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 REPLY BRIEF

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Constitutional Provisions:
Iowa Const. art. I, § 1
Iowa Const. art. I, § 8

REPLY ARGUMENT

Andy contends that his initial brief comprehensively covers the issues involved in this case. However, there are some aspects of the State's brief that requires further comment.

ISSUE I: STATE'S SELECTIVE FACTUAL RECORD

In its brief, the State seeks to create an arbitrary cut off for Andy's claims. It claims that the only point at which Andy can assert claims against the IDHS workers is before the January 16, 2015 order. Andy rejects that argument, and his argument lies both legally and factually on solid ground.

First, IDHS had total control of the "who, what, when, where and how" involving Andy and his children. IDHS' statutory deadline is twenty (20) calendar days from the commencement of intake to fully investigate the allegations in a manner consistent with Iowa law. IAC 441-175.26(1). Iowa law also provides an "addendum status" to permit IDHS additional time to investigate when needed. IAC 441-175.26(1)(a)(8).

IDHS decides when the CPC interview is scheduled and therefore how much time it has to gather and investigate background information before the CPC interview. IAC 441-175.25. Under Iowa law, IDHS need only "observe and evaluate" the alleged victim within ninety-six hours of intake, and can

even obtain a waiver of that time period. IAC 441-175(1)(A). IDHS also decides when it will seek juvenile court intervention.

The available evidence establishes that IDHS was in possession of enough collateral sources and contradictory information prior to the CPC interview to undermine its own findings and those it brought to the juvenile court. As early as January 12, 2015, the day before the CPC interview, IDHS had an abundance of collateral sources available to it. These collateral sources included not only the ER treating physician, but the ER medical reports referencing his conclusion that the allegation was false. (App. 1040; App. 371-378). The ER report also identified S.L.'s therapist, Kyle Votroubek, and false claims by Holly that Kyle was aware of "sexualized behaviors" by S.L. (App. 376). The ER Report also contained the identity of the children's pediatrician, Kenneth Cearlock. (App. 376). IDHS had an affirmative duty to contact these sources and failed to do so. IAC 441-175.25(4); (App. 98-114; App. 997). IDHS deemed collateral contacts "discretionary" despite Iowa law to the contrary. (App. 788). IAC 441-175.25(4).

IDHS also refused to investigate collateral sources that were revealed to them during the CPC process with S.L. On January 13, 2015, through the CPC interview, IDHS was made aware of the identity of additional collateral sources for its investigation that could have proven or disproven the abuse

allegations. (App. 1111-1125). These sources included pediatricians, teachers, therapists, and alleged eyewitnesses to the sexualized behaviors purported exhibited by S.L. (App. 1111-1125). IDHS did not contact any of those sources. In addition to collateral sources available from the ER and S.L.'s CPC interview, IDHS had a lack of physical evidence from the CPC medical exam undermining the mother's allegations. (App. 232-233; App. 1126-1129).

Instead, IDHS abrogated its statutory duty in favor of CPC interviews and examinations of all three children and uncorroborated statements by Holly, all of which contradicted each other and the physical evidence. (App. 232-233; App. 1126-1129). As admitted by Amy Howell, they assumed the allegations were true, thus justifying their failure to follow legally mandated protocols. (App. 804-05).

Andy's claim is <u>not</u> that IDHS failed to conduct a more nuanced investigation, nor even failed to cautiously question allegations brought by a motivated mother with her daughter in the midst of a contentious divorce. Instead, Andy's claim is that IDHS intentionally abrogated its statutory and constitutionally based mandate when it failed to conduct <u>any</u> investigation at all. Had IDHS simply met its basic obligation to investigate collateral sources, as mandated by Iowa law, the falsity of the allegations would have been

revealed. IAC 441-175.25(3); IAC 441-175.25(4); IAC 441-175.25(6). And they would have been revealed before needing to approach the juvenile court. (App. 371-379; App. 223-230; App. 1111-1124). IDHS' failure to do so caused the deprivation between Andy and his children, and resulted in the ongoing trauma of having the children in the custody of their actual abuser-Holly.

IDHS' responsibility was to find and prove the allegation based on evidence available to it. IAC 441-175.21; IAC 441-175.25(4); IAC 441-175.25(6). To do so, it needed to conduct a mandatory investigation. IAC 441-175.25(3); IAC 441-175.25(4); IAC 175.25(6). But IDHS conducted no investigation, choosing instead to determine credibility without seeking corroboration. For example, Howell testified that "at the interview we start off with what the child is saying is 'her truth' and that we are going to figure out if that allegation is true based on her interview." (App. 801; App. 804-5). Howell admitted as much when she stated: "there wasn't anything in the [CPC] interview that would make me not believe what she was saying." (App. 804-5). However, there were numerous reasons not to believe the truth of what a five-year-old was saying, most of which were contained in the CPC interview itself, which described fantastical and unbelievable allegations and consistently referenced adult information. Even a layperson

could recognize that the child was getting information from an adult, such as a mother in the midst of a nasty divorce. (App. 71-76; App. 733-34).

