distinction and lumped all its actions as part of the judicial process. It was reversible error to do so.

II. THE DISTRICT COURT UTILIZED THE WRONG FRAMEWORK IN ERRONEOUSLY GRANTING SUMMARY JUDGMENT ON QUALIFIED IMMUNITY.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

[4] There are instances in the Statement of Disputed Facts and the supporting exhibits where Andy refers to the testimony of Siver before the Juvenile Court but the purpose is to establish the facts and not to assert a claim arising directly out of such testimony.

Standard of Review.

See the same analysis under Section I.

Merits.

In *Baldwin v. City of Estherville*, 915 N.W.2d 259, 281 (Iowa 2018), this Court held that a "government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law."

Defendants asserted qualified immunity but did not include any evidence that they acted with all due care. They did not designate experts or submit expert reports, nor submit any affidavits from the individual defendants. Since it is an affirmative defense, the Defendants bear the burden of proof. *Id.* at 280. Having failed to do so, their request for qualified immunity as a matter of law should have been rejected.

Notwithstanding Defendants' failure to come forward with such evidence, Andy submitted substantial evidence, including expert reports, that create a genuine issue of material fact. Paula Rohde stated the following opinion:

> A comparison of the evidence known, provided and available to [Siver] against what [she] obtained, reviewed, considered and documented in her assessments *reflects pervasive deliberate indifference to exculpatory evidence and consistent bias against the children's father.*
>
> ***
>
> Melody Siver *did not even review or consider* the majority of evidence offered and provided in opposition to the allegations including family law court documents, mental health records, physicians' records including St. Luke's Emergency Department, affidavits from friends and neighbors, video recordings, audio recordings, Andy Lennette's polygraph examination and psychosexual evaluation. *Melody Siver failed to follow the law and reached her own conclusion of founded child abuse unilaterally, with the approval of Amy Howell, Social Work Supervisor.*

(App. 666, 671) (emphasis added).

Regarding Siver's Affidavit to the Court in obtaining the Court Orders to remove Andy from the home and to prohibit him from having contact with his children, Ms. Rohde concluded that she "misled the Juvenile Court to believe probable cause existed including domestic violence, that safety and risk had been assessed, to believe that the sexual offense had occurred and substantial evidence existed to believe that the presence of Andy Lennette in the family home presented a danger to the child's life or physical, emotional or mental health." (App. 666, 676).

Defendants' failure to conduct a proper investigation as required by law and their failure to review and follow up with exculpatory information provided by Andy and his attorneys constitutes deliberate indifference and a

deprivation of the constitutional right of Andy and each of his children. Accordingly, the Defendants' request for Qualified Immunity regarding Andy's claims for Iowa Constitutional violations must be rejected.

The District Court erred when it utilized the wrong legal framework in granting qualified immunity as a matter of law. The Court ignored this Court's decision in *Baldwin* and utilized the framework used in 42 USC §1983 litigation. That framework was rejected by this Court in *Baldwin* at 279. The court was required to follow *Baldwin.* Its failure to do so constitutes reversible error.

III. BOTH THE STATUTORY DUTY TO INVESTIGATE AND THE INTENTIONAL CONDUCT AT ISSUE PRECLUDES THE APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION OF IOWA CODE §669.14(1).

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000)

Merits.

Under Iowa Code §669.14(1) the State of Iowa preserves sovereign immunity for any claim "based upon the exercise or performance or the failure

to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused." (Emphasis added). "[T]he burden rests on the governing body to prove entitlement to the statute's protection" and immunity is narrowly construed. *Ette v. Linn-Mar Cmty. Sch. Dist.*, 656 N.W.2d 62, 68 (Iowa 2002). The Court is to use a two-part test as outlined in *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). *Goodman v. City of LeClaire*, 587 N.W.2d 232, 238 (Iowa 1998). In *Ette*, the Court made clear that the analysis is based on the allegation made by the plaintiff and not the interpretation asserted by the government. *Ette* at 67-68.

The *Berkovitz* test has two components:

1. "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice."

2. "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz* 486 U.S. at 536-537 (emphasis added).

Andy's common-law claims are not based on a negligent act, but rather on an intentional act, either intentionally interfering with custody or intentionally inflicting emotional distress. See *Callahan v. State*, 385 N.W.2d 533, 539 (Iowa 1986) (child protection workers can be liable for intentional infliction of emotional distress).

From this, one can reasonably deduce that to apply the discretionary function exception, the underlying claim must be for negligence. This is reasonable given that the purpose of the discretionary function exemption is to avoid second-guessing policy decisions.

Investigations are mandatory and conducting them pursuant to certain standards and rules does not permit discretion. Iowa Code § 232.71B. Therefore, Defendants do not meet the first component. In addition, a claim for an intentional tort is focused on conduct that is never supported by policy or discretion. *It can **never** be the policy of DHS to ignore Iowa Code §232.71B.* Since Andy's claim is for intentional conduct, there is no public policy that needs protection. Accordingly, Defendants cannot meet either component of discretionary function immunity; it was reversible error for the District Court to grant this immunity.

IV. THE FUNCTIONAL EQUIVALENT EXCEPTION OF IOWA CODE §669.14(4) CANNOT BE APPLIED TO AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

CLAIM OR A CLAIM FOR INTERFERENCE WITH CUSTODY.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I.

Merits.

The State retains sovereign immunity under Iowa Code §669.14(4) for a litany of intentional torts, but not for intentional infliction of emotional distress. *Dickerson v. Mertz*, 547 N.W.2d 208 (Iowa 1996) or for a claim for interference with custody. This section is to be narrowly interpreted. *Minor v. State,* 819 N.W.2d at 406.

However, the State argues that "[i]f a claim is the functional equivalent of a section 669.14 exception to the ITCA, the State has not waived its sovereign immunity." *Smith v. Iowa State Univ.*, 851 N.W.2d 1, 20-21 (Iowa 2014).

Once again, we turn to the gravamen of Andy's complaint: the failure to investigate the allegations of alleged abuse *as mandated by Iowa law* and the refusal to consider, follow up with, and investigate the claims of

exculpatory evidence. Superimposed on this foundational claim is the lack of candidness and the effort to cover up the underlying refusal to comply with Iowa law. Rather than comply with their obligations under Iowa law, the Defendants chose to point the finger at Andy without properly investigating, forced him out of his home, and deprived his children of a relationship with their father for many months.

Defendants argue that the gravamen of Andy's complaint is the alleged misleading and deceptive conduct on the part of DHS Investigators. While there is no doubt that such evidence adds to the picture of the intentional infliction of emotional distress and the outrageousness of the conduct, it is not the functional equivalent of a claim for misrepresentation or deceit. *A government official acts outrageously by intentionally refusing to perform their duties and in the process knowingly causes harm to the public*. Defendants then chose to lie or mislead to cover up their failure. The cover up does not convert an otherwise legitimate claim under Chapter 669 to a claim exempt by Iowa Code §669.14(4).

The State's request would result in a judicial amendment to the statute. If the Legislature intended that claims for intentional infliction of emotional distress would be included in this statute, the legislature had that ability to do so. It chose not to include those claims. Therefore, the concept of functional

equivalency must be narrowly interpreted to assure that the mere existence of evidence of misrepresentation or deceit does not overwhelm an otherwise legitimate intentional tort claim. After all, intentional infliction of emotional distress is an intentional tort and inherently there will be situations where outrageous conduct includes a decision to cover up otherwise outrageous behavior.

Paula Rohde concluded that the DHS Investigators were deliberately indifferent. This situation is factually different than what the court dealt with in *Minor v. State*. In *Mino*r, the claim was premised solely on misrepresentations made by DHS workers. *Id*. at 407.

In *Smith*, the court said "[t]he underlying conduct here is far broader than false statements." *Smith* at 21, 25. As in *Smith*, the evidence here establishes a pattern of refusal to investigate, both as part of the initial investigation and as part of the request by Andy to review exculpatory evidence, all while continuing to allow Andy to be separated from his children. It is this continual refusal to follow through and perform the job duties statutorily required that is at the heart of Andy's complaint and the expert conclusions of Ms. Rohde.

The same argument applies regarding the claim for interference with custody. Again, the central problem was the intentional refusal by the DHS

Investigators to comply with Iowa law on how an investigation was to be conducted and in addition refusing to investigate the information provided to them by the plaintiff. This led to the initial and then continuing interference with the parent-child relationship.

The State's claim of sovereign immunity under §669.14(4) is without merit and the District Court erred in granting such immunity.

V. THE IMMUNITY PROVIDED BY IOWA CODE §232.73 DOES NOT APPLY TO THESE DEFENDANTS. *ASSUMING ARGUENDO* THAT IT DOES, THERE IS A GENUINE ISSUE OF MATERIAL FACT ON DEFENDANTS' BAD FAITH.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I.

Merits.

The State argues that Iowa Code §232.73 cloaks it and its employees with statutory immunity and a resulting dismissal of any common law claims. This defense does not apply to Constitutional Tort claims. The Defendants misinterpret the statute.