Howell's testimony reveals not only that IDHS willfully and intentionally assumes the truth of an allegation, before it is proven, but that it intentionally refused to investigate the collateral sources necessary to support or contradict credibility.

Lastly, had IDHS found insufficient time within the twenty-day timeframe to complete the investigation they were legally mandated, it could have placed the investigation on addendum status while investigating further. IAC 441-175.26(1)(a)(8). In fact, IDHS did place the investigation on addendum status, not one but twice, and nonetheless did nothing in furtherance of the investigation during that delay. (App. 234-264).

IDHS should not be granted immunity based on its failure to investigate before seeking a Court Order on January 16, 2015. IDHS created the very timeline (January 16, 2015) that it now seeks to hide behind. IDHS' argument that the entry of the Court Order in this case removing Andy from the home provides them immunity cannot stand given that the Juvenile Court relies on and assumes that IDHS meeting its statutory duty to investigate when issuing orders that separate parents from children. The Iowa legislature has specifically created exceptions to foundation and hearsay rules for the

admission of DHS Abuse Assessment to permit easy admission of these reports to the juvenile Court without the presence of the investigator in reliance on their competence. Iowa Code § 232.96 If this Court were to find that IDHS has immunity, IDHS would effectively have a legal mandate to remove children from parents without investigation, and the juvenile court would be unable to rely on IDHS meeting its legal obligations when investigating abuse claims.

Andy's claims relate to the failure to investigate the allegation of abuse as required under Iowa law as part of its independent duty to conduct investigations regardless of other collateral legal actions. Iowa Code § 232.71B. IDHS' gross and intentional failures occurred both before and after January 16, 2015. It continued for many months and resulted in a lengthy separation between Andy and his children. The failure to investigate resulted in the failure to recognize that the allegations of abuse against Andy were wholly unsupported by the evidence and resulted in the continued separation of Andy from his children. The fact that there was an ongoing CINA action does not preclude Andy's claim of failure to investigate. The obligation to investigate does not derive its power from the existence of a juvenile court action. It is derived from statutory obligation to perform a comprehensive

assessment. Iowa Code §232.71B. That obligation occurs whether a CINA action is filed or not.

ISSUE II: NO ONE IS ABOVE THE LAW

The State's Brief is one long argument for absolute immunity for IDHS workers regardless of what they do and when they do it. This even though our Supreme Court has refused to grant absolute immunity where the individual social worker is a complaining witness or is involved in investigatory acts. *Minor v. State*, 819 N.W.2d 383, 389 (Iowa 2012). Andy Lennette's claims focus on those investigatory acts and those acts in which the individual social worker is a complaining witness.

The State also seeks to create a bright line for its investigatory responsibilities. The State utilizes the entry of the court order on January 16, 2015 as a limitation on its responsibility to investigate. It then limits Andy's claims to those events that preceded the January 16, 2015 court order. However, IDHS' investigatory responsibilities flow from a statutorily mandated abuse assessment process with statutorily circumscribed procedures.

> Upon acceptance of a report of child abuse, the department *shall* commence a child abuse assessment when the report alleges child abuse…

Iowa Code § 232.71B(1)(a)(1) (emphasis added)

The assessment process is outlined in Iowa Code § 232.71B(4). This court has discussed the importance of this assessment process:

> In order "to provide the greatest possible protection to victims or potential victims of abuse, "the legislature established a comprehensive system of child abuse reporting, assessment, and rehabilitation. Id. The legislature also placed the DHS at the forefront of this protective net, and assigned it myriad critical responsibilities and duties to perform. One such duty involves the receipt and assessment of child abuse reports….
>
> Under this statutory scheme, the DHS promptly conducts an assessment of every report alleging child abuse. The assessment involves *a comprehensive investigation and evaluation by a child protection worker, followed by a written assessment report*. The assessment process has numerous statutory requirements and components, and can involve the input of a multidisciplinary team, as well as others.
>
> The comprehensive nature of the assessment process reveals the importance of accurate assessments. The existence of a central depository of the assessments to be used by various persons and agencies to combat child abuse also gives rise to separate legislative concerns for the safeguarding of the rights of others and the need for a fair and efficient assessment and registry system. [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.").

Grant v. Iowa Dep't of Human Servs., 722 N.W.2d 169, 176-177 (Iowa 2006) (Emphasis Added).