Iowa Code §232.73 states in relevant part:

> **1.** A person participating in good faith in the making of a report, photographs, or X rays, or in the performance of a medically relevant test pursuant to this chapter, or aiding and assisting in an assessment of a child abuse report pursuant to §232.71B, shall have immunity from any liability, civil or criminal, which might otherwise be incurred or imposed. The person shall have the same immunity with respect to participation in good faith in any judicial proceeding resulting from the report or relating to the subject matter of the report.

The statute does not apply to DHS; it only applies to those persons and entities that assist DHS.

Nevertheless, Defendants contend they are entitled to such protection because they were involved in the investigation of child abuse allegations and any subsequent judicial proceeding. Further they contend that they acted in good faith.

By its own terms, the statute provides qualified immunity to reporters of child abuse or persons who assist DHS in the assessment of an allegation of child abuse, such as physicians and medical providers. No mention is made that it applies to those who investigate for DHS and there is no reason to imply immunity to investigators.

The cases interpreting this section confirm this. *Teachout v. Forest City Community Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998) (a teacher had a good-faith belief that child abuse had occurred in her classroom, her intent to report the abuse was protected); *Garvis v. Scholten*, 492 N.W.2d 402, 404 (Iowa 1992) (granting immunity to physician, hospital, and hospital record

keeper for releasing information to a DHS child protective worker); *Maples v. Siddiqui*, 450 N.W.2d 529, 530 (Iowa 1990) (granting immunity to physician who reported suspected abuse indicating statute was drafted "to encourage those who suspect child abuse to freely report it to authorities without fear of reprisal if their factual information proves to be faulty."); *Howell v. Metro. Med. Lab., P.L.C.*, 2007 Iowa App. LEXIS 1161 (Iowa Ct. App. Nov. 15, 2007) (finding immunity to doctor for reporting suspected child abuse but not to laboratory for alleged medical negligence, since laboratory could not have believed it was assisting in the investigation of a child abuse report).

The statute was intended to encourage <u>others</u> to report child abuse or to assist in an assessment. When DHS investigates, it is not a reporter or assistant, it is an investigator. Accordingly, Iowa Code §232.73 does not provide immunity to these Defendants.

Assuming *arguendo* that the statute applies to DHS, Andy has provided evidence of bad faith that falls outside the protection of the statute. In *Nelson v. Lindaman*, 867 N.W.2d 1 (Iowa 2015), this Court discussed the standard to be used in assessing "good faith" under this statute. The Court made the following key points:

1. “Good faith” under § 232.73 is determined under a subjective standard. Reasonableness and the objective standard play no part in determining “good faith.”
2. “Good faith” is based on a defendant's subjective honest belief that the defendant is aiding and assisting in the investigation of a child abuse report.
3. “Honesty in fact that constitutes good faith merely requires honesty of intent….”
4. Bad faith is defeated by “the actual belief or satisfaction of the criterion of 'the pure heart and empty head.’”
5. To avoid summary judgment, the plaintiff must have evidence the defendant acted dishonestly, not merely carelessly, in assisting the DHS.

Nelson at 8 (citations omitted). The dissent pointed out that “[t]here is rarely direct evidence of subjective good faith, and as a result, reasonable inferences that can be drawn from circumstantial evidence are sufficient to generate a fact question on the issue.” The dissent also noted that questions of subjective good faith are "ordinarily" not resolvable upon summary judgment. *Nelson*, 867 N.W.2d at 21-23.

The standard of subjective good faith hinges on issues of credibility of witnesses and legitimate inferences in favor of Andy. Andy refers the court to his Statement of Facts and to the supporting Appendix. In particular, and for the sake of brevity, Andy refers the court to the report of Paula Rohde which outline her conclusions from the overall evidence.

In summary, Iowa Code §232.73 does not apply to DHS investigators, but even if it did there is a genuine issue of material fact as to the bad faith conduct of these investigators.

VI. THERE IS A GENUINE ISSUE OF MATERIAL FACT THAT PRECLUDES SUMMARY JUDGMENT ON ANDY'S TORT CLAIMS FOR TORTIOUS INTERFERENCE WITH CUSTODY AND FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I.

Merits.

A. Intentional Infliction of Emotional Distress:

"In order to find outrageousness, the court must determine if the conduct is 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573 (Iowa 1987).

The two elements that are the most difficult for plaintiffs to establish are the "outrageous conduct" and the "severe or extreme emotional distress."[5]

In *Smith,* the Iowa Supreme Court noted that "[o]ur cases that have found substantial evidence of emotional harm have had direct evidence of either physical symptoms of the distress or a clear showing of a notably distressful mental reaction caused by the outrageous conduct." *Smith*, 851 N.W.2d at 30,.

Ms. Rohde's report found that "Siver's deliberate indifference created Adverse Childhood Experiences for the children including parental deprivation, ongoing exposure to parental mental illness and ultimately sustaining mental injury." (App. 666, 680).

When analyzing the issue of outrageous conduct, the context in which the claim arises is relevant. For example, in the employment context, this claim typically fails. *Smith*, 851 N.W.2d at 26 ("We have stated the standard of outrageous conduct "is not easily met, especially in employment cases…"). On the other hand, in *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976), a case involving the failure to provide appropriate funeral services, the court found outrageous conduct. In part, the connection between the context and the

[5] Defendants sought summary judgment solely on the outrageous conduct element. Nevertheless, Andy discusses the severe emotional distress element to better understand the outrageous conduct element.

expectation that an individual would suffer emotional harm from that context cannot be separated. Accordingly, Andy contends that you must put both pieces together.

If the situation is inherently stressful, such as the deprivation of the parent-child relationship, the expectation that harm will occur is far greater. A funeral director or a CPW should recognize that wrongfully performing your job, particularly in a manner that is reckless or deliberately indifferent, is very likely to cause harm and will be more likely to shock the public.

Restatement of Torts, Second, §46, Comment j notes that "severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." In this case, severe or emotional harm to those individuals affected by wrongful conduct is likely. This does not demand a higher standard but rather a recognition that acting recklessly or with deliberate indifference is more likely to be outrageous and more likely to cause harm.

The reasoning behind the "outrageous conduct" and "severe or extreme emotional distress" elements is rooted in the concern that these claims could be faked or trivialized. *Restatement of Torts, Second, §46, Comment b.* This leads to the comment in the restatement that "[g]enerally, the case is one in

which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Restatement of Torts, Second, §46, Comment d; Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156-57 (Iowa 1996).

Comment e notes that qualifying conduct "may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." *Comment f* also recognizes that it "may arise from the actor's knowledge that the other is particularly susceptible to emotional distress."

In this case, the clear authority that the defendants had over Andy, the susceptibility of small children, the inherently emotional relationship of parent and child, coupled with the recognition that it was likely that emotional harm would suffer if they did not act appropriately, supports a claim for intentional infliction of emotional distress. In this setting one could reasonably expect that the conduct of these defendants would lead a jury to exclaim "outrageous!"

In *J.C. v. County of Los Angeles*, 2019 U.S. Dist. LEXIS 168261, the U.S. District Court for the Central District of California, denied a motion to dismiss a claim for intentional infliction of emotional distress against a child protection worker where the allegations made there were not as factually

compelling as in this case. *J.C.* at *18-19. The key element is the expectation that someone given the power to impact an intact family will not abuse that power, will not misuse the trust placed in them to lawfully investigate. When an investigator chooses to ignore those laws and standards and families are affected by, it is reasonable to be outraged by such conduct.

Finally, the new *Restatement of Torts, Third, Liability for Physical and Emotional Harm, §46* does not appear to make any meaningful changes to this section. However, the following is noteworthy: "Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged." *Comment d.*

B. Tortious Interference with Custody:

In *Wood v. Wood*, 338 N.W.2d 123, 124-25 (Iowa 1983), this Court recognized the tort claim of intentional interference with custody.

Defendants argue this claim fails as a matter of law because they are privileged to interfere with custody because of its statutory obligation to investigate abuse, a privilege recognized by the *Restatement of Torts, Second,*

§700 ("Any person authorized by law to remove a child from an improper home is privileged when acting within the scope of his authority.").

However, that privilege only covers the period necessary to keep the child away from the parent. *§700* of the Restatement states: "or not to return to the parent after it has been left him." The Restatement clearly recognizes that while one might initially have a legitimate basis for interference with custody, the obligation to act to avoid further interference continues. Therefore, the privilege can be lost. It is not within the scope of the authority of DHS to continue to deprive a parent of custody after it has enough information to conclude that the child no longer needs to be rescued.

In *Wyatt v. McDermott*, 725 S.E.2d 555, 558-562 (Va. 2012), the Virginia Supreme Court recognized the tort of interference with the parent-child relationship. This case recognizes that the goal of preventing interference with the parent-child relationship has always been part of the common law. The same applies to the specific words used in the Restatement. It uses "abducts or otherwise compels or induces" to encompass all the ways in which a child can be separated from a parent.

Andy contends it is a fact question whether the privilege asserted by the State was retained throughout the entire time that Andy and his children were separated. This Court should find that a genuine issue of material fact exists

as to the continued existence of privileged conduct on the part of the defendants and that a jury could conclude that such privilege was lost and when lost the defendants acted wrongfully in continuing to keep children separated from their father.