The State also seeks to undermine the importance of the statutorily mandated assessment process upon which the juvenile court, families, and the system relies by arguing that the investigatory responsibilities of the Department are discretionary and that responsibility or accountability for a

comprehensive investigation can be avoided by the filing of a CINA petition or the entry of a court order that removes a parent pending that investigation. The end result of such an argument is that IDHS and its individual social workers become a law unto themselves and are not accountable to this Court or to those affected by a nonexistent investigation.

Moreover, IDHS' position is in direct contravention of Iowa law designed to protect families and inform the Courts. Under Iowa law, "allegation" means a statement setting forth a condition or circumstance yet to be proven." IAC 441-175.21. An allegation of abuse must be found by a preponderance of evidence. IAC 441-175. A preponderance of evidence is defined under the administrative code as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. IAC 441-175.21. Thus, IDHS has a legal obligation to consider all the evidence provided by the parties as well as independent sources.

IDHS' duty to conduct a fulsome investigation does not end when it decides to seek juvenile court intervention. It ends when the investigator has met the statutory obligations. IAC 441-175.21; IAC 441-175.25(3); IAC 441-175.25(4); IAC 175.25(6). In fact, the Iowa Administrative Code specifically contains an addendum process to permit IDHS additional time it

needs to conduct a thorough investigation as directed by Iowa law. IAC 441-175.26(1)(a)(8).

In the present case, the addendum process was used by IDHS under the auspices that it was conducting a fulsome investigation. (App 234-264). It was not. Rather, the assessments and evidence reveal that IDHS did not conduct further investigation or seek out any of the collateral sources that either Holly or Andy had identified as having relevant information. (App. 371-380; App. 788-789; App. 796; App. 761; App. 775).

Finally, should the Court find that the State has qualified immunity for all acts after it commenced a juvenile court action, there would be grave consequences to our legal system and families across Iowa. First, it would incentivize IDHS to fail to investigate child abuse claims and seek juvenile court intervention at initial stages. Second, the State's argument would effectively obliterate the "shall" mandate within the statutes themselves, making IDHS investigatory duties permissive after the point that it determines juvenile court intervention is appropriate. Third, finding qualified immunity for IDHS during the assessment process based solely on its initiation of a juvenile court would undermine the confidence and competence of every investigation, leaving the courts and litigants solely responsible for investigating and presenting collateral information. This

result would obliterate the very mandate of IDHS investigations themselves. Lastly, and most importantly, it would result in the removal of parents and children from each other based on mere allegation, leaving children and families with no semblance of due process.

In short, IDHS considers itself above the law. Not only does it seek absolute immunity for any of its failings but ignores this Court's decision in *Minor*. This court should reject this overarching argument and apply the law as outlined in *Minor*.

ISSUE III: EXPERT WITNESS PAULA ROHDE

In its brief, the State argues that Andy's retained expert, Paula Rohde, offers only conclusory allegations and does not refer to statutory or administrative regulations relating to a IDHS investigation. This claim is unsupported by the record.

In her report, Ms. Rohde cites to specific Iowa Administrative Code provisions violated by the IDHS investigator. See App. 670-71 (IAC 441-175.21 and IAC 441-175.25(5)); App. 672 (IAC 441-175.25, discussing the "eight tasks associated with completion of the assessment"); App. 674 (IAC 441-175.26(1)(e) and IAC 441-175.25(8) App. 675 (Iowa Code § 232.71B(1)(b); App. 677 (IAC 441-175.26(1)(b)) and Iowa Code

§232.76(2)(b); App. 679 (Iowa Code §232.71B(11)).

ISSUE IV: "TOLERABLE"?

In its brief, the State makes the following statement:

> While Lennette may disagree with the State's conduct because it alleged he abused his children and he was temporarily separated from them, that is a result that is tolerable in a society that has laws in place governing State responses to allegations of child abuse.

(State's Brief, p. 65)

First of all, this Court has never ratified such a concept. In fact, our appellate courts have made clear that the separation of children from their parents has a "negative impact on children… Most children are strongly attached to their parents and as far as the child's emotions are concerned interference with parental ties whether to a fit or unfit psychological parent are extremely painful. Removal from a home generates insecurity in a child and affects the child's ability to form future attachments. 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).

Secondly, our appellate courts have consistently stated that the parent-child relationship is constitutionally protected. *In the Interest of C.M.*, 2011 Iowa App. LEXIS 295 (Iowa Ct. App. 2011). If we are to

live up to the constitutional protection of this relationship, it can never be tolerable to separate a child from a parent without a complete and adequate investigation. We cannot be so comfortable as to believe that the ends justify the means. While IDHS has a responsibility to protect children, it has an equal responsibility to follow the law so that the removal of the child from a parent is justified by all of the evidence.