VII. *GODFREY V. STATE OF IOWA* APPLIES TO CLAIMS PURSUANT TO ARTICLE I, §1 OR ARTICLE I, § 8 OF THE IOWA CONSTITUTION.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I.

Merits.

This Court has recognized a "tort claim *under the Iowa Constitution* when the legislature has not provided an adequate remedy." *Godfrey v. State*, 898 NW2d 844, 880 (Iowa 2017) (emphasis added). Iowa statutory law does not provide a claim for damages for the violation of a parent's constitutional rights during an inadequate DHS investigation. See *Callahan v. State*, 385 N.W.2d 533, 537 (Iowa 1986) ("the legislature did not intend to imply a tort action against the State, its department and employees for a failure to

thoroughly and promptly report and investigate incidents of child abuse."). Therefore, a constitutional claim is appropriate in this setting.

In *Godfrey*, the court stated "[w]hen a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future." *Id.* at 877. "The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." *Id.*

Further, in the event the court determines that Iowa Code §232.73 provides the individual defendants with statutory immunity, then the only remedy available to Andy would be a constitutional claim under the Iowa Constitution.

In this case, Andy asserts claims pursuant to article 1, §§ 1, 8, and 9 of the Iowa Constitution. The District Court held "that *Godfrey* did not extend tort remedies to Article I, Section 1 or Article I, Section 8 of the Iowa Constitution." (App. 1164). This conclusion is inconsistent with *Godfrey* and *Baldwin.*

In *Godfrey*, this Court allowed claims for violations of article I, §§6 and 9. *Godfrey* at 871-72. In *Baldwin*, the Court implicitly found that *Godfrey*

claims applied to article, I, §§1 and 8, subject to an affirmative defense of qualified immunity. *Baldwin* at 260-61.

This part of the District Court's ruling must be reversed.

Article I, §1:

> *All men and women are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.*

Known more commonly as the Inalienable Rights provision of the Iowa Constitution, it is the first section of the first article of the Iowa Constitution. It is the heart of the Iowa Constitution. It outlines the premiere importance of life, liberty, property and the pursuit of happiness.[6] Often, this section is partnered with article I, § 9, the due process section of the Iowa Constitution and much of the case law focuses on §9. Pettys, *The Iowa State Constitution*, p. 67 (2018). Nevertheless, the inalienable rights provision can be separate support for the conclusion that arbitrary and unreasonable conduct by the government can violate this section of the Iowa Constitution. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004); *State v. Osborne*, 154 N.W. 294, 299 (Iowa 1915).

[6] The U.S. Constitution 5th Amendment makes no mention of the pursuit of happiness. See Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1 1997-1998\.

In *Gacke*, this Court noted that the inalienable rights provision "is not a mere glittering generality without substance or meaning." It was "intended to secure citizens' pre-existing common law rights (sometimes known as "natural rights") from unwarranted government restrictions." However, the Clause is "subject to reasonable regulation by the state in the exercise of its police power." Therefore, "in determining whether the challenged statute violates article I, section 1 of the Iowa Constitution, we must determine (1) whether the right asserted by the plaintiffs is protected by this clause, and (2) whether [a statute] is a reasonable exercise of the state's police power. *Gacke* at 176).

Accordingly, in order to assert a claim under article I, §1, the plaintiff must establish that the right asserted is protected and that the conduct of the government is arbitrary and capricious, and not a reasonable exercise of the state's police power. There is no doubt that maintaining a family, having children, and caring for those children is a fundamental right ingrained in liberty and the pursuit of happiness. And it can be equally stated that such a right is not absolute and is subject to the reasonable police power of the State to assure the safety of a child. But as noted above, the exercise of the state's police power must be reasonable. It cannot be arbitrary and capricious.

Otherwise, such conduct undermines the fundamental right to care, custody, and management of the family.

Andy has established that the DHS Investigators failed to conduct the investigation required by law and made decisions without considering any evidence much less all the evidence that they were required to obtain, review and incorporate. In short, these investigators acted arbitrarily and without reason. By doing so, they abused the power entrusted to them. This abuse of power was more than a negligent act. It was an intentional decision or choice not to consider all the evidence, and not to investigate as required by Iowa law. Ultimately, all decisions arising out of this arbitrary and capricious conduct were a cause of harm to Andy. The refusal to investigate reflected a deliberate indifference to the welfare of Andy and most importantly the children to whom they were responsible. As noted by the Court in *Gacke*, liberty implies the absence of arbitrary restraint. The conduct of the defendants in this case is the definition of arbitrary restraint. Accordingly, Andy has established the necessary elements of a claim under article I, §1 of the Constitution.

Article I, § 8

> *The right of the people to be secure in their persons…against unreasonable seizures… shall not be violated*; and *no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.*

The overwhelming case law regarding the analysis and application of this section of the Iowa Constitution relates to criminal law. In *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010), a unanimous Court steered directly away from a "lockstep" interpretation of article 1, §8 with U.S. Supreme Court interpretation of the Fourth Amendment to the U.S. Constitution. *Ochoa* at 267. "[T]he Iowa framers placed considerable value on the sanctity…of the home." *Ochoa* at 273, 274-75. As with other constitutional provisions, this right is not absolute. Absent defined exceptions, a warrant based on probable cause is necessary to comply with the Fourth Amendment. *Ochoa* at 278.

The case before this court involves an effort to remove a father from his home and to keep him separated from his children. It also involves an Affidavit utilized to obtain court approval and the accuracy and factual support for that Affidavit.

Christenson v. Ramaeker, 366 N.W.2d 905 (Iowa 1985) utilizes the framework provided by *Franks v. Delaware*, 438 U.S. 154 (1978) to assess a challenge to the validity of an application for a search warrant. *Franks*

confirmed that the affidavit supporting a warrant is entitled to a presumption of validity.

> There *must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons*.

Christenson at 909 (emphasis added).

Franks itself provides additional direction in assessing the validity of an arrest warrant: First, an applicant is permitted to impeach the veracity of the affiant. Second, it reminds that "the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct." *Franks*, 438 U.S. at 168-69. The holding in *Franks* has been extended to "deliberate omissions." *United States v. Smith*, 581 F.3d 692, 695 (8th Cir. 2009).

Of course, the analysis of evidence must be adjusted for the fact that the claim made by Andy is not pursuant to Federal Law, but rather pursuant to *Godfrey* and *Baldwin* which alters the standard to an all-due care standard. Given that the Court in *Baldwin* rejected the Federal law's expansive qualified immunity standard, analyzed other State approaches and resolved the issue of qualified immunity on a negligence standard, the *Franks* principles can be applied using a negligence approach.

As applied to this case, the evidence establishes not only negligence in seeking the no-contact order and removal order, but establishes the reckless disregard for the truth demanded in *Franks*, both as to evidence provided to the court and as to deliberate omissions. Please refer to Andy's expert's report for a more thorough analysis. (App. 666).

Further, as required by *Franks*, Andy can identify the following statements to be false or misleading: In ¶3 of the Affidavit, the following are misleading:

- "She had knowledge that a child of her age could not know otherwise. I found her interview to be credible."

As noted by Ms. Rohde, this statement has no basis in fact, research, or training. It is a non sequitur. Moreover, it is unsupported by the CPC interview report which reflects that Holly was asking S.L. to share information well before the CPC interview and thereby contaminating the value of the CPC interview. (App. 459). There are 17 references in that report to "Holly asked [S.L.]."

- "[S.L.] has exhibited some sexualized behaviors recently."

Votroubek testified in the CINA trial that none of the children had shown such behavior. (App. 547). It was only the mother involved in a custody dispute that was claiming this was happening. Ms. Rohde notes that

statements such as these are "void of supporting evidence and/or corroboration." (App. 666, 675).

This latter representation to the court highlights a significant problem with Siver's Affidavit to the court. None of the information that she presents is corroborated by reliable or collateral sources. All she has to offer are the unsupported representations of a mother in a bitter custody battle, and statements made by a 5-year old child who reflects no physical evidence of sexual assault consistent with the allegations. The CPC interview does not support the interpretation given by Siver. (App. 459, 711). In her deposition she claims that CPC provided a credibility determination, a claim denied by CPC.

At best, the statements made by the child are contradictory and confused and therefore highly suspect.[7] The Linn County Attorney ultimately found the child to lack credibility. (App. 917). Before Ms. Siver seeks court intervention it is incumbent on her to perform some form of investigation to corroborate the allegations. Given the lack of an investigation before and after

[7] An example: "The child said her father showed her a movie with adults naked under the covers. She could not explain how she knew they were naked. She described the movie as occurring in a movie theatre and showing a father putting his penis on a son's mouth. Any such child pornography would not have been shown in a movie theatre…." (App. 711, 732). In her interview, the child claims they had popcorn while watching the movie. (App. 459, 472).

the CPC interview, her presentment of this affidavit to the court without corroboration and without later making any effort to investigate provides the context from which a jury could reasonably conclude that Siver was reckless in her presentation of this case to the court.

Further, in ¶5 of her Affidavit, the comments regarding domestic violence are simply untrue. Ms. Siver made no effort to corroborate the existence of police reports that supported such claims. (App. 666, 676).

Further, there is the wholesale failure to research and disclose to the court the fact that there was a bitter divorce, with efforts at kidnapping the children and a court order requiring mother (the person alleging the abuse) to leave the home and obtain employment. Siver did not even look at the court records to verify any of this information.