ISSUE V: DISCRETIONARY FUNCTION

The decision to do a comprehensive assessment (investigation) is not a discretionary act. It is not a matter of choice. "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." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

A comprehensive assessment is statutorily mandated and the Department has regulations found in the Iowa Administrative Code that define how an investigation should be conducted. Accordingly, the discretionary function exception to the waiver of sovereign immunity cannot apply to the obligation of a social worker to perform a comprehensive assessment as set forth in the Iowa Code and Iowa Administrative Code.

ISSUE VI: IOWA CODE §232.73 IMMUNITY

In a footnote in its brief, the State argues that any purported immunity applicable to IDHS in Iowa Code §232.73 would extend to constitutional claims. (State's Brief at 52-53, n. 8) It provides no support for the contention that the Legislature can override constitutional protections by imposing legislatively created immunity.

This Court's most recent pronouncement related to Iowa constitutional claims discussed the interplay between legislative pronouncements and constitutional protection. *Wagner v. State,* 2020 Iowa Sup. LEXIS 110 (December 31, 2020):

> In *Godfrey II [v. State,* 898 N.W.2d 844 (Iowa 2017)], we concluded, at least implicitly, that the ITCA did not foreclose a direct constitutional damages claim against the State and state employees acting in their official capacity. The issue before us now is whether the procedural limits of the ITCA should nonetheless apply to such a claim. It is logical to hold that constitutional torts, like other torts, are subject to the procedures set forth in the ITCA. Just because the substantive barriers to liability in the ITCA do not apply, that does not mean we should dispense with the entire ITCA.
>
> In *Godfrey II,* the dispositive concurrence in part agreed with the lead opinion that tort claims for damages under the Iowa Constitution should be available even without legislative authorization. Yet, it also concluded that the legislature could provide its own remedy for the constitutional violation in lieu of a court-devised remedy so long as it was an "adequate remedy." The procedural components of the ITCA, such as the requirement to present claims for adjustment and settlement before bringing suit and the two-year statute of limitations… do not deprive a plaintiff such as Wagner of an adequate remedy. Unlike the immunities set forth in the ITCA, these procedural requirements don't

> go to ultimate questions of liability and damages. The legislature intended the ITCA to be the only path for suing the State and state officials acting in their scope of employment on a tort claim. Consistent with *Godfrey II*, ITCA procedures should apply to constitutional torts.
>
> *Baldwin I* [*v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018)] is also consistent with our answer to this certified question. In *Baldwin I*, we shaped and refined the independent damages claim for constitutional violations we had just recognized in *Godfrey II*. The immunity question we decided was one of substantive law. It presents no obstacle to today's holding that ITCA procedures govern such claims.

Wagner at *29-31.

There are two takeaways from *Wagner* that are applicable to this case. First, the Supreme Court continues to permit claims pursuant to the Iowa Constitution. Therefore, there is no indication that this Court will overrule *Godfrey II.* Secondly, the Court is making a clear distinction between the ability of the legislature to provide a framework for the adjudication of Iowa Constitutional claims ("procedural") and the ability of the legislature to prohibit Iowa Constitutional claims ("substantive").

As applied to this claim, it is clear that claimants seeking to assert constitutional claims under the Iowa Constitution will be required to, as Andy did here, submit their claims through the administrative process provided by Iowa Chapter 669. Equally clear is that the legislature cannot control the ability of an Iowa citizen to bring an Iowa Constitutional claim by imposing

roadblocks such as immunity. This would include any qualified immunity provided by Iowa Code §232.73. Therefore, if the Court concludes that this statute applies to Andy's common-law claims, it will not preclude Andy from continuing with his Iowa Constitutional claims.

ISSUE VII: IOWA CONSTITUTIONAL CLAIMS

In its brief, the State contends that there is no Iowa case permitting a direct claim for violation of article I, §1 or article I, §8. However, 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. Further, in *Wagner*, the Court stated: "We begin by summarizing briefly our recent caselaw on direct constitutional claims for damages. In 2017, in *Godfrey II*, our court ruled that *direct claims could be brought under the Iowa Constitution without legislative authorization*." *Wagner* at *12 (emphasis added). The Court made no distinction between claims brought under one part of the Iowa Constitution or another part of the Constitution. The Court has made clear that claims under the Iowa Constitution are self-executing. It has not to-date limited any part of the Constitution from direct claims.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Final Reply Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

_____/s/ Martin A. Diaz____

CERTIFICATE OF COST

I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Final Reply Brief.

_____/s/ Martin A. Diaz__

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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_____/s/ Martin A. Diaz__