While law enforcement, and in this instance social workers, are given latitude with which to work recognizing that their work is not always easy, the demands of the Iowa Constitution are such that there needs to be meaningful investigation before seeking a court order. Without corroboration of any of the information placed within the four corners of the affidavit, it is incumbent upon the social worker to provide the Court with that information that is exculpatory or potentially exculpatory. That allows a court to make a

reasoned determination whether to issue the court order or whether to demand that more information be obtained before such an order is issued.

The Affidavit fails to be both factually accurate and fully transparent. Accordingly, there is substantial evidence to permit a jury to rule on whether there has been a violation of article I, §8 of the Iowa Constitution.

VIII. THERE IS SUBSTANTIAL EVIDENCE OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS VIOLATIONS OF THE IOWA CONSTITUTION.

Preservation of Error.

See the same analysis under Section I. Andy has preserved error for review.

Standard of Review.

See the same analysis under Section I.

Merits.

Article I, § 9 states, with the relevant section italicized:

> The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; *but no person shall be deprived of life, liberty, or property, without due process of law*.

In *Godfrey*, this Court concluded that a plaintiff may assert a claim directly under article I, § 9 of the Iowa Constitution. *Godfrey* at 870-71. The Iowa Supreme Court has repeatedly recognized that the right to parent is a fundamental right. *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001).

In *Troxel v. Granville*, 507 U.S. 57 (2000), the U.S. Supreme Court stated "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* at 65-66.

It is hard to imagine a more important constitutional right than the right of individuals to establish and maintain families, including children. Accordingly, the law demands the highest level of protection for this right and expects the government to respect this right and not to interfere in it absent compelling evidence, strict compliance with statutory requirements, and the applicable standard of conduct. This is not the type of right that one can interfere with based on a gut feeling, inadequate investigation, and withholding of exculpatory information. Protocols, regulations, and standards of conduct matter.

Procedural Due Process: At first blush, one assumes that Andy was provided with procedural due process in that he had access to counsel, a hearing, the right to confront witnesses and the opportunity to offer evidence to resist the State's effort to interfere. But the problem was created in the investigative stage, when the State ignored available evidence, failed to acknowledge the lack of physical evidence that was inconsistent with the

allegations, and chose to mislead a court to issue an order that excluded Andy from the home and prevented him from having contact. While a hearing was provided shortly after the *ex parte* order, the child abuse assessment was unnecessarily delayed based on an untruthful claim that a criminal investigation was still pending, the DHS Investigators failed to investigate, and the process was stretched out over months finally resolving in December 2015 some 11 months after the *ex parte* order was obtained. The principle cause for this delay and lack of procedural protection was the deliberate indifference of DHS Investigators.

The process established by Iowa law to investigate complaints of alleged abuse and to provide protection from wrongful allegations is part and parcel of procedural due process in this setting. The failure to meet those requirements not only led to the wrongful allegations in this case but were a meaningful cause of the constitutional deprivation.

In *Santi* this Court stated that "the infringement on parental liberty interests implicated by the statute must be 'narrowly tailored to serve a compelling state interest.' … We hereby interpret article I, sections 8 and 9 of the Iowa constitution to afford fit parents that same protection. *Santi* at 318 and 321. It is noteworthy that the Court found a violation of article I, §8 as

well. This supports Andy's claim that infringement upon the parental role also constitutes a seizure as it invades the parental home.

In criminal cases, the demands of probable cause include not only the existence of evidence but the responsibility to disclose exculpatory information. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In short, if you want an *ex parte* court order, procedural due process demands an accurate investigation leading to the request for such relief and full disclosure to the court.

This same procedural due process must be found in a system that seeks to balance the concerns of alleged child abuse with wrongful deprivation of the parent-child relationship. Procedural due process requires that DHS Investigators comply with those statutes intended to protect both the child and the parent and the failure to do so constitutes a violation of article I, § 9.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that the "fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 332.

The Iowa Constitution's article I, § 9 protection of procedural due process include a requirement that any procedural due process that provides for pre-hearing or post-hearing deprivation include a requirement that the State not interfere in the exercise of those procedural protections by failure to

timely and appropriately complete its investigations as mandated by existing statutes, rules, or industry standards.

Substantive Due Process: This due process claim is similarly premised on the failure to conduct an adequate investigation, one that complied with Iowa law, as well as the failure to investigate Andy's exculpatory evidence.

Historically, §1983 litigation utilized the "shocks the conscience" test in assessing claims of violation of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-847 (1998). Iowa has also followed that standard in §1983 cases. *Al-Jurf v. Scott-Conner*, 2011 Iowa App. LEXIS 1094 (Iowa App. 2011) (unpublished). But what exactly "shocks the conscience" means is not as clear.

> Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other…. *As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical*, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Lewis, 523 U.S. at 848-851 (emphasis added).

There are two points to take away from *Lewis:* First, the constitutional analysis at the federal level treats constitutional claims as something other than tort claims and accordingly demands a greater standard of care than

negligence, with an emphasis toward the other extreme---such as "deliberate indifference"; secondly, the term "shocks the conscience" is by its nature a flexible term depending on the circumstances involved and the flexibility is found in whether there is time for reflection and investigation, as opposed to split-second decision-making found in the police setting.

These two points become important in analyzing this case. First, Iowa constitutional claims have been deemed *constitutional tort claims*. *Godfrey*, 898 N.W.2d at 880; *Baldwin*, 915 N.W.2d at 275. Because they are constitutional tort claims, the foundation for the "shocks the conscience" test does not exist in the State of Iowa. Concepts applicable to tort claims can be utilized in assessing Iowa constitutional violations. This is plainly evident in the Court's decision in *Baldwin* to utilize all due care as the standard in assessing qualified immunity. *Baldwin*, 915 N.W.2d at 280. See also *Restatement of Torts, (Second)*, § 874A.

Andy urges this court to abandon the "shocks the conscience" test in analyzing substantive due process under the Iowa Constitution. It is inconsistent with *Godfrey* and *Baldwin*, and the underlying basis for using that test in the State of Iowa. In addition, it would make qualified immunity moot in any case involving proof beyond negligence. If defendants' conduct "shocks the conscience", qualified immunity would be unavailing. For a

comprehensive assessment of the "shocks the conscience" test and the need for a new test, the court is referred to Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 308 (2010); *see also* Tepker, *The Arbitrary Path of Due Process*, 53 Okla. L. Rev. 19 (2000).

Secondly, if the Court requires Andy to establish that the defendants' conduct "shocks the conscience", then the court must consider that there was nothing about the time frame available to the defendants that required any form of split-second or immediate decision. It took Ms. Siver 3-days before she sought a court order. Andy's expert describes the defendants' behavior as deliberate indifference or recklessness toward the constitutional rights of Andy and his children. There is substantial evidence from which a jury could conclude that the conduct of the defendants was arbitrary and without objective evidentiary support.

Assuming arguendo that the court utilizes the "shocks the conscience" test, there is substantial evidence to meet that standard in the context of the opportunity to deliberate before acting. It is noteworthy that the Iowa Supreme Court has discussed "shocks the conscience" in the context of termination of parental rights. *In the Interest of K.M.*, 653 N.W.2d 602, 607 (2002).

Regarding claims of inadequate investigations, the Iowa Court of Appeals, in an unpublished opinion, discussed the standard to be used based

on §1983 litigation. *Sheeler v. Nev. Cmty. Sch. Dist.*, 2018 Iowa App. LEXIS 715 (Iowa App. 2018):

> Circumstances indicating a failure to investigate that shocks the conscience include "(1) evidence that the state actor attempted to coerce or threaten the defendant, (2) ***evidence that investigators purposefully ignored evidence suggesting the defendant's innocence***, [and] (3) ***evidence of systematic pressure to implicate the defendant in the face of contrary evidence***." *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009).)

Sheeler at *7-8 (Emphasis added). In that case, the plaintiff did not argue for a different analysis under the Iowa Constitution. *Sheeler* at *8.

In *Akins v. Epperly*, 588 F.3d 1178 (8th Cir. 2009), the Eighth Circuit noted that "In *Wilson v. Lawrence County* [260 F.3d 946, (8th Cir. 2001)], we recognized a substantive due process cause of action for reckless investigation in circumstances in which the state actor had the opportunity to consider 'various alternatives prior to selecting a course of conduct.' … Akins must show that Trammell and Vaughan 'intentionally or recklessly failed to investigate, thereby shocking the conscience.' *Akins* at 1183-84 (Citing *Wilson* at 956-57).

Andy's claim is premised on a shockingly inadequate investigation as outlined in the Statement of Disputed Facts. It is also premised on the intentional failure of Defendants to investigate exculpatory evidence provided

by Andy. All of which occurred with the opportunity to consider "various alternatives prior to selecting a course of conduct."

The District Court erred in granting summary judgment on the article I, § 9 claims for procedural and substantive due process.

CONCLUSION

This Court should reverse the District Court's grant of summary judgment and remand the case for trial on all claims.

REQUEST FOR ORAL SUBMISSION

Andy requests oral argument as to all issues.

Respectfully submitted,

